Public Interest Advocacy Centre

Submission to Standing Committee on Social Policy and Legal Affairs

Administrative Review Tribunal Bill 2023

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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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Recommendations

Recommendation 1 – Practice directions be made in consultation with users and their representatives

The ART Bill require that before making a practice direction, the President, through the Tribunal Advisory Committee, must:

a. *take reasonable steps to obtain the views of bodies representing the interests of users of the ART or a specific jurisdictional area (as may be relevant); and*
b. *have regard to those views in developing the practice direction.*

Recommendation 2 – Additional powers to remove a respondent or order that a decision-maker not participate

The ART Bill be amended to introduce a power for the ART to remove a decision-maker or order that a decision-maker not participate in a review or category of review proceedings, if the ART considers it would assist to pursue its objective and/or assist to resolve the application for review.

Recommendation 3 – Manner in which a proceeding will be conducted in the absence of the decision-maker

The ART Bill be amended to include an explicit statement that when the decision-maker is a non-participating party or is removed from the proceeding for any reason:

a. *the ART is not required to afford the decision-maker procedural fairness; and*
b. *the ART may inform itself on any matter in such manner as it considers appropriate.*

Recommendation 4 – Members to receive training in conducting inquisitorial proceedings

The ART ensure members receive specific training in relation to conducting inquisitorial proceedings.

Recommendation 5 – Introduce mandatory power to order adequate statement of reasons

Subclause 24(2) be amended to provide that if an applicant requests a further statement of reasons, and the ART finds the decision-maker has not provided a statement of reasons containing sufficient findings on material questions of fact, evidence or other material on which the findings are based, and reasons for the decision, the ART 'shall' order the decision-maker to provide a fuller statement of reasons, unless there are exceptional circumstances that justify not making such an order.

Recommendation 6 – Broaden scope of clause 271 to all statements of reasons

Subclause 271(1) be amended to allow any person who receives an inadequate statement of reasons (whether or not the statement was provided in response to a request under clause 268), to seek an order from the ART that the decision-maker produce a further statement of reasons.

Recommendation 7 – Confirm clauses 268-271 can operate concurrently with a substantive review application

The ART Bill be amended to explicitly confirm the operation of clauses 268-271, by which a person affected by a decision can seek an adequate statement of reasons for that decision, are unaffected by whether the person applies for review of the underlying substantive decision.

Recommendation 8 – General power to award costs against respondents

The ART be empowered to award costs against a government respondent where that respondent is found to have acted inappropriately in its conduct of the matter before the ART.

Recommendation 9 – Members assigned to the NDIS jurisdictional area should have specialised expertise relating to disability

Subclauses 199(5) and (10) of the ART Bill be amended to require members only be assigned to the NDIS jurisdictional area where they have training, knowledge or experience relating to disability.

Recommendation 10 – Increase funding for legal and advocacy services to improve access to justice

Government provide sustained and substantially increased funding to disability advocates, community legal centres, legal aid commissions and Aboriginal Legal Service providers via the inclusion of a statutory annual funding formula in the ART Bill.

1. Introduction

The Public Interest Advocacy Centre ('PIAC') welcomes the opportunity to make this submission to the Standing Committee on Social Policy and Legal Affairs inquiry into legislation implementing the new Administrative Review Tribunal ('ART'). Our comments concern the Administrative Review Tribunal Bill 2023 ('ART Bill'); we have no comment regarding the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023.

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, we have used our legal and policy expertise to advocate for better outcomes under the National Disability Insurance Scheme ('NDIS') for people with disability. We do this in close consultation with national peak disability rights organisations, as well as legal and advocacy groups with similar expertise and reform concerns. This submission draws on our direct experience representing applicants in external reviews of National Disability Insurance Agency ('NDIA') decisions before the Administrative Appeals Tribunal ('AAT'), and the views and feedback we received from applicants and disability representative organisations.
We are pleased to see several positive changes proposed in this Bill, many of which reflect concerns and recommendations made in our submission to the Attorney-General's Department's Administrative Review Reform Issues Paper. In particular, we welcome measures to improve administrative decision-making, including through:

- re-establishing the Administrative Review Council ('ARC');
- implementing mechanisms for senior leadership of the ART to identify, escalate and report on systemic issues in its caseload;
- the requirement for the ART to publish decisions involving a significant conclusion of law, or with significant implications for Commonwealth policy or administration;
- strengthening requirements for decision-makers to provide a statement of reasons for reviewable decisions (see below recommendation 5); and
- instituting a guidance and appeals panel to consider significant issues and promote consistent decision-making in the ART.

