DANA

Disability Advocacy Network Australia

DANA's response to selected questions from *Administrative Review Reform: Issues Paper*

Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair

12 May 2023

DANA Disability Advocacy Network Australia

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Introduction

The Australian Government has announced a reform of Australia's system of administrative review. This includes abolishing the Administrative Appeals Tribunal (AAT) and establishing a new federal administrative review body. The reform includes a transparent, merit-based system of appointments and review of administrative decisions. Public consultation invited responses to an Issues Paper or responses to a short survey. The responses were due on 12 May 2023.

DANA's response to the selected Issues Paper questions is through the lens of advocates who support people with disabilities to appeal NDIS decisions. The questions were selected with input from DANA members and are those questions that cover the most relevant issues for people that DANA members represent.

Contributors to this submission

In preparing its response to the Issues Paper, DANA held online consultations (three hours each) with members in April 2023. Written contributions were also encouraged and received.

The following organisations contributed to the content of the submission -

- Action for More Independence and Dignity in Accommodation Inc. (AMIDA)
- ACTION for people with disability
- Advocacy WA
- Australian Federation of Disability Organisations
- Brain Injury SA
- Council for Intellectual Disability (CID)
- Darwin Community Legal Service (DCLS)
- Disability Advocacy Service Alice Springs
- Down Syndrome Australia
- Disability Resources Centre (DRC Advocacy)
- Family Advocacy
- First Peoples Disability Network (FPDN)
- Inclusion Australia
- Intellectual Disability Rights Service (IDRS)
- Leadership Plus
- Multicultural Disability Advocacy Association of NSW (MDAA)
- Melbourne East Disability Advocacy (MEDA)
- NPY Women's Council
- People With Disability Australia (PWDA)
- Public Interest Advocacy Centre (PIAC)
- Rights Information and Advocacy Centre (RIAC)
- Rights and Inclusion Australia
- Side By Side Advocacy

- Star Victoria
- Speaking Up For You (SUFY)
- TASC Legal and Social Justice Services
- The Association for Children with Disability (Tas) Inc
- Victorian Advocacy League for Individuals with Intellectual Disability (VALiD)
- Victorian Mental Illness Awareness Council (VMIAC)

Endorsement of DANA's submission

DANA will circulate its submission in response to the Issues Paper to its members. This will provide the opportunity for additional member organisations to formally endorse DANA's submission.

The list of organisations who have contributed and endorsed the submission can be found here: www.dana.org.au/admin-review-reform/

Design

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

The design of the new review body should promote the experience of people with disability and ensure they have a voice and recognition. This will require a multifaceted approach, with meaningful co-design at the centre, and a strong commitment to simplifying processes, improving accessibility, transparency, and accountability, and providing advocacy support and legal representation to those who need it.

The new review body should be based on a set of principles that provide a pathway to avoiding the problems of the past and underpin best practice approaches to empowering people with disability. It should also take a rights-based approach consistent with the principles of the United Nations Convention on the Rights of Persons with Disabilities, and provide an accountability mechanism to ensure it promotes independence, neutrality, transparency, trustworthiness and has the capacity to support and recognise the voice of people with disability (Graeme Innes AM, 'Interim Report on long-term options for dispute resolution under the NDIS', December 2022).

The principles listed here should apply universally to the new review body (as Public Interest Advocacy Centre has also argued). These principles should be expressly included in the legislative framework for the new review body as:

- objects guiding decision-making;
- provisions giving effect to the principles (for example, '*proceedings.... shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as*

the proper consideration of the matters.... permit' - section 38(1) (NSW) Land and Environment Court Act 1979); and

- provisions imposing standards of decision-making (for example, *'decisions should be made in accordance with these principles'*, '*before doing X, the decision-maker must be satisfied that'*).

