Response to Administrative Review Reform Issue Paper

May 4th, 2023

VMIAC proudly acknowledge Aboriginal people as Australia's First Peoples and the Traditional Owners and custodians of the land and water on which we live and work. We acknowledge Victoria's Aboriginal communities and culture and pay respect to Aboriginal Elders past and present.

We recognise that sovereignty was never ceded and acknowledge the significant and negative consequences of colonisation and dispossession on Aboriginal communities.

Despite the far-reaching and long-lasting impacts of colonisation on Aboriginal communities, Aboriginal people remain resilient and continue to retain a strong connection to culture. We acknowledge the strong connection of Aboriginal people and communities to Country, culture and community, and the centrality of this to positive mental health and wellbeing.

Introduction

VMIAC welcomes this opportunity to respond to the public consultation on the new system for federal administrative review (the new body) which will replace the Administrative Appeals Tribunal (AAT).

This submission contains answers to some of the consultation questions in the Issues Paper published by the Attorney-General's Department regarding the Administrative Review Reform and makes some key recommendations. The focus of this submission is centered around the experiences of people living with psychosocial disabilities who are appealing decisions made by the National Disability Insurance Agency (NDIA).

VMIAC currently offers a NDIS Appeals service for people with psychosocial disabilities and/or experiences of mental ill health or emotional distress who are seeking access to the NDIS or navigating review processes. Our service primarily involves mid-to-long-term advocacy support for people appealing NDIS decisions. Therefore, our responses relate to NDIS appeals processes and experiences of people with psychosocial disability in the NDIS as they have been identified by our staff.

Key recommendations

Recommendation 1: Governing legislation include a requirement that the appointment of tribunal members to particular positions must have consideration to demonstrated and relevant qualifications and/or expertise to decide matters related to their area of expertise.

This includes lived or living experience, legal expertise in areas e.g. discrimination law, qualifications or experience in social services or allied health professions, and which are relevant to the matters they determine, and NDIS matters.

Recommendation 2: Lived and living experience be integrated at every level in the new body that would replace current AAT arrangements. This includes lived experience (designated) roles and employment opportunities for those with declared lived experience, including in senior positions and among members.

Recommendation 3: Government agencies be required to seek leave from the new body to appear with legal representation in matters where applicants are not legally represented. Government agencies to only be entitled to apply for this leave once the alternative dispute resolution process has been exhausted.

Recommendation 4: A new code of conduct be established for all representatives engaged with the new body, to be regulated internally by the new body, with an adequate complaints process and enforcement mechanisms.

Recommendation 5: That the new body has flexible, adaptable, consultative, and empowering processes to ensure they are accessible, and as suitable as possible for each applicant. This should be undertaken through the application of all recommendations listed under the response to question 63 (pgs. 5-7).

Recommendation 6: It be the responsibility of the new body to ensure every opportunity for participation in the external review process has been explored with the applicant.

Recommendation 7: The new body *must* not be granted the power to appoint a litigation guardian for someone due to their psychosocial disability. Where people do have a litigation guardian, rigorous safeguarding should be employed to protect people from exploitation throughout their engagement with the new body.

Response to public consultation questions

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)?

VMIAC believes tribunal members and registrars of the new body should hold specific expertise and/or qualifications. This includes lived or living experience, legal expertise in areas e.g. discrimination law, qualifications or experience in social services or allied health professions and which are relevant to the matters they determine, and NDIS matters. This would ensure members and registrars were more competent, ethical and did not contribute to the burden of applicants' impairments. In the absence of the significant expertise necessary to address matters relating to psychosocial disability, VMIAC has found that current AAT members and registrars risk re-traumatising applicants to the extent that they seek to abandon appeals.

VMIAC believe members undermine their credibility and the credibility of the tribunal when they demonstrate a level of knowledge of disability (including psychosocial disability) at/or below that of the general public. This creates a negative perception of tribunal members among the community and leads to poor decision-making.

We recommend the governing legislation include a requirement that the appointment of tribunal members to particular positions must consider demonstrated and relevant qualifications and/or expertise to decide matters related to their area of expertise.

Further, specific expertise could also address the following:

1. **Stigma and discrimination**

VMIAC note where tribunal members lack relevant expertise, applicants are subjected to stigma and discrimination in relation to their psychosocial disabilities and/or other disabilities. This permeates decision-making processes during applications and can lead to detrimental outcomes for applicants where tribunal members have a limited understanding of both the subject matter of the appeals they are determining, and the barriers and challenges faced by applicants with psychosocial disability.

