Australian Centre for Justice Innovation and

The Castan Centre for Human Rights Law

Monash University Faculty of Law

Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the performance and integrity of Australia's Administrative Review Systems

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Submission Author Information

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Dr Yee-Fui Ng is an Associate Professor and Deputy Director of the Australian Centre for Justice Innovation in the Law Faculty at Monash University. She has taught Administrative Law at Monash and RMIT University and is co-author of *Douglas and Jones's Administrative Law* (Federation Press, 8th ed, 2018) and a number of journal articles on administrative law issues.[3] She has previously worked as a Policy Adviser at the Department of the Prime Minister and Cabinet, a Senior Legal Adviser at the Victorian Department of Premier and Cabinet, as well as a Manager at the Victorian Department of Justice.

It is in these capacities as academic researchers that we make this submission.

[1] Y-F Ng, M O'Sullivan, M Paterson and N Witzleb 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' 43(3) (2020) *UNSW Law Journal*;
Y-F Ng and M O'Sullivan, 'Deliberation and Automation – When is a Decision a 'Decision'?' (2019) 26(1) *Australian Journal of Administrative Law* 21-34.

[2] M O'Sullivan, 'Automated Decision-Making and Human Rights: The Right to an Effective Remedy' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021).

[3] Y-F Ng, M O'Sullivan, M Paterson and N Witzleb 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' 43(3) (2020) *UNSW Law Journal*;
Y-F Ng and M O'Sullivan, 'Deliberation and Automation – When is a Decision a 'Decision'?' (2019) 26(1) *Australian Journal of Administrative Law* 21-34; Yee-Fui Ng, 'Institutional Adaptation and the Administrative State' (2021) 44(3) *Melbourne University Law Review* 889; Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455.

TERMS OF REFERENCE 1: THE ADMINISTRATIVE APPEALS TRIBUNAL

1. Selection Process for AAT Members

We suggest that the Australian Government should commit to a more transparent process to appointing AAT Members.

The current processes for appointing tribunal members carry the risk of appointments based on political patronage, rather than merit. The integrity of the tribunal appointment process is integral to public confidence in the legal system and we believe that public confidence is affected when tribunal members are viewed as having been appointed due to their political affiliations rather than on merit. We note that other submissions to the present Inquiry have raised similar concerns.[4]

Other scholars and commentators have also raised questions about the appointment process for the AAT. For instance, Arthur Moses SC - who previously served as President of the NSW Bar Association (2017-18) - has expressed concerns about the absence of a transparent merit-based, diverse appointments process for the AAT.[5] Similarly, scholar James Morgan has argued that the AAT must be independent from inappropriate influence, and the perception of such influence, in order to effectively perform its duties of *de novo* merits review of government decisions. Drawing on recent controversies surrounding the AAT in 2017, Morgan concluded that the current mechanisms of AAT member reappointment exposes the Tribunal to a risk of inappropriate influence by the government of the day or at least a risk of public perception to that effect. After examining several possible reforms to minimise this risk, he proposes the creation of an independent reappointment committee for the AAT.[6]

Guidance from Comparative Jurisdictions

It is useful in this regard to consider how tribunal appointments are made in comparative jurisdictions (particularly the UK and Canada).

A good example of a robust appointment process is the so-called 'Governor in Council' appointments to the Canadian Immigration and Refugee Board. These members are selected using a rigorous merit-based selection process, during which candidates are assessed through an exam, an interview and the verification of references.[7] Through its selection process, the

[4] See for instance, Submission by G Appleby, L Blayden, C Bostock and J Boughey, Faculty of Law and Justice at UNSW to the Senate Legal and Constitutional Affairs Committee Inquiry: *The performance and integrity of Australia's administrative review system*, 23 November 2021, p 3: 'The perceived independence of the AAT is undermined when tribunal members are viewed as having been appointed due to their political affiliations, rather than on merit. There have been periodic claims that governments from both major parties have appointed members to the AAT and other Commonwealth tribunals based on political affiliation' (citing R Creyke, 'Where Do Tribunals Fit into the Australian System of Adjudication?' in G Huscroft and M Taggart (eds), Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan (University of Toronto Press, 2006) 81, 99).

