Public Interest Advocacy Centre

Submission to Attorney-General's Department

Administrative Review Reform: Issues Paper

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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 Public Interest Advocacy Centre

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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Recommendation 2: The objectives should be expanded to promote and improve transparency and accountability in broader government decision-making

The objectives of a new federal review body should be expanded to promote transparency and accountability in public administration and decision-making, and reflect the need for administrative review processes to systemically contribute to improved government decision-making.

Recommendation 3: The Administrative Review Council, or similar body, should be established

The Administrative Review Council, or a similar body, should be (re-)established in the new legislation with a mandate to oversee Australian administrative review decision-making and make recommendations for improvements in the interests of better public administration.

Recommendation 4: A power to issue guidance decisions

The President and/or Division Heads of the new review body should have the power to issue guidance decisions. Guidance decisions should be issued where they could promote consistency in decisions of the review body and government departments.

Recommendation 5: A power to refer questions of law to the Federal Court of Australia

Each Division within the new review body should regularly review its caseload to identify issues that would be appropriate for referral to the Federal Court of Australia for determination on a question of law. Where such issues are identified, the Division should seek appropriate cases to make these referrals, and, where required, fund legal support to the parties to argue the matter before the Court.

Recommendation 6: A power to compel review of government policies found to be unlawful

Where the new review body finds a government policy to be unlawful during a review, it should have the power to issue a public notice to the government body responsible for maintaining the policy. This public notice would require the government body to respond within a set period of time, explaining how it plans to address the unlawful policy.

Recommendation 7: A power directing a government body to produce a detailed statement of reasons

The new review body should have the power to direct a government body that has made a decision that could be reviewed by it to produce a sufficiently detailed statement of reasons for its

decision. There should be a presumption in favour of any such direction being made where it is requested by a person affected by the decision; and time limits for considering and making such a direction, and the government body producing the statement of reasons, should be prescribed.

Recommendation 8: The new review body should retain a divisional structure

The new review body should retain a divisional structure to facilitate effective and orderly discharge of its functions, and to enable members to be assigned to specific divisions based on specialised skills and experience. Specifically, there should be a separate division to review NDIA decisions.

Recommendation 9: A process similar to the Independent Expert Review Program needs to be designed carefully

If a process similar to the Independent Expert Review Program is adopted:

- *The independent experts will need to be appropriately qualified, skilled and experienced including having an understanding of the disability sector, the NDIS and/or lived experience of disability.*
- *The Program should be independent of the NDIA.*
- *Recommendations and settlements reached through the Program should be published in a de-identified register.*
- *The NDIA should accept an independent expert recommendation unless it forms the view on reasonable grounds, that a recommendation is clearly wrong in fact or law.*
- *If the NDIA does not accept an independent expert recommendation, the applicant should be entitled to tender the recommendation into evidence in the proceeding.*
- *There should be adequate funding to ensure unrepresented applicants participating in the Program can access free legal advice.*

Recommendation 10: A two-tier model of external review needs to be designed carefully

If a two-tier model of external review is introduced:

- *The additional first tier must be efficient, quick, non-adversarial and independent, with review conducted by a suitably qualified panel of decision-makers experienced in working with people with disability.*
- *If an inquisitorial process is adopted, safeguards should be introduced to mitigate against the risk of distorting the neutrality of decision-makers.*
- *Where the dispute concerns a novel legal or policy issue, there should be a mechanism to refer a matter directly to the second tier (bypassing the first tier). There should be adequate funding to ensure unrepresented applicants can access free legal advice.*

Recommendation 11: Members reviewing NDIA decisions should be specifically assigned to the NDIS division and have specialised skills

Decisions by the new body on reviews of NDIS decisions should only be made by members specifically appointed and assigned to the NDIS division on the basis of having the requisite skills and knowledge of the Scheme and of disability.

Recommendation 12: Final decisions should be made by legally qualified members

While the new review body should include persons with relevant lived experience and expertise wherever possible, all final decisions of the review body should be made only by people with legal qualifications. If multi-member panels are used to make decisions, at least one member of the panel should have legal qualifications.

Recommendation 13: Any power to appoint experts should be constrained

If the new review body is empowered to appoint experts:

- *There should not be a power to compel applicants to undergo a medical examination (including a psychological examination).*
- *Where an applicant has a reasonable basis to decline to undergo a medical examination, the new review body should not be able to draw an inference adverse to the applicant.*
- *This power should be used either following consultation with the parties, or in some circumstances with the agreement and input of the parties.*

Recommendation 14: There should be additional mechanisms to manage conflicts of interest

The new review body should contain additional mechanisms to manage conflicts of interest for its members, including a requirement that the President of the new body inform the Attorney-General of any failures to disclose conflicts of interest.

Recommendation 15: The requirements to lodge an application should be accessible, flexible and informal

The requirements to lodge an application should be accessible, flexible and informal, including:

- *The new review body should allow applications to be lodged via email, online portal, post or by phone if required.*
- *Review applications should not require a statement of reasons to be provided at the time of application.*
- *Time limits for the lodgment of NDIS review applications should allow at least three months to apply and should exercise discretion to extend this time or cure defects in an application generously so as not to restrict access to justice.*
- *No fee should be payable to lodge an application in the NDIS division.*

Recommendation 16: Case conferencing powers should be retained in the NDIS division

Case conferencing should continue to be available in NDIS reviews, but case conferences should be ordered and conducted in a manner that recognises the distress that delays in resolving a matter can have for participants and limits the prospect of unproductive and repetitive case conferences.

Recommendation 17: Registrars should be legally qualified and empowered to give directions

The new review body should ensure that all registrars hold legal qualifications, and should also receive disability awareness and cultural safety training before being assigned to NDIS matters. Registrars should have the power to give direction and advance matters quickly.

Recommendation 18: The new review body should have broad power to make directions as necessary for the conduct of the matter

The new review body should have broad power to make directions as necessary for the conduct of the matter. In particular, its powers should:

- *include the ability to direct a government body to produce a detailed statement of reasons; and*
- *exclude the ability to make directions that would interfere with an individual's right to bodily integrity (including by being required to undergo a medical examination).*

Recommendation 19: The new review body should have mechanisms to address non-compliance with directions

The new review body should have mechanisms to address non-compliance, including making a finding of non-compliance, recording instances of non-compliance and regular reporting to Parliament on the number of instances of non-compliance.

Recommendation 20: The 'fast-track' process should be retained for reviews of NDIA decisions

The new review body should retain a 'fast-track' process for dealing with NDIS reviews that are particularly time-sensitive. The review body should proactively consider whether this process is appropriate for each NDIS matter before it, and if so, should suggest to applicants at an early stage that they consider it.

Recommendation 21: Private hearings and non-publication orders should be permitted in any NDIS matter

The implementing legislation for the new body should provide for private hearings and non-publication orders upon the applicant's request in any NDIS matter.

Recommendation 22: Timeframes to lodge an appeal from the NDIS division should be extended to 90 days

The time frame to appeal a decision of the new review body should commence from the time an applicant receives the reasons for the body's decision, and for NDIS decisions should be at least 90 days.

Recommendation 23: Applicants in the NDIS division should not be required to seek leave to appear with representation

Applicants should be able to be legally represented in all NDIS matters before the new review body, without needing to seek leave.

Recommendation 24: The review body should urge compliance with Model Litigant Obligations

Members and registrars of the new body should proactively facilitate compliance with the Model Litigant Obligations and respond to breaches of the Model Litigant Obligations. The new review body should implement training, guidance, a Practice Direction, and where appropriate legislation to promote compliance with the Model Litigant Obligations.

Recommendation 25: Services to assist parties to participate should be determined through consultation and should be provided by the new review body

Services to assist parties to participate equally in the new review body's processes should generally be provided by the new body directly or other organisations, and not by the government department whose decisions are being reviewed. The precise nature of these services should be determined through close consultation with organisations representing AAT user groups.

Recommendation 26: Guidelines for conducting reviews with vulnerable applicants

The new review body should develop guidelines to assist its members in conducting reviews concerning vulnerable applicants, and in employing trauma-informed practices. These guidelines should be applicable to, at least, reviews of NDIS decisions, and developed in consultation with groups representing people with disability.

Recommendation 27: A positive obligation to promote accessibility

The implementing legislation for the new review body should place an obligation on the body to promote accessibility for all users, including making reasonable adjustments to accommodate the needs of applicants with disability.

Recommendation 28: Increase funding for disability advocates, community legal centres and Legal Aid Commissions

To support people with disability to engage with the new review body in their own capacity in a way that reflects their preferences and needs, the Government should substantially increase funding to disability advocates, community legal centres and legal aid Commissions who work with people with disability.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make a submission to the Attorney-General's Department's Administrative Review Reform Issues Paper to design a new federal administrative review body (**Issues Paper**). PIAC welcomes the Government's commitment to improve the way that administrative review is conducted in Australia.

PIAC's work focuses on tackling barriers to justice and fairness experienced by marginalised communities. We have a long history of involvement in public policy development and as an advocate promoting the rights and equal participation of people with disability.

Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the National Disability Insurance Scheme (**NDIS**, the **Scheme**) for people with disability. This work has been done in close consultation with key peak disability rights organisations, as well as legal and advocacy groups with similar expertise and reform concerns. Our work has also involved casework assisting people with disability to appeal NDIS decisions to the Administrative Appeals Tribunal (**AAT**).

Our submission is based on our direct experience representing applicants in external review of decisions of the NDIA to the AAT, and the views and feedback we have received from applicants and representative organisations. In recent years reports, government bodies and submissions from people with disability and their advocates – including PIAC – have raised the endemic issues faced by people with disability appealing NDIS decisions at the AAT.[1] We consider the new review body should have built-in processes and procedures so that it can play a role in generating better first-instance decision-making, better government policies, and greater public confidence in government administration.

2. Answers to questions

Design

Question 1: What are the most important principles that should guide the approach to a new federal review body?