Our submission recommends further changes to address the following aspects of the powers and functions of the ART:

- development of practice directions;
- proceedings conducted in the absence of the decision-maker;
- requirements to provide reasons for first-instance decisions;
- a power to award costs against a decision-maker in some circumstances;
- assignment of members to the NDIS jurisdictional area;
- accessibility of the ART; and
- resourcing for legal and advocacy assistance services.

Our views and recommendations reflect our experience in relation to reviews of NDIS decisions. We acknowledge that users of other jurisdictional areas of the ART may have different experiences, and specific measures may be necessary to address particular issues as apply to those kinds of reviews.

2. Development of practice directions

The ART Bill contains a wide range of powers which the ART can employ flexibly to resolve applications for review. Equally, the ART Bill provides few restrictions on when and how these powers are to be deployed.[1] Instead of prescribing how the ART *will* conduct reviews, the Bill sets out how the ART *can* conduct reviews. This approach would allow the ART to adapt and tailor processes for each type of review and 'jurisdictional area'. It is likely this adaptation and tailoring for each jurisdictional area would occur through the President's power to make practice directions for conduct of proceedings by the ART and the dispute resolution processes.[2]

In this context, the practice directions to be made by the President are extremely important. We anticipate these practice directions will set out how the ART will use its powers to review each type of decision, including crucial matters such as when and how the ART engages with the parties to a review; which alternative dispute resolution processes are used; the types and forms of evidence the ART will accept; or whether respondents will be expected to participate in the review proceeding.

We understand the emphasis on practice directions is intended to allow the ART to adopt flexible approaches to reviews and adjust its procedures to respond to emerging trends and identified issues among its caseloads. However, it carries the risk that practice directions, if made without proper consultation, will perpetuate inappropriate approaches to review applications (such as those described within the current AAT NDIS Division by previous submissions from PIAC and others in the disability community).[3]

Given this, the ART Bill should contain mechanisms to ensure the President consults broadly before making practice directions. In particular, the President should seek and have regard to the views of users of the ART (including through relevant representative bodies) that may be affected by a proposed practice direction.

We note existing subclause 36(3) requires the President to consult with the Tribunal Advisory Committee ('Committee') when issuing practice directions; and subclause 236(5) requires the Committee, in performing its functions, to have regard to any views expressed by stakeholders. However, the term 'stakeholders' as used in subclause 236(5) is undefined and unclear. Further, it is not clear whether there is any obligation for the Committee to actively seek or invite such stakeholders' views, or how the Committee might be expected to do so (such as by conducting

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1 Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 4[24], 30[208].

2 Administrative Review Tribunal Bill 2023 (Cth) ('ART Bill') cl 36.

3 See for example, 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) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/GeneralIssues/Submissions> ('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) <https://villamanta.org.au/wp-content/uploads/2022/07/Model-litigant-obligations-and-NDIS-Appeals.pdf> ('Model Litigant Submission'); PIAC, *Submission to Joint Standing Committee on the NDIS: Inquiry into the Capability and Culture of the NDIA* (12 October 2022) https://piac.asn.au/2022/10/24/submission-to-joint-standing-committee-on-the-ndis-inquiry-into-the-capability-and-culture-of-the-ndia/; PIAC, Submission to Attorney-General's Department Administrative Review Reform; Issues Paper (12 May 2023) < https://piac.asn.au/2023/06/10/submission-to-attorney-generals-department-administrative-review-reform-issues-paper/>.

consultations about a proposed practice direction). These existing provisions would therefore risk consultation occurring in an ad hoc, unstructured and/or piecemeal way; or no consultation occurring at all.

Instead, the ART Bill should require that before making a practice direction, the President, through the Committee:

a. take reasonable steps to obtain the views of bodies representing the interests of users of the ART or a specific jurisdictional area (as may be relevant); and
b. have regard to those views in developing the practice direction.

