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Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
By email: spla.reps@aph.gov.au

Economic Justice Australia submission to Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)

Economic Justice Australia (EJA) is the peak organisation for community legal centres providing specialist advice and advocacy regarding social security and family assistance 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.

EJA draws on its members' casework experience to identify systemic policy issues and provide expert advice to government on reforms needed to make social security system and appeals mechanisms more accessible. Our law and policy reform work aims to strengthen the effectiveness and integrity of Australia's social security system, and thereby reduce poverty and inequality.

EJA appreciated the opportunity to take part in the extensive consultation conducted by the Commonwealth Attorney General's Department (AGD) in developing the new administrative review model and the enabling legislation. However, although these Bills incorporate various welcome measures designed to enhance access to external review, we believe these will be counteracted by the critical impact of the abolition of the two-tier system currently in place for certain jurisdictions. It is for this reason that EJA cannot support the Bill in its current form.

EJA commends the Government for many of the Bill's measures, including:

- rules providing for assignment of members to a particular jurisdictional area having regard to skills, qualifications and experience
- rules enabling multi-member tribunals constituting members with particular expertise relevant to the case in terms of either the complexity of the issues involved or their significance, or in the interest of justice
- re-establishment of the Administrative Review Council, ensuring oversight of the implementation of the new model
- providing the right to representation, as opposed to having representation by consent

We are also pleased that the Bill includes a range of targeted measures aiming to enhance access to external review - including provisions for appointment of a litigation guardian, and processes to ensure access to interpreters.

In providing input to the AGD consultation, both EJA and Legal Aid strongly argued that the new external review model should retain a two-tier structure for social security and family assistance matters, and that the first tier should continue to be inquisitorial, non-adversarial and as informal and accessible as possible.

We are deeply disappointed at the loss of the two-tier structure for social security and family assistance matters. This is a retrograde measure, undermining the Government's intention to effect structural reform to ensure that the administrative review system is accessible and fair. In our view this fundamental change will have the converse effect; the loss of the two-tier structure will make administrative review less accessible for social security and family assistance matters, both in terms of deterring potential applicants from lodging applications, attrition (withdrawal of appeals) and in terms of ensuring fairness and equity, especially for unrepresented applicants.

Given EJA's and its members' expertise, this submission focusses on issues relating to appeals against social security and family assistance decisions (the social security jurisdiction), raising issues in relation to:

- the loss of the two-step administrative review structure for social security and family assistance matters; and
- Issues regarding the proposed Guidance and Appeals Panel.

LOSS OF THE TWO-STEP STRUCTURE FOR SOCIAL SECURITY AND FAMILY ASSISTANCE MATTERS

EJA's fundamental concern is that the positive measures in the Bill will not compensate for the negative impacts of changing from a two-tier to single tier process for social security and family assistance appeals.

The Robodebt Royal Commission report highlighted the importance of people having confidence in the social security system. We note that the Bill is presented as aiming to 'improve the transparency and quality of government decision-making and ... public trust and confidence in the Tribunal', implementing four recommendations of the Robodebt Royal Commission.

Unfortunately, we believe that the single tier administrative review structure for the social security jurisdiction will be counter-productive to achieving these aims, particularly for unrepresented applicants and for potential applicants with complex matters. There are also issues regarding efficiency and cost: many matters are currently resolved satisfactorily at the lower tier of the Administrative Appeals Tribunal, and this is far less time consuming and costly than a General Division hearing or a new single tier Tribunal - for applicants, community legal sector and Legal Aid services, and the Government.

In our response to the AGD's consultation on replacing the AAT with a new body we noted that from EJA and its members' perspective, the fundamental guiding principles for establishing the new administrative review body should include:

- Recognition of the complexity of social security and family assistance legislation, and the fact that this complexity results in systemic barriers to both internal and external appeals
- Recognition of the profound impacts that Tribunal decisions in social security matters can have on individuals, as Applicant or Respondent
- Guaranteed accessibility, particularly for people from vulnerable cohorts and for those with historically disproportionately low rates of appeal to the AAT, with a focus on addressing longstanding barriers to access for Aboriginal and Torres Strait Islander people – especially people in rural, remote and very remote communities
- Transparency of decision-making, and practices and procedures
- Improving accountability mechanisms in primary administrative decision-making.

