

24 November 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: legcon.sen@aph.gov.au

Dear Committee Secretary,

Economic Justice Australia (EJA) submission to the inquiry into the performance and integrity of Australia's administrative review system

1. Economic Justice Australia (EJA) is the peak organisation for community legal centres providing specialist advice regarding social security issues and rights. Our members across Australia have provided free and independent information, advice, education and representation in the area of social security for over 30 years.
2. EJA draws on its members' casework experience to identify systemic policy issues and provide expert advice to government on reforms needed to make the social security system more effective and accessible. Our law and policy reform work:
 - strengthens the effectiveness and integrity of our social security system;
 - educates the community; and
 - improves people's lives by reducing poverty and inequality.

Professor Terry Carney's submission to the inquiry

3. Economic Justice Australia fully endorses the submission of Emeritus Professor Terry Carney AO, FAAL, to the inquiry - regarding both:
 - Administrative Appeals Tribunal (AAT) member selection; and
 - revival of the Administrative Review Council.
4. Insights from the casework experience of EJA's member organisations in social security and family assistance cases have particular relevance to the issues raised by Professor Carney regarding the denial of procedural fairness and justice. As outlined below, these issues can arise where AAT members hearing social security or family assistance cases lack the requisite knowledge of relevant social security/family assistance law, and/or where AAT members lack an understanding of socio-cultural factors that can be fundamental to the application of legislative discretion in individual cases.

Need for specialist expertise – disability; socio-cultural issues

5. AAT applicants in social security and family assistance matters inevitably come from diverse, often intersecting, backgrounds – including:
 - people with physical or cognitive disability
 - Aboriginal and Torres Strait Islander people
 - recently arrived migrants
 - refugees and asylum seekers, including survivors of torture and trauma
 - people recently released from custodial settings, including young people of diverse backgrounds
 - people experiencing family and domestic violence – including physical violence, coercion and financial control.
6. For people among such cohorts, equitable access to procedural fairness and justice in AAT appeals requires that nuanced regard is had to a wide range of issues, all within the context of relevant legislative discretions. This is particularly crucial in certain matters – such as appeals regarding Disability Support Pension eligibility for people with episodic mental illness, whether there are “special circumstances” to waive recovery of a debt, whether a migrant is eligible for Special Benefit, or whether a woman experiencing domestic violence should be assessed as single rather than as a member of a couple.
7. Our members’ casework experience demonstrates that if AAT members lack the knowledge, expertise and experience to elicit all the relevant information from vulnerable cohorts at a hearing, and appropriately exercise discretion in the application of relevant law and policy, decisions can be made which cause further harm.
8. Domestic violence is a case in point. EJA’s research reports – *How well does Australia’s social security system support victims of family and domestic violence?*¹ and *Debt, duress and dob-ins: Centrelink compliance processes and domestic violence*² – include case studies demonstrating how domestic violence has not been appropriately taken into account by AAT members. In one case, the AAT at Tier 1 decided not to waive recovery of a Family Tax Benefit debt for an Aboriginal grandmother experiencing family violence, on the flawed reasoning that “domestic violence and elder abuse is so prevalent in society that it is not uncommon”³. In another case, the AAT only waived a compensation preclusion period following legal representation by our member centre, with evidence of how the applicant’s husband forced her to spend her compensation payment under duress. The applicant was eventually successful but the appeal took 15 months – causing stress and anxiety for the client that compounded the trauma of the domestic violence.

¹ Available at <https://www.ejaustralia.org.au/wp/general/how-well-does-australias-social-security-system-support-victims-of-family-and-domestic-violence/>

² Available at <https://www.ejaustralia.org.au/wp/latest-news/debt-duress-and-dob-ins-centrelink-compliance-processes-and-domestic-violence/>