Such a provision would, for example, require the ART to consult with Disability Representative Organisations (among other bodies) whenever it develops a proposed practice direction that would particularly impact applicants with disability – such as directions governing the procedure for reviews in the NDIS jurisdictional area. While such consultation is particularly important in the case of groups facing systemic disadvantage or at risk of exploitation through the review process (such as people with disability), we consider consultation on practice directions should apply to all jurisdictional areas and subject material within the remit of the ART (eg, practice directions on evidence).

This consultation should be legislated so that parliament and the public can have confidence the ART will exercise its considerable discretion to design review processes with user interests in mind.

Such consultations with users and their representatives reflect common practices in other courts and tribunals:

- in the Federal Court of Australia, it is envisaged that user groups will be established for each National Practice Area;[4]
- in the Supreme Court of NSW, user groups have been set up for different divisions and lists;[5]
- the Land and Environment Court of NSW consults with user groups;[6] and
- the NSW Civil and Administrative Tribunal receives stakeholder feedback through its Liaison Group and Divisional Consultative Forums.[7]

We consider such provisions would allow the ART to design and adopt better practices for conducting reviews, and increase confidence in the ART among users.

Recommendation 1 – Practice directions be made in consultation with users and their representatives

The ART Bill require that before making a practice direction, the President, through the Tribunal Advisory Committee, must:

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4 Federal Court of Australia, 'User Groups', *Law & Practice* (Web Page) <https://www.fedcourt.gov.au/law-and-practice/consultation-and-liaison/user-groups>.

5 Supreme Court of NSW, *Annual Review* (Report, 2022) 64-68 <https://supremecourt.nsw.gov.au/documents/Publications/Annual-Reviews-+-Stats/AnnRep2022_LowRes.pdf>.

6 Land and Environment Court of NSW, 'Strategic Innovations' *About us* <https://lec.nsw.gov.au/about-us/strategic-innovations.html>.

7 NSW Civil & Administrative Tribunal, *Annual Report* (Report, 2021-2022) <https://ncat.nsw.gov.au/documents/reports/ncat-annual-report-2021-2022.pdf>.

a. *take reasonable steps to obtain the views of bodies representing the interests of users of the ART or a specific jurisdictional area (as may be relevant); and*
b. *have regard to those views in developing the practice direction.*

3. Proceedings conducted in the absence of the decision-maker

3.1 Circumstances in which a decision-maker may be absent

The ART Bill recognises some proceedings may benefit from being conducted without the government decision-maker participating (in the role of 'respondent' before the ART). In appropriate cases, this could achieve a less formal and adversarial approach. Broadly, the ART Bill provides two circumstances in which a decision-maker may be absent from the ART proceeding: (1) where the decision-maker elects not to participate; or (2) where the ART removes the decision-maker for non-appearance or non-compliance.

At present, however, a respondent which upholds its obligations to appear at case events and comply with orders cannot be prevented by the ART from participating in the review proceeding. Thus, in circumstances where the ART considers a type of review application could be more efficiently resolved without the presence of the respondent, it would have no power to require this.

In our view, the ART Bill should provide additional powers for the ART to remove a respondent as a party to, or prevent a respondent from participating in, a review if the ART considers this would assist it to pursue its objective and/or to resolve the application for review. In keeping with the ART Bill's facilitative approach, this would allow the ART to trial innovative methods such as by adopting inquisitorial processes for certain types of review applications, and to tailor its procedures to the specific cases before it.

For example, people with disability and their advocates have voiced significant concerns about the NDIA's persistently adversarial and obstructive approach to the conduct of AAT appeals.[8] This is supported by the evaluation of the Independent Expert Review Program, which found the non-adversarial process to be less legalistic and more efficient than the current AAT process, and reduced the stress and anxiety of applicants.[9] The ART should have the power, if it so chooses, to trial or adopt such non- or less-adversarial procedures in the absence of the respondent.

Recommendation 2 – Additional powers to remove a respondent or order that a decision-maker not participate

The ART Bill be amended to introduce a power for the ART to remove a decision-maker or order that a decision-maker not participate in a review or category of review proceedings, if the ART considers it would assist to pursue its objective and/or assist to resolve the application for review.

8 See for example, Model Litigant Submission (n 1).
9 NDIA Research and Evaluation Branch, *Independent Expert Review Program Evaluation Report* (Report, October 2023) <https://www.ndis.gov.au/about-us/research-and-evaluation/research-helps-us-improve-ndis/independent-expert-review-ier-evaluation-report>.