EJA also noted the need to recognise that external review applicants in social security and family assistance matters inevitably come from diverse, often intersecting, backgrounds - including:

- people with physical or cognitive disability
- people with psychiatric disability
- Aboriginal and Torres Strait Islander people
- recently arrived migrants and refugees and asylum seekers, including survivors of torture and trauma
- people from culturally and linguistically diverse backgrounds, including those with limited English language
- 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.

For people among these vulnerable cohorts, equitable access to procedural fairness and justice in external 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 against debts; appeals regarding Disability Support Pension eligibility for people with episodic mental illness; appeals regarding whether a person is a ‘member of a couple’; appeals involving consideration of whether there are ‘special circumstances’ to waive recovery of a debt or a compensation preclusion period; consideration of whether a recently arrived migrant has ‘special circumstances’ to warrant grant of Special Benefit; or to establish whether the fact that a person is a domestic violence victim-survivor should be taken into account in the exercise of a discretion.

Given the limited resources of EJA member services and Legal Aid services (noting that Legal Aid only provides advocacy in social security matters in some state/territory jurisdictions), most people appearing before the AAT in social security and family assistance appeals are unlikely to have the benefit of legal advice before attending the hearing and then legal representation. The fact is that the complexity of social security legislation, and the preponderance of discretionary provisions, result in evidence requirements that can only be met if they are understood; for many applicants such understanding will only come with access to free legal advice or advocacy.

We understand from the AGD consultations that there is an intention to establish duty lawyer services as part of the new Tribunal structure. We welcome this; however, the effectiveness and viability of the initiative will depend on a substantial funding boost to Community Legal Centres and Legal Aid Commissions under the NLAP – both to resource provision of duty lawyers; and to better resource CLCs and Legal Aid Commissions where clients are on-referred for advice/advocacy by the ART duty lawyers.

Duty lawyer services generally involve a lawyer and client meeting for the first time on the day of the hearing. Given this, there is usually limited opportunity to review documents. For complex matters, where there is no time to comprehensively review documents, duty lawyer advice often focuses on procedural aspects rather than the merit of the argument. Even if the intention is to provide access to duty lawyer services prior to the hearing day, this is no replacement for advice and representation provided by a legal service with expertise in social security and family assistance law.

Under the new model, with its single-tier for social security matters, applicants who have not accessed legal advice will face what will in most cases be their sole chance of having their decision changed without having had the opportunity to provide crucial evidence – evidence that may well have been readily obtainable (such as a specialist medical report for a DSP matter; a domestic violence counsellor’s report for a ‘member of a couple’ matter; or a financial counsellor’s report for a compensation preclusion period matter); or which could have been identified and obtained with the advice and assistance of a legal advocate.

Case study – Steve

Steve was 82 years old when he approached Social Security Rights Victoria (‘SSRV’) following an unsuccessful Social Services and Child Support Division (SSCSD) decision. Steve told SSRV that he had been receiving the single rate of Age Pension since 2007. In 2019, Centrelink decided that he was a member of a couple, reducing his rate of payment by about \$250 per fortnight. It was very unexpected to Steve that Centrelink had decided he was in a relationship, as his circumstances hadn’t changed since 2007 – when he had commenced living separated under one roof with his ex-wife. Given their age, they didn’t feel it was viable to sell their home and both relocate. They rarely interacted and lived entirely independently.