In 2021, PIAC established the NDIS Systemic Advocacy Working Group (**NDIS Working Group**) comprising national peak disability representative organisations and legal aid commissions. The NDIS Working Group was established to address the gap in the sector's capacity to undertake

[1] For instance, see Joint Submission of 20 organisations, Submission No 83, to Joint Standing Committee on the NDIS, 'Unreasonable and Unnecessary Harms', *General issues around the implementation and performance of the NDIS* (August 2021), available <https://www.aph.gov.au/DocumentStore.ashx?id=e42a174e-8e3a-47eb-b461-268a13d6ed50&subId=712398> ('*Unreasonable and Unnecessary Harms*'); Disability Advocacy NSW, Your Say Advocacy Tasmania and Villamanta Disability Rights Legal Service, *National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal* (Public Submission dated 3 June 2022), available <https://villamanta.org.au/wp-content/uploads/2022/07/Model-litigant-obligations-and-NDIS-Appeals.pdf> ('Model Litigant Submission'); Joint Standing Committee on the NDIS, Parliament of Australia, *NDIS Planning* (Final Report, December 2020), 213-237; PIAC and Summer Foundation, *Housing Delayed and Denied: NDIA Decision-Making on Specialist Disability Accommodation* (30 April 2022), available <https://piac.asn.au/2022/04/30/housing-delayed-and-denied-ndia-decision-making-on-specialist-disability-accommodation-funding/>.

systemic advocacy on the NDIS. The role of the NDIS Working Group includes sharing information about systemic problems with the NDIS, collaborating on addressing systemic problems as well as informing PIAC's legal and policy advocacy.

PIAC has prepared the below list of principles in close consultation with the Working Group including:

- People with Disability Australia;
- First Peoples Disability Network;
- Children and Young People with Disability;
- National Ethnic Disability Alliance;
- Inclusion Australia; and
- Disability Advocacy Network Australia (**DANA**).

The principles have been designed with specific reference to the NDIS division of the AAT and focus on promoting the experience of people with disability within the new review body's processes, by ensuring access to justice and upholding procedural fairness. The principles are also in line with the overall goal of the NDIS to provide support for decision-making for people with disability which promotes self-determination, control, and autonomy. Notably, DANA, the national representative body for independent disability advocacy organisations has endorsed many of the principles in its submission.

We consider the principles should, where appropriate, be expressly included in the implementing legislation for the new review body to guide how the new review body functions, uses its powers, implements processes and makes decisions. This would be similar to section 4 of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**), which provides an extensive list of principles guiding actions under that Act. The guiding principles in the NDIS Act are beneficial in providing a reference point for how the NDIS should be administered and for what NDIS participants can expect. Equally, legislated principles in the new legislation would ensure access to justice is achieved in all elements of the new review body's functions and processes.

Notwithstanding the principles specific relevance to applicants with disability in the NDIS division, the principles should apply universally to the new review body because of the way they promote inclusion, accessibility, informality and procedural fairness.

Principles	**Description**
Person-centred	• The approach to a new review body should be premised on co-design principles, with broad and genuine engagement with First Nations people and people with disability about the mechanisms, processes and settings. • The review body should be designed to actively involve applicants and seek to increase their understanding of review decisions, empowering applicants to be part of their own resolution process.
Inclusive	• The review body should be designed to be inclusive of all people with a disability, languages, cultural backgrounds, and geographical location.

	• An approach of inclusivity should inform the operation of the review body and acknowledge intersectionality between disability and other factors including gender, sexuality, cultural diversity and age.

Accessible	The review body should be designed – and the system adequately resourced – to:
	• Support applicants to engage and meaningfully participate in the review process, including through:
	  ○ direct support throughout the process;
	  ○ legal and non-legal advocacy;
	  ○ access to functional communication support;
	  ○ mechanisms to proactively determine the need for, and access to, supported decision-making; and
	  ○ access to mental health support.
	• Ensure staff and people involved in the dispute resolution process are trained in disability awareness and inclusion.
	• Ensure applicants have access to clear written and oral information about the review process and review rights. Information must be provided in accessible formats, including Easy Read, languages other than English including the language needs of First Nations people, Auslan and Braille.
	• Incorporate the principles of active support for people with a disability: maximising choice and control; autonomy; engagement; and graded assistance.
	• Recognise the particular needs of applicants living in regional, remote and rural communities.
	• Acknowledge that applicants experiencing disadvantage may need additional time, providing flexibility around processes and support to engage and participate in the resolution process.
	• Ensure the availability of independent advocacy and legal assistance, including advocates for First Nations people and people in regional, remote or rural areas.

Culturally safe	The review body must be designed and operate in a way that recognises and respects First Nations people, their communities and cultures. In particular, this should include: • Consulting with First Peoples Disability Network and National Ethnic Disability Alliance to ensure the structures, systems and process respects and accommodates different cultures. • Ensuring staff and people involved in the dispute resolution process are trained in cultural safety and cultural competence.
Informal	• The review process should avoid legal formality and minimise adversarialism, including through appropriate alternative dispute resolution processes. • The process should focus on ascertaining relevant facts: applicants should not, for example, be required in practice to rebut the respondent's position.

	• The process should allow for support from family, support workers and local community, particularly in rural and remote communities where resources are limited. This may require balancing perceptions of conflicts of interests with accessibility.
Fair	• Applicants should have the right to be assisted by advocates or legal representatives. • The new review body must be proactive and responsive in ensuring applicants can participate in proceedings. • The review body should recognise and take active steps to ameliorate power imbalance between the applicant and the respondent. • To the extent possible, the review body should ensure respondents conduct themselves in accordance with their obligations as model litigants.
Independent	• It is essential that the new review body is, and is seen to be, impartial and independent of government. • This applies both to its design and operation as well as processes for appointment of decision-makers.
Timely	The review body should be designed, resourced and operate in a way that ensures disputes are resolved as quickly as is practicable, including: • Capacity for case management, including expedition and early hearings where requested and appropriate. • Providing clear timeframes for each stage. • Allowing additional evidence, but minimising opportunities for delay – for example, requiring respondents to justify requests for further reports
Trauma-informed	The review body should operate consistent with trauma-informed practice, including: • through evidence-gathering processes; • respecting choices of applicants as to how they participate, including how they re-share their experience; and • providing consistency of people involved in resolving the dispute to reduce trauma from re-sharing experiences and allow for trust and transparency.
Transparent	• The new review body should provide clear and complete reasons for its decisions.

Recommendation 1: Principles should ensure access to justice

The new review body should be person-centred, inclusive, accessible, culturally safe, informal, fair, independent, timely, trauma-informed and transparent. These principles should guide how the new review body functions, uses its powers, implements processes and makes decisions. They should also inform how the system as a whole is resourced.

Question 2: Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?

The present objectives of the AAT are insufficient to address the functions the new review body should fulfil in the modern system of Australian administrative law. While the objectives of accessibility, informality, speed and proportionality are all relevant, they risk emphasising the need for the new review body to resolve its caseload expeditiously at the expense of promoting other public goods such as greater transparency, or improvements to departmental decision-making.

For example, in the matter of *Witsen and National Disability Insurance Agency* [2022] AATA 2205, (where PIAC acted for the applicant), the AAT placed reliance upon objectives in declining to direct the NDIA to provide detailed reasons for its first-instance decision, in part because providing such reasons might delay the resolution of the matter.[2] While this outcome may have reflected a desire to progress the case as quickly as possible, it came at the expense of the applicant's desire for clarity on the NDIA's decision-making, and the public benefits of transparency and scrutiny that previous decisions of the AAT had found were a key principle behind providing such reasons.[3] In our view, the limitations of the current objectives served in this case to inhibit better public decision-making and government accountability.

PIAC considers the objectives of a new review body should be expanded, to reflect in particular the role of that body in promoting transparency and public justice. The objectives of the *South Australian Civil and Administrative Tribunal Act* 2013 (SA) (as cited in the Issues Paper) provide a more helpful balance, including particularly the first objective which charges that Tribunal with:

> (a) in the exercise of its jurisdiction, to promote the best principles of public administration, including—
> (i) independence in decision-making; and
> (ii) natural justice and procedural fairness; and
> (iii) high-quality, consistent decision-making; and
> (iv) transparency and accountability in the exercise of statutory functions, powers and duties…[4]

The objectives of a new federal review body should reflect a similar balance to this.

We also consider the new review body's role to promote public trust in broader government decision-making could be further reflected by adopting an objective similar to that of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) to 'identify and bring to the Attorney-General's attention systemic problems in relation to the operation of authorising laws' (as cited in the Issues Paper). Such an objective would further enhance broader government decision-making and ultimately improve first-instance decisions.

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2 See [66]-[69].

3 See *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 at [193]-[195], *Re Frolich and Minister for Capital Territory* (1979) 2 ALD 434 at [442], *Re VCA and Australian Prudential Regulation Authority* [2006] AATA 872 at [94]-[100].

4 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8.

As noted above, we also suggest that it would be appropriate for legislation establishing the new body to contain principles to guide its operation, similar to those in the NDIS Act.

Recommendation 2: The objectives should be expanded to promote and improve transparency and accountability in broader government decision-making

The objectives of a new federal review body should be expanded to promote transparency and accountability in public administration and decision-making, and reflect the need for administrative review processes to systemically contribute to improved government decision-making.

Question 3: Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?

The new legislation should re-establish the ARC or a similar body. The former ARC played an important role in monitoring the administrative review system, ensuring that it operated effectively and in effecting control over executive decision-making. It allowed for rigorous thinking and analysis about trends in administrative law, best practice for decision-makers, and necessary reforms.

There is currently no independent organisation or body with a mandate to ensure the integrity of administrative review decisions. The Attorney-General's Department cannot effectively exercise the functions that would be exercised by an independent ARC or similar body because an ARC type body would be:

a) independent from government and objective, which is critical to enhance public confidence in the government's administrative decision-making; and
b) directly accountable to Parliament, and not any particular government department, which promotes transparency.

These functions are particularly important to people with disability given the present deficit of trust formed by the widespread poor experiences of those challenging NDIA decisions.[5] A body like the ARC could serve to restore some of this trust in public administration and review systems, reassuring NDIS participants that the decision-making systems they rely upon are scrutinised and can be held accountable by a fair, independent and rigorous body.

Recommendation 3: The Administrative Review Council, or similar body, should be established

The Administrative Review Council, or a similar body, should be (re-)established in the new legislation with a mandate to oversee Australian administrative review decision-making and make recommendations for improvements in the interests of better public administration.