3.2 Nature of review where decision-maker is absent from proceeding

Where a review proceeding occurs in the absence of a respondent – either because the respondent has elected not to participate, or has been removed as a party – we are concerned the ART Bill does not clearly define the nature of the review. The Bill does not, for instance, establish whether such proceedings are inquisitorial or adversarial in nature; or outline the content of procedural fairness obligations that may be owed to the absent respondent.

At present, the Bill contains several provisions regarding respondents which elect not to participate which appear difficult to reconcile. For instance, subclause 55(2) provides that a non-participating party is not entitled to present its case, including to make submissions; however, subclause 63(1) entitles a non-participating party to give the ART written submissions. Separately, subclause 56(3) imposes a limited obligation on a non-participating party to assist the ART. While the apparent intention of these provisions is to provide flexibility for non-participating parties to maintain some level of participation in the proceeding, these provisions make it difficult to understand what procedural fairness obligations the ART would have to a non-participating respondent.

Further, there are no provisions identifying the nature of the review to be conducted where a respondent is *removed* from proceedings; the ART's procedural fairness obligations (if any) to such a former respondent; or how these considerations might apply if a respondent is removed and subsequently reinstated as a party pursuant to subclause 83(5).

In these circumstances, ART members may feel compelled to adopt a more favourable approach to the position of a non-participating or removed respondent, out of concern they will otherwise fall into legal error. Additionally, ART members may be reluctant to exercise their power to remove a non-compliant respondent to avoid legal complexities of conducting the review in their absence.

To provide greater clarity, we therefore suggest the ART Bill include an explicit statement that in relation to any review or period in a review where the decision-maker is a non-participating party or is removed from the proceeding, the proceeding is to be conducted in an inquisitorial manner – the ART is not required to afford the decision-maker procedural fairness, and that the ART may inform itself on any matter in such manner as it considers appropriate.

Recommendation 3 – Manner in which a proceeding will be conducted in the absence of the decision-maker

The ART Bill be amended to include an explicit statement that when the decision-maker is a non-participating party or is removed from the proceeding for any reason:

a. *the ART is not required to afford the decision-maker procedural fairness; and*
b. *the ART may inform itself on any matter in such manner as it considers appropriate.*

3.3 Training in inquisitorial methods

Where an application for review occurs in the absence of the respondent, we consider there are risks of distortion (real or perceived) of the neutrality of the presiding ART member(s). This may occur where, without a respondent to act as a contradictor, the presiding member(s) are required to themselves test the evidence of an applicant, raise potential considerations adverse to the

applicant's position, and perhaps conduct their own inquiries before coming to a decision. While these actions are central to inquisitorial reviews, they must be done carefully to avoid unfairness to the applicant or the perception of bias by the presiding member.

To mitigate these risks, we therefore suggest ART members receive specific training on conducting proceedings in an inquisitorial manner. This would equip members to adopt flexible procedures that are more accessible to applicants, and to avoid the adversarial methods of Australian legal training being adopted by default. For example, a key feature of adversarial proceedings is the thorough testing of evidence; habits formed from these proceedings can lead to members conducting inquisitorial procedures in a manner similar to examination and cross-examination in an adversarial matter. Appropriate training could instead encourage members to be flexible in deciding the extent of evidence required to establish certain facts in the absence of a respondent/contradictor, or to draw inferences instead of demanding rigorous proofs.

Recommendation 4 – Members to receive training in conducting inquisitorial proceedings

The ART ensure members receive specific training in relation to conducting inquisitorial proceedings.

4. Requirements to provide reasons for first-instance decisions

The ART Bill contains provisions requiring decision-makers to produce a statement of reasons upon request in certain circumstances.[10] However, these provisions must be strengthened to eliminate loopholes and ensure sufficiently detailed reasons are made available.

Adequate statements of reasons for decisions are crucial, as they allow those affected to decide whether to seek review by the ART, assist the ART in conducting its review, and serve the public good by exposing government decision-making practices to public scrutiny and accountability. The importance of these statements can be seen by contrast with current practices by the NDIA. While the NDIA gives NDIS participants brief reasons for their internal review decisions, these regularly fall short of participants' expectations and the standards required by the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act'). In most cases PIAC has seen, the NDIA's internal review decision is made up almost entirely of boilerplate text, and provides only one or two sentences of actual explanation about the reasons for refusing the participant's specific request. This is legally inadequate, and leaves participants with little understanding of why the decision has been made or whether it should be reviewed. The ART Bill's mechanisms requiring production of statements of reasons must prevent these practices from continuing.