When Steve contacted SSRV Centrelink Steve was in financial hardship, as the couple rate was not enough for Steve to support himself. Steve had already appealed Centrelink’s decision to pay him the couple rate to the AAT SSCSD. The SSCSD had affirmed Centrelink’s decision to consider Steve a member of a couple. Steve provided SSRV with the SSCSD decision to review. By taking instructions, reviewing Steve’s documents, and reviewing the SSCSD decision, SSRV identified that Steve had not raised or discussed with the Tribunal all his circumstances relevant to a member of a couple determination. SSRV helped Steve appeal the SSCSD decision to the General Division. Centrelink then raised a debt of \$15,000 against Steve, on the grounds that he had not been entitled to the single rate and therefore had been overpaid \$15,000 in Age Pension.

SSRV represented Steve at the General Division, providing substantial evidence regarding his ongoing separation from his wife. SSRV prepared statements and submissions, and compiled Steve’s supporting documents. With all Steve’s circumstances presented and considered, the Department settled – the Services Australia representative agreed that Steve had not been a member of a couple since his separation in 2007. Steve was paid arrears back to the date his age pension was reduced, and his \$15,000 debt was cancelled.

Without two levels of review, Steve's original SSCSD decision would have been the final decision. Steve would have had reduced payments ongoing, and a \$15,000 debt to repay to Centrelink. The two tiers of review allowed Steve to quickly access the SSCSD, but when all the relevant circumstances were not considered by the SSCSD, Steve had a further level of review to pursue the correct and preferable decision. Steve's life would have been significantly impacted had there not been a second level of review available to him.

Case study – Avra

Avra, a 33-year-old mother of four, contacted Welfare Rights Centre NSW (WRC) seeking help with two Family Tax Benefit debts totalling \$5,340, which arose from a combination of "percentage of care" issues, administrative error and not updating her employment income. She was very afraid after years of domestic violence perpetrated by Theo, the father of her two eldest children. Theo's affiliation with a high-profile crime family intensified Avra's fear, limiting her ability to contest Centrelink's decisions relating to care percentages and contributing to the accrual of the debts. Her mental health was severely affected by the ongoing domestic violence, contributing to severe anxiety, depression, and PTSD. Avra, along with her four children, did not have a permanent housing, residing in a motel while awaiting priority housing. This precarious living situation imposed additional financial burdens, compelling Avra to rely on take-away food due to the lack of kitchen facilities. Her daily expenses far exceeded her Centrelink payments. She had not updated her income estimate because of unexpected changes to her casual employment and her mental health issues. She also believed that she was caring for her children sufficiently to entitle her to FTB.

Due to high demand, Avra needed to wait almost a month before she was able to speak to a WRC lawyer. Avra had already appealed her debts to the ARO and received a decision. WRC advised her that she could further appeal to the Social Services & Child Support Division of the AAT, and that she could challenge Centrelink's percentage of care decision and also seek waiver on the basis of special circumstances. WRC explained that if she decided to challenge the percentage of care decision, the AAT member would contact Theo during the hearing so that he would have the opportunity of presenting his version of events. WRC further advised that if she was successful in challenging the percentage of care element of her debts, it is possible that Centrelink would reassess FTB payments received by Theo, which may result in a debt being raised against him.

Due to the ongoing domestic violence and threats, Avra was very concerned that Theo not be brought into the proceedings, and was especially concerned that if Centrelink were to raise a debt against Theo, he would blame her, resulting in further violence. To ensure that the AAT understood that Avra was not seeking to challenge the percentage of care decision and that she was only seeking waiver on the basis of special circumstances, WRC agreed to represent Avra in her hearing. WRC gathered evidence from her children's school, police, domestic violence caseworkers and housing and prepared detailed written submissions which explicitly excluded the percentage of care decision.

The AAT member listened to Avra's story, understood the complexities of her circumstances and decided to waive recovery of the debt in full, in the 'special circumstances' of the case.

If the single-tier new ART were already in place, the result may have been very different:

- If Avra had proceeded with the appeal without the benefit of WRC’s advice, she may not have realised that if she raised the percentage of care issue during the hearing, the tribunal would advise that they needed to contact her ex-husband. To do so would have put her safety seriously at risk, and Asra would either have withdrawn her appeal or the Tribunal would likely have affirmed the decision without considering waiver.
- A Tribunal duty lawyer would not have had the time or resources to consider the full implications of Avra’s circumstances, or to gather the evidence necessary to prove special circumstances.
- Avra’s matter may have been referred to the GAP but not necessarily.