These principles are:

- Person-centred
- Inclusive
- Accessible
- Culturally safe
- Inquisitorial
- Informal
- Independent
- Timely
- Transparent
- Human rights-focussed

Principles	Description*
Person-centred	• Dispute resolution system that is premised on co-design principles, with broad and genuine engagement with people with disability about the mechanisms, processes, and settings. • Actively involves applicants and seeks to increase their understanding of review decisions, empowering applicants to be part of their own resolution process. • For First Nations people, a self-determined process directed by First Nations communities, involving family and the broader kinship networks.
Inclusive	• Inclusive of all people with a disability, languages, cultural backgrounds, and geographical location. • Acknowledge intersectionality between disability and other factors including gender, sexuality, cultural diversity, and age.
Accessible	• All applicants should be supported to engage and meaningfully participate in the review process, including through: o direct support throughout the process; o legal and non-legal advocacy; o access to functional communication support; o mechanisms to proactively determine the need for, and access to, supported decision-making; and

	o access to mental health support. • Staff and people involved in the dispute resolution process should be trained in disability awareness and inclusion. • Applicants should have access to clear written and oral information about the review process and review rights. Information must be provided in accessible formats, including Easy Read, languages other than English including the language needs of First Nations people, Auslan and Braille. • The process must incorporate the principles of active support for people with a disability: maximising choice and control; autonomy; engagement; and graded assistance. • The geographic location of the applicant needs to be considered, particularly applicants living in regional, remote, and rural communities. • Acknowledging that applicants may need additional time, there should be flexibility around processes and support to engage and participate in the resolution process. • There needs to be adequate funding for independent advocacy and legal assistance, including advocates for First Nations people and people in regional, remote, or rural areas.
Culturally safe	• There must be knowledge and respect for First Nations people and of their communities and cultures. • Consultation with FPDN and NEDA should take place to ensure the process is culturally safe. • Staff and people involved in the dispute resolution process should be trained in cultural safety and cultural competence. • Services offered should be culturally safe, e.g., phone line for people to call to obtain information about the review process.
Inquisitorial	• The review process must be focused on ascertaining the facts, not on negotiation or rebuttal.
Informal	• The new review body and respondents must be responsive to the factors which may affect the applicant's ability to participate in the proceeding. • Applicants should have the right to participate at hearings and be assisted by advocates or legal representatives.

	• Applicants should not have to rebut the respondent's position, and the process should be focused on ascertaining relevant facts. • Ensuring support can be provided by family, support workers and local community, even if there is a perception of a conflict of interest, particularly in rural and remote communities where resources are limited. • The process must aim to be less legalistic, allowing for different models of conflict resolution. • The review process must include an assessment of the power imbalance between the applicant and the respondent.
Independent	• The new review body must be independent from the respondent.
Timely	• There should be the capacity for case management while facilitating early hearing where requested. • Whilst the provision of additional evidence should be allowed, the respondent should be required to justify the request of further reports • Appropriate staffing to resolve disputes as quickly as practicable. • The process should set clear timeframes for each stage. • Applicants should be able to request for their matter to be expedited in urgent circumstances or where the subject matter is time sensitive.
Transparent	• The new review body should provide detailed reasons for its Decisions with reference to the evidence on which those decisions were based
Human-rights-focussed	• The new review body should adhere to international human rights obligations.

*The description of some of these principles was provided to DANA by PIAC (Public Interest Advocacy Centre), and reflect the discussions had with DANA members throughout the consultation process.

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

DANA supports the new review body legislation requiring government agencies to improve their administrative decision-making practices. One way this can be achieved is by tracking systemic issues related to decision-making. The new body should also include a requirement for parties to openly share information, commit to alternative dispute resolution, act in good faith, and call on past decisions that involve similar issues, so that settlements can be reached before a full hearing. This would save time and resources. Additionally, the use of precedent or developed principles for decisions, where appropriate, would also be beneficial.

While it may be difficult for the new review body to enforce best practices and change directly within an agency, it should have the power to make recommendations for improvement as part of a decision, like the role of a coroner. The new review body should report any repeated systemic issues to the responsible Minister, who would be required to have other departmental Ministers address and respond to the report. The report of the new review body and Ministerial responses regarding recommendations for systemic best practice improvement by agencies should be required to be made public. In some cases, the responsible Minister may need to raise policy and/or legislative changes that apply to a particular agency to ensure change and best practice.

DANA also supports the legislation for the new review body having a provision for the establishment of an entity like the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Cth).

Members

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)?

