

Administrative Review Reform

**Submission by
Queensland Advocacy for Inclusion**

To the Attorney-General's Department

12 May 2023

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the **NDIS Advocacy Practice** (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); the **Human Rights Advocacy Practice** (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the **Mental Health Advocacy Practice** (which supports people receiving involuntary treatment for mental illness); and the **Disability Advocacy Practice** (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and coordinate the Queensland Independent Disability Advocacy Network (QIDAN). QIDAN has three aims: member support, sector advocacy and systemic advocacy. Member organisations work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD)
- To be accountable to the most disadvantaged people with disability in Queensland
- To advance the health, social and public wellbeing of disadvantaged people with disability.

Background and overview

QAI welcomes the opportunity to provide a submission into the design of a new federal administrative review body.

This submission is informed by QAI's experience delivering advocacy for people engaging with the National Disability Insurance Scheme (NDIS) through our Appeals Support Program. We are funded by the Department of Social Services and are currently experiencing a huge demand on both of our services.

Our NDIS Appeals team:

- Represents people with a disability at the Administrative Appeals Tribunal (AAT) appealing a decision of the NDIS. Our advocates and solicitors regularly appear for clients at case conferences and conciliations at the AAT,
- Provide individual advice sessions to people with a disability at all stages of their NDIS AAT appeal. We work to assist clients to self-advocate at the AAT, for example assisting clients to understand legal documentation and to articulate their needs to the Agency, and
- Develop community education, for example by speaking at events and creating fact sheets.

In providing our submission, our recommendations are based on our experience solely within the NDIS jurisdiction of the AAT and our experience working with people with a disability in that jurisdiction.

Challenges in the NDIS jurisdiction

It is well known that there have been challenges for people navigating the NDIS jurisdiction in the AAT. There is significant scope in this jurisdiction to improve the experience of people with a disability. Our concerns to date have primarily been associated with the conduct of the Agency responsible of the administration of the NDIS, the National Disability Insurance Agency (NDIA). These concerns have been highlighted in the paper submission "[Unreasonable and unnecessary harms: Joint submission regarding the NDIS internal review and external appeals processes](#)" and in the Federal Court decision of *National Disability Insurance Agency v Davis* [2022] FCA 1002.

With respect to the Model Litigant Obligations, Mortimer J said:¹

While the Agency might seek to defend its internal decision-making, the Agency does not appear at the Tribunal as a true adversary in the sense of having private interests to defend and advance. It has a public, statutory function, expending public monies to administer the scheme of the NDIS Act. It has no agenda to exclude people from the NDIS. Nor to admit them.

¹ *National Disability Insurance Agency v Davis* [2022] FCA 1002 44.

Its role is to ensure that the legislative scheme created by Parliament is administered objectively and carefully, in accordance with Parliament's intention, as objectively ascertained. In that sense, it has no 'stake' in the outcome, other than assisting the Tribunal to reach the correct or preferable decision.

QAI carried out some work last year regarding the increasing numbers of applications made to the Tribunal through 2021. Our direct observations were that the rapid, sudden and unexpected escalation in NDIS applications to the Tribunal resulted in significant resource issues for the Tribunal which have yet to be resolved. These resource issues resulted in long wait times for the first case conference, difficulty in scheduling hearings and delays in the Tribunal finalising decisions arising out of s42D and 42C agreements. These delays can and have resulted in people not having any support and can give rise to significant safety and risks for participants as well as detrimental impacts on their informal supports.

In our work on the rise in NDIS applications to the AAT, we found that 76% of supports decisions ordered at AAT hearings were different to the original NDIA decision. The full analysis of NDIS appeals at the AAT is available in [QAI Analysis of NDIS appeals report](#).