³ Ibid n 1, p32

9. In another case study provided by one of our member centres, a refugee was refused re-grant of DSP after being in clinical care for depression, an anxiety disorder and post-traumatic stress disorder (PTSD) for eight years. The client also had a number of physical conditions – including a long-standing spinal condition, epilepsy, diabetes, vision problems and asthma. In deciding against the client, the AAT General Division member did not refer to the full scope of the client’s evidence in the decision – evidence which in our member centre’s view, clearly warranted re-grant of DSP. The client is now on JobSeeker Payment and struggles to comply with mutual obligations. He is at risk of falling into extreme poverty.
10. Another recent case from an EJA member centre highlights the need for the AAT to ensure that members assigned to social security matters have the knowledge and skills to manage the conduct of hearings where the applicant has a psychiatric disability. This can be a fundamental issue in appeals involving the exercise of discretion, such as debt waiver cases, and particularly in appeals against refusal of claims for DSP.
 - The client had appealed against a decision to reject a claim for DSP, their major condition being PTSD. They had represented themselves at the AAT Tier 1 hearing but the hearing was stopped when they became hysterical. The client advised the centre’s solicitor that the AAT member “shouted” at them during the hearing, which made them extremely distressed. The solicitor agreed to represent the client at the AAT and the Tier 1 hearing was rescheduled, with the same member. At the rescheduled hearing it was immediately apparent to the representing solicitor that the AAT member was speaking very loudly, ostensibly shouting, because he was hard of hearing. The AAT member noted at the start of the new hearing that he felt the client had been evasive/not responsive to his questions when giving evidence previously.
 - The representing solicitor advises that the AAT member’s manner at the rescheduled hearing was as described by the client at the original hearing – with the AAT member constantly interrupting the client’s responses. English is the client’s second language and it was apparent to the representing solicitor that the client was trying to answer questions very carefully, taking time to process the questions before answering. The interruptions were obviously distressing for the client – from the client’s perspective the member was shouting, interrupting and talking over them.
 - Ultimately, the AAT member granted the client DSP but only because the solicitor was able to interrupt the AAT member, spell out the case and highlight the evidence supporting the client’s eligibility for DSP. Without representation it is probable that this vulnerable applicant with significant psycho-social disability would have been unsuccessful with the Tier 1 appeal – and would not have appealed to the General Division.
11. Decisions in appeals seeking waiver of social security compensation preclusion periods can be particularly problematic when the AAT member lacks a nuanced approach to the exercise of discretion. This issue is explored in EJA’s report, *Compensation preclusion periods and the impact of COVID-19*⁴, which presents a detailed analysis of recent AAT compensation preclusion period cases. The analysis and EJA member centre feedback indicates that COVID-

⁴ Available at <https://www.ejaustralia.org.au/wp/latest-news/compensation-preclusion-periods/>

related issues have generally not being explored by AAT members in preclusion period cases, and that this appears to be attributable to AAT members having blinkered regard to Departmental policy guidelines.

➤ **Recommendation**

- *That AAT procedures be reviewed to ensure that assignment of AAT members to social security and family assistance matters has regard to members' background and specialist, non-legal expertise.*

Need for a litigation guardian

12. Given the complexity of the social security system, and pressures on the limited resources of EJA members' services, and of Legal Aid, most people appearing before the AAT in social security and family assistance appeals are unlikely to have the benefit of legal representation.
13. The AAT has no power to appoint a litigation guardian for applicants who lack the capacity to represent themselves due to mental illness, psycho-social disability, intellectual disability or acquired brain injury, even where the applicant's affairs are managed by a public guardian due to that incapacity. The repercussions for such self-represented applicants can be particularly unfair where their disability is of fundamental relevance to the appeal – such as refusal of Disability Support Pension, imposition of a penalty for non-compliance with mutual obligations, or recovery of a substantial debt.
14. This problem was dramatically illustrated in the case of *Chen and Secretary, Department of Social Services* ([2019] AATA 560), in an appeal against a \$324,648 Disability Support Pension (DSP) debt resulting from a complex arrangement of trusts which had not been disclosed to Centrelink. Senior Member Puplick commenced the decision outlining his concerns about the applicant's mental health and lack of capacity to understand the proceedings, and noted the apparent absence of power to appoint a guardian to conduct the proceedings. The matter eventually found its way to the Federal Court by way of an appeal by Ms Chen against the decision of the General Division. She lost the appeal, and had costs awarded against her (*Chen and Secretary, Department of Social Services* (No 2)[2020] FCA 384). Ms Chen had no ability to represent her interests or provide the tribunal with material relevant to her appeal.

➤ **Recommendation:**

- *That the Administrative Appeals Tribunal Act 1975 be amended, to provide the power to appoint a litigation guardian where an AAT applicant lacks the capacity to understand the proceedings.*

Addressing actual or perceived bias

15. Having AAT members without the requisite skills, experience and expertise hearing complex social security and family law matters can lead to serious injustice, and actual or perceived bias.

16. EJA member solicitors who appear regularly before the Tribunal advise that they are able to identify individual members who:

- are less likely to conduct hearings in a manner that is conducive to procedural fairness given the appellant's background and any vulnerabilities
- consistently fail to exercise the full breadth of available discretion in their decision-making
- are likely to make errors in their application of law and policy.

17. A senior solicitor from one of our member centres observes:

"We have an inexplicably low success rate with certain members of the Tribunal and can predict, almost irrespective of the merits of the case, that we will need to appeal to the General Division. While we always prepare our matters with great care, with some members we know the first hearing is a merely the step to getting to the General Division so the matter can get a proper hearing or be settled."

18. Such inevitability of the need for a General Division appeal is frustrating and resource-intensive for legal services; for unrepresented applicants unable or loathe to appeal to the General Division, this represents a denial of justice.