The new review body should have members who collectively represent the diversity of Australian society, as well as those with specific expertise relevant to the matters they are determining This includes individuals who are representative of the decisions they are reviewing, such as First Nations people, people from CALD communities, women, and people with disability. It is also important to have a membership that includes social workers, people with lived experience of disability, allied health professionals, and lawyers experienced in human rights. For members determining

NDIS matters, they must have content knowledge of how the National Disability Insurance Agency (NDIA) and National Disability Insurance Scheme (NDIS) operate and make decisions.

Members of the new review body should have a foundational knowledge of disability and receive disability awareness training. They need to understand the material before them but also approach matters in a trauma-informed way. It is not enough for members to simply have a disability; they need to have relevant skills required to determine a matter. Members should also understand the substantive issues the applicant and their family are dealing with, and an awareness of the social and economic impact on the applicant and their family.

First Nations members can help applicants feel culturally safe and empowered. It is also important that diversity in members flows from the top of the new body, and that members are appointed transparently and based on merit, with affirmative action/positive discrimination measures for people with disability and other under-represented groups.

Finally, a three-member panel model (legal, professional, community) is beneficial as it means decisions can be made that consider varying views and expertise.

In summary, the new body should set criteria for subject-matter expertise alongside more general qualifications for its members to ensure that decisions are made with the appropriate knowledge and understanding.

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

The new body should have the ability to appoint experts to assist in a matter. However, it is important to clarify what is meant by ‘expert’. Experts should include individuals with lived experience of disability. It is also important that the applicant can choose the experts they want to work with. Finally, it is essential that the appointment of experts forms a hypothecated part of the new review body’s budget each year so that it is both a substantive access to justice mechanism (and not simply a right that only exists on paper) and its use can be tracked and accountable.

The role of the experts should be to provide accurate information and evidence to assist with the matter. If experts are needed, they should be accountable, and there should be clear guidelines around who they are and what their role is. Members should have the option to call in experts to get the correct information and evidence to assist with the matter. The genuine independence of the expert is critical, and the experts that the NDIA arranges are presently not seen as independent from the perspective of the applicant and family. Therefore, the new review body should find the expert, not the NDIA/NDIS, for them to be truly independent.

Some circumstances where experts could be appointed include where the applicant has complex communication needs, a significant cognitive impairment, challenging behaviour, or a medical issue. However, the applicant should be able to decline the expert the other party has arranged if it is felt the expert may be biased or opinionated.

In conclusion, the new body should have the ability to appoint experts, but it is important to clarify the role of the experts and ensure their genuine independence. A panel of experts could be beneficial to avoid bias, and there should be an appeals process for this panel's decisions. It is crucial to include individuals with lived experience of disability, and there should be process for an applicant to raise objections to the expert the other party has arranged if there is evidence to suggest or indicate the expert may be biased.

Making an application

Question 30a - What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required?

To ensure a user-friendly and accessible process for lodging an application, submitting a statement of reasons should not be a mandatory requirement. The application process should be straightforward, and applicants should not be put off applying by a statement of reasons being needed. If an applicant chooses to provide a statement of reasons, the applicant should be able to choose how they present it. The new review body should also provide an easy guide, with prompts, on how to produce a statement of reasons.

The current AAT application process is cumbersome, and the online process needs to be tailored to the type of decision being appealed to ensure that the information required is relevant and necessary, making it less intimidating for applicants.

Lastly, the new body needs to provide clear guidelines at the application stage regarding the decisions it can and cannot review. This would help manage expectations and avoid confusion or disappointment later on in the process.

Question 30b - 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 time limit for making an application to the new review body should start from when the applicant (not their advocate, support person etc) receives the decision in writing from the NDIA (or relevant agency). To help people make informed decisions about

whether to appeal or not, the NDIA (or relevant agency) should provide a good quality statement of reasons for the internal decision, along with the full NDIS plan. This would provide people with all the information they need to make an informed decision about whether to appeal to the new body.

The current 28-day limit for making an application is too short. It's difficult for people to find an advocate or legal representation within that time frame, so most people end up having to apply for an extension, which is just another bureaucratic process to go through. The time limit for making an application to the new body should at least be 60 days with the possibility for an extension if needed.