2. **Identifying inappropriate requests for information from the NDIA**

VMIAC note applicants we support are often asked by respondents of the NDIA to spend money and time gathering excessive evidence beyond what is reasonable to determine their appeal.

Applicants are often required to undergo extensive testing and reporting, including being pressured to undertake independent assessments with Agency-appointed clinicians who frequently lack mental health qualifications, to obtain additional evidence. Further, this evidence gathering delays access to timely supports and, in our experience, has led to the decline and deterioration in capacity and health of many applicants. It has also caused some applicants to accept inadequate offers or withdraw their appeal due to these barriers.

3. Lived and living experience.

VMIAC recommends inclusion of lived and living experience at every possible avenue in the new body. This includes lived experience roles for those with declared lived experience, including in senior positions and among members. This would promote equality, foster inclusion, and reduce stigma - while diverse perspectives and experiences among staff and members would increase engagement capacity.

It is VMIAC's observation that people with lived or living experience bring significant understanding of the nuances and impacts of appeals and Tribunal decisions. We believe the input of people with lived and living experience should be highly valued in decision-making processes, akin to those who are formally qualified with recognised expertise in the 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?

The new body needs to be genuinely accessible to applicants who are unrepresented. The AAT currently holds itself out as a forum where legal representation is not required. However, the power imbalances between the legally represented NDIA and unrepresented applicants (or applicants with representatives who are not legally trained) are obvious to our staff at every step of the appeals process.

VMAIC acknowledge legal expertise may assist the new body reach equitable and correct decisions. However, currently legal expertise is predominantly available to the respondent and frequently employed to protect the interests of the respondent, rather than assist the tribunal in decision-making.

Applicants supported by VMIAC regularly report feeling overwhelmed in case conferences by adversarial engagements with NDIA legal representatives. This can be challenging for applicants with psychosocial disability and/or a significant trauma history.

It is also common for legal representatives to present the NDIA's interpretation of legislation and case law as if it is the *correct* or *only* interpretation. It would be extraordinary for an unrepresented applicant to have access to the resources required to put forward an alternative legal position.

One of the clearest examples of these power imbalances is where matters reach the hearing stage. It is not unusual for the NDIA to have both a solicitor and a barrister appointed to represent the Agency when a matter proceeds to hearing. A barrister, with extensive experience and skills in conducting hearings, will lead evidence from the respondents' witnesses and conduct cross-examination of the applicants' witnesses. Where an applicant is unrepresented, the AAT members can question witnesses to obtain any additional information they require. However, AAT members are not permitted to cross-examine witnesses on behalf of the applicant. Any cross-examination of the respondents' witnesses needs to be conducted by the applicant.

The Agency and the AAT may recognise an applicant is best served by securing legal representation where a matter proceeds to hearing and encourage applicants to apply for support. However, the organisations which provide this support, such as legal aid services, are not sufficiently resourced to meet the demand of applicants.

We strongly recommend in circumstances where the applicant is not legally represented (whether or not the applicant has *non-legal* representation), the respondent should be required to seek leave to appear with legal representation. We also recommend the respondent only be entitled to apply for this after the alternative dispute resolution process has been exhausted.

In determining whether leave should be granted, members of the new body should be required to consider both the benefits with respect to the efficiency of the process and the risks to the applicant of the certain resulting imbalance. Where leave is granted, tribunal members should be required to address how this imbalance will be redressed. An example could be making the respondent's leave to appear with legal representation conditional on the applicant securing support from legal aid.

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?

VMIAC's NDIS appeals advocates hold themselves to a high standard of professionalism, prioritising the best interests and the voice of the applicant. We are also aware legal representatives are already bound by both a strong ethical code and practice rules.

VMIAC however, consider a code of conduct for all representatives (applicants and respondents) engaged in the new body could provide a valuable, added level of protection and improve clarity on representative conduct expectations. We believe such a code, particularly in NDIS matters, should extend beyond acting in the best interest of the party to include appropriate conduct by all representatives in relation to vulnerable applicants.

For example, in NDIS matters, we have frequently witnessed conduct from the respondent's representatives (lawyers and case managers) that is insensitive to the needs of the applicant, not trauma-informed and which is inappropriate given the intended non-adversarial nature of the issues being dealt with.