The effect of one-tier external review for social security and family assistance matters is that unless their matter is referred to the GAP, at the Tribunal President’s discretion, vulnerable people will have one shot at correcting decisions. If they are unsuccessful because they are not afforded the opportunity to provide information, and/or supporting evidence regarding the facts of their case and their circumstances, and they haven’t received comprehensive advice or any advice, or have misunderstood the issues in question, the decision will stand. This is a significant step backward from the current AAT system.

Loss of settlement opportunity

We note that currently, where a party is unrepresented in the AAT General Division, there is an obligation on Services Australia (SA) to assist the Tribunal and try to resolve the matter/act in accordance with the model litigant principles. Currently, a significant portion matters settle – EJA is concerned that the proposed single-tier structure of the new tribunal will limit opportunities for settlement, unless the matter referred to the Guidance and Appeals Panel.

Case study – Jamila

Jamila was born in Afghanistan in June 1994 and arrived in Australia in May 2019, she resides in Western Sydney with her parents and five siblings. Before their displacement from Afghanistan, Jamila’s family faced adversity, with her father being the sole breadwinner. Fleeing to Pakistan in 2001 due to Taliban threats, they lived as undocumented migrants. In Pakistan, Jamila’s father worked as a bricklayer and her mother engaged in piecemeal work to supplement the family’s income.

As Jamila was unable to attend local schools in Pakistan, she relied on a makeshift school for Afghan refugees, facing disruptions due to authorities’ interventions. Despite briefly attending a private English college, financial constraints forced her to discontinue her studies.

In approximately 2011, Jamila’s father travelled to Australia, facing immigration detention upon arrival in Australia for about two years, after which he was granted an Australian protection visa 2014. He resumed supporting Jamila back in Pakistan. The family reunited in Australia when Jamila was granted an Australian visa in June 2019, sponsored by her father. After settling in Australia, Jamila enrolled in year 9 at an Intensive English Centre (IEC).

Life in Australia has been very challenging for Jamila and her father. Jamila has experienced major health issues, including depression, anxiety, gastritis, chronic headaches. Despite medication, her symptoms persist, necessitating ongoing psychological support. Jamila’s father has had a serious lung condition and has undergone surgery. As the family was very poor and was struggling to pay the rent, bills and for food, Jamila

applied for Austudy shortly after enrolling at the IEC, however her claim was rejected due to the Newly Arrived Residents Waiting Period. The rejection was affirmed by an Authorised Review Officer (ARO) on 18 July 2020. Jamila approached her school counsellor for help, who contacted Welfare Rights Centre NSW (WRC) shortly after on 22 August 2020. Due to high demand for WRC's services, WRC was not able to give her advice until 4 September 2020, nearly 7 weeks after Jamila received the ARO decision. Jamila's initial advice took nearly two hours as an interpreter was needed.

After many months gathering evidence of Jamila's background, health conditions and her father's health conditions, WRC represented Jamila in her appeal to the SS&CS Division, arguing that Services Australia should exercise its discretion and treat her as a dependent child of a refugee and on this basis grant her payment. Although the AAT member did not accept WRC's arguments and affirmed the Department's decision, the AAT member was very understanding of Jamila's circumstances. Jamila felt able to tell her story to the Tribunal member in a private and informal setting.

WRC appealed to the General Division, providing a Statement of Facts, Issues and Contentions, including a detailed legal argument in support of the existence of the discretion and the manner in which it may be exercised.

Rather than proceed with a full hearing, the Department agreed to orders that the client be treated as a dependent child of a refugee and back paid to her first claim in May 2019 (nearly \$13,000).

If the single-tier new ART were already in place, Jamila's outcome would have been very different. Jamila's case required intensive work gathering evidence, developing legal arguments and preparing documents over many months. A duty legal service would not have provided the level of legal support required. Without the first tier hearing where Jamila was able to tell her story and provide valuable evidence, Services Australia may not have been persuaded as to the strength of her case and agree to settle.