Question 4: How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

[5] See *Unreasonable and Unnecessary Harms*, above n 1; Independent Expert Review Oversight Committee, *Interim Report on long-term options for dispute resolution under the National Disability Insurance Scheme* (7 December 2022) https://www.dss.gov.au/sites/default/files/documents/03_2023/interim-report_0.pdf at 10-14.

We propose several mechanisms by which the decisions and resolutions reached by the new review body could be used to inform and improve administrative decision-making. These are necessary because the current powers and structures available to the AAT to press government decision-makers to change their practices and processes in relation to NDIS decisions are insufficient. These mechanisms would also be in line with an expanded set of objectives of the new review body to promote public trust in broader government decision-making (please see our response to question 2).

Failures of accountability and feedback

One example of where AAT decisions could have improved administrative decision-making relates to the 'Robodebt' scheme. Despite a series of Tribunal decisions from 2016 finding that the averaging method used by the Department was unlawful, the Department, did not change its practice.[6] A new review body better equipped to press for change could have compelled reforms sooner, ending an unlawful practice and minimising its harm.

In our own practice we have seen instances where the NDIA has declined to modify its approach to first-instance decision-making following AAT decisions. For example, in relation to Specialist Disability Accommodation (**SDA**) funding decisions within the NDIS, a series of AAT decisions in the past year have stressed the importance of funding a type of SDA that reflects a NDIS participant's specific needs and living situation. In these decisions, the AAT set aside and substituted a number of SDA funding decisions. The AAT's reasons included comments to the effect that the original decision ignored or gave insufficient weight to personal factors raised by the applicant (such as lifestyle and mental health needs, the way housing would affect their personal relationships, independence and work, study, etc).[7] Of the five decisions in which the AAT has considered the appropriate SDA 'building type' (ie, whether the home is a house, apartment, or villa/townhouse; and the number of residents and bedrooms that home should have), all five recommended the applicant be provided with more generous SDA funding.[8]

Cases such as these suggest a need for the NDIA to review and alter its own internal processes and guidance for making SDA decisions. However, in PIAC's ongoing casework and review of new first-instance SDA decisions being made by the NDIA, we have not seen an appreciable trend towards giving greater weight to applicants' lifestyle factors; and can identify no consequential revisions to the Agency's relevant published Operational Guideline to direct greater attention towards such factors.

Guidance decisions

Given instances such as the above, we recommend the new review body be empowered to create or designate guidance decisions in cases where there is a clear authoritative position or trend of interpretation on a point of law, practice or policy from its decisions. Guidance decisions

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6 See decisions compiled for the ongoing Robodebt Royal Commission; *Royal Commission into the Robodebt Scheme* (Exhibit 3-3493 – TCA.9999.0001.0061_R, 24 January 2023), 'Table of AAT1 Decisions relating to the Robodebt Scheme', available <https://robodebt.royalcommission.gov.au/publications/exhibit-3-3493-tca999900010061-r-table-aat1-decisions-relating-robodebt-scheme >.

7 For examples of such commentary, see *LWVR and National Disability Insurance Agency* [2021] AATA 4822; *Boicovitis and National Disability Insurance Agency* [2022] AATA 204 at [29]-[38] and [58]-[72]; *Kennedy and National Disability Insurance Agency* [2022] AATA 265 at [121]-[127]; *Paterno and National Disability Insurance Agency* [2022] AATA 3908 at [46]-[87]; and *QKNJ and National Disability Insurance Agency* [2023] AATA 794 at [44]-[56].

8 Ibid.

could be the responsibility of the President (or equivalent), or Division Heads (or equivalent), within the new review body. These decisions would be expected to direct future decisions of the review body in a manner similar to that anticipated by s 420B of the *Migration Act 1958* (Cth) in relation to the current Migration and Refugee Division of the AAT. Guidance decisions would assist to influence the quality of first-instance decision-making, by ensuring that practices the new review body finds to be inappropriate or even unlawful are not repeatedly the subject of its review.

PIAC considers that guidance decisions would be in keeping with the design intention of the current AAT, whereby government departments should reshape their decision-making practices to follow AAT determinations.[9] As the above examples show, this has not always happened in practice; but appropriate designation of guidance decisions could serve to clearly express the new review body's intention as to how it will approach reviews.

Guidance decisions could also be relevant and beneficial in instances where multiple AAT decisions on the same subject take differing views of the appropriate interpretation of a law or policy. Diverging interpretations can create difficulties for government decision-makers and uncertainty for applicants. Although there is no formal doctrine of precedent in administrative law, uniform and consistent decision-making is desirable. Issuing guidance decisions to clarify or resolve diverging decisions of the new review body would assist government agencies to improve decision-making.

To illustrate, the question of the NDIA's role in providing supports (in considering s 34(1)(f) of the NDIS Act) has been the subject of diverging views by AAT members. In *Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706, the AAT found the NDIS was not intended to respond to gaps in services more appropriately provided under mainstream services. Whereas, in *Burchell and National Disability Insurance Agency* [2019] AATA 1256, the AAT considered that s 34(1)(f) was not satisfied if a support was not in fact provided by the other service delivery system, and therefore declined to follow the reasoning in *Fear*. Each of *Fear* and *Burchell* has given rise to further AAT decisions, resulting in two distinct lines of authority. New AAT cases involving the interpretation of s 34(1)(f) require extensive legal argumentation, delaying their resolution; and it is difficult for applicants and the NDIA to predict how the issue might be decided in their case. The issuing of a guidance decision by the President or Division Head might be one way for a new review body to resolve this issue, and to produce more consistent (and less seemingly arbitrary) future decisions on the subject. Such a guidance decision would also enable the NDIA to produce policies to apply s 34(1)(f) with greater confidence and clarity.

Referring questions of law to the Federal Court

Diverging interpretations could also be resolved by the new review body making greater use of its power to refer questions of law to the Federal Court at interlocutory stages of the process. While

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9 Justice Garry Downes AM, former AAT President 'The Implementation of the Administrative Courts' Decisions' (Speech, International Association of Supreme Administrative Jurisdictions VIIIth Congress, 26-28 April 2004):

> 'Government departments and agencies treat themselves as bound by the decisions and the reasoning of the Administrative Appeals Tribunal. This is, in part, because they know that on review the Tribunal will make the same decisions it has previously made on the same issues. The sensible course for government departments and agencies is to make the decision they know the Tribunal will make.'

the AAT currently has such a referral power, it is rarely used and there is no mandate for it to do so to resolve unsettled legal issues or improve the quality of public decision-making in general. We suggest a greater role for a new review body to make use of such powers.

The implementing legislation for the new review body could require each Division to regularly – perhaps monthly, or quarterly – review trends in its decisions and provide a report to its Division Head about outstanding and unsettled questions of law within the caseload, or issues on which different members have decided a matter of principle in competing ways. These matters would represent cases in which a Federal Court decision could provide interpretive clarity, and legal authority for a consistent approach by future decision-makers. The reports produced might also be provided to external bodies such as a reconstituted ARC, to provide oversight and scrutiny of the views expressed.

The review body could be asked to monitor its caseload and, where cases are identified that could provide a vehicle to address these unsettled legal issues, the review body could suggest to the parties that it refer the question of law to the Federal Court. As such a Federal Court referral would be made in the interests of broader justice, the review body or the Attorney-General's Department should offer funding to pay for the parties to be legally represented in arguing the question of law before the Court. As well as contributing to better quality decision-making, we consider this approach could authoritatively settle matters that might otherwise yield high volumes of further review applications.

Mechanisms to compel policy review

The new review body could also be given the power to compel review of government policies that it finds to be unlawful. The current position at law is that the AAT should consider and generally apply policies developed to guide decision-making; but that policies which are inconsistent with the underlying law, or go beyond the power of the policy-maker to issue, are unlawful, invalid, and should not be applied.[10] Such a finding would generally be expected to prompt the responsible government department to amend, revise or withdraw the policy concerned; however, there is currently no mechanism by which such policies are systemically brought to the attention of the department, or by which that department might be required to act.

The consequences of this absence are felt by NDIS participants. A number of NDIS reviews have involved policies of the NDIA that the AAT has found to be unlawful; but in several cases the NDIA has declined to revise its policy position, and the unlawful policies remain in place, or there has been undue delay in the NDIA revising its policy position. These include:

- the NDIA maintaining a policy that bars funding of gym memberships, despite the AAT finding that such a policy is unlawful;[11]
- the NDIA retaining a policy regarding transport funding with identical wording to the version found unlawful in a 2018 decision of the AAT.[12]

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10 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; *Green v Daniels* [1977] HCA 18; (1977) 13 ALR 1.

11 See, eg, *King and National Disability Insurance Agency* [2017] AATA 643. See also NDIS, 'Would we fund it: Improved health and wellbeing: Gym membership', *Gym membership* (Web Page) < https://ourguidelines.ndis.gov.au/would-we-fund-it/improved-health-and-wellbeing/gym-membership>.

12 See, eg, *Ewin and National Disability Insurance Agency* [2018] AATA 4726,[80]-[82]. See also NDIS, *Including Specific Types of Supports in Plans Operational Guideline – Transport* (Web Page) <https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport>.

Where such policies remain in place, they are likely to be applied by NDIA first-instance decision-makers; and, therefore, may generate unlawful decisions and/or further review applications for the AAT. The continued application by the NDIA of policies which are deemed unlawful by the AAT amounts to an administrative failure.

The new review body could be given the power, where it finds a policy to be unlawful during a review, to issue a public notice of this to the department responsible for making the decision. Issuing such a notice could require consultation between the reviewer and the President or relevant Division Head of the new review body. The notice could require a response from the department within 30 days, notifying of either action taken to address the perceived unlawfulness of the policy; a plan to conduct a further review (with details about the timing of this plan); or the department's intention to maintain the policy by, for instance, seeking judicial review.

Provision of reasons

At present, the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) contains several provisions for an applicant to request reasons for a decision from a first-instance decision-maker. This includes requesting reasons prior to making a review application to the AAT or requesting reasons after filing an application to the AAT.[13] Where such a request is not complied with, the applicant can ask the AAT to direct that these reasons be provided; and the AAT at its discretion may make such a direction.