The [AAT Annual Report 2021-2022](#) reported that lodgements increased by 174% in the NDIS Division with a total of 5,918 of lodgements, comprising an increasing proportion of the overall caseload of 13% in 2021-2022 (compared to 3% in 2019-2020 and 6% in 2020-2021). Yet, there was only 122 decisions published by the AAT in 2021-2022. This small percentage of decisions being published creates a concern related to transparency and accountability in cases that are settled and not published. As of 31 March 2023, the AAT had 2,954 NDIS matters on hand.

It would be our expectation that the number of applications in the NDIS jurisdiction are likely to rise again given the number of people in the NDIS and that, the recent reduction should be seen in the context of a concerted drive by the NDIA and the Commonwealth Government to reduce the number of applications in the AAT. In addition, media coverage of peoples' experience at the AAT, has in our view resulted in less people willing to review a decision through to the AAT.

QAI response to Questions in the Issues Paper

Part 1 – Structure and Membership

We have chosen to not address all questions. We strongly support a review body with a transparent, independent and merit-based appointment process for both members and registrars.

Questions 5-16 and 19-29 have not been addressed.

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

The new body should be guided by the following principles:

- Accessible and inclusive,
- Transparent and consistent,
- Independent,
- Strive for best practice decision making and alternative dispute resolution.

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

The objective of accessibility could be expanded to specifically include reference to accessibility and inclusivity for all people, including people with a disability.

We support the inclusion of:

- Independence
- Transparency,
- Consistency, and
- Quality decision making.

We would also support an objective of best practice and innovation.

For the existing objective in s2A(b) of fair, just, economical, informal and quick this could be generally supported with a clearer articulation of each. For example, 'economical' on the current reading is not clear on what that means. Is it meant to be economical for the Tribunal, the applicant or the NDIA? In the NDIS jurisdiction the term 'economical' on its own without context is fraught with difficulties.

The current objective s2A(c) implies a level of judgement as to the importance or otherwise of a particular matter. There is an implication in this objective, that some matters are more important than others. The current s2A(c) should not be included in the legislation for the new body.

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

QAI is supportive of the re-establishment of an ARC or similar body. The NDIS jurisdiction is relatively new and it's a complex jurisdiction. We see there would be real benefit in a body which could provide overview of the types of applications made, guidance and comment on the quality of the decisions made by Government bodies and agencies. A body that can provide public reports

to Government and the Tribunal on trends identified through the Tribunal can be used to strive for better and improved decision making.

The new body could also be supported with better practice guidelines and directions.

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

The NDIS jurisdiction has had particular challenges in recent years. As solicitors and advocates supporting people with a disability through a NDIS appeal, we have directly experienced and spoken with many people with a disability who have experienced:

- Consistent failure by the NDIA to meet directions of the Tribunal made in the case conferencing process,
- Failures by the NDIA to provide proper or adequate reasons,
- Inappropriate questions and requests for further evidence. On occasion, the NDIA questions appear to fail to understand the legislative criteria,
- The NDIA continue to raise an issue which cannot be supported by the legislation or the evidence which delays the process for resolution for the participant.

There are a number of improvements which are discussed throughout our response. In particular we would like to see:

- a) A stronger case conferencing process which provides for 'break outs' by the conference register for frank confidential discussions, and
- b) A public reporting mechanism for the Tribunal where it identifies trends in decision making at the first instance which are not meeting appropriate administrative decision-making standards.

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?

It is preferable that members working in the NDIS jurisdiction should have prior experience working with people with a disability and knowledge of the NDIS legislation.

It should be mandatory for members and registrars in the NDIS jurisdiction to complete appropriate training on working with people with a disability and understanding inclusion.

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

Yes, provided the applicant agrees to the appointment of an expert by the new review body.

Based on our experience, appointing an expert to provide evidence in the matter can be helpful particularly in NDIS access cases or where there are real technical issues about whether supports are effective and beneficial (which, very frequently requires clinical expertise).

In the NDIS jurisdiction it is relatively common for the NDIA to engage an independent expert.

When considering whether the new body could appoint an expert, we agree that if the applicant has not been able to provide any evidence of their own and there are clear gaps in the evidence, the review body should be able to appoint its own medical professional or disability expert to advise the Tribunal.