Lastly, people should have access to supported decision making to help them decide about whether to appeal or not. This would help people make the best decision for their individual circumstances and support them to realise their will, preferences, and rights, in accordance with the National Decision Making Principles proposed by the Australian Law Reform Commission (see *Equality, Capacity and Disability in Commonwealth Laws* - ALRC Report 124 (2014)).

Question 30c - Are application fees at an appropriate level? Are current criteria for reduced fees' or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?

There should be no fee for making an application to the new review body, regardless of the area of administrative decision-making. Charging a fee for applying can deter people from appealing a decision and goes against the principles regarding access to justice for all.

Question 33 - Which applicants or categories of applicant should be able to lodge an application orally?

The new review body should allow any person with an impairment which impacts their ability to access, understand, or complete an application form, to make an application orally. This includes, but is not limited to, individuals who:

- Speak a preferred language other than English
- Has difficulties reading, writing, or speaking
- Does not have access to technology or has low technology literacy skills
- Has an impairment that impacts their ability to see
- Has an impairment that impacts their ability to assess and understand information

The availability of the option to make an oral application should be widely advertised.

An applicant should not have to provide evidence that they meet the oral application criteria. Requiring additional administrative processes would only discourage people from applying, which would be counterproductive.

To assist the new body to plan for the resourcing needed to accept oral applications, data from the NDIA on the number of people who submit applications orally could be accessed. This information would assist the new body to predict the percentage of people who are likely to submit an oral application.

Case Management, Directions and Conferencing

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

Conference registrars in the new body should primarily function as facilitators of the matter. This means that they should assist in the smooth running of proceedings and ensure that all parties involved understand the process. To achieve this, there needs to be clear guidelines around the conduct of registrars. These guidelines should outline their responsibilities and what is expected of them, consistent with the principles set out in question one.

In addition, conference registrars should possess certain skills and training. While they do not necessarily need a law degree, they do need legal training around administrative law and the legislation of the new body. This is crucial to ensure that they can effectively navigate the legal system and assist parties in understanding the process. Furthermore, they should have training and experience in alternative dispute resolution (ADR). ADR skills are essential in helping parties both determine when ADR is appropriate and how to come to a mutually agreeable resolution if ADR is used.

Another critical aspect that conference registrars should possess is disability awareness and trauma-informed practice training. This training will enable them to be sensitive to the needs of parties who have disabilities and/or have experienced trauma. It will also help them to approach each case with the utmost care and empathy.

Conference registrars should also keep the NDIA accountable for any unnecessary delays in the process (consistent with the principle of matters being dealt with in a timely manner). They should have the authority to ensure that the NDIA is meeting its obligations to parties, and if not, they should have the ability to expedite or escalate the matter.

Finally, it is essential that conference registrars are impartial and available to explain the process to parties. This means that they should not take sides and should remain neutral throughout the proceedings. They should also be available to answer any questions that parties may have about the process, ensuring that they have a clear understanding of what is happening.

In conclusion, conference registrars in the new body should play a crucial role in facilitating the process of a matter. They should possess legal training, ADR skills, disability awareness, and trauma-informed practice training to ensure that they can effectively navigate the legal system and assist parties in coming to a mutually agreeable resolution. They should also be impartial and available to explain the process to parties and keep the NDIA accountable for unnecessary delays.

Information provision and protection

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

In keeping with the principle of open justice, hearings in the new review body should be conducted in public and the outcome publicly available. However, given the personal nature of the subject matter in NDIS matters, information should be de-identified to protect the privacy of the applicant.

The criteria for the new review body to allow private hearings or make non-disclosure/non-publication orders should be based on clear considerations. Such considerations should be the applicant's privacy, safety, experience of trauma and exposure to risk.

Parties should be able to initiate an application to the new review body for the matter to be heard in private or for a non-disclosure/non-publication order to be made. To enable an applicant to make an informed decision about making such an application, the new review body should have a role in explaining private hearings, non-disclosure, and non-publication orders to the applicant.

It is important that decisions made by the new body are available in some form so that a body of precedent can be established, and learnings for the NDIA/NDIS are fed back to inform improvements in the original decision-making process. If hearings were to be private by default, open justice would not be served. Rumours of certain results will spread without verification, and sharing of knowledge amongst participants, advocates, and lawyers will be extremely limited and restricted to those connected by circumstance or profession. Even among advocates who share knowledge, this is frequently word of mouth and can easily be lost with a change of employed advocates.