Unfortunately, this power is largely unutilised. PIAC has been told by the AAT that as at September 2022 there have only been two applications made to request reasons for a first-instance decision under s 28 of the *AAT Act* since the AAT was established in 1975.[14] The AAT has also told PIAC that while precise statistics were not available, orders to produce reasons under the related power of s 38 of the *Act* are 'also extremely rare'.[15] This is partly a result of the powers to request reasons being little known, and largely unpublicised by the AAT. Additionally, in a series of NDIS review cases in which parties have requested reasons for the initial decision in their case, the AAT has declined to order that these reasons be provided.[16] In large part, these decisions appear to rely on the idea that the AAT's review is *de novo* in nature, and so reasons for a prior decision by the NDIA would not necessarily assist the AAT to resolve the case before it.

The difficulty with such an approach by the AAT is that if applicants are unable to obtain adequate reasons for first-instance decisions, the internal processes of the first-instance decision-maker remain opaque. Assisting the AAT to understand and resolve the case immediately before it should not be the only consideration in making a direction to produce a statement of reasons; instead, reasons serve vital public purposes of promoting transparency and providing for reform of decision-making practices.

The new review body's power to direct a statement of reasons should be clarified to reflect this. There should be a presumption that when a person requests a statement of reasons – either prior

13 *Administrative Appeals Tribunal Act 1975* (Cth) ss 28, 37(1)(a).
14 Email correspondence between PIAC and AAT Caseload Management Support team, September 2022.
15 Ibid.
16 See eg, *YKDD and National Disability Insurance Agency* [2022] AATA 2541; *Witsen and National Disability Insurance Agency* [2022] AATA 2205; *HGLS and National Disability Insurance Agency* [2022] AATA 2766.

to filing for review, or at an early stage of the matter – the review body will direct that a statement of reasons will be provided promptly, unless there are exceptional circumstances to justify otherwise. The content of the statement of reasons should be prescribed to be sufficient for the parties, the review body, and the public to understand the full basis and policy reasons for the decision made by the government department. There should also be strict time limits for the review body to consider and make the necessary directions, and for the government department to furnish a directed statement of reasons, so that applicants do not feel they must choose between expeditiously pursuing their review application, or fully understanding the decision that has been made about them.

Recommendation 4: A power to issue guidance decisions

The President and/or Division Heads of the new review body should have the power to issue guidance decisions. Guidance decisions should be issued where they could promote consistency in decisions of the review body and government departments.

Recommendation 5: A power to refer questions of law to the Federal Court of Australia

Each Division within the new review body should regularly review its caseload to identify issues that would be appropriate for referral to the Federal Court of Australia for determination on a question of law. Where such issues are identified, the Division should seek appropriate cases to make these referrals, and, where required, fund legal support to the parties to argue the matter before the Court.

Recommendation 6: A power to compel review of government policies found to be unlawful

Where the new review body finds a government policy to be unlawful during a review, it should have the power to issue a public notice to the government body responsible for maintaining the policy. This public notice would require the government body to respond within a set period of time, explaining how it plans to address the unlawful policy.

Recommendation 7: A power directing a government body to produce a detailed statement of reasons

The new review body should have the power to direct a government body that has made a decision that could be reviewed by it to produce a sufficiently detailed statement of reasons for its decision. There should be a presumption in favour of any such direction being made where it is requested by a person affected by the decision; and time limits for considering and making such a direction, and the government body producing the statement of reasons, should be prescribed.

Structure

Question 5: What structure would best support an efficient and effective administrative review body?

As the Issues Paper notes, the AAT reviews decisions under more than 400 Commonwealth Acts and legislative instruments, encompassing a broad and diverse range of subject matters. Given the tailored approaches required for many of these types of review, PIAC supports the retention of divisions in the new review body.

A division-based structure with distinct procedures and models of review tailored to suit the decision and applicant cohorts in each area would facilitate effective and orderly discharge of the functions of the new review body, as well as enable members to be assigned to specific divisions based on specialised skills and experience. In particular, PIAC considers that NDIS reviews should continue to be dealt with by a separate division. Please see our response to question 6 below about the necessary skills, experience and training members in the NDIS division should have.

In relation to the NDIS division, we are aware of different proposals to reform processes for reviewing NDIA decisions. We set out below our understanding of the proposals and our observations and comments. Overall, PIAC does not adopt any particular proposal, but raises several matters for consideration by Government in relation to each of the proposed models.

Option 1: Process utilising neutral evaluation, similar to the Independent Expert Review (IER) Program

PIAC has been a member of an advisory group convened by the Minister for the NDIS to work on solutions to resolving the backlog of AAT appeals and reforms to the dispute resolution process. One such reform is the IER Program, which is similar to the Neutral Evaluation Process currently available (but rarely used) at the AAT. We understand that the IER Program may form the basis for a future, more permanent program implemented with the new review body for NDIS decisions.

PIAC's view on the IER Program is informed by our work assisting clients to engage with the Program, and discussions with fellow practitioners, advocates and other IER applicants.

We have heard the IER Program is resolving matters in a way that is respectful and inclusive of the people with disability involved. We understand this success is largely due to the careful selection of independent experts based on their experience with the disability sector and the NDIS and/or experience in mediation and conciliation processes. As such, any future similar program must centre on a panel of experts who are appropriately qualified, skilled and experienced ie, understand the disability sector, the NDIS and/or lived experience of disability.

However, we understand by the time it winds up at the end of June 2023, about 120 cases will have gone through the IER Program – far less than the 1,000 applicants expected to participate. Future similar programs should seek greater uptake by applicants by considering proactive rollout strategies, revised selection criteria for entry to the program, and/or active suggestions by registrars to applicants that they consider such an independent evaluation process. We additionally note that the small sample size of IER Program cases means the results or recommendations from the evaluation of the Program need to be considered with caution.

PIAC has some observations about important features of the IER Program that should be considered in the design of any similar process.

First, the IER Program is being administered and funded by the NDIA itself. This raises a concern about the lack of independence within the Program and can decrease applicant trust in the process. Additionally, there is currently a lack of public transparency about how effective the process is, including the absence of information about what settlements have been reached

following the independent expert's recommendation. In the absence of publication of IER settlement outcomes and recommendations, there is no way to scrutinise what factors are prompting the NDIA to change its position and agree to fund supports, and no ability to track the systemic barriers arising in the original decision-making process. This means that even where the IER Program resolves individual disputes, the underlying systemic problems will remain hidden and continue to generate flawed original decisions and proliferate the demand for internal and external review.

Second, within the IER Program, the NDIA agreed to accept the recommendation, 'unless it has significant reasons for not doing so such as where the Agency considers there has been an error of fact or law'.[17] This commitment by the NDIA has given applicants confidence that the IER Program can help to resolve their matter, and has allowed a high rate of IER Program matters to settle following the IER recommendation. We consider the NDIA must continue to accept recommendations produced by any future independent expert evaluation program at a high rate. Towards this, we note the current IER Program agreement states that, where the NDIA does not accept the expert's recommendation, the NDIA agrees not to object to the applicant tendering the recommendation with the AAT as evidence; any future IER-like process should consider providing a similar mechanism to incentivise government to accept reasonable recommendations.

Third, a necessary element in the design of the Program has been the establishment of the Independent Expert Review Advice Service (**IERAS**), whereby the NDIA funds external lawyers and advocates to provide free legal advice to applicants about engaging with the IER Program. In PIAC's experience, this legal assistance provides applicants with the confidence to participate in this Program and has enabled applicants to fully present the facts relevant to their case. At a minimum, any future IER-like process must provide adequate resourcing to implement a service similar to the IERAS for assisting unrepresented applicants and people with disability.

Fourth, we understand the IER Program has not always resolved matters as quickly as hoped, largely owing to the complexity of the matters. While the understanding is that applicants will receive the independent expert's recommendations within six weeks of the referral to the independent expert, we understand this is frequently not the case and many cases have taken multiple months for a recommendation to be made. A permanent process modelled on the IER Program needs to factor this complexity into its design and selection of independent experts, and the expectations set about the role it can play in resolving cases.

As noted, the AAT is currently able to itself refer a matter for 'neutral evaluation'. However, in the context of addressing the backlog of NDIS appeals, we understand the AAT was not able to facilitate neutral evaluation as it did not have the resources needed – necessitating the design and implementation of the separate IER Program. This highlights the need for any future process grounded in neutral evaluation and/or modelled on the IER Program to be resourced adequately to ensure it remains a genuine option for dispute resolution within the new review body.

Option 2: a two-tier model of external review

An interim report prepared by the Oversight Committee of the IER Program recommends introducing a first tier of independent review of NDIA decisions following the NDIA's internal

[17] This is the wording of a standard clause contained in the NDIA's IER agreement to be signed by participants and the NDIA.

review process but prior to a review by the AAT/new review body.[18] This recommendation is based on review processes for some non-NDIS matters, such as reviews of veterans' pension decisions conducted by an independent statutory tribunal, or decisions about social security and income support that are made by an additional tier of the AAT. On either approach, we understand the first tier is proposed to be an inquisitorial rather than adversarial process, possibly with limited scope for either party to be legally represented.

PIAC suggests that any additional first tier of review must be efficient, quick, non-adversarial, provide an independent review by a multi-member panel of suitably qualified decision-makers, and focus on supporting and hearing the case of NDIS participants to resolve matters fairly and consistently. This would allow a range of experience and knowledge (including lived experience of disability, legal qualifications, and other administrative skills), and would mitigate some of the possible risks of an inquisitorial body discussed below.

In light of the protracted NDIA internal review process and delays that have been experienced by many NDIS participants, it is vital any new first tier review does not unduly extend the total period of reviews a participant is required to undergo to get a final outcome to their dispute. We urge that any new tier be developed through a co-design process that engages organisations and people with lived experience of the NDIS.

Safeguards for an inquisitorial body

If an inquisitorial model is adopted, there are some elements of the structure that need to be carefully considered. Most significant is the common risk of distortion (even if only perceived) of the neutrality of the members of the review body in an inquisitorial system.[19] For example, where an applicant provides evidence in an ADR process in the absence of a representative of the NDIA, there would be no contradictor. This requires the member/s of the review body to themselves test the evidence of the participant, raising potential considerations adverse to their position and perhaps conducting inquiries before then coming to a decision.