Part 2 – Powers and Procedures

Making an application

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

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

The current simple three-page application is in our view sufficient and appropriate in the NDIS jurisdiction. The ability to apply verbally or via alternative means is imperative in this jurisdiction.

We would like to see an additional requirement on representatives at whatever stage they begin to complete a form to provide details of their role, their relationship with the applicant and declare any conflicts of interest (see our comments at question 60).

It should not be a requirement for applicants in the NDIS jurisdiction to provide a statement of reasons. Applicants often tell us they have appealed a decision because they did not understand why a decision was made the way it was. It is our view that the fact that the applicant does not agree with the outcome of the decision should be sufficient to lodge an application in the NDIS division.

b. What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?

The current time limit in the NDIS jurisdiction is 28 days from the date the applicant received the internal review decision. This timeframe is insufficient to enable a person to seek advice on whether to appeal or not. People with a disability also experience many barriers which can impact on their ability to respond promptly to the internal review decision.

Due to limited capacity and high demand, our service gives people who contact us instructions on how to lodge and once they receive their T-documents we can give them an advice appointment. A longer timeframe could enable advocacy services to speak with a potential applicant before lodgement.

Aligning the lodgement period to 60 days in line with the workers compensation, taxation and veteran affairs is appropriate.

c. Are application fees at an appropriate level?

Not applicable to the NDIS jurisdiction and should not be introduced for applicants.

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

All methods should be permitted to allow accessibility: phone, email, post, in person and online application.

33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload / resources involved and the need for clear criteria)?

Applicants who are unable to use other methods due to their disability or due to other accessibility issues/limitations (such as no access to a computer / phone or computer illiterate) should be able to lodge via phone or in person.

Case Management, Directions and Conferencing

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

We would like to see the introduction of a preliminary meeting between the staff of the new review body (conference registrar or a case manager) and applicants and their representative. The purpose of this meeting should be:

- i. Explanation of the confidentiality options,
- ii. To understand any special requirements and information that the review body has to be aware of (such as existing trauma),
- iii. The option of attending a case conference (in-person, video conference or telephone) and discuss next steps / additional evidence necessary to progress the matter,
- iv. The option of attending via directions hearing in preparation for a hearing (in cases where the matter is seen as ready to be decided).

It is our experience that the majority of matters in the NDIS jurisdiction are automatically referred to case conferencing. On occasion the first appearance is listed as a direction hearings. How or why the AAT has made that decision is not clear to us (although we can sometimes guess by looking at the evidence). The applicants never understand why the application has been listed for a directions hearing.

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

The new body could have conference registrars or case managers who would be responsible for:

- Receiving the application
- Analysing the information provided
- Identifying the issues in dispute (or any gaps that require clarification)
- Assessing whether the matter could progress to a hearing or whether case conferencing is necessary and
- Discussing next steps with the applicant (including the ones indicated in question 34).

Conference registrars or case managers should have legal qualifications and training in disability (for the purpose of the NDIS division). They must be skilled in mediation and alternative dispute resolution.

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

All directions making powers related to the progress of the matter should be available for the new body for all matters.

Case registrars or case managers should be able to exercise them (as well as members or decision makers).

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

Enforceability of decisions and/or directions is an ongoing issue within our practice. The new body should have mechanisms to hold the NDIA accountable to the AAT's orders.

Given that non-compliance with directions would generate additional work to the administrative staff, it is our view that an administrative fee could be implemented where the NDIA fails to meet the new review body's directions.

38. What other interlocutory processes and proceedings should be available in the new body?

The new body should have the ability to determine the scope of the application at an earlier stage. We face disputes where the underlying arguments of the NDIA refer to issues already determined by the Federal Court. Interlocutory processes and proceedings could assist by resolving preliminary issues which could reduce the overall evidentiary burden on applicants and minimise the issues in dispute.

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

Please refer to question 34.

