30 November 2021

Senator the Hon Kim Carr
Chair
Senate Legal and Constitutional Affairs References Committee
By email: legcon.sen@aph.gov.au

Dear Chair

Senate Legal and Constitutional Affairs Reference Committee's inquiry into the performance and integrity of Australia's administrative review system

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Reference Committee's inquiry into the performance and integrity of Australia's administrative review system.

About Legal Aid NSW

The Legal Aid Commission of NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients. We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Government Law team provides free advice and minor assistance to members of the community on many aspects of federal administrative law. Specialist advice and representation are provided in the areas of immigration and citizenship, social security,

the National Disability Insurance Scheme (**NDIS**) and veterans' law. Advice and minor assistance are not subject to a means test.

Lawyers in our Government Law team represent applicants in these types of cases at all levels of the decision-making process. Our lawyers conduct litigation in the Administrative Appeals Tribunal (**AAT** or **Tribunal**), Veterans' Review Board (**VRB**), Federal Circuit and Family Court (Division 2) and Federal Court pursuant to a grant of legal aid or extended legal assistance. The matters for which we can grant legal aid or extended legal assistance are set out in our policies. In general, these services are subject to a merit test and, in some cases, a means test.

In the AAT, our lawyers appear in the:

- General and Veterans Appeals Divisions, principally in NDIS, social security, veterans' and visa cancellation matters.
- Migration and Refugee Division (**MRD**), principally in refugee and partner visa matters, and
- Social Security and Child Support Division (**SSCSD**) in social security matters.

Summary

This submission focuses on matters in which we have particular expertise, in particular, the functioning of the AAT.

Legal Aid NSW believes that a robust and fair system of review of administrative decisions is crucial in engendering confidence in the administration of Commonwealth legislation that has profound impacts on members of the public. Administrative decisions affect their ability to have an income, their ability to live with dignity despite disabilities or other life hurdles, their ability to remain in Australia or be reunited with family, and their right not to be returned to a place where they fear harm or persecution because of who they are or what they believe.

In general, any system of administrative review must deliver the right balance of economical, quick, informal review, which is accessible, fair and just. A rigorous system which reviews decisions on the merits of the case and is transparent, is essential to provide administrative justice to individuals and to engender public confidence in decision-making by government departments.

In broad terms, we support the current system of review of Commonwealth administrative decisions in the areas in which we practice. In particular, the AAT is a longstanding and credible institution that is widely regarded as delivering a high level of administrative review. However, there remain some areas of concern which are outlined in this submission.

Two tiers of review in social security and veterans' matters

We consider that the current, long-standing two tiers of external review for social security and veterans' matters are appropriate. The VRB and the AAT's SSCSD[1] conduct reviews in a non-adversarial manner, which is entirely appropriate for the nature of the cases that they consider and the types of applicants that appear before them. In particular, in our experience, the pre-hearing processes at the VRB lead to a significant number of matters being resolved at this early stage rather than progressing to the more formal and expensive AAT (Veterans' Appeals Division) forum.

However, the current restrictions which do not allow legally qualified people to appear with a veteran in a VRB hearing ought to be removed. The restrictions unnecessarily limit the assistance that veterans are able to receive at the VRB stage, and the Board can readily prevent the proceedings becoming unnecessarily legalistic through its practices and procedures.

Administrative Appeals Tribunal

(a) General Division

Statutory power to appoint a litigation guardian or separate representative

An area that is becoming increasingly problematic both for lawyers and Tribunal members hearing a matter is the issue of applicants before the AAT who lack capacity to understand the nature of the proceedings or to give competent instructions. Legal Aid NSW submits that urgent consideration should be given to providing the AAT with statutory powers to appoint a litigation guardian (or Guardian ad Litem (**GAL**)) or a tutor for applicants who lack capacity.

The NSW Civil and Administrative Tribunal (**NCAT**) is a comparable tribunal which has relevant statutory powers.[2] NCAT has published guidelines and factsheets on the appointment of GALs.[3]

The terminology used in various forums may differ (e.g. GALs, litigation guardians, tutors), but in very broad terms, any model which may be adopted would operate as follows when the tribunal determines that a party is not capable of conducting legal proceedings themselves due to a relevant incapacity:[4]

1. The Tribunal appoints a tutor or GAL.

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[1] Prior to 1 July 2015, the first tier of external review of Centrelink decisions was conducted by the Social Security Appeals Tribunal.
[2] *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4).
[3] See NCAT, *NCAT Guideline 2 – Representatives for People Who Cannot Represent Themselves (GALs)* (April 2021). Available at: https://ncat.nsw.gov.au/content/dam/dcj/ctsd/ncat/documents/guidelines/ncat_guideline_guardian_ad_litem.pdf.
[4] Note that we are not suggesting a scheme whereby a young person under the age of 18 years is considered to be under legal incapacity by virtue of their age alone.