19. Another practice's senior solicitor outlines the problems addressing perceived bias:

"Once you know which member has been appointed to a matter you will sometimes have an instant, and rightful, sense that an unsuccessful outcome is a foregone conclusion. This is particularly concerning when it is extremely difficult to successfully advocate for recusal or reconstitution. This issue is further compounded by the lack of opportunity to ventilate bias or apprehended bias arguments in the Federal Court, given our clients' general hesitancy and fear of a costs order being made against them if they choose to seek judicial review. Even in the face of advice that there are arguable grounds for success, without being able to guarantee that an unsuccessful judicial review application will not result in a costs order, clients just don't want to take the chance."

➤ **Recommendation:**

- *That the AAT publish the number of decisions affirmed, varied or set aside by each member, with a view to increasing oversight and transparency of AAT decision-making, and improving confidence in the Tribunal's independence.*

Need for targeted recruitment of AAT members; need for training

20. We understand that social security law is not being taught in a substantive way by Australian law schools; social security may be touched on as part of 'administrative law', but the complexity of social security and family assistance law is such that this is inadequate. Access to specialist teaching via clinical law courses with specialist social security legal services partnering with law schools would be ideal, however, the potential to do this is inhibited by

lack of federal funding. As the situation now stands, access to justice in relation to social security in the administrative review system is impeded by insufficient focus on social security in the law curriculum.

21. One of our member centres has recently had two cases at the AAT Tier 1 where the member made an error in the application of family assistance law. One of the decisions was in favour of the client; in the other decision, the member considered 'severe financial hardship', however, this was not a relevant consideration due to the timing of when the debt was raised and the existence of administrative error. The error led to recovery of only part of the debt being waived and not the whole debt. This mistake was disappointing as our member centre had represented the client at the Tier 1 hearing and provided written submissions. The client decided not to appeal further to the AAT General Division.
22. To reduce the likelihood of such injustices, serious impacts on vulnerable people, and the potential loss of confidence in administrative review, it is critical that AAT members are recruited with the expertise required for decision-making across the whole range of areas in which they are likely to be called upon to make decisions.
23. Given the complexity of ever-changing social security and family assistance legislation and the absence of social security law in law degree curricula, AAT members making social security/family assistance decisions should be provided with ongoing training in these areas of law.
24. There is also a need for ongoing professional development for AAT members regarding socio-cultural issues. The AAT's offer to work with Economic Justice Australia to develop a training module for all AAT members in the Child Support and Social Services Division on the intersection of family and domestic violence and social security law is an example of a welcome development in this regard – a potential model for development of training programs for other key issues.

➤ **Recommendations:**

- *That consideration be given to providing federal funding to enable specialist teaching via clinical law courses, with specialist social security legal services partnering with law schools*
- *That AAT members hearing social security/family assistance matters be provided with ongoing training in these areas of law, and in relevant socio-cultural topics.*

Unmet legal need for social security/family assistance legal help

25. There is an urgent need for specialist social security legal services to be adequately resourced to meet unmet demand for legal assistance. There are currently no specific funds for social security legal help provided under the National Legal Assistance Partnership⁵, despite the number of people affected by adverse social security and family assistance decisions daily – many of whom in vulnerable cohorts, unable to self-represent in appeals.

⁵ <https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>

26. Unmet need is most pronounced in regional and remote Australia. Some regional and remote areas of Australia have no funded specialist on-the-ground services providing social security legal advice and assistance. This leaves people without access to accessible information, advice and advocacy on social security and family assistance issues. The Northern Territory (NT) is the prime example: none of the non-profit legal services in the NT – neither Aboriginal Legal Services, Community Legal Centres nor the Legal Aid Commission – receives specific funding to provide social security legal help. There has been no needs assessment relating to social security legal need in the Northern Territory.
27. The Kimberley is another example. Twice the size of Victoria, the region is thousands of kilometres from the closest community legal centres providing specialist social security legal advice and assistance, these being in Darwin and Perth. Whilst the Kimberley Community Legal Service (KCLS) is a generalist Community Legal Service, neither KCLS nor any of the other non-profit legal services in the Kimberley receive dedicated funding to provide social security legal help.
28. Lack of access to specialist social security legal advice is particularly problematic in the NT and the Kimberley given the high proportion of disadvantaged people in need of social security support and the dramatic effects of barriers to accessing appeal rights. Access to appeal rights is particularly problematic for Aboriginal people – who are subject to disproportionately high rates of mutual obligation penalties and social security debts, but have disproportionately low appeal rates.

➤ **Recommendations:**

- *That the Government Inject \$5 million per annum by way of ongoing core funding to the 15 specialist social security community legal centres and programs across Australia and to Economic Justice Australia as the peak organisation.*
- *That the Government provide additional funding to ensure that community legal centres serving regional and remote communities to enable provision of specialist legal advice assistance on social security issues.*

Contact for this submission

Linda Forbes
Law Reform, Policy and Communications Officer,
Economic Justice Australia
Suite 321/410 Elizabeth Street,
Surry Hills NSW 2010
Tel: +61 448 007 428

Website: www.ejaustralia.org.au