In summary, it is our view that the new body should assess the case as soon as it is lodged and consider if the matter is ready to be decided or if additional evidence would be required to assist the new body to make the correct or preferable decision.

Information provision and protection

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

All documents related to the original decision should be provided by the respondent, including:

- a) NDIS planning reassessment documents (requests, forms, planning questionnaires and documents)

- b) NDIS internal review documents (requests, forms and documents)
- c) Internal records related to decision making process of that reassessment, including any internal tools used (as we see, for example, with the NDIS Home and Living Panel).

The Agency should be required to provide written confirmation of compliance that they have provided all information they hold or has been created by them and is relevant to the decision under review.

It is noted that when a participant makes a “participant information access” request directly to the NDIA prior to making an AAT application, it is common for significantly more information to be provided, including importantly the data sheets prepared by the initial assessor. Rarely do we see this information provided in the “T-Documents”.

The documents should be provided within 28 days of the lodgement of the application.

Copies of such documents should be made available to the applicant in digital format and if requested in hard copies (space for this option is required on the application form).

Digital formats must be indexed and in 1 part. Too often they are in 4 parts and it is impossible for participants to navigate the documents bundle. Many participants use their phone and have no printing or computer access.

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

We would like to see powers to compel the NDIA to provide information and documents in a proceeding.

Currently, in an effort to ‘get on’ and focus our efforts on getting an outcome for our clients, we rarely push for delivery of documents from the NDIA which do not appear to have been provided. In [Witson](#) which covered both a statement of reasons and provision of documents it is noted that no order was made on the provision of documents and it appears that following an interlocutory hearing the NDIA agreed to disclose certain documents requested. It is presumed reading this decision that it took this additional pressure by the applicant for the NDIA to comply with the provision of documents.

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

All documents and information related to the application and which the NDIA used to make its decision should be shared with applicants.

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

Where there is sensitive information and when is required by the applicant.

In the NDIS division it should be easy for an applicant to have their name removed from the case reference registry. The disclosure of information in published transcripts should be discussed with applicants by members prior to any hearing. The information in the NDIS division is particularly sensitive and applicants need to be actively advised that a published decision will be made and consideration given to the removal of identifying material from those decisions.

Resolving a matter

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

In the NDIS jurisdiction there is heavy reliance on case conferencing. In our experience this process is set up purely to timetable and provide the applicant with time to provide more evidence and the respondent to reconsider that evidence.

We would like to see conference registrars take more proactive steps in the conferencing. For example, where a conference registrar can see that questions being asked in a Statement of Issues by the Agency are inappropriate, they should take the opportunity to tell the Agency. In the NDIS division questions, which go to 'commercial considerations' often appear. For example, in a recent SOI the following was requested:

“on the basis that the applicant would prefer to live in sole occupancy SDA, whether the applicant has considered the gap between what is currently funded and the cost of sole occupancy.”

The above question is an irrelevant consideration in the legislation and inappropriate. Questions which are so obviously outside the decision being reviewed should be queried in the conferencing. Self-represented applicants should be informed that they are not required to answer all the Agency questions.

We are open to the conference registrar's having private conversations with both the Applicant and the Agency in the case conference and that this may assist the process.

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

In the NDIS division we support dispute resolution. In some circumstances it is not appropriate. Please refer to question 34.

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

Currently, as advocates and solicitors in the NDIS division it appears all matters are referred to dispute resolution without reference to the applicant or respondent. More transparency is required as to the options available and why some matters are conferenced, and some referred to directions hearings. See our comments about preliminary meetings with applicants.

48. What powers should the new body have to resolve a matter before hearing? Which of these powers should be conferred on non-members? Should these powers be standardised across all matters?

In the NDIS jurisdiction only a member should have the power to dismiss an application.

Where agreements are made to resolve a matter or some parts of a matter (currently 42C and 42D agreements) we see some scope for registrars to be able to sign these. However, where participants have been unrepresented or not received advice independent legal advice in relation to the agreement caution is required, particularly in complex plans and where the agreement contains any unusual provisions the agreements should be referred to a member.