In conclusion, the new body should balance the need for open justice with privacy concerns, by making hearings and decisions publicly available by default, but allowing exceptions to be made based on clear considerations.

Resolving a matter

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

To increase the accessibility and availability of dispute resolution in the new review body, several powers and procedures could be introduced. One suggestion is that the new body should have the power to refer matters into Alternative Dispute Resolution (ADR) pathways, in the same way the current AAT has. The new review body should be responsible for informing the applicant what ADR pathways are available, so the applicant can engage in the process fully informed and prepared. We note that currently ADR works well for some applicants and the NDIA, but it relies on the conference registrar to manage the matter. Therefore, it is crucial to ensure that conference registrars approach the parties equally.

Currently, ADR options in the AAT are subject to a power imbalance. The NDIA attends ADR with lawyers, but the applicant rarely has a lawyer. This sometimes puts pressure on the applicant to accept ADR and agree to a settlement through that process. To address this, measures must be put in place that provide applicants with more/equal support during the ADR process.

The current Independent Expert Review (IER) is a form of dispute resolution for matters where proceedings have been brought in the AAT for review of an access or planning decision. It is funded by the NDIA and aims to provide better and earlier outcomes for NDIS participants by obtaining a non-binding recommendation on the matter from an independent expert, which is implemented by the parties should they agree. These experts may be current or former judicial officers, experienced mediators or conciliators, NDIS or legal practitioners and people with a disability (‘Interim Report on long-term options for dispute resolution under the National Disability Scheme,’ December 2022).

The IER process should continue to be funded by the NDIA. Some members of DANA are of the view that the IER process could fit into the processes of the new body rather than alongside the new body’s process. Others are of the view that the IER should stay separate from the new body.

The IER seeks to deliver several advantages over current AAT arrangements. These include:

- maintaining the relationships between the participant and agency

- potentially resolving disputes faster than current AAT arrangements
- providing an opportunity for participants to be heard outside AAT processes
- reducing stress and anxiety
- providing a circuit-breaker in disputes that are not progressing to resolution through AAT conciliation processes
- reducing the legal costs the agency incurs in AAT matters
- demonstrating the agency's commitment to meet its Model Litigant Obligations by seeking early resolution and avoiding contested AAT matters where possible
- encouraging the resolution of disputes in a framework that is not overly legalistic nor adversarial in its approach.

Introducing a tier of independent review prior to the AAT could be advantageous. However, improving the applicant experience also necessitates improving the NDIA's current approaches to original decision-making, including in the giving of clear and accessible reasons for its decisions.

To minimise the number of cases that go to the new review body, the new legislation should include dispute resolution provisions that give the new review body power to examine whether the NDIA has made reasonable attempts to resolve the dispute. If it has not, the matter can be remitted to the NDIA with conditions. The legislation must clearly set out what constitutes reasonable attempts to resolve a matter. For example, offers must be sent in writing, and participants should be given the opportunity to choose an appropriate meeting time and attend with support people.

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

Ensuring that hearings are accessible, informal, economical, proportionate, just, and quick is essential for promoting fairness, efficiency, and transparency in the legal process. To achieve this, there are several measures that can be taken.

Firstly, applicants should have the option to choose for the hearing to be heard "on the papers." This means that the matter will be conducted based on the written evidence and submissions provided, without the need for a hearing where the parties need to make an appearance. This option provides a more economical, time-efficient, and informal process, especially for minor cases that do not require extensive oral arguments.

Secondly, easy-to-read, and accessible information should be available to applicants throughout the process. It is important to provide clear instructions and guidance in plain language, so applicants can easily understand their rights and obligations, as well as the procedures and timelines involved in the hearing process. This will also enable the applicants to participate effectively in the hearing, which ensures a fair and just process.

Thirdly, members conducting the hearing should commit to providing an estimated timeline for the decision-making process and when the reasons for the decision will be available. This information is critical for the parties involved to plan accordingly and avoid unnecessary delays. It is important to ensure that the hearing process is timely and efficient, while still providing a fair and just decision.

Fourthly, the new review body should adopt, monitor and review output indicators around access to justice and effectiveness and efficiency as part of a best practice approach to the conduct of hearings.