[5] Arthur Moses SC, 'Accountability, Transparency and Diversity – The Importance of an Independent Tribunal Appointment Process' (Speech, Council of Australasian Tribunals National Conference, 7 June 2019)

[6] James Morgan, 'Securing the Administrative Appeals Tribunal's Independence: Tenure and Mechanisms of Appointment', (2017) 43(4) *Alternative Law Journal* 302.

[7] Immigration and Refuge Board of Canada, 'Governor in Council (GIC) Appointments' (Webpage, 24 November 2020) < https://irb.gc.ca/en/transparency/pac-binder-nov-2020/Pages/pac15.aspx> .

Immigration and Refugee Board works to identify individuals with the following attributes: high ethical standards and integrity; impartiality; sound judgment; tact and discretion; and sensitivity to multicultural and gender issues. In addition, candidates should have suitable education credentials, recent experience in the interpretation or application of legislation, and the demonstrated ability to gather and assess complex information in order to prepare written and oral decision.[8]

Another relevant example is the UK Judicial Appointments Commission,[9] which selects candidates for judicial office in England and Wales, and for some tribunals with UK-wide powers. Members come from a wide background to ensure the Commission has a breadth of knowledge, expertise and independence, with the Chairman of the Commission being a lay member.[10] The Commission is responsible for running selection exercises and making recommendations for posts up to and including the High Court, but not the Supreme Court (the highest court in the UK).

In light of the above, we recommend that an independent Judicial Appointments Commission be set up to select both judicial officers and tribunal members, with a statutory duty to attract diverse applicants from a wide field. The process for appointment should include a public call for expressions of interest and publication of criteria for appointment. This could be modelled on the UK Judicial Appointments Commission discussed above.

A Judicial Appointments Commission would implement a more rigorous and transparent process for judicial appointments, increase public confidence in the appointments process, encourage a wider range of candidates to seek appointment to judicial office, as well as ensure that appointments are based on genuine merit.[11]

Recommendation:

We recommend that an independent Judicial Appointments Commission be set up to select judicial officers and tribunal members, with a statutory duty to attract diverse applicants from a wide field.

[8] Immigration and Refuge Board of Canada, 'Governor in Council (GIC) Appointments' (Webpage, 24 November 2020) < https://irb.gc.ca/en/transparency/pac-binder-nov-2020/Pages/pac15.aspx>
[9] 'Judicial Appointments Commission' <https://judicialappointments.gov.uk/>.
[10] Of the 14 other Commissioners, 6 must be judicial members (including 2 tribunal judges), 2 must be professional members (each of which must hold a qualification listed below but must not hold the same qualification as each other), 5 must be lay members, 1 must be a non-legally qualified judicial member.
[11] R Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 143.

2. Other aspects of the operation of the AAT

We also make two comments about other aspects of the operation of the AAT.

2.1 Backlogs in the AAT Migration and Refugee Division

First, we are aware that there are significant backlogs in the AAT Migration and Refugee Division. We endorse Recommendation 1 of the Refugee Council of Australia's submission to this Inquiry, that the Australian Government should significantly increase resources to the AAT Migration and Refugee Division in order to address the backlog of protection visa cases.[12]

Recommendation: The Australian Government should significantly increase resources to the AAT Migration and Refugee Division

2.2 The Use of ADR in the Administrative Appeals Tribunal

Second, we believe that greater consideration should be given to the use of Alternative Dispute Resolution (ADR) in the AAT.

The 2019 Callinan Report highlighted the importance of ADR and recommended that the AAT Act be amended to make ADR and case conferencing available across all Divisions.[13] However, that expansion has not yet occurred.

Administrative law scholar Cassandra Holford has made a number of very useful observations and recommendations about the use of ADR at the AAT.[14] She is of the opinion that the Tribunal's use of ADR is not only appropriate, but highly effective in the merits review context.[15] She notes that 'ADR allows the applicant to ask questions of the government representative where the reasons for the decision are unclear, or where they do not otherwise understand why their original application was not successful.'[16] She also details the ways in which the Tribunal's ADR process allows for the improvement of relationships between aggrieved applicants and their decision-makers.[17]

Specifically, she argues that:

> '… the effect of ADR has been to add meaning to what is meant by the 'preferable' decision, where the 'preferable' decision is a negotiated settlement.