This type of conduct has deterred applicants from engaging in the external appeals process or limit the degree to which they engage. We have observed applicants withdraw issues in dispute as a direct result of the conduct of the NDIA's legal representatives, and, in many instances, consider withdrawing their appeals entirely.

Tribunal members are striving to make the legally correct decision (and where there is more than one legally correct decision - the preferable decision). The primary role of the parties is to assist the Tribunal to reach that decision. We regularly encounter conduct by legal representatives which is clearly primarily aimed at protecting the interests of the NDIA.

As a commonwealth agency, the NDIA is required to act as a model litigant in the conduct of litigation. VMIAC is aware of multiple reported NDIA breaches of the model litigant obligations. There is currently no satisfactory avenue for having these breaches swiftly and adequately addressed. Applicants are required to lodge complaints with the NDIA for internal investigation (with notification of the complaint and the outcome being made by the NDIA to the Office of Legal Services Coordination) or to lodge complaints with the Commonwealth Ombudsman about unfair or unreasonable treatment by the NDIA.

In addition, inappropriate conduct by representatives of the NDIA may be significantly detrimental to applicants but still fall short of a breach of the model litigant obligations. The proposed code would potentially provide a remedy in these circumstances.

In addition to regulating the conduct of the NDIA's representatives, a code of conduct would be of great value in cases where applicants are represented by unqualified or informal supports, or by

private or paid non-legal advocacy services who may have conflicts of interest in pursuing certain outcomes.

The code should clearly outline the roles and responsibilities of representatives in relation to particular matters and expectations about appropriate conduct.

We recommend the code of conduct be regulated internally, within the new body. However, this would require an adequate complaints mechanism, with new body staff, registrars and members proactive in flagging potential breaches and responding appropriately.

Depending on the breach, enforcement mechanisms may include warnings, recommendations or undertakings for less serious breaches. More serious misconduct could potentially result in representatives being reported to employers, other government agencies/departments, professional bodies, or police in extreme circumstances. Barring representatives from involvement in current and/or future matters may also be appropriate for serious breaches.

We recommend consulting advocacy organisations, particularly those providing appeals advocacy support, on the drafting of the code of conduct. It would be important to ensure the code supported rather than deterred the involvement of informal supports where those supports are genuinely acting in the best interests of an applicant.

We recommend all representatives be required to read and sign a code of conduct on their first engagement with the new body. In the interests of minimising administrative burden, this agreement could remain valid for subsequent engagements, to be renewed annually or within a reasonable timeframe.

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?

It is important to have flexible, adaptable, consultative, and empowering processes to ensure they are accessible, and as suitable as possible for each applicant. In response to this, VMIAC makes the following recommendations:

A) Applicants who have experienced or are identified as at risk of trauma or abuse, should have an opportunity to undertake planning and consultation sessions to allow them to express, in their own terms, what they need during dispute resolution processes and to suggest how processes can be made accessible and safe for them.
We recommend these planning and consultation sessions be completed with the applicant and either:
    (i) Designated workers who have lived experience of mental health challenges, trauma and/or mental distress; or
    (ii) Employees or representatives of the new body who have completed extensive trauma-informed practice training facilitated by people with lived experience of mental health challenges, trauma and/or mental distress.

B) We recommend the new body have clear and transparent protocols in relation to information protection, with the governing legislation acknowledging that the body is bound by the Privacy Act and principles. Policy and procedures surrounding this should be clearly explained to applicants in multiple formats, including written documents, oral and visual communications. This will allow applicants to choose the format most understandable to them.

C) Applicants should be provided the opportunity to address any concerns about privacy and protocols for protection of sensitive information with the new body and have their questions answered promptly.

D) The new body should have clear and transparent protocols in place for responding to breaches of privacy or confidentiality that could potentially prejudice the outcome of matters.

E) Only information and material directly relevant to the matter should be requested from applicants. Appropriate safeguards should be used to ensure there is no coercion or summonsing of material by the AAT that may be unnecessarily re-traumatising for applicants. The balance of power is currently such that (for example) all medical records of a five-year period may be summonsed revealing information beyond what is required for an

application before the AAT. This might be addressed by requirements in regulations for the new body that respondent requests for summons be strictly scrutinised in circumstances where the applicant has not consented to it, expressly objected or is unrepresented. The new body should not hesitate to refuse unreasonable requests and we would recommend positive obligations to ensure any summons is as narrow in scope as possible. We also recommend that the period during which the applicant can request exclusions or redactions from summonsed material be agreed between the parties during the alternative dispute resolution process.