50. In what circumstances should the new body be able to dispense with a hearing?

In the NDIS jurisdiction it is noted that the Tribunal is currently considering that some access applications could be decide on the papers. In our view, this should only occur where an applicant has received advice from a legal practitioner on the risks or otherwise of proceeding without a hearing.

Decisions and appeals

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

In the NDIS jurisdiction there has been questions of law which cause considerable delay, distress and time for applicants and their representatives. The most obvious example related to the question of whether the Tribunal had jurisdiction to consider supports which were not requested at the internal review stage. There were competing decisions over a number of years at the Tribunal until the matter was resolved by consent orders, in favour of a beneficial application of the jurisdiction by the Federal Court in October 2021 in [QDKH](#). Whilst the issue was unresolved, the Agency continued to adopt its preferred narrow position, which was ultimately not supported.

There are a number of other interpretation issues where a preferred approach has been demonstrated in a number of Tribunal decisions but has not been considered by the Federal Court. One in particular has significant impact on the types of evidence applicants are required to gather. The Agency adopts its preferred position notwithstanding the majority of considered decisions at the Tribunal do not support that approach.

For these types of matters, a referral at an interlocutory stage on a question of interpretation to a panel of senior members or a Federal Court judge would assist in resolving these issues at an earlier stage. Such applications must be properly supported by Legal Aid Commissions.

(For an example a paper prepared by jointly by QAI, Villamanta Disability Rights Legal Service, Darwin Community Legal Service and Rights Information and Advocacy Centre (RIAC) [here](#)

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

In the NDIS division, given it is a relatively new jurisdiction a referral to the Federal Court on recurring issues of law would be of benefit. See comments above at 56.

Applicants on matters referred must be able to access Legal Aid.

Supporting parties with their matter

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?

No, in the NDIS jurisdiction this level of formality should not be required. See though our comments at 60 below in relation to ensuring appropriate information about representatives is gathered by the Tribunal.

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?

In the NDIS division, the NDIA is always in our experience represented by lawyers.

Applicants are either:

- self-represented,
- rely on informal supports or substituted decision makers,
- represented by non-legal advocates funded by DSS or lawyers from LegalAid or community legal centres, or
- supported by their service providers (most commonly support coordinators).

Given the range of skills, experience and interests of representatives, we agree a code of conduct would be helpful, provided it does not conflict with either the model litigant rules or the Australian Solicitors Conduct Rules.

We also think that the Tribunal should require representatives to complete a short form on starting in the role of representative which includes:

- Their name,
- Employer,
- Role,
- Relationship with the participant,
- A declaration of any actual or potential conflicts of interest.

Having this information should assist the Tribunal in its dealings with the participant and assist with managing any actual or potential conflicts of interest.

We support a participant's right to choose their representative, even where there is a potential conflict (which can be common in this jurisdiction) provided the conflict can be declared and managed. Ensuring applicants can access legal and advocacy support could reduce the instances of participant's having representatives who have a conflict of interest.

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

- a) by departments and agencies

See our comment at c) regarding the funding of independent solicitors and advocates by DSS and the Commonwealth Government.

- b) by the new body

The new body should be encouraged to provide training and communicate more regularly with advocates and solicitors working in the NDIS jurisdiction.

Despite working regularly within the division and attending quarterly meetings organised between DSS, the Tribunal and the Agency we are often guessing at Tribunal processes. We know there will be delays on certain matters not through communication from the Tribunal but by trying to glean information through the case conferences or speaking with other advocates.

Sessions conducted by the Tribunal and open to advocates and solicitors for both the Agency and the applicants would be useful. At these sessions up to date information about: timelines, processes and the Tribunal's expectations could be provided.