Finally, legal representation for both parties should be ensured during the hearing, where necessary. This means that both parties should have access to appropriate legal representation or legal aid. This measure promotes fairness, as both parties can present their cases adequately, and the hearing can be conducted without any undue advantage for either party.

In conclusion, ensuring accessibility, informality, economy, proportionality, justice, and speed in the hearing process can be achieved through measures such as on-paper hearings, providing easy-to-read and accessible information, setting a timeline for decision-making, and ensuring equal legal representation. By implementing these measures, the new body can promote a fair, efficient, and transparent legal process that upholds the principles of justice and the rule of law.

Decisions and appeals

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

Achieving quality, consistency, accessibility, and simplicity in explaining the reasons for decision is crucial for any new body. One of the key ways to ensure this is by making sure that the person making the decision has the appropriate qualifications and experience. This will help to ensure that the decision is based on sound reasoning and that the reasoning is communicated clearly and effectively.

Secondly, it is important to ensure that the information being used to inform the decision is of high quality. There is a wealth of information available on how to provide accessible information, much of which has been created by advocacy groups. The new review body should consider referring to this material when developing its approach to communicating and writing reasons for decision. This will help to ensure that the information being provided is clear and easy to understand for all stakeholders.

Consistency is another key factor to consider when communicating reasons for decision. It is important that the new body has a standardised approach to

communicating decisions and writing reasons for decision, helping to ensure that all stakeholders are treated fairly and that decisions are based on consistent criteria. While merits review does not create precedents, it is possible to develop decision-making principles that underpin types of decisions (see the planning principles developed by the NSW Land and Environment Court in its merits review jurisdiction: https://www.lec.nsw.gov.au/practice-and-procedure/principles/planning-principals.html).

Finally, simplicity is key when it comes to communicating reasons for decision. The new body should strive to use plain language and avoid technical jargon or legalistic language that may be difficult for the parties to understand. By communicating in a clear and concise manner, the new body can help to ensure that the parties are fully informed about the reasons for decision and can make informed decisions about whether to pursue further review options.

Supporting parties with their matter

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

The question of whether there should be a requirement in the new body to seek leave to appear with representation is a complex one. On the one hand, having lawyers involved in all matters can slow down the process and make it more legalistic, which can be a problem. However, it is also important to consider the rights of applicants to choose whether they want representation or not, without having to apply for it to occur.

One potential issue with requiring applicants to seek leave to appear with representation is that it adds another layer of bureaucracy and complexity to the process, which could be challenging for some applicants. Instead, it may be more appropriate early in the appeals process to ensure that both parties have access to legal representation if they choose to do so, rather than requiring applicants to seek permission to have representation.

One potential solution could be to limit legal representation, and therefore the ability to apply for leave, to complex matters only. Having lawyers involved in complex matters can be beneficial to getting to a decision, as they can provide valuable expertise and support to applicants.

It is also important to ensure that applicants have access to legal advice and support. There should be a process in the new review body to explain to the applicant that they can have legal representation and point them in the right direction as to where to access representation. This could include a "duty lawyer" who can assist participants on the day of their case conference, conciliations, and hearings. This would ensure

that applicants are able to make informed decisions about whether to seek legal representation and would provide them with support throughout the process.

Finally, it is important to address issues with NDIA lawyers' behaviour. Participants have reported that NDIA lawyers have behaved poorly and derogatorily at AAT case conferences, with no avenue for participants to complain about lawyer behaviour internally. It is essential that there is a system in place within the new review body to address complaints about lawyer behaviour, to ensure that participants are treated fairly and with respect throughout the process.

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?

There should be requirements or a code of conduct for representatives to ensure that they act in the best interests of their party. This code of conduct should be enforced by a new body that has the power to determine when a representative has breached the code. In drafting the code of conduct, the new review body should consult advocacy organisation, particularly those providing appeals advocacy support.

The code of conduct should include model litigant principles and obligations: see 'Commonwealth's Model Litigant Obligations,' pursuant to Appendix B of the 'Legal Services Directions 2017' (Cth).

The new review body should also provide information on, and be aware of the need for, how a representative should use supported decision-making principles when representing a person with disability. These principles can be found in the Australian Law Reform Commission publication 'Equity, Capacity and Disability in Commonwealth Laws (ALR Report 124).