As an example, colleagues practising in migration and refugee law before the Migration and Refugee Division of the AAT (an inquisitorial body) observe that:

- the inquisitorial hearing process can suggest to applicants that the member has adopted a perspective favouring the government's position (since the applicant's case will be made for the member, whereas the member must themselves develop and articulate what they think the government's best arguments might be);
- the legal training of most members can lead to inquiries being conducted in a manner similar to examination and cross-examination in a Court; and
- applicants can be given the (mistaken) impression that the member was a representative of the government, undermining their confidence in the process.

We think adopting a multi-member panel (such as in the Veteran's Review Board) would go some way towards mitigating these issues; the panel could also develop specific training in inquisitorial

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18 Independent Expert Review Oversight Committee, *Interim Report on long-term options for dispute resolution under the National Disability Insurance Scheme* (7 December 2022) <https://www.dss.gov.au/sites/default/files/documents/03_2023/interim-report_0.pdf>.

19 Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration Incorporated, 2006) 25, 35,

approaches for members, and/or provide sufficient funding and permission for skilled legal and non-legal advocates to represent applicants.

Mechanisms for escalation of disputes based on legal or policy issues

The NDIS is still a relatively new scheme and continues to evolve, including through caselaw.

In cases where the dispute between a participant and the NDIA concerns a significant point of policy or law, rather than a factual evaluation, it may be inevitable that any outcome from the first tier of review will be appealed to the second tier of review (or even to a federal court), where a more authoritative determination of that point can be obtained. In such a case, the first tier of review may be unlikely from the outset to produce a final resolution, and so would only expose a participant to greater delay and frustration.

Alternately, if an outcome is reached though the first tier of review without resolving the underlying novel legal or policy issue, this would obstruct the development of the relevant common law and may mean that the participant (and others in similar circumstances) continues to face disagreements over the same issue with the NDIA in development of future NDIS plans. To illustrate, the AAT has on a number of occasions scrutinised NDIA Operational Guidelines and found them to be unlawful.[20] If the first tier of review is unlikely to apply such scrutiny to policy and is instead likely to follow NDIA policies that may otherwise be found unlawful, this would obstruct the development of the relevant caselaw (and impede many of the mechanisms for addressing unhelpful or unlawful departmental policies and practices we suggest above at Question 4).

Given these dynamics, we consider that any first tier of review should contain mechanisms for the review body, on its own motion or following a request by the participant only, to refer the matter to be heard directly by the second tier of review and/or Federal Court of Australia where the dispute concerns a novel legal or policy issue. Lawyers should be funded to provide advice to participants prior to accessing the first tier, to enable applicants to make an informed decision about whether to request that a matter be escalated.

Recommendation 8: The new review body should retain a divisional structure

The new review body should retain a divisional structure to facilitate effective and orderly discharge of its functions, and to enable members to be assigned to specific divisions based on specialised skills and experience. Specifically, there should be a separate division to review NDIA decisions.

Recommendation 9: A process similar to the Independent Expert Review Program needs to be designed carefully

If a process similar to the Independent Expert Review Program is adopted:

- *The independent experts will need to be appropriately qualified, skilled and experienced including having an understanding of the disability sector, the NDIS and/or lived experience of disability.*

[20] *See for example, SCHW and National Disability Insurance Agency* [2021] AATA 591 at [146]; *Evans and National Disability Insurance Agency* [2019] AATA 754 at [17]; *Madelaine and National Disability Insurance Agency* [2020] AATA 4025 at [129]; *Ewin and National Disability Insurance Agency* [2018] AATA 4726 at [80]-[82].

- *The Program should be independent of the NDIA.*
- *Recommendations and settlements reached through the Program should be published in a de-identified register.*
- *The NDIA should accept an independent expert recommendation unless it forms the view on reasonable grounds, that a recommendation is clearly wrong in fact or law.*
- *If the NDIA does not accept an independent expert recommendation, the applicant should be entitled to tender the recommendation into evidence in the proceeding.*
- *There should be adequate funding to ensure unrepresented applicants participating in the Program can access free legal advice.*

Recommendation 10: A two-tier model of external review needs to be designed carefully

If a two-tier model of external review is introduced:

- *The additional first tier must be efficient, quick, non-adversarial and independent, with review conducted by a suitably qualified panel of decision-makers experienced in working with people with disability.*
- *If an inquisitorial process is adopted, safeguards should be introduced to mitigate against the risk of distorting the neutrality of decision-makers.*
- *Where the dispute concerns a novel legal or policy issue, there should be a mechanism to refer a matter directly to the second tier (bypassing the first tier). There should be adequate funding to ensure unrepresented applicants can access free legal advice.*

Question 6: How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?

We consider that members assigned to NDIA matters should have substantial experience (3+ years) skills or qualifications relating to issues affecting people with disability. Similar to the current selection criteria for the IER Program, members allocated to NDIS matters should also have knowledge of or qualifications in trauma informed practice, to use harm-minimising practices when conducting NDIS reviews. If a two-tier model is adopted for NDIS matters, at least one member of the panel in each first-tier review should be a person with lived experience of disability.

We also consider that for NDIS reviews, specialised knowledge of the NDIS Act will be essential for the effective function of a review body. This is because the NDIS legislation is complex, and the issues being raised on review are new and emerging. Ensuring members who oversee NDIA matters have specialised knowledge of the NDIS Act will enhance consistency and quality of decision-making in review matters.

Recommendation 11: Members reviewing NDIA decisions should be specifically assigned to the NDIS division and have specialised skills

Decisions by the new body on reviews of NDIS decisions should only be made by members specifically appointed and assigned to the NDIS division on the basis of having the requisite skills and knowledge of the Scheme and of disability.

Members

Question 16: Should all members be required to be legally qualified to be eligible for appointment?

Question 17: What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?

While Commonwealth tribunals do not exercise judicial power, they resolve disputes about complex and distinct areas of law. These matters often involve questions of fact and law, and need to be resolved through a process that provides procedural fairness.

Accordingly, any model(s) (including those discussed at Question 5) adopted by the new review body should require final decisions on applications to be made only by legally qualified members.

This is particularly important in relation to reviews of NDIS decisions, which require the decision-maker to engage with a particularly complex legislative framework and broad questions of technical interpretation. However, we do not consider that legal qualifications should be the only relevant expertise – members should have other specific expertise relevant to the matters they determine. For example, in the NDIS division members should have expertise and/or training to engage with people with disability and skills in trauma-informed practice.

It is possible that, within a two-tier model of review, the first tier could be constituted by multiple-member panels; and, where this is the case, it may be appropriate that only one panel member be legally qualified. This would allow other members to be selected on the basis of their lived experience, or other experience and knowledge (such as medical or health expertise), while utilising the legal knowledge of the legally qualified panel member. However, in other models or circumstances where members would be expected to hear and decide matters alone, we consider only legally qualified members should be appointed.

We do not minimise the value and importance of lived experience to review decision-making. In relation to NDIS decisions – and other types of decisions that may particularly concern people with disability – we consider the new review body should give priority to appointing people with disability who have legal qualifications as members wherever possible. The review body should also seek to appoint people with disability to conduct other roles that may not require legal qualifications, including conducting conciliations and other forms of ADR.

Recommendation 12: Final decisions should be made by legally qualified members

While the new review body should include persons with relevant lived experience and expertise wherever possible, all final decisions of the review body should be made only by people with legal qualifications. If multi-member panels are used to make decisions, at least one member of the panel should have legal qualifications.

Question 18: Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?

Expert evidence is often a significant aspect of proceedings involving the review of NDIA decisions, and the new review body may have a role in facilitating requests for further evidence by the respondent NDIA or in appointing its own expert to provide evidence.

We think it is important to observe there is a distinction in the type of expert evidence that may be relevant to an NDIS matter. On one hand, evidence may be sought in relation to questions of fact that are non-invasive eg, the general effectiveness of a particular support an applicant seeks. On the other hand, evidence may be sought about the particular individual applicant eg, whether a support will be of long-term benefit to the applicant. In the former circumstance, it may be appropriate for the new review body to have the power to appoint an expert, once the parties have been consulted. In the latter circumstance, any power to appoint any expert should be more constrained and, where possible, employed with the agreement and input of the parties ie, agreeing to the expert chosen and agreement about the questions to be asked of the expert.

Given this context, PIAC understands that it may assist the new review body in some NDIS matters to have the power to appoint an independent expert to provide evidence about certain points. As the Issues Paper notes, such a power would provide the new review body with a means to access expert opinion regardless of the financial position of the parties. Therefore, we can see benefits to the presiding member using this power to inform themselves about matters where an applicant may otherwise struggle to obtain necessary evidence, and may endure an unduly protracted process or be unsuccessful in their review as a result. However, providing the new body with such a power could also come with risks, and we consider there are several matters the Government should be cautious of before providing such a power.

First, the new review body should not have the power to compel applicants to undergo a medical examination (including a psychological examination), or assessment that would otherwise interfere with the bodily integrity of the person. This reflects in substance the current state of the law with respect to the AAT, following the Full Federal Court's decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LPSP* [2023] FCAFC 24 (***LPSP***). For further discussion of this matter, see our response to Question 36 below, which sets out some of the reasons why we consider it is essential that applicants not be so compelled.

Second, where an applicant has a reasonable basis to decline to undergo a medical examination eg, due to the potential for distress, the new review body should not be able to draw an inference adverse to the applicant.

Third, we mentioned above that the new review body should use this power either following consultation with the parties, or in some circumstances with the agreement and input of the parties. We consider this to be necessary to ensure the evidence-gathering process is not only efficient, but importantly trauma-informed (as set out in our response about the principles guiding the new review body in Question 1).

Recommendation 13: Any power to appoint experts should be constrained

If the new review body is empowered to appoint experts:

- *There should not be a power to compel applicants to undergo a medical examination (including a psychological examination).*

- *Where an applicant has a reasonable basis to decline to undergo a medical examination, the new review body should not be able to draw an inference adverse to the applicant.*
- *This power should be used either following consultation with the parties, or in some circumstances with the agreement and input of the parties.*

Appointments and reappointments

Question 25: How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?

PIAC supports the proposal that the President of the new body be required to inform the Minister of failures to disclose conflicts of interest, and the introduction of performance management provisions to assist to manage conflicts of interest. PIAC also considers that reinstating an independent oversight body, similar to the previous ARC, will assist in ensuring there is accountability and oversight in relation to the disclosure and management of actual and perceived conflicts of interest.