[12] Refugee Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry: *The performance and integrity of Australia's administrative review system*, p. 4.
[13] Ian Callinan, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (23 July 2019) pp. 21–22 [1.32].
[14] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288
[15] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 28 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288
[16] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 15 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288
[17] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 16 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288

> Generally speaking, there is no "formula" for arriving at the "preferable" decision: this is a discretionary exercise which requires the member to weigh the relevant factors and reach a reasoned conclusion in light of the merits of the case. However, by giving effect to settlements, the Tribunal is essentially endorsing a version of the "preferable" decision which gives maximum effect to the applicant's individual, private interests, insofar as this is permissible within the Tribunal's powers.'[18]

Given the Tribunal's central function to arrive at the 'correct or preferable decision', Holford argues that the use of ADR in the Tribunal 'must offer an effective, alternative forum [to the hearing process] for the Tribunal to arrive at the correct or preferable decision'.[19] She says that this requires two concessions:

> 'Firstly, negotiated settlements must be seen to be an appropriate stand-in for the 'preferable' decision. This requires an acceptance that the "preferable decision" can be justifiably defined with primary reference to the applicant's private interests. Secondly, the reduced number of hearings, and the normative impact of the Tribunal as a result, must be accepted as a necessary casualty of the need to afford maximum accessibility to disputants.[20]

Recommendation: Greater consideration be given to the way in which ADR is practiced in the AAT and whether use of ADR can and should be expanded.

3. The Immigration Assessment Authority

We also express our concerns with the operation of the Immigration Assessment Authority (IAA), a body established under the Fast-Track process to review appeals for people seeking asylum who arrived by boat. The 'Fast-Track' process was introduced in 2014 to process the so-called 'Asylum Legacy Caseload' efficiently (at that time: 30,947 unauthorised maritime arrivals).

The fast track process for certain boat arrivals is unusual as it provides only a limited form of merits review and, in some instances, no independent merits review at all.[21] These legacy cases are not reviewed by the Administrative Appeals Tribunal as are other refugee applications, but by the IAA.[22]

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[18] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 27 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288

[19] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 31 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288.

[20] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), p. 31 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288.

[21] These are what are known as 'excluded fast track applicants', see discussion in Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," 41(3) (2018) *UNSW Law Journal*, 1003-1043.

[22] *Migration Act 1958* (Cth), s 473DA(1).

The fast track process undertaken by the IAA is significant in two ways: applicants do not have a right to an oral hearing or interview by the Authority[23] and there is no obligation on the reviewer to consider new information from the applicant.[24] This is in contrast to the 'mainstream' merits review system provided to other asylum-seekers by the AAT, which conducts a full merits review of the matter and has an obligation to hold an oral hearing.[25]

The rationale for this difference is that the IAA was established to deal with the legacy caseload of 30,000 applicants which requires an emphasis on efficiency. Further, it is premised on an assumption that applicants should present all their claims and evidence at the first interview which is conducted by the Department of Home Affairs. The fast track system assumes applicants will receive procedural fairness at that stage and, as such, it is unnecessary for the granting of full procedural fairness (such as an oral interview) at the review stage.

The removal of these core tenets of independent review run contrary to standards of procedural fairness which are protected in the AAT provisions in the Migration Act and applied more broadly in the Australian administrative review system. In particular, the fast track system creates an imbalance between the principles of fairness and efficiency because of the way in which IAA's limited mandate (eg. exceptional circumstances) is being interpreted in practice.[26]

Civil society and academics have also raised concerns about the operation of the IAA. In terms of civil society, the Refugee Advice Casework Service and the Asylum Seeker Resource Centre have made compelling arguments in relation to the operation of the IAA.[27] Academics who