To ensure that there is a clear and straightforward process for complaints to be made about the behaviour of representatives, the new body should establish a complaints mechanism. Anybody involved in the review process or within the new review body should be able to make a complaint for breach. The new review body needs to consider the timelines of responding to the complaint as there is a risk that the representative continues to be involved in the matter, and a decision about their conduct is not reached until after the matter is resolved or determined.

The new review body should have the power to reprimand or deliver a breach warning to the representative when a problem arises. The government should determine the most appropriate mechanism for the new review body to be authorised to sanction unacceptable conduct, including but not limited to costs orders and enforcement powers where relevant (see 'National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal,' Submission by Disability Advocacy NSW, Your Say Advocacy Tasmania, Villamanta Disability Rights Legal Service Inc, 3 June 2022). This would provide accountability and consequences for representatives who breach the code of conduct.

In conclusion, we strongly recommend that there be requirements or a code of conduct for representatives to ensure that they act in the best interests of their party, and that this code of conduct is enforced by a new body with the power to determine when a representative has breached the code. This will provide accountability and consequences for representatives who breach the code of conduct and ensure that they act in the best interests of their party.

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

a. by departments and agencies

b. by the new body

c. by other organisations.

To ensure that parties can fully participate in processes under the new body and have a positive user experience, a range of services should be made available including:

- advocacy services should be widely accessible and adequately funded by the government. This will ensure that all applicants who require advocacy support are able to receive it, rather than having to wait for lengthy periods or going unsupported. Additionally, other options, such as Legal Aid and Community Legal Centres, should be made available to applicants.
- information about the review process should be provided in accessible formats to help parties understand what to expect.
- training on disability awareness, supported decision making principles, and trauma-informed practices should be made available to, and/or be compulsory for, all members and staff of the new review body
- a case management service to assist applicants in navigating each step of the process, including accessing representation, should be provided. This would help to ensure that applicants understand the process and their rights and are able to make informed decisions.
- debriefing services should also be available for applicants after their matter has been determined. This would provide an opportunity for parties to reflect on the process and any outcomes and receive support if needed.
- a 'duty lawyer' who can assist applicants on the day of their case conference, conciliation, and hearings should be available.
- an obligation on the new review body to support the psychosocial health of people going through the review process should form part of the legislation. This could include making referrals to mental health supports and advocacy services to ensure that applicants are supported throughout the process.

By implementing these services, the new review body can ensure that parties are able to fully participate in the review process and have a positive user experience.

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?

To protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse, the new review body needs to implement special processes that take into consideration the specific needs and concerns of such applicants. This can be achieved by engaging with the applicant and asking them what support they need to feel safe and comfortable throughout the process.

The new review body should ensure that different options are available to the applicant in how they participate in alternative dispute resolution (ADR) and hearings. For example, some applicants may prefer to participate remotely or to have support persons present during the process. It is important to be flexible and accommodate the specific needs of each applicant.

For applicants who have experienced domestic violence, the new review body should offer the option for the applicant to choose the gender of the member and even the representatives who will be involved in the process. This can help to alleviate any fears or concerns the applicant may have and ensure that they feel safe and supported throughout the process.

It is also important to explain the process to the applicant in clear and simple language, including what will happen to the information they provide, who will have access to the information, and who will be involved at each stage of the process. This can help to build trust and confidence in the process and ensure that the applicant feels informed and empowered.

In summary, the new body needs to take a trauma-informed and supportive approach towards applicants who have experienced trauma or abuse. By engaging with the applicant, offering different options for participation, and providing clear and simple explanations of the process, the new body can help to protect the safety and interests of these vulnerable applicants.

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

Yes, legislation should place an obligation on the new body to promote accessibility for all users. This means that the new body should be responsible for ensuring that its services and facilities are accessible to all individuals, regardless of disability or impairment they may have. By promoting accessibility, the new review body will be able to create a more inclusive appeals process where everyone has equal opportunities to participate and contribute.