2. The tutor/GAL can be any capable adult who has no interest in the matter. In NSW, that person is typically drawn from a panel in the GAL program.[5]
3. The proceedings cannot be conducted except by a solicitor.
4. The tutor provides instructions to the solicitor after considering the subject person's wishes and the advice of the solicitor.
5. The solicitor takes instructions from the GAL/tutor who accordingly stands as the client.

The problems caused by this lack of a statutory power in the AAT is demonstrated by the case of *Klewer and National Disability Insurance Agency*.[6] The Presiding Member said:

> Ms Klewer submitted that the Tribunal does not have the power to appoint a GAL and it appears that it has not happened before. In this regard, I note that the NCAT has specific power to appoint a guardian under the *Guardianship Act 1987* (NSW). Unlike the NCAT, there is no specific power in the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) for the Tribunal to appoint a GAL.[7]

In that case, in the absence of a statutory power to appoint a litigation guardian, the AAT took the unusual step of effectively suspending the AAT case in relation to Mr Klewer's NDIS entitlements until a representative was appointed for him.

The Tribunal member went on to observe that:

> I acknowledge that the appointment of a GAL does not appear to have previously arisen before the Tribunal. However, it must also be said that particularly in cases involving the NDIS, such questions are likely to arise more frequently in the future. **At the very least the current circumstances highlight the need for consideration as to whether the Tribunal should have similar powers enshrined in legislation to those currently available to NCAT**.[8] (emphasis added)

While under Part 5 of the *National Disability Insurance Scheme Act 2013* (Cth), there is scope for a nominee of the participant "to act in a manner that promotes the personal and social wellbeing of the participant",[9] these provisions can be insufficient to provide instructions to lawyers or for the nominee to represent the applicant in review proceedings.

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[5] See for example the NSW Department of Communities & Justice, 'Guardians ad Litem' (Webpage, 13 December 2019). Available at: http://www.gal.justice.nsw.gov.au/Pages/Home.aspx.
[6] [2019] AATA 4974. See also the comments of Perram J in *Klewer v National Disability Insurance Agency* [2020] FCA 161.
[7] *Klewer and National Disability Insurance Agency* [2019] AATA 4974 [48].
[8] Ibid [57].
[9] *National Disability Insurance Scheme Act 2013* (Cth) s 80(1).

In addition to NDIS cases, in our experience, the absence of this type of statutory power causes difficulties for the Tribunal in other areas, such as:

- visa cancellation cases, where the applicant is in immigration detention and, because of their immigration history, often does not have anybody in the community or close family to make applications for guardianship orders for them, and
- protection visa matters, where applicants may suffer from serious mental health issues, often as a result of past experience of torture and trauma, or prolonged detention. Many of these applicants also suffer from a lack of close community or family ties.

The AAT is often left not knowing what to do where the applicant is unrepresented and appears to lack capacity. Where the applicant has a lawyer, the lawyer is put in a difficult position if there are questions about their client's capacity to give instructions. Lawyers are understandably reluctant to approach the relevant state tribunal for a guardianship order with legal services functions, and the process is difficult if the applicant lacks family or other connections in the community to make such an application.

Legal Aid NSW submits that consideration of appropriate legislation to provide the AAT with statutory powers to appoint a GAL or a tutor should be a priority in order to assist the Tribunal to provide a meaningful review process for applicants who lack capacity.

Increasingly legalistic and adversarial approach to matters

The Tribunal's objective is set out in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth), as follows:

> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
>
> (a) is accessible; and
> (b) is fair, just, economical, informal and quick; and
> (c) is proportionate to the importance and complexity of the matter; and
> (d) promotes public trust and confidence in the decision-making of the Tribunal.

In our experience, the extent to which this objective is met in the AAT's General Division varies according to the area of law. We understand that the Tribunal's practices are also affected by enabling legislation, especially in relation to character cancellation matters related to the *Migration Act 1958* (Cth) (**Migration Act**).