[23] *Migration Act 1958* (Cth), s 472DB. When using the term 'oral hearing', we refer to an opportunity for the applicant to appear before the IAA in person to present their claims and answer questions or comment on any evidence that is put to them. This does not necessarily only refer to a *public* hearing, as is available in the AAT General Division or during judicial review. As McDonald and O'Sullivan state: 'Whilst we acknowledge that an oral interview is not the *only way* in which the IAA can obtain information and comments from the applicant, we argue that the IAA should be guided by the procedural fairness 'content' factors established by Australian case law… We also argue in this article that the decision-making context in refugee matters means that there may be circumstances where the issues cannot be decided fairly by written submissions alone': Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," 41(3) (2018) *UNSW Law Journal*, 1003 at p 1005-06, footnote 13.
[24] *Migration Act 1958* (Cth), s 473DC. See discussion of the operation of this provision by the High Court of Australia in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16, [27].
[25] *Migration Act 1958* (Cth), s 425. Note there are exceptions to this, such as where the Tribunal intends to find in favour of the applicant, but most reviews are completed using oral hearings, see section 425: 'The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review. (2) Subsection (1) does not apply if: (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or (c) subsection 424C(1) or (2) applies to the applicant. (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.'
[26] Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," 41(3) (2018) *UNSW Law Journal*, 1003-1043.
[27] Refugee Advice Casework Service, Submission to The Callinan AAT Statutory Review Inquiry, 24 August 2018 https://www.ag.gov.au/sites/default/files/2020-03/refugee-advice-casework-service.PDF; Asylum Seeker Resource Centre, Submission 5 to Senate Inquiry on Courts and Tribunals, Parliament of Australia, *Courts and Tribunals Legislation Amendment (2021 Measure No. 1) Bill 2021* (15 July 2021).

have raised concerns include McDonald and O'Sullivan,[28] Kenny and Proctor,[29] Honnery,[30] Townsend and Kerwin.[31] Chris Honnery, for instance, notes that the fast track system is 'particularly problematic in cases involving victims of sexual violence who have not disclosed their trauma at the outset of their protection visa applications or asylum seekers who have not provided all relevant information due to mental illness.'[32]

In light of the above, we argue that the IAA fast track process does not adequately provide integrity in the Australian administrative review system. We argue that an oral hearing provides the best opportunity for decision-makers to properly consider an asylum seeker's case. The risks to asylum seekers from the fast track procedure is heightened due to the fact that most asylum seekers are no longer entitled to Commonwealth-funded legal assistance to assist them with their cases.[33]

Whilst we recognise that the introduction of efficiency measures is an important way of avoiding delays in decision-making, and from that perspective is beneficial to administrative justice, we believe the IAA Fast Track system increases the propensity of such measures to lead to serious legal errors. This is particularly problematic given the seriousness of the decision-making context at stake (possible return of refugees to harm). This was also recognised by the Australian Law Reform Commission (ALRC) in its report on Procedural Fairness:

> The ALRC considers that … the fast track review process would benefit from further review to consider whether the exclusion of the duty to afford procedural fairness is *proportionate*, given the gravity of the consequences for those affected by the relevant decision.[34]

We would also argue that fairness is especially compromised by the lack of an oral hearing when issues of an applicant's credibility are at stake. Credibility assessments involve the making of both objective and subjective judgments, and fairness is likely to require that IAA