To effectively implement this accessibility obligation, it is important that the new body is adequately funded. This will allow it to develop and implement programs, policies and procedures that prioritise accessibility for all users. Adequate funding will also enable the new body to invest in staff training and development, which will ensure that all employees are knowledgeable about accessibility issues and able to provide appropriate support to applicants.

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

Ensuring that individuals with disabilities are supported to participate in proceedings is crucial for achieving fair and just outcomes. The new review body can take several steps to ensure that individuals with disabilities are supported to participate in proceedings in their own capacity.

Firstly, the new review body must provide information to people with intellectual or cognitive disability in Easy English/Language. The Easy English format ensures that information is presented in an easy-to-understand manner, making it accessible to people with diverse levels of literacy and cognitive abilities.

Secondly, the new review body must provide options for individuals with disability on how they can participate in hearings and conferences. These options could include in-person participation, video conferencing, or participation by phone. By providing a range of options, the new body ensures that people with disability can participate in proceedings in a way that works best for them.

Thirdly, the new review body should adopt a supported decision-making approach to assist individuals with disability in making informed decisions when needed. This approach involves providing the necessary support and accommodations to enable individuals with disabilities to participate in proceedings in their own capacity. The support provided could include training, tools, or other resources to assist with decision-making. There must be formalised training and accreditation provided to all staff in the new body on supported decision making to ensure that individuals with disability receive consistent and appropriate support.

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 review body should have the ability to appoint a litigation guardian for a party, but only after exploring alternatives such as advocacy. Before a litigation guardian is appointed, views should be sought from the applicant, if possible, their family, and others who know the applicant well.

It is important that the litigation guardian still applies a supported decision-making approach with the applicant. This means that the applicant's wishes, feelings, beliefs, and values should be considered when making decisions on their behalf. All measures relating to guardianship and supported decision-making must comply with Article 12 of the United Nations Convention on the Rights of Person with Disabilities (CRPD), which ensures equal recognition before the law.

The role and expectations of litigation guardians in the new body's proceedings should be well defined, with a strong emphasis on supported decision-making and expediency in signing off on decisions. Litigation guardians should seek to reflect the will and preference of the party they represent, while also respecting their autonomy and right to make decisions for themselves.

Other matters

Question 67 – Do you have any other suggestions for the design and function of the new review body?

Several additional issues, comments and suggestions were raised by DANA members during the consultation process. These include:

- Withdrawals
- Harman undertaking
- NDIA conduct prior to case conference
- Payment for reports
- NDIA Statement of Reasons
- Implied undertakings

Withdrawals
Currently, there are high withdrawal rates at the current AAT for NDIS matters. This may be due to the NDIA implementing a new NDIS plan whilst the matter is at the AAT, resulting in the applicant being satisfied and withdrawing from the tribunal. To improve transparency, withdrawals should be categorised in the new body by reason and capture when people have 'given up' due to lack of support.

Harman undertakings
The application of the Harman undertaking in NDIS Appeals matters is complex and confusing for NDIS Appeals advocates and self-represented applicants. The new review body should address these challenges, so people are not prevented from using costly evidence gathered during the review process for future NDIS Plans. Further info on the Harman undertaking: https://www.mccullough.com.au/2021/08/11/the-harman-undertaking-know-your-obligations-and-stay-out-of-harms-way/

NDIA conduct prior to case conference

The NDIA has been rejecting plans without contacting participants for missing information/clarification. The new legislation should seek to minimize the number of cases that go to the new body and give the new body power to examine whether the NDIA has made reasonable attempts to resolve the dispute. The legislation must set out what constitutes reasonable attempts to resolve a matter.

Payment for reports

Participants/applicants face financial barriers to accessing functional assessments. The NDIA also rejects participants' functional assessments during case conferences and requests specialist assessments. The new body must ensure the NDIA cannot unreasonably reject functional assessment reports and bears fiscal responsibility for all report requests.

NDIA Statement of Reasons

The NDIA must provide its statement of issues three business days prior to the first case conference in the new review body. The new legislation should enforce this requirement, and a penalty should be included as a compliance incentive such as awarding costs to the other party.

Implied undertakings

Implied undertakings prevent documents used to substantiate an applicant's case at the AAT from being available for another purpose, such as future NDIA planning. Exceptions will be necessary, but these documents should automatically be available by default to other areas of the NDIA for future planning decisions.