At QAI in 2022 we spoke with over 240 people about their NDIS appeal. We speak in detail to people about what to expect in the first case conference and through the process. If process or timing changes and we don't know that affects the quality of our service. In our experience the better prepared an applicant is at the first case conference the easier it is for them to understand what will happen. This has benefits for the Tribunal and the NDIA.

The new body should provide guidelines and fact sheets in plain and easy English.

- c) by other organisations.

Availability of independent advocates and solicitors is critical to support applicants in the NDIS jurisdiction. Our preference is for advocates and solicitors to be independent and therefore funded through the Commonwealth Government.

Whilst skilled advocates and solicitors are essential and should be available for all applicants, we do not think the jurisdiction would be served by further 'legalise' or 'adversarial' approaches and this needs to be discouraged.

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

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?

In the NDIS division a significant portion of applicants have experienced or are at risk of trauma or abuse. As solicitors and advocates working in this jurisdiction, we have witnessed circumstances where that experience has been minimised or exacerbated, however, in our direct experience this is more often due to the action of the NDIA and not the Tribunal staff.

Our suggestions:

- On the application form space should be provided for any specific requests by the applicant as to their requirements. These need to be followed. For example, we have spoken with applicant's who have specifically requested that the Tribunal call them to let them know they are sending an email. This has not occurred.
- Prior to the first case conference the new body should contact that applicant for a pre-meeting. See our suggestions at question 34.

The new body should ensure its staff receive appropriate trauma informed training. The material in this division can trigger vicarious trauma and the new body should ensure that its staff are appropriately supported to limit this risk.

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

Yes.

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

The new body should be required to:

1. Determine the role / capacity of a person participating in the proceeding. This should include ensuring that the documentation demonstrating a person is a substitute decision maker is provided (in the case of nominees, these appointment documents could be included in the T-Documents by the Agency).

2. Video conferencing should be encouraged for case conferences and the Tribunal should seek to speak directly to the person with a disability about the role of their support person / advocate/ substitute decision maker.

See our suggestion below at 66 for circumstances where an independent advocate / solicitor could be appointed.

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?

QAI takes the view that within the Tribunal, wherever possible people should be supported to make their own decisions. In practice, many are supported with their decision making by others or have formal decision makers appointed.

We have observed that through the process of an AAT application, the voice of the person with a disability can be lost. Commonly, an AAT matter will be run by a nominee (the appointment process for which is too easy), formal decision makers or others who have stepped into support type role (for example service providers). These people rather than the person with a disability then make the decisions around the application.

We consider that in the NDIS division, the new body would benefit from being able to appoint an independent advocate/ solicitor for an applicant, where the new body (and not the NDIA) identifies that the person acting as a substitute decision maker, may not be acting in interests of the applicant.

These powers apply in the Queensland Consumer and Administrative Tribunal (QCAT). It is also not dissimilar to the role of independent children's lawyers in the Family Court.

There would need to be clear guidelines and appropriate funding from Government for such a role. The independent advocate would be required to follow a supported decision-making model. If the person was unable (or prevented by the substitute decision makers) from communicating directly with the applicant, the independent advocate would be required to provide a considered report to the Tribunal.

QAI and ADA Law are about to publish an import guide to supported decision making.

Other matters

67. Do you have any other suggestions for the design and function of a new administrative review body?

The current process for the issue of decisions following a section 42D and section 42C Agreement by the parties should include a timeframe by which the new body will issue its decision. This is critical in the NDIS division when a delay at this stage can result in participants being unsupported.

The new review body needs a modern and accessible filing system. The current Tribunal in the NDIS division does not have a portal where all material filed, properly labelled and accessible by the parties and their representatives. New advocates or lawyers picking up matters halfway through are working in the dark.

The e-register is a critical tool for advocates and solicitors working for the applicants to know how many case conferences have occurred and when the next appearance is to occur. It would help if even matters which have been deidentified could be included in the register – provided they could only be located by searching the AAT number and no names or jurisdiction is included.

Closing

Thank you for this opportunity. Should any further information be sought please contact Sian Thomas, QAI on gai@gai.org.au