Case study – Maria

Maria is a 33-year-old woman, and a mother to four young children. Centrelink raised a debt of \$20,000 against Maria for overpayment of Family Tax Benefit and Parenting Payment. Centrelink said Maria hadn't been entitled to the payments because she wasn't the children's primary carer. For the past four years, Maria's children had been in and out of the care of child protection services.

Maria had been slowly paying the debt back through her JobSeeker Payment and had \$12,000 owing when she appealed the debts to the SSCSD. She attended the hearing alone, without prior advice or representation. The SSCSD decided the debt was correct, because Maria had not been the primary carer of the children for certain periods of time over the past four years.

After the SSCSD decision, Maria was very disappointed. Maria was facing many pressures in her life, including homelessness, mental health issues and financial hardship. She was extremely overwhelmed. Maria's children were in the care of child protection services full-time, and Maria felt she could not work toward reunification without first strengthening her financial position.

Maria engaged with a support worker, who assisted her with housing, her finances, and linked her in with Social Security Rights Victoria (SSRV). With Maria's support person present, SSRV took comprehensive instructions from Maria about her circumstances and her Centrelink debt. Maria disclosed to SSRV that child protection had become involved following serious family violence perpetrated against her and her children. Maria had not discussed these circumstances of family violence with the SSCSD. She did not like discussing what she and her children had been through and had not known it was relevant to her Centrelink debt.

SSRV helped Maria to seek further review of her debt at the General Division. SSRV helped Maria to draft a supporting statement and compile evidence of her circumstances, including a letter from her support worker and previous intervention orders.

Following the filing of these documents, the Secretary's representative offered to settle the matter, by waiving the \$12,000 Maria had owing. Maria agreed, and her remaining Centrelink debt was waived. She now had no more money to pay back to Centrelink and fortnightly deductions from her JobSeeker Payment stopped. Maria was very happy with this outcome. Following the General Division settlement, Maria felt she was in a much stronger position to work toward reunification with her children.

Case study – Vivienne

Vivienne is woman in her mid-30's living with fatigue related medical conditions, as well as mental health difficulties. She applied for the Disability Support Pension as she was no longer able to sustain paid work. Vivienne's claim was initially rejected. She appealed this rejection but was unsuccessful at the ARO and AAT SSCSD levels.

Vivienne did not get any legal advice about these appeals, and had only limited other advice and support. She appealed her rejection to the AAT General Division. As the complexity of the processes increased, she sought assistance from Social Security Rights Victoria (SSRV). SSRV took instructions and reviewed her medical and Centrelink documents. SSRV represented Vivienne at the AAT General Division and assisted her to set out her case in written submissions. Prior to the final Hearing date, the Department accepted Vivienne was eligible for the DSP. SSRV negotiated a settlement with the Secretary's Representative where Vivienne's DSP application was granted with backpay to the date of the application.

Under-resourcing of EJA members

There is a need to recognise the impact on EJA members and Legal Aid of loss of the two-step process for the social security jurisdiction, with all social security / family assistance appeals effectively assuming the formality of current AAT General Division appeals – and complexities where a referral is made to the Guidance and Appeals Panel (GAP). Issues will include:

- increased formality of processes, this increasing workloads for advocates and their supervisors, and for Principal Solicitors in meeting practice requirements
- the need to substantially amend casework intake guidelines, to ensure that due regard is had to vulnerability and inability to self-represent
- challenges in preparing clients to self-represent, compared with the relative informality of preparing clients the SSCSD as a first-step, and the likely return of clients for advice if their matter is referred to the GAP
- Challenges in engaging with Services Australia and the ART to seek an enhanced ARO explanation /statement of reasons, and then providing advice in the light of the new explanation
- Challenges in reskilling / professional development to build expertise relevant to the new structure – a single tier for social security matters, and formal requirements / advocacy in respect of GAP referrals.