4.1 The ART's power to order additional reasons as an interlocutory step in a review

Clause 23 of the ART Bill provides that where an application for review is made, the decision-maker must provide a statement of reasons. Clause 24 provides that the ART 'may' order the decision-maker to provide a more detailed statement of reasons. These clauses mirror existing sections 37(1) and 38 of the AAT Act.

10 ART Bill cl 23(a).

While these provisions could be used to ensure that decision-makers which provide inadequate reasons are compelled to provide more detailed reasons, in the AAT this has been shown to be ineffective. For instance, in the case of *HGLS and National Disability Insurance Agency*,[11] the AAT found the NDIA's statement of reasons was inadequate, but nonetheless declined to direct the NDIA to provide a more detailed statement. The AAT's decision primarily concerned whether a further statement of reasons would assist to resolve the case before it, and did not appear to consider the broader value to an applicant of a fulsome statement of reasons, or the significance of appropriate reasons to encouraging broader good governance practices.

The decision in *HGLS* reflects a dynamic PIAC has seen in other cases we have acted in, where the AAT has relied on similar factors in exercising its discretion to decline to order the NDIA produce further reasons. Partly as a result of such exercises of discretion by the AAT, we have been told (while precise statistics are not available) that orders to produce reasons using this discretionary power are 'extremely rare'.[12] 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. Moreover, assisting the AAT to understand and resolve the case immediately before it should not be the only consideration in ordering the decision-maker to provide fuller reasons; instead, reasons serve vital public purposes of promoting transparency and providing for reform of government decision-making practices.

Given the public policy value of appropriate reasons, where an applicant requests additional reasons for the initial decision, and the ART finds the decision-maker has not provided sufficient reasons, the legislation should *require* the ART to order the production of a further, adequate statement of reasons. Subclause 24(2) of the ART Bill should be amended to provide that in such circumstances the ART 'shall' order the decision-maker to produce an adequate statement of reasons, unless there are exceptional circumstances to justify not doing so (such as the inherent sensitivity of information contained in those reasons).

Recommendation 5 – Introduce mandatory power to order adequate statement of reasons

Subclause 24(2) be amended to provide that if an applicant requests a further statement of reasons, and the ART finds the decision-maker has not provided a statement of reasons containing sufficient findings on material questions of fact, evidence or other material on which the findings are based, and reasons for the decision, the ART 'shall' order the decision-maker to provide a fuller statement of reasons, unless there are exceptional circumstances that justify not making such an order.

4.2 Individual's right to seek an order for adequate reasons from the ART

Separately, the ART Bill contains provisions allowing a person affected by a reviewable decision to:

- request a statement of reasons from a decision-maker (clause 268);
- apply to the ART for an order that the decision-maker produce a statement of reasons (clause 270); or

11 [2022] AATA 2774.
12 Email correspondence between PIAC and AAT Caseload Management Support team, September 2022.

- apply to the ART for an order that the decision-maker produce a further statement of reasons where they consider the initial statement was inadequate (clause 271).

The above provisions mirror existing powers available in the AAT.[13] These clauses in the ART Bill are largely appropriate, but should be amended in two ways to close loopholes and avoid uncertainty in their application.

First, at present clause 271 would only apply to circumstances where a person requested a statement of reasons from the decision-maker pursuant to clause 268, and then received a (potentially inadequate) statement of reasons in response. It would *not* apply in circumstances where a decision-maker provides a statement of reasons without first being subject to a request under clause 268. In other words, if a decision-maker were to proactively provide a (potentially inadequate) statement of reasons, a person affected by that decision would have no access to the process in clause 271 to have the adequacy of that statement tested. This loophole could be addressed by simply amending subclause 271(1) to cover any circumstances in which a person whose interests are affected by a reviewable decision receives a (potentially inadequate) statement of reasons for the decision.

Second, the ART Bill does not specify how these provisions in clauses 268-271 would apply where a person has *also* applied for review of the substantive decision by the ART. Similar ambiguity has led to confusion in the case of the equivalent provision in s 28 of the AAT Act, such as in the recent decision of *HVYY and National Disability Insurance Agency*.[14] In that case, the AAT found the legislation was ambiguous, but ultimately decided a person could *not* make a request for reasons pursuant to s 28 where they had already applied for review of the underlying decision.[15] Such ambiguity is undesirable and adds to the difficulty individuals face in seeking adequate reasons for decisions by government bodies.