Recommendation 14: There should be additional mechanisms to manage conflicts of interest

The new review body should contain additional mechanisms to manage conflicts of interest for its members, including a requirement that the President of the new body inform the Attorney-General of any failures to disclose conflicts of interest.

Making an application

Question 30: How can the new body ensure that application methods and processes are accessible to all those seeking review? For example,

a. **What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?**

b. **What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision? Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate?**

c. **Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?**

Question 31: What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?

Question 32: What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?

The new body must ensure its application methods and processes are accessible for all applicants, with consideration to be given to the needs of people with a disability and First Nations peoples.

There should be no requirement for the applicant to submit a statement of reasons at the point of application. This is because some applicants, particularly those who are unrepresented, may face difficulties in articulating reasons at this early stage and may seek legal advice, advocacy or support, after lodging an application. There will be some applicants who need support at this stage of the process to articulate reasons as well as submitting an application so there should be flexibility, accessibility and informality built into the process.

Acknowledging that people with disability may experience additional challenges, there needs to be a considerable degree of flexibility around time limits for making an application, particularly within the NDIS division of the new body. Time limits should be extended to at least 3 months with the new review body having the discretion to extend time limits where it considers it just and equitable to do so. In the interests of access to justice, every opportunity to remedy defects and mistakes in the application should be provided.

For relevant applications, such as reviews of NDIS decisions, there should be a range of options for lodging an application including online, paper, and via an oral application taken over the phone. Although lodgment by email or web form is the most ideal, access to justice would allow oral applications to be accepted where applicants are unable to submit in writing or online.

We strongly recommend that no fee be applicable in the NDIS division. People with disability experience statistically high rates of financial disadvantage and an application fee would be a significant barrier to making an application.

Recommendation 15: The requirements to lodge an application should be accessible, flexible and informal

The requirements to lodge an application should be accessible, flexible and informal, including:

- *The new review body should allow applications to be lodged via email, online portal, post or by phone if required.*
- *Review applications should not require a statement of reasons to be provided at the time of application.*
- *Time limits for the lodgment of NDIS review applications should allow at least three months to apply and should exercise discretion to extend this time or cure defects in an application generously so as not to restrict access to justice.*
- *No fee should be payable to lodge an application in the NDIS division.*

Case Management, Directions and Conferencing

Question 34: What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?

Based on our experience in the NDIS division, where case conferencing is common and is by far the most widely used interlocutory ADR procedure, we consider that appropriately-managed case conferences can be a useful tool for managing matter timetables, clarifying the issues in dispute, and encouraging the parties to engage in discussion.

However, we have also seen case conferences be unhelpful diversions for applicants, which gives rise to frustration, and delay ultimate resolution of matters that ought to simply proceed to a hearing.

One problem stems from the fact the applicant has initiated the AAT proceeding because they are unhappy with a decision of the NDIA – meaning the 'status quo' favours the NDIA, and any settlement will require the NDIA agreeing to alter its view. As a result, PIAC has seen case conferences become venues for the NDIA to stipulate conditions under which it would revise its position, including making multiple requests for further evidence from an applicant that delay any resolution.

Conference registrars are often amenable to these requests, given their remit to mediate in search of agreement between the parties, and in our experience encourage applicants to comply – including by making directions to this effect. However, even where these requests are met, there is no guarantee the NDIA will agree to settle the matter – particularly where the case concerns a matter on which the NDIA has strongly-held policy views, such as the funding of a 'controversial' type of support. The effect of the conversations at these conferences is therefore to cast the NDIA as the decision-maker rather than the AAT, and to thus generate evidence that may have been considered relevant by the NDIA but only of tangential interest to the AAT itself; and to have delayed the progress of the matter to a hearing. The experiences described here are ones that have been consistently raised by other legal and advocacy organisations in other forums.[21]

We also understand that conference registrars can advise parties in relation to the prospects for success in an application.[22] However, in several matters, we have experienced conference registrars taking a passive approach to their role that did not always facilitate the swift resolution of applications. For example, at a conciliation where PIAC represented the applicant, the parties discussed a number of issues arising in the proceeding, while the conference registrar did not offer any views on the prospects of either parties' position. Had the conference registrar done so, the parties may have been assisted to narrow the issues in dispute.

The potentially drawn-out nature of the conferencing process is exacerbated when the NDIA and its representatives do not comply with timeframes and directions, such as for providing Statements of Issues, explaining to the Tribunal and the applicant what evidence it intends to

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21 See for example, Model Litigant Submission, above n 1; *Unreasonable and Unnecessary Harms*, above n 1.

22 Justice Garry Downes AM, former AAT President, 'Case Management in the Administrative Appeals Tribunal' (Administrative Court of Thailand, February 2006) < https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/case-management-in-the-administrative-appeals-trib>.

obtain, and the actual lodgment of evidence. This leads to further delay if conferences need to be rescheduled or rendered futile.

These issues are amplified by the way that the dynamic at a case conference can often reflect the NDIA's greater resources, causing some non-legally-represented applicants to describe feeling intimidated in the relatively informal setting of the case conference.

The issues described here, leading to the drawn-out nature of the case conferencing process is a significant contributor to the length of time it takes to finalise NDIS matters, which most recently is recorded at a median time of 31 weeks.[23]

PIAC considers that case conferencing powers should continue to be available for use in NDIS reviews. We consider that conference registrars (or their equivalent) in the new body should be directed, at least in NDIS matters, to give greater consideration to the need to progress the matter towards resolution. Registrars should be alert to determine matters on which the parties' positions are fundamentally irreconcilable, and which should therefore be determined by the new review body rather than negotiation.

In these cases, it may be particularly appropriate for the registrar to question and test the NDIA's expressed positions and requests for evidence to clarify whether their objections reflect matters of principle unlikely to be resolved outside of a hearing. It may also be helpful for the review body to develop expectations of how many case conferences a typical matter will have; and, at set points, to review whether satisfactory progress is being made through the case conferences or whether another approach is required.

Recommendation 16: Case conferencing powers should be retained in the NDIS division

Case conferencing should continue to be available in NDIS reviews, but case conferences should be ordered and conducted in a manner that recognises the distress that delays in resolving a matter can have for participants and limits the prospect of unproductive and repetitive case conferences.

Question 35: What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?

In the new body, the registrars should have the power to give direction and advance matters quickly. They should be responsible for ensuring that, as set out above, case conferences and similar ADR processes are used appropriately and that matters are not subject to obfuscation or undue delay. Registrars should, particularly, be asked to hold government representatives to account for behaviour that is inconsistent with the Model Litigant Obligations. The implementing legislation for the new review body should be drafted to permit and encourage this. (We address Model Litigant Obligations in further detail below at Question 60).

[23] AAT, 'AAT Caseload Report: For the period 1 July 2022 to 31 March 2023' <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2022-23.pdf>.

With regard to the qualifications of registrars, we understand from conversations with AAT representatives that all registrars in the NDIS division at present are legally qualified. We consider this is appropriate; and all conference registrars in the new review body should continue to hold legal qualifications. Registrars in the NDIS division should also receive disability awareness and cultural safety training to ensure they understand people with disability and the supports and structures that may assist them to participate fully in a review application.

Recommendation 17: Registrars should be legally qualified and empowered to give directions

The new review body should ensure that all registrars hold legal qualifications, and should also receive disability awareness and cultural safety training before being assigned to NDIS matters. Registrars should have the power to give direction and advance matters quickly.

Question 36: What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?

As discussed above at Question 4, we consider the new body should have the power to direct first-instance decision-makers to produce a detailed statement of reasons for its decision, and there should be a legislative presumption in favour of making such directions where requested.

Otherwise, the new body should generally have the power to make directions as necessary to progress the matter before it, with one important clarification. The wording of the present *AAT Act* with regard to directions does not explicitly specify whether it extends to permit the AAT to make directions to compel a person to undergo a medical examination (including a psychological examination), or that would otherwise interfere with the bodily integrity of a person. The Full Federal Court has recently decided in the appeal of *LPSP* that in accordance with the principle of legality the *AAT Act* does not permit such directions to be made.

We consider the position in *LPSP* is good law and good policy. Australia's common law traditions value highly the right to individual bodily integrity, and we do not consider that administrative review proceedings provide a sufficiently urgent justification for curtailing that right.

Given this, we consider the new review body's power to make directions should be explicitly defined to exclude any power to direct a person to attend or submit to a medical examination. Further, while the first-instance Federal Court decision in *LPSP* suggested the AAT might issue an indefinite stay in a proceeding in which an applicant did not submit to an unwanted medical exam, the Full Federal Court cast doubt on this conclusion but left open the matter for future determination.[24] The new review body's legislation should clarify that no stay may be issued on the basis that a party declines to participate in a medical examination or similar procedure.

[24] *LPSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1563 at [24]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LPSP* [2023] FCAFC 24 at [88].

Recommendation 18: The new review body should have broad power to make directions as necessary for the conduct of the matter

The new review body should have broad power to make directions as necessary for the conduct of the matter. In particular, its powers should:

- *include the ability to direct a government body to produce a detailed statement of reasons; and*
- *exclude the ability to make directions that would interfere with an individual's right to bodily integrity (including by being required to undergo a medical examination).*

Question 37: What powers should the new body have to address non-compliance with directions?

The new review body should have the power to take action against a party who has failed to comply with directions.

At present, the AAT has the power to dismiss the application of a party who has failed to comply with a direction. However, this power is by nature asymmetrical – where the review application is dismissed, the initial decision remains in place. In a NDIS review, where an applicant is challenging a decision to refuse funding for a support, where the review is dismissed they remain without funding. Accordingly, the dismissal provisions provide a compelling reason for an applicant to comply with directions; but does not have the same implications for the respondent. PIAC has regularly seen instances where the NDIA has failed to comply with procedural directions.[25] We hear similar accounts from our partners in the disability community, and others who assist applicants with NDIS appeals. We consider that a new review body must be empowered to address this by holding government parties accountable for failures to comply.