F) VMIAC recommend the development of a Trauma Informed Practice Framework to be developed in close consultation with people of lived experience, the (to be soon established) National Consumer Peak and Appeals advocacy services to ensure all professional development provided to the new body's staff, members, as well as legal representatives and case managers, is sufficient to ensure they are sensitive and responsive to applicants who have experienced trauma.

G) All applicants should have access to independent advocates. We recommend this be included in the application forms for the new body to ensure applicants are aware of advocacy support and given the opportunity to opt in or out of this support. VMIAC has been contacted by applicants, support coordinators, community health services, allied health practitioners, and AAT registrars requesting the support of advocates, however the limited availability of advocacy funding means many applicants are unable to secure this.

H) A comprehensive mechanism should be integrated into the new body to ensure that all requested information and documentation are reasonable, relevant and necessary for the matter that is being decided. This may help to protect applicants from having to gather unnecessary supporting evidence or documentation that will not be relied upon in deciding their matter.

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

We believe it is the responsibility of the new body to ensure every opportunity for participation in the external review process has been explored with the applicant. This should include, but not limited to:

A) All relevant information and options being explained to applicants in their preferred language, in simple terms, and in multiple formats
B) Applicants being given sufficient time and space to effectively assess and process the information and their options in a way that is most suitable to them
C) Applicants being given an opportunity to ask questions and explore consequences of decisions and options with someone that they feel comfortable with
D) Applicants being given the opportunity to communicate their needs, wants, and preferences throughout all stages of engagement with the new body
E) All efforts be made by the new body to address power imbalances and adversarial conduct by the respondent which may deter, intimidate, or disempower applicants from engaging with the process.

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?

The new body *must* not be granted the power to appoint a litigation guardian for someone due to their psychosocial disability. To grant the new body this power would be in breach of Australia's obligations under the Convention on the Rights of Persons with Disabilities (the 'CRPD'), which grants all people with a disability the right to equality before the law, including the right to be recognised as a full legal entity with the right to make decisions about things that affect their own life.

As outlined above, applicants should always be granted leave to seek legal representation. Legal representatives must be trained in supported decision-making practices which, if properly utilised, will mean that the person should not need to be subjected to litigation guardianship in all but the most extreme circumstances. Most people can make their will and preferences known if given the proper time and opportunity to do so. This means most people can instruct their legal representative, so long as the representative takes the time to speak to the person about their options, any possible outcomes and the consequences. This must be done in an environment

where the person feels comfortable, with whatever supports they require, and the information given to the person must be given in a way they can understand it. It is important to note that while this process may take some time, it is the only way to ensure that the new body and its processes are compliant with the CRPD.

There may be some circumstances where, despite legitimate attempts at supported decision-making, the person's will and preferences cannot be determined. In this case, the legal representative must be able to demonstrate they have made all possible attempts to use supported decision-making with the person and why these attempts failed. If they they cannot reasonably do any more, then a litigation guardian may be appointed for as long as the person remains unable to express their will and preferences.

We acknowledge that people with psychosocial disabilities can require support where their needs are complex and layered. However, it is VMIAC's view that this decision should only be made after genuine and rigorous attempts at supported decision-making have been tried and failed.

We recommend that applicants be provided with every opportunity to understand the potential risks of having a litigation guardian appointed to them, including the forfeiture of certain litigation rights. If the person can indicate they do not want a litigation guardian to be appointed, then the appointment must be reconsidered.

Litigation guardians must be independent. Where people do have a litigation guardian, rigorous safeguarding should be employed to protect people from exploitation throughout their engagement with the new body. This safeguarding should include working closely with an advocate such as those situated within the VMIAC NDIS Appeals Program or a general lived experience mental health advocate to ensure any litigation guardianship is done with the permission of the applicant, or alternatively, in line with the best interpretation of their will and preferences. Ideally advocates would have mandatory reporting requirements, to ensure oversight if any of the following circumstances become a concern:

- litigations guardians holding a conflict of interest.
- a complex relationship existing between the guardian and the person.
- there is a possibility of exploitation.