To avoid similar confusion and potential ambiguity in the ART, the ART Bill should explicitly provide that the operation of the provisions in clauses 268-271 is unaffected by whether an applicant has applied for review of the underlying substantive decision. A person's rights to seek reasons for a decision that affects them, and to have that decision reviewed by the ART, serve related but distinct public purposes; the processes by which a person can uphold each of those rights should operate independently.

Recommendation 6 – Broaden scope of clause 271 to all statements of reasons

Subclause 271(1) be amended to allow any person who receives an inadequate statement of reasons (whether or not the statement was provided in response to a request under clause 268), to seek an order from the ART that the decision-maker produce a further statement of reasons.

Recommendation 7 – Confirm clauses 268-271 can operate concurrently with a substantive review application

The ART Bill be amended to explicitly confirm the operation of clauses 268-271, by which a person affected by a decision can seek an adequate statement of reasons for that decision, are unaffected by whether the person applies for review of the underlying substantive decision.

[13] *Administrative Appeals Tribunal Act 1975* (Cth) s 28.
[14] [2023] AATA 4248.
[15] Ibid [28] and [41].

5. Power to award costs against respondents in certain circumstances

The AAT does not provide an effective means to sanction a respondent which behaves inappropriately in the course of a review, such as by failing to comply with procedural directions or timetables. This means even where a respondent's poor behaviour causes an applicant to incur costs and subjects them to stress and frustration, the applicant has little recourse and the respondent experiences limited consequences.

Within the AAT's NDIS Division, this dynamic has led to regular concerning behaviour by the NDIA. A range of lawyers, advocates, organisations representing applicants, as well as the Joint Standing Committee on the NDIS have expressed concerns about the NDIA's inappropriately adversarial approach to the conduct of AAT appeals, including failures to act as a model litigant.[16]

We understand the power in clause 83 of the ART Bill to remove a decision-maker for non-compliance is designed to partially address these concerns. While this is a welcome measure, this power will not be available or appropriate in *all* circumstances. For example, a decision-maker may comply with directions, but nevertheless conduct the proceeding in a way that causes unnecessary costs and/or disadvantage to the applicant, or that unreasonably prolongs the time taken to complete the proceeding. Additionally, it may not always be desirable to remove a respondent from a proceeding, even where they have acted egregiously.

As a further mechanism to address poor behaviour, and to compensate applicants who are put to unnecessary costs by such behaviours, we recommend the ART Bill include a power for the ART to order costs against a respondent where that party is found to have acted inappropriately.[17] We note this would require consequential amendments to relevant legislation to allow costs to be ordered.[18]

A relatively high threshold should be required for such a costs order to be made, and we would anticipate this power would be used rarely. We nonetheless consider it would help to deter respondents from inappropriate conduct, and compensate applicants for costs incurred as a result of such conduct. Similar powers are available in state tribunals; for example, the NSW Civil and Administrative Tribunal is empowered to award costs if it is satisfied there are special circumstances that warrant this,[19] and the Victorian Civil and Administrative Tribunal is empowered to award costs if it is satisfied that it is fair to do so having regard to specified circumstances.[20]

Such a power to award costs should apply only to respondents. Even a small risk of an adverse costs order could have a significant chilling effect on applicants to the ART, many of whom are vulnerable or experience disadvantage, and who may not be legally represented or familiar with expected standards of conduct in litigation. By contrast, government respondents should be

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16 Unreasonable and Unnecessary Harms (n 1); Model Litigant Submission (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].

17 Noting the ART Bill empowers the ART to order costs for certain types of decisions.

18 For example, consequential amendments may be required to s 200A of the *National Disability Insurance Scheme Act 2013* (Cth).

19 *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

20 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.

expected to act appropriately in tribunal proceedings, and to risk costs consequences where they fail to do so.

We stress such a power to order costs would complement rather than replace other mechanisms to hold respondents accountable for their conduct in ART proceedings, such as the ART reporting inappropriate conduct to the relevant minister, the Attorney-General and/or the ARC.