One possibility is for the review body to track all instances where a respondent government party does not comply with a direction. Presently, the AAT has an administrative mechanism to list a non-compliance directions hearing; however this mechanism is rarely used where compliance is satisfied before the day of the directions hearing, or the non-compliance is not especially serious.[26] Additionally, the procedural requirements of the existing mechanism can be overly formal and onerous, and AAT Members may be reluctant to schedule them for most instances of non-compliance. This means that instances of non-compliance by respondents that inconvenience an applicant, or cause meaningful delay in a matter, are rarely addressed unless they become very serious, impeding oversight of unhelpful practices and potentially allowing persistent patterns of non-compliance.

Where non-compliance is suspected, the new review body could be required to put this to the respondent (eg, informally in written correspondence); and, where no good reason is provided for the non-compliance, the review body should make a finding and/or record the incident of non-compliance. The review body could then present a report each quarter to Parliament (and/or a reinstated ARC) setting out the number of instances of non-compliance by each government

25 PIAC's experiences in this regard are echoed in the Model Litigant Submission, above n 1, at pp 9, 16-17.

26 Justice D G Thomas, President – AAT, *General Practice Direction: Direction under section 18B of the Administrative Appeals Tribunal Act 1975* (28 February 2019), [4.61].

body, allowing for public scrutiny and for the Government to address underperforming departments, teams and contractors.

Importantly, under such a regime non-compliance with a direction should not be excused on the basis of lack of resourcing, or human error. It is important that non-compliance on these bases be recorded and reported on, as they will allow Parliament to identify and address the underlying issues such as a need for greater funding, better staff training, or improved quality assurance processes.

We also support retaining a provision similar to s 63 of the *AAT Act* which provides for criminal offences of 'contempt of Tribunal', in more serious cases of obstruction or hindering of the review body.

Recommendation 19: The new review body should have mechanisms to address non-compliance with directions

The new review body should have mechanisms to address non-compliance, including making a finding of non-compliance, recording instances of non-compliance and regular reporting to Parliament on the number of instances of non-compliance.

Question 39: What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

The NDIS Division of the AAT currently contains provision for a 'fast-track' process to decide certain applications in an expedited manner, with a hearing scheduled within six weeks of the commencement of that fast-track process. This is established by the relevant Practice Direction, rather than by legislation.[27] This fast-track procedure can be appropriate for NDIS cases, some of which are time-critical as they concern vital supports for a person or can pose serious risks to health and safety if the initial decision is not reversed. PIAC relied on the fast-track hearing process in one of our NDIS matters, involving a man with a fast-progressing health condition and an urgent need for supports. In that matter, the fast-track process successfully and quickly contributed to the matter reaching an appropriate settlement.

However, while we are aware of a number of matters for which time is a critical factor, as far as PIAC is aware the fast-track procedure is little-used. When we have asked others in the sector who assist with NDIS appeals about their use of it, we have been told that they have never requested nor received a fast-track hearing for a case. We are also unaware of any published NDIS decision that makes reference to the fast-track process having been used. To our knowledge, the fast-track process is not typically raised by conference registrars, or otherwise suggested by the AAT; as such, its underuse may well be due to simple lack of knowledge by applicants.

The new review body should consider whether a fast-track procedure is appropriate for each NDIS review before it – and, in cases the review body thinks it may be appropriate, it should be required to suggest this to applicants. While it should remain up to the applicant whether or not to

[27] Justice Duncan Kerr, President – AAT, *Review of National Disability Insurance Scheme Decisions (Practice Direction)* (30 June 2015), [5].

request a fast-track hearing, prompting by the review body could assist unrepresented applicants and allow better prioritisation of urgent cases.

Recommendation 20: The 'fast-track' process should be retained for reviews of NDIA decisions

The new review body should retain a 'fast-track' process for dealing with NDIS reviews that are particularly time-sensitive. The review body should proactively consider whether this process is appropriate for each NDIS matter before it, and if so, should suggest to applicants at an early stage that they consider it.

Information provision and protection

Question 40: What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?

At least in relation to NDIS matters, respondents should continue to be required to provide the new body with 'every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal' (as required by the present *AAT Act* at s 37(1)(b)). The requirement that these documents be provided within 28 days of receiving notice of the application (subject to directions by the Tribunal) should also be retained.[28]

In cases we have seen at the AAT, these documents have frequently not been provided by the NDIA within the necessary timeframe. Unexplained non-compliance with this requirement should be recorded and reported, in line with our recommendations above to Question 37.

In cases we have conducted, we have also regularly seen the NDIA omit relevant documents from these materials. For instance, where the NDIA has relied upon an internal specialist panel (such as its 'Home and Living Panel', which makes recommendations in relation to funding decisions for housing and related supports), the NDIA has regularly omitted the recommendations of that panel in the bundle of documents it produces to the AAT. In several of PIAC's cases, we have requested production of the relevant recommendation, and (belatedly) received it as part of a supplementary filing from the NDIA. If it were not for our specific knowledge of the NDIA's internal processes (which most self-represented applicants will not have), our clients would not have access to this critical information.

We therefore consider it may be appropriate for the new review body to develop categories of documents that would be expected to be produced for some common types of decisions to guide departmental practice and assist applicants to review the documents produced.

Question 41: What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?

[28] As required by *Administrative Appeals Tribunal Act 1975* (Cth) ss 37(1), (1A).

We consider the existing powers held by the AAT to issue summons and directions are adequate and appropriate in relation to NDIS reviews. There should be a presumption that the new review body use these powers in relation to compelling production by government departments and agencies, where the material requested would inform the review.

However, we note that in many instances NDIS review applicants are concerned with the prospect of their treating practitioners, family, friends and others being compelled to provide documents.[29] Many applicants with disability find this distressing and we are aware of at least one instance in which fear of such a summons has driven an applicant to withdraw their AAT application.

When making decisions about issuing summonses and other directions, we consider the new review body should be directed (eg, through legislative considerations or Practice Direction) to consider and give significant weight to distress (including subjective distress) and sensitivity of applicants to the disclosure of personal information concerning them. The review body should be cautious to make such orders.

Question 42: What documents and information should the Tribunal share or not share with applicants?

All documents received by the new review body that are relevant to a matter should be shared with applicants. Exceptions should be tailored extremely narrowly, and only applicable where there is an extraordinary and compelling interest in preventing disclosure – in which instance the party opposing disclosure (usually, the respondent government body) should bear the onus of demonstrating that this is the case.

Question 43: By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?

In our experience, some applicants in NDIS cases are very concerned with protection of their privacy and anonymity. In the case of people who are vulnerable because of trauma, features of their disability, or other factors, the availability of private hearings and non-publication orders could impact their willingness to pursue the review. Accordingly, in the interests of access to justice, private hearings and non-publication orders should be allowed upon request in any NDIS matter.

Recommendation 21: Private hearings and non-publication orders should be permitted in any NDIS matter

The implementing legislation for the new body should provide for private hearings and non-publication orders upon the applicant's request in any NDIS matter.

Resolving a matter

Question 45: What types of dispute resolution should be available in the new body?

[29] See, for instance, *CGXH and National Disability Insurance Agency* [2022] AATA 2836; *HXJZ and National Disability Insurance Agency* [2022] AATA 825.

Question 46: Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?

Question 47: What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be able to refer a matter to dispute resolution?

Question 51: How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

The range of dispute resolution available in the existing AAT should be retained, including conciliation, neutral evaluation, case conferencing, etc. However, when directing or engaging in any kind of dispute resolution, the new review body should be conscious of the concerns set out above at Question 37 in relation to case conferences.

The other matters raised by these questions for NDIS matters should in our view be answered by reference to the principles set out above in response to Question 1, and our discussion of alternate models for addressing NDIS reviews discussed at Question 5. We also encourage the Government to give close consideration and significant weight to views provided to this consultation by people with disability and organisations representing them.

Decisions and appeals

Question 52: What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?

Written reasons for decisions play an important role in improving government decision making. While oral reasons can be useful in straightforward matters that can be resolved expeditiously, we consider that in any matter where the review body elects to provide oral reasons they should subsequently provide a written statement of reasons within 28 days.

In general, members should be encouraged and expected to provide written reasons within a timeframe of 28 days for NDIS review decisions. The new review body should be sufficiently resourced to implement this timeframe.

Question 53: How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?

As above, we consider for NDIS matters at least, the new body should provide written reasons for decision. We consider the main determinant for the production of high-quality written reasons for a decision (including as to the accessibility and simplicity of those decisions) is the capability and skill of the members involved in producing them. As such, it is important that (as set out above at Question 16 and 17) members responsible for determining a matter should all be legally qualified; members should also be selected for their expertise and lived experience with issues relevant to

their review caseload, and provided with sufficient training to produce appropriate statements of reasons.

Question 54: Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?

We urge the importance of streamlining appeal processes to resolve matters efficiently. In particular, in NDIS reviews applicants can be left without needed disability supports for the duration of proceedings, impacting their health and wellbeing, including from the distress of the proceeding itself. In our responses to other questions we have made suggestions and recommendations for how the appeal process could be streamlined, eg in Questions 5, 34, 35, 36, 39, 40, 52.

Question 55: What should be the timeframes for lodging an appeal from a decision of the new body? Should this date from the receipt of a decision, or the receipt of written reasons for decision?

The timeframes for lodging an appeal from a decision of the new body should apply from the time of receipt of written decisions. This is because an appeal from a decision of the body will be an appeal on a question of law or judicial review, the prospects of which will require careful consideration and legal advice, and which in most cases will revolve largely around the reasons provided for the decision.

In PIAC's view the time to apply for an appeal of a decision from the NDIS division of the new review body should be 90 days, factoring in the time to consider prospects of an appeal and the costs involved. For some appellants, considering an appeal could be the first time they engage legal advice in relation to their matter. For appellants of limited means, including many NDIS participants, applications to legal aid commissions or other similar pro bono legal assistance service may require additional time. This longer timeframe will also promote greater accessibility and inclusivity, including for appellants with disability.

Recommendation 22: Timeframes to lodge an appeal from the NDIS division should be extended to 90 days

The time frame to appeal a decision of the new review body should commence from the time an applicant receives the reasons for the body's decision, and for NDIS decisions should be at least 90 days.

Question 56: When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?

Question 57: What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?

As outlined above at Question 4, we consider the new body should have the power to issue guidance decisions where appropriate to reflect settled practices, resolve divergences between

decisions, and assist the development of better decision-making practices by first-instance decision-makers. There should be structures and legislative mandates to regularly identify questions of law for referral to the Federal Court, and funding provided to litigants to argue those questions before the Court. The process for making such referrals to the Federal Court should be transparent and open to scrutiny from bodies such as a reconstituted Administrative Review Council.