The area in which we consider that the objectives of the Tribunal are not met is in relation to the NDIS matters. It is our experience that contrary, for example, to the

social security jurisdiction where Centrelink often uses in-house advocates who understand the nature of the jurisdiction, the private firms and counsel instructed by the National Disability Insurance Agency (**NDIA**) to appear at the AAT conduct the proceedings in the manner of a superior court where the rules of evidence strictly apply and advocate in this manner in the AAT. This includes:

- making unnecessarily broad requests for documents to be produced under summons (see comments on issuing summons in the AAT below)
- contesting previously conceded elements of disputes
- requesting additional experts and reports mid-hearing, and
- agitating technicalities.

The increasingly adversarial approach taken by the NDIA:

- has doubled the average number of hearing days required, from the previous one to two days, to three to four days, for matters where legal aid commissions have represented applicants, which prevents efficient and expeditious resolution of disputes before the AAT[10]
- results in distress and appeal fatigue to applicants
- leads to increased costs to legal aid commissions, and
- consequently reduces the number of applicants we can assist.

Funding to legal aid commissions is not adequate to cover the costs of long, complex hearings that require counsel, numerous expert reports, witnesses and transcripts. This approach is often taken by the NDIA in relation to even the most basic of support needs for applicants.

These matters have been raised in various other forums but there appears to be little progress. It is the parties' role to use their best endeavours to assist the Tribunal to reach the correct and preferable decision in each case.[11] Legal Aid NSW submits that the AAT should play a stronger role in reducing any practices by parties that make proceedings overly legalistic and adversarial.

Further, Legal Aid NSW's Veterans' Advocacy Service observes that in many cases, the AAT operates on an overly formal basis in veterans' entitlements matters. Its process is slow, with only 57% of matters being finalised within 12 months during 2020/21.[12]

[10] Legal Aid NSW has two NDIS matters before the AAT which are over two years old.
[11] *Administrative Appeals Tribunal 1975 Act* (Cth) s 33.
[12] AAT, *Annual Report 2020-21* (Report, 2021) 31, 51.

Visa cancellation matters

As noted above, the AAT is often constrained in its process by the requirements of enabling legislation. This is particularly problematic in the character cancellation/refusal regime commencing from section 500 of the Migration Act. The regime of administrative review is problematic in a number of ways, including:

- the strict nine-day time limit to seek review of a decision by the Minister's delegate under section 501 or 501CA of the Migration Act[13] to the AAT (no extension of time is possible). This is prohibitively short, especially when adversely affected people are either in criminal custody or immigration detention
- the strict requirement for the AAT to determine reviews within 84 days, otherwise the adverse decision is taken to be affirmed (no extension of this period is permitted),[14] and
- the power of the relevant Minister to set aside decisions of the AAT.[15]

We submit that these restrictions on administrative review are undesirable as the decision may have significant and profound consequences for the individual. Visa cancellations carry a lifetime bar on re-entry to Australia or may impact on a person's right not to be returned to a country where they face persecution or significant harm.

It is acknowledged that changes to these review processes require amendments to the Migration Act. Nevertheless, in our view, the administrative review system in relation to these cases is less than desirable given that it is characterised by stringent timeframes for which there is no allowance to depart in exceptional circumstances.[16]

Practice in relation to summonses to produce

The AAT's current practices in relation to the application for, and issuing of, summonses to produce documents in its General Division are set out in various parts of the AAT's website.[17]

In general, a party who is seeking to issue a summons to produce documents is required to complete two forms: a summons to produce documents and a request to issue a summons. The latter form requires an applicant to set out the reasons in support of the request, "including details of the issue(s) to which the evidence or documents relate, the relevance of the evidence or documents to that issue and the

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[13] *Migration Act 1958* (Cth) s 500(6B).
[14] Ibid s 500(6L).
[15] Ibis ss 501A and 501BA.
[16] For more information, see Legal Aid NSW, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds: Submission to the Joint Standing Committee on Migration* (May 2018). Available at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/28818/Legal-Aid-NSW-submission-to-inquiry-into-visa-cancellation-on-criminal-grounds.pdf.
[17] For example, see AAT, 'Summons' (Webpage). Available at: https://www.aat.gov.au/steps-in-a-review/national-disability-insurance-scheme-ndis/summons.

importance of the evidence or documents to the case". The Tribunal has also included the issuing of summonses in its *COVID-19 special measures Practice Direction – FOI, General and Veterans' Appeals*.[18]

The requirement for a party to explain the reasons that the summons to produce is relevant to the issues in the case is an improvement on previous practices. The Tribunal has the power to refuse a request for a summons[19] but, in our experience, the Tribunal will often accede to very wide requests for documents without, in our view, turning its mind sufficiently to the matters raised in the practice directions. The area in which we see this most often is in NDIS matters where the NDIA requests a summons to obtain the entire medical records of an applicant, often from a treating health professional.