Recommendation 8 – General power to award costs against respondents

The ART be empowered to award costs against a government respondent where that respondent is found to have acted inappropriately in its conduct of the matter before the ART.

6. Assignment of members to NDIS jurisdictional area

The ART Bill outlines the qualifications of members and assignment of members to jurisdictional areas. Additionally, the ART Bill provides the President with the flexibility to (re-)assign members across the ART's jurisdictional areas, according to operational needs.[21] The Bill provides that these assignments can only occur where the President is 'satisfied that the member has the appropriate skills, qualifications and experience' to work in the jurisdictional area they would be assigned to.[22]

We acknowledge the value of flexibility in assigning members to jurisdictional areas, and of allowing members to move between areas to encourage creative approaches and 'cross-pollination' among the ART. However, in relation to the NDIS jurisdictional area, we consider there is serious risk in assigning members who do not have specific expertise in and understanding of disability. Given the structural power imbalances regularly faced by people with disability, and the harm that can be done by failures to appropriately understand and engage with disability, it would be inappropriate to assign members to the NDIS jurisdictional area by virtue of expertise in dispute resolution and/or government decision-making alone.

The ART Bill should be amended to require that members only be assigned to the NDIS jurisdictional area where they have training, knowledge or experience relating to disability, as well as the appropriate skills, qualifications and experience.

Recommendation 9 – Members assigned to the NDIS jurisdictional area should have specialised expertise relating to disability

Subclauses 199(5) and (10) of the ART Bill be amended to require members only be assigned to the NDIS jurisdictional area where they have training, knowledge or experience relating to disability.

7. Accessibility of the ART

We have had the opportunity to review the submission of the Disability Advocacy Network Australia ('DANA'), and note its observations regarding accessibility as follows:

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21 ART Bill cl 199; Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) [19], [1127],

22 ART Bill cl 199(5).

> The inclusion of an obligation to make the tribunal 'accessible and responsive to the diverse needs of parties to proceedings' is also a positive inclusion. While the AAT in its current form has many advantages over the court system in how it can adapt to individual circumstances, there are still difficulties that emerge when people interact with an intimidating and formal system, often for the first time. Many jurisdictional areas, but particularly NDIS matters, feature applicants who require additional support to participate in the process.
>
> The new Tribunal must consult with people with disability to determine the best methods of making the Tribunal accessible. Some recommendations likely to emerge may already be covered (such as the flexibility around making applications) but people with direct experience of the barriers to participation are best positioned to advise how to get rid of them. While clearly not intended to be exhaustive, the current definition and examples may not capture the specific need for support staff to be trauma-informed when managing cases that raise issues that have intense, emotionally charged subject matter, which is not uncommon in NDIS matters. Engaging with users regularly and often, as well as individuals as they lodge and work through applications, is key to making sure that the obligation is not merely lip-service. [footnotes omitted]

We endorse DANA's views, and the recommendation that people with disability be consulted directly about accessibility measures in the ART.

8. Resourcing for legal and advocacy assistance

Legal and advocacy representation provides vital assistance to many applicants in administrative review proceedings, and can enable the ART to conduct reviews in a just, fair and efficient manner. This representation can be particularly important for applicants with disability, considering the systemic disadvantages they may face and the potential need for assistance to engage with the ART in a way that reflects their preferences and needs. Such applicants are also more likely to rely on free/pro bono legal assistance provided by disability advocates, community legal centres, legal aid commissions, and/or Aboriginal Legal Service providers. These dynamics apply similarly to jurisdictional areas and cohorts of applicants who are likely to experience other forms of systemic disadvantage, such as in reviews of social security or migration and refugee decisions.

It is therefore essential these services are funded adequately to assist users of the new ART. Such funding is a critical feature of the ART, ensuring it can function smoothly and provide access to justice for applicants. Given this key role, the ART Bill should provide for automatic ongoing annual funding of legal and advocacy services to assist applicants based on a legislated formula which reflects the demand for such assistance. This formula should take into account the number, type, and complexity of cases before the ART in the previous year, and the rates of disadvantage and financial need among applicants.

Recommendation 10 – Increase funding for legal and advocacy services to improve access to justice

Government provide sustained and substantially increased funding to disability advocates, community legal centres, legal aid commissions and Aboriginal Legal Service providers via the inclusion of a statutory annual funding formula in the ART Bill.