[28] Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," 41(3) (2018) *UNSW Law Journal*, 1003-1043.
[29] Mary Anne Kenny and Nicholas Procter, 'The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers' (2016) 23(1) *Psychiatry, Psychology and Law* 62.
[30] Chris Honnery, 'The Immigration Assessment Authority and the Erosion of Fairness in Australia's Refugee Framework', 2019, available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/12/immigration (Accessed 23 November 2021).
[31] Joel Townsend and Hollie Kerwin, 'Erasing the Vision Splendid? Unpacking the Formative Responses of the Federal Courts to the Fast Track Processing Regime and the 'Limited Review' of the Immigration Assessment Authority' (2021) 49(2) Federal Law Review 185.
[32] Chris Honnery, 'The Immigration Assessment Authority and the Erosion of Fairness in Australia's Refugee Framework', 2019, available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/12/immigration (Accessed 23 November 2021).
[33] A small number of people who are considered most vulnerable (such as unaccompanied minors) may be eligible for government-funded assistance under the Primary Application Information Service (PAIS): see Kaldor Centre for International Refugee Law, *Factsheet: Legal Assistance for Asylum Seekers,* <www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>. Some legal assistance has also been provided by State Governments and via pro bono programs: ABC News, 'Victoria to provide legal aid to thousands of asylum seekers under new initiative', 17 April 2016, <www.abc.net.au/news/2016-04-17/new-victorian-initiative-to-provide-legal-aid-to-asylum-seekers/7332884>.
[34] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,* ALRC Report 129, 2016, Ch 14: Procedural Fairness [14.47] <www.alrc.gov.au/publications/laws-exclude-procedural-fairness>.

reviewers make those subjective judgments comprehensively and in consideration of all available factors. Specifically, without observation of an applicant's body language and facial expressions, reviewers are restricted in their understanding of an applicant's demeanour.

Recommendation

We recommend that the IAA should be abolished. In this context, we endorse the comments made about the IAA in the submission of the Refugee Council of Australia to the present Inquiry.[35]

If it is not abolished, the IAA should be reformed to improve procedural fairness protections. Namely, applicants before the IAA should be given an opportunity to address adverse information that could be used as a reason for making a negative decision regardless of whether the information was before the primary decision-maker or arose at the review stage

[35] Refugee Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry: *The performance and integrity of Australia's administrative review system,* Recommendation 4, p. 13: 'The Australian Government should abandon the Immigration Assessment Authority and ensure all people seeking asylum have access to merits review through the Administrative Appeals Tribunal'.

TERMS OF REFERENCE 2:

The importance of transparency and parliamentary accountability in the context of Australia's administrative review system.

Transparency

The 2004 Administrative Review Council Report on automated decision making identified the 'lawfulness, fairness, rationality, openness or transparency, [and] efficiency' as 'crucial elements of the administrative law system'.[36]

Transparency in government is a democratic ideal, based on the notion that an informed citizenry is better able to participate in government; thus providing an obligation on government to provide public disclosure of information.[37] As the saying goes: 'sunlight is … the best of disinfectants'.[38]

In terms of government decision-making, it is desirable for persons affected by a decision to know *why* it was made, including access to the reasons for decisions and underpinning principles.[39]

However, the rise of automated decision-making in government has created significant challenges in terms of maintaining transparency of government decisions.[40] Automated decision-making can be opaque in two ways. The first is its invisibility; people often do not realise that they are interacting with the technology, and generally know little about the programs that are used to make decisions about them. The second is the complexity of its functioning. This leads to what is commonly known as the 'black box' problem, whereby it is possible to observe incoming data (input) and outgoing data (output) in algorithmic systems, but their internal operations are poorly understood. As highlighted by Oswald, incorporating an algorithm into decision-making 'may come with the risk of creating "substantial" or "genuine" doubt as to why decisions were made and what conclusions were reached'.[41]

Recommendation:

In order to enhance transparency, we recommend that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) be amended to explicitly expand section 13 to require AI to be designed in a manner that requires reasons for decisions to be captured by the automated system.

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[36] Administrative Review Council, *Automated Assistance in Administrative Decision-Making*, Report to the Attorney-General, Report No 46/2004, November 2004, 6 <www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/publications/report-46-html.aspx>.
[37] Daniel J Metcalfe, 'The History of Government Transparency' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.
[38] Louis D Brandeis, Other People's Money and How the Bankers Use It (F A Stokes, 1914) 92.
[39] Ibid 429-430.
[40] Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal* 1041; Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation: When Is a Decision a Decision? ' (2019) 26(1) *Australian Journal of Administrative Law* 21, 27-31.
[41] Marion Oswald, 'Algorithm-assisted Decision-making in the Public Sector: Framing the Issues using Administrative Law Rules Governing Discretionary Power' (2018) *Phil. Trans. R. Soc.* A 376 5 http://dx.doi.org/10.1098/rsta.2017.035 .