It should also be noted that many of our members utilise junior lawyers, and paralegals who are not legally trained but who are expert in social security law, for providing advice in social security matters, under the supervision of the Principal Solicitor.

Removing Tier 1 for social security matters and making the formal hearing the sole opportunity for a decision change (unless the matter has been referred to the GAP), will preclude many of our members' advocates from assisting vulnerable clients in external appeals. This reduces the already limited capacity of CLCs to assist in ART matters.

Internal review accountability measures

EJA is encouraged that introduction of the Bill includes measures to improve the accountability and accuracy of Centrelink internal review decisions, and that the implementation of the new structure will involve complementary initiatives designed to improve Services Australia's internal review processes – particularly by ensuring that Services Australia may be required to submit statements of reasons where the Authorised Review Officer (ARO) decision is unclear, including at the request of the Applicant.

Implementation of these initiatives will require significant budgetary allocations to the Services Australia internal review function, both to enable implementation of the Bill's measures and to address ongoing delays in finalising internal reviews. It cannot be assumed that Authorised Review Officers (AROs) will suddenly be able to start doing their job at optimal level.

Services Australia and the new ART will need to partner closely in ensuring implementation of the measures affecting ARO decision-making, including via provision of training and professional development for AROs; addressing ongoing deficiencies in the quality of original and ARO decision letters; and addressing the current backlogs in ARO reviews by better resourcing the internal review function.

It also needs to be acknowledged that where there can be deep-seated systemic issues affecting decision-making where there is automation involved, as was the case with Robodebts; or where complex compliance systems are at play, as is the case with implementation of mutual obligation penalties under the Targeted Compliance Framework. Authorised Review Officers are often not in a position to provide detailed and comprehensive reasons that assist a person to frame an appeal in such cases. It is unclear how an unrepresented person or their advocate would go about seeking a statement of reasons regarding their Authorised Review Officer decision where the person really has no idea what information they should be asking for.

The initiatives that encourage accountability of decision-makers are very welcome and will potentially bring systemic reform, but proper implementation will likely cause further delays in decision-making unless the ARO function is prioritised and supported, and adequately resourced.

CONCERNS REGARDING THE PROPOSED GUIDANCE AND APPEALS PANEL

We note that the Bill will enable the Tribunal President to refer a matter for further review of the agency's decision to the new Guidance and Appeals Panel (GAP), either on the President's initiative or at the request of the Applicant. We understand that the President may refer a matter to the GAP at any time, either before or after the ART has made a decision; and that for social security matters, an individual or Services Australia may seek referral of a matter after the ART has made a decision. The GAP will review the original decision under appeal, not the decision made by the ART.

EJA understands that the grounds for referral of certain classes of matter will be limited, and then at the President's discretion in individual cases. It is unlikely that all Disability Support Pension medical refusal cases will be approved, for example, or all debt waiver cases, or all compensation preclusion period cases – unless the President determines that there are systemic issues requiring consideration.

EJA welcomes the GAP initiative but is concerned that considerations affecting referral are unclear – and that the opacity of the underlying considerations and decision-making principles is problematic. It appears that the loss of the two-tier structure for SS matters will mean that the President will hold significant discretionary powers regarding the approval of requests for referrals from both individual applicants and from Services Australia. This is concerning, especially for unrepresented individual applicants appealing a discretionary decision who may not appreciate that they have potential grounds for their matter to be referred, or who may be aggrieved but are unable to articulate that they want their case referred and/or their grounds for seeking referral.

If the Committee is of the view that that the GAP provisions be passed, under this Bill or an amended Bill, consideration should be given to amendments to provide that where an unrepresented Applicant seeks referral to the GAP, the President should exercise their discretion to refer to prefer a matter to the GAP if the Applicant GAP unless application clearly vexatious/no merit.

RECOMMENDATION:

EJA recommends that the Bill be amended so as to provide that the ART incorporate a two-tier structure for social security and family assistance matters, with the first tier effectively being a continuation of the current Social Security and Child Support Division of the AAT.

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