While a party to the proceedings or the person who has been issued with the summons to produce has the right to object,[20] in practice a party to the proceedings who is not the subject of the summons will usually not have the opportunity to object until after the summons is issued and complied with. The Tribunal therefore does not, as a matter of course, have the benefit of hearing an opposing view as to why the summons should not be issued earlier in the process.

In the comparable NSW jurisdiction of NCAT, the relevant practice direction states:

> A sealed copy of the summons is also required to be served **on each party**, other than the party who applied for the summons or the person named in the summons before the date for compliance with the summons.[21] (emphasis added)

We submit that this is a preferable approach and should be adopted by the AAT in its summons practices.

We also suggest that consideration be given to adopting a practice of providing each party to the proceedings a copy of the summons request prior to the summons being issued by the Tribunal. This would give a party to the proceedings whose entire medical records may have been summonsed the opportunity to object to the issuing of a summons to produce. The Tribunal will be assisted in its statutory function, as it

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[18] See AAT, *COVID-19 Special Measures Practice Direction – Freedom of Information, General and Veterans' Appeals Divisions* (2 March 2021) paras 3.6-3.9. Available at: https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/COVID-19-Special-Measures-Practice-Directions-FOI-General-and-Veterans-Appeals-Divisions.pdf.
[19] *Administrative Appeals Tribunal 1975 Act* (Cth) s 40A(2).
[20] See AAT, 'Information for a person summonsed to produce documents in another division' (Webpage). Available at: https://www.aat.gov.au/fact-sheets/fact-sheets-for-persons-who-have-received-a-summon/information-for-a-person-summoned-to-produce-docum.
[21] See NCAT, *Procedural Direction 2 – Summons* (29 April 2021) para 19. See also NCAT, 'Request a Summons' (Webpage, 20 August 2020). Available at: https://www.ncat.nsw.gov.au/ncat/how-ncat-works/prepare-for-your-hearing/summons.html.

is unlikely to know if there is a basis to refuse to issue a summons if the other side is not in a position to give the Tribunal a contrary view at that early stage.

(b) Migration and Refugee Division

Backlog and timely processing of applications

The long waiting times for a migration matter to be decided by the Tribunal impacts upon the integrity of the AAT in terms of meeting community expectations of standards of service and accessibility.

The caseload report for the current financial year indicates that backlogs and delays are apparent across the board.[22] Referring to two areas of immigration law practised most by Legal Aid NSW lawyers in the MRD – protection visa and partner visas – the report shows the following:

- Partner visas – the average processing time is 837 days (about 2.3 years) and median processing time is 893 days (about 2.4 years).
- Protection visas – the average processing time is 709 days (1.9 years) and median processing time is 657 days (1.8 years).

We note that these are averages, and in our experience applicants' cases can often take longer to be heard and decided.

The report states the total number of active cases on hand as of 31 October 2021, as follows:

- Partner visas: 4,487.
- Protection visas: 34,409.

The large backlog of protection visa applications, in particular, is problematic. Applicants have no indication of when the case will be heard. Circumstances in the countries of origin can frequently change, and the delay can result in difficulties at hearings due to issues such as applicants trying to give evidence of matters which may have occurred many years ago where their memory is affected by torture and trauma.

Similarly, in our experience the delay in determining partner visa cases where there is a claim of domestic violence has the potential to cause extreme hardship to women, especially those who have no right to income support.

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[22] AAT, *Administrative Appeals Tribunal Migration & Refugee Division Caseload Report*: *Financial Year to 31 October 2021* (Report, 2021). Available at: https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2021-22.pdf.

Despite the fact the MRD is a non-adversarial forum (which Legal Aid NSW supports), the slow processing times and significant backlog of cases is not desirable. The statistics strongly suggest there is inadequate resourcing of the AAT to deal with the number of cases and, in particular, there are insufficient members to deal with the caseload.

Legal Aid NSW supports the appointment of a greater number of appropriately qualified members to address the issue. The appointment of acting members may also be a viable solution to address the difficulties. The appointment of Tribunal members in any capacity must be accompanied by a rigorous selection process based on merit.