Question 58: Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an appeals mechanism within the new body for complex matters or matters raising systemic issues?

We do not have a view on whether there should be a more formal additional tier of review available in the new body. However, in relation to a possible two-tier review system for NDIS matters, we reiterate our comments expressed above at Question 5.

Supporting parties with their matter

Question 59: Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?

In the NDIS division at least, applicants should not be required to seek leave to be represented. The important role of legal representatives in facilitating access to justice for people with disability against a well-resourced government agency, should outweigh any benefits of informality and speed.

Recommendation 23: Applicants in the NDIS division should not be required to seek leave to appear with representation

Applicants should be able to be legally represented in all NDIS matters before the new review body, without needing to seek leave.

Question 60: Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?

We express no view as to whether requirements or a code of conduct for representatives should apply in relation to those acting for applicants before the new body.

The Model Litigant Obligations contain a process for how government agencies are to conduct themselves in AAT proceedings. These Obligations reflect the unique position of government agencies when litigating against individuals, and the expectations that governments will engage fairly and honestly in legal proceedings. The Obligations are particularly relevant to the context of an administrative review body where government decision-making is being examined.

In relation to NDIS reviews, a range of bodies and applicants have expressed concerns over failures by the NDIA and its representatives to adequately define and adhere to the Model Litigant

Obligations.[30] We are pleased the NDIA has recently reviewed how it applies the Model Litigant Obligations in NDIS proceedings.[31] However, we also consider that it would be appropriate for the new review body to play a role in ensuring the obligations are met.

Members and registrars of the new body should have the ability to proactively facilitate compliance with the Model Litigation Obligations and respond to possible breaches of them. This could be achieved by:

- providing members and conference registrars, as well as any other review body staff involved in alternate dispute resolution and hearings, with training on content of the Model Litigant Obligations. This training should include guidance on how the members and registrars can raise instances of potential non-compliance with the Obligations during proceedings;
- a Practice Direction to legal representatives setting out how the review body will engage with the Model Litigant Obligations;
- the new body itself establishing a process for reporting of breaches of the Model Litigant Obligations to the Attorney-General; and
- inclusion of appropriate directions and powers in the implementing legislation to authorise and encourage the above actions by the new body.

Recommendation 24: The review body should urge compliance with Model Litigant Obligations

Members and registrars of the new body should proactively facilitate compliance with the Model Litigant Obligations and respond to breaches of the Model Litigant Obligations. The new review body should implement training, guidance, a Practice Direction, and where appropriate legislation to promote compliance with the Model Litigant Obligations.

Question 61: What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided:

a. by departments and agencies
b. by the new body
c. by other organisations

In accordance with the principles set out at Question 1, particularly those regarding accessibility, we consider that services provided to applicants should include at least the following.

- Services to engage and meaningfully participate in the review process, including through:
  - direct support throughout the process;
  - access to functional communication support;
  - mechanisms to proactively determine the need for, and access to, supported decision-making; and
  - access to mental health support.

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30 *Unreasonable and Unnecessary Harms*, above n 1; Model Litigant Submission, above n 1; Joint Standing Committee on the NDIS, Parliament of Australia, *Inquiry into the Capability and Culture of the NDIA*, (Interim Report, March 2023), 42-44 [3.128-3.135].

31 National Disability Insurance Agency, *Our model litigant guidelines*, (14 March 2023) <https://ndis.gov.au/about-us/legal-matters/our-model-litigant-guidelines>.

- Access to clear written and oral information about the review process and review rights. Information must be provided in accessible formats, including Easy Read, languages other than English including the language needs of First Nations people, Auslan and Braille.
- Independent non-legal advocacy and legal assistance, including advocates for First Nations people and people in regional, remote or rural areas. There needs to be adequate funding to provide these services.

Otherwise, we urge the Government to defer to the views expressed by groups representing AAT users with access and participation needs, who are best placed to understand the best services to ensure equal access to review.

In relation to who should provide the services, we consider that in relation to NDIS decision reviews the relevant services should not be provided by the NDIA – beyond simply providing information about a person's review rights. Accessibility assistance and services should instead be provided by the new body itself, or by other government or community groups.

Recommendation 25: Services to assist parties to participate should be determined through consultation and should be provided by the new review body

Services to assist parties to participate equally in the new review body's processes should generally be provided by the new body directly or other organisations, and not by the government department whose decisions are being reviewed. The precise nature of these services should be determined through close consultation with organisations representing AAT user groups.

Question 62: How can the new body (or ancillary services) enhance access for vulnerable applicants?

Question 63: How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?

PIAC appreciates the Government's consideration of how the new review body can be made more accessible for vulnerable applicants and those with histories of trauma and abuse. In relation to our work with NDIS participants, we note the high rates of trauma and abuse experienced by people with disability in a variety of settings within Australian society, as has been made clear by the ongoing Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. In our experience, the process of seeking review of NDIS decisions – including initial funding conversations with the NDIA, internal reviews by the NDIA, and subsequent review by the AAT (or any future new review body) – can in itself be traumatic for NDIS participants who describe this process as stressful and upsetting. These experiences can be compounded by existing support needs that stem specifically from the nature of a person's impairments. In sum, NDIS reviews concern a group of people who experience disproportionate rates of trauma and vulnerability prior to their engagement with the reviewing body.

PIAC considers the Guidelines on Vulnerable Persons developed for use in the AAT's Migration and Refugee Division (**MRD**) are a useful template for the new review body, and contain many useful suggestions. While these would need to be adapted to account for the adversarial nature

of other review settings (given the MRD is inquisitorial), we consider a similar document could be issued in relation to at least NDIS reviews, and possibly all matters considered by the new review body.

In relation to the content of such guidelines, there are several points we think should be raised:

- A major component of trauma-informed legal practice is providing individuals with greater control over the processes they are involved in. This means that when dealing with vulnerable applicants, the review body should be cautioned against making directions compelling them to do anything that is not strictly necessary for the process of the review. This would include, for instance, not insisting on scheduling conciliation conferences if the applicant would prefer not to (particularly where these might involve a traumatic power imbalance between the government department and the applicant).
- The review body should avoid compelling unnecessary disclosure of personal matters about the applicant and their family, which can be very distressing. This may include exerting control over lines of questioning by government representatives during cross-examination, to limit questioning that could be distressing for applicants. Such interventions may require legislative support to authorise any perceived infringements on procedural fairness of the procedure, such as to explicitly allow reasonable interventions by the presiding member to accommodate the needs of vulnerable persons giving evidence.
- Presiding members should be alerted to the common reluctance on the part of vulnerable applicants to produce evidence going to their privacy, such as their personal medical records. Decision-makers should be cautioned about drawing adverse inferences based on any perceived 'gaps' in the evidence that may arise on this basis.
- Registrars, members, and other review body staff should be proactive about accommodating the needs of vulnerable applicants, such as asking them if they would like breaks in proceedings, as opposed to waiting for applicants to make requests for support.
- Registrars and members should be encouraged to address and correct unhelpful practices by representatives for respondents, such as discussing applicants in a disrespectful or insensitive manner.

These suggestions are not exhaustive, and we encourage the Government and/or the new review body to consult with groups representing people with disability in developing new guidelines.

As noted above, some useful measures in the guidelines may require accompanying legislative modifications to implement. We therefore recommend the guidelines be prepared prior to drafting of implementing legislation for the new review body being finalised, so that any necessary legislative measures can be incorporated.

Recommendation 26: Guidelines for conducting reviews with vulnerable applicants

The new review body should develop guidelines to assist its members in conducting reviews concerning vulnerable applicants, and in employing trauma-informed practices. These guidelines should be applicable to, at least, reviews of NDIS decisions, and developed in consultation with groups representing people with disability.

Question 64: Should the legislation place an obligation on the new body to promote accessibility for all users?

The new legislation should contain a positive obligation on the new review body to promote accessibility. PIAC considers this would encompass the new review body being required to make reasonable adjustments to ensure applicants with disability can fully and genuinely participate in the whole proceeding. A positive obligation would require active consideration of accessibility by the new review body, which would go some way toward implementing the principle of 'accessible' (referred to Question 1) in the new review body's operations.

As an example, PIAC has represented applicants whose disability support needs require AAT listings to be made at particular times of the day. Prior to each listing, PIAC requests the AAT to accommodate the applicants' request. On occasion, the AAT has not been able to accommodate the request or has inadvertently overlooked the request. If the new review body had a positive obligation to promote accessibility, the new review body could record requests for reasonable adjustments to ensure such requests are actively and consistently accommodated without the person or their representative having to explain and request the adjustment on each occasion.

Recommendation 27: A positive obligation to promote accessibility

The implementing legislation for the new review body should place an obligation on the body to promote accessibility for all users, including making reasonable adjustments to accommodate the needs of applicants with disability.

Question 65: How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?

Question 66: Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?

Almost all applicants in NDIS review matters will be people with disability. PIAC has acted for many clients with disability in the AAT, in Courts and in other Tribunals. This can be complex where clients' impairments mean they have limited capacity to instruct, or difficulties providing clear instructions.

We consider there is scope for a trusted intermediary, such as a lawyer or a disability advocate, to assist applicants with disability who might otherwise not be able to participate in review matters. In particular, the safeguards of a lawyers' fiduciary duty to their client and professional ethical frameworks mean that lawyers can be trusted to navigate difficult boundaries between assisting an applicant to clearly articulate their needs and wants and putting words in their mouth; or between using a persons' relationships of care and respect to provide support during a complex proceeding, and having other voices crowd out those of the applicant.

Accordingly, the best way to increase the capacity of many review applicants with disability to participate in proceedings is to fund and provide them with advocacy assistance, particularly from lawyers in community legal centres and legal aid commissions who have the necessary experience and knowledge in disability and working with marginalised groups to provide effective and sensitive assistance.

We express no view in relation to the appointment of litigation guardians in matters before the new body.

Recommendation 28: Increase funding for disability advocates, community legal centres and Legal Aid Commissions

To support people with disability to engage with the new review body in their own capacity in a way that reflects their preferences and needs, the Government should substantially increase funding to disability advocates, community legal centres and legal aid Commissions who work with people with disability.