Application fees

Payment of a filing fee of $3,000 is currently required to file an application for review by the MRD, with the exception of protection visa cases and bridging visa cases where the adverse decision results in a person being placed in immigration detention.[23] The application fee can be reduced by 50% if an applicant makes an application to demonstrate that paying the full fee would cause them severe financial hardship and the AAT agrees. Payment of the relevant fee is a condition of the application being accepted as a valid application.

Legal Aid NSW submits that the application fees are too high and prevent access to review by the MRD. In many cases, the requirement to pay half the fee ($1,500) is still too onerous for many applicants, particularly women in partner visa matters involving claims of domestic and family violence, who may be placed in further financial hardship as a result or may be prevented from seeking review. In the latter case, a woman may become 'unlawful' and even more vulnerable.

Legal Aid NSW submits that application fees for non-protection visa matters should be waived where an applicant can demonstrate that payment of the fee would cause them severe financial hardship.

Consideration of a first tier of merits review for NDIS matters

An area which, in our view, should be investigated and considered is the introduction of a first tier of merits review for NDIS decisions.

The number of NDIS cases being reviewed by the AAT is growing. According to the Tribunal's latest Annual Report, the number of applications lodged in the NDIS Division of the AAT increased from 1,780 in 2019/20 to 2,160 applications in 2020/21, an increase of about 21%.[24] Anecdotally, at a recent AAT forum on the NDIS jurisdiction,

[23] AAT, 'Fees' (Webpage). Available at: https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/fees.
[24] Administrative Appeals Tribunal, *Annual Report 2020-21* (Report, 2021) 49.

the AAT noted that in the four months since 1 July 2021, about the same number of applications for review had been lodged as for the entirety of 2020/21.

When seen in the context of the adversarial approach by the NDIA to these cases (see above), this increase in applications will, in our view, increase the time taken to resolve cases and will impact negatively on highly vulnerable applicants.[25]

The addition of a first tier of review could be along similar lines to the review of social security decisions, and involve:

- mandatory internal review by an officer of the NDIA (which exists currently)
- a first tier of independent merits review as of right by a new division of the AAT, and
- a second tier of review as of right to the AAT's General Division.

There would be no right of appearance by the NDIA at the first tier of review, as the NDIA presents its case through the internal review decision. The first tier review Tribunal would also have access to the NDIA's file, which would contain the relevant evidence upon which the decision was made. There does not appear to be any role for a departmental advocate in a jurisdiction which would essentially be inquisitorial (see below).

The right to judicial review of AAT decisions would remain unchanged.

In our view, the introduction of a first tier of merits review for NDIS cases along the lines of the AAT's SSCD or the VRB may have a number of benefits, including the following:

- A level of review which is quicker, more economical, efficient and more accessible than the current system, and which meets the needs of highly vulnerable applicants with disabilities to obtain substantial justice.
- A forum in which applicants, most of whom would not have legal representation, would receive a fair opportunity to put their case in a relatively informal setting. The review body would be able to guide an applicant in relation to the legislative requirements for access or supports through inquisitorial procedures which elicit the necessary information to make a properly considered decision.
- The first tier of review would act as a filter and dispose of the majority of matters before they get to the AAT's General Division. By way of comparison:

[25] The proportion of NDIS applications finalised within 12 months in 2020/21 was 85% compared to 90% in 2019/20: Ibid 31.

- In 2020/21, the AAT's SSCSD received 10,377 applications in Centrelink matters[26] compared to 1,826 filed in the General Division.[27]
- In 2020/21, the VRB received 2,772 applications in veterans' matters[28] and finalised 2,978 matters.[29] There were only 72 appeals to the AAT in 2020/21, which represents 2.4% of the decisions made by the VRB in that period.[30]

- A flow on effect from the above would be that it would allow a focus of scarce legal resources on cases at the second tier of review, which will likely be fewer in number and involve more complex factual and legal issues.

For these reasons, Legal Aid NSW suggests that the introduction of a first tier of merits review should be the subject of closer scrutiny.

Thank you for the opportunity to make a submission to this inquiry.

Yours sincerely

Monique Hitter
Acting Chief Executive Officer

[26] Ibid 62.
[27] Ibid 46.
[28] Veterans' Review Board, *Annual Report 2020-21* (Report, 2021) 22.
[29] Ibid 8.
[30] Ibid 24.