In addition, where machine learning is utilised to automate decisions, the ADJR Act could require accurate documentation of the decision logic, including the principles behind the machine learning model, training and testing processes; and a statement of reasons is logged for all predictions or decisions at the point in time that they are made. An equivalent provision could be included in section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth)

TERMS OF REFERENCE 3: THE ADMINISTRATIVE REVIEW COUNCIL

We recommend that the Administrative Review Council (ARC) be re-established. The ARC was created as part of the pivotal 1970s Kerr Committee reforms of Australian Administrative Law and was designed to be a high level administrative authority to supervise the administrative review system. We would argue that the need for such supervision remains significant today. In fact, the need for a body such as the ARC could be said to be enhanced due to the integrity challenges and other complexities raised by modern developments such as the use of technology in government decision-making.

It is significant that a number of jurists and academic commentators have also recommended that the ARC be re-established. These include former High Court justice, Michael Kirby,[42] Justice John Griffiths of the Federal Court of Australia (writing extra-judicially),[43] Justice Susan Kenny of the Federal Court of Australia (writing extra-judicially),[44] Professor George Williams[45] and leading Administrative Law scholar, Narelle Bedford.

As Bedford notes, the Kerr Committee recorded that 'fundamental to our system for the introduction of a proper system of administrative review, both on the law and on the merits, is a *continuously operating* Council…'[46] Bedford has drawn attention to the words 'continuously operating' noting that 'the permanence of the Council was a deliberate design feature of the ARC as initially conceived.'[47] Bedford concludes that:

> The loss of its overarching role has created a vast gap that neither the Attorney-General's Department nor the ALRC can possibly fill. The comparatively small amount of funding saved by the government continues to be disproportionate to the loss of specific administrative law expertise and advocacy. As government becomes more complex and the nature of decision-making evolves into new areas raising novel issues (such as COVID-19 restrictions and the expansion of automated decision-making), the need for an overarching, expert body increases rather than diminishes.[48]

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[42] Michael Kirby, 'The Decline and Fall of Australia's Law Reform Institutions – And the Prospects of Revival' (2017) 91 *Australian Law Journal* 841 at 843-45.

[43] Justice John Griffiths, 'Access to Administrative Justice' Griffiths (Speech, Australian Institute of Administrative Law National Conference, 20 July 2017) 25 at 35-36.

[44] Susan Kenny, 'The Administrative Review Council and Transformative Reform' in *Public Law in the Age of Statutes* (Federation Press, 2015). Her Honour notes that 'Without an effective ARC, one may anticipate greater fragmentation and more failures in the administrative law system, with the accompanying costs, delays, and other inefficiencies that these entail.'

[45] Professor Williams has noted that the ARC played an 'essential role' and said moving its independent functions to the Department was 'not an appropriate substitute': cited in 'Long-term legal body faces the axe in Federal budget', *Daily Telegraph* 11 May 2015: https://www.dailytelegraph.com.au/news/nsw/grafton/longterm-legal-body-faces-the-axe-in-federal-budget/news-story/b07d49c0d222d61f095a1c97e6e76ecd .

[46] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/ (emphasis added).

[47] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) <https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/>

[48] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-

We also agree with, and endorse, the comments on the ARC made by Appleby, Blayden, Bostock and Boughey from UNSW Law and Justice in their submission to this present Inquiry.[49] In particular, we endorse their comments about the need for the ARC's advice to be duly considered by government. We also confirm that they are correct in noting that policy failures such as Robodebt could be avoided if a body such as the ARC was able to set out best practices to guide policy formulation and government actions.[50]

Recommendation:
We recommend that the Administrative Review Council be re-established

council/. See also Narelle Bedford, Submission Bedford to Attorney General, *Statutory Review of the Amalgamated Administrative Appeals Tribunal* (24 August 2018) https://pure.bond.edu.au/ws/files/27564242/N_Bedford_Submission_Amalgamated_AAT_August_2018.pdf.

[49] Submission by G Appleby, L Blayden, C Bostock and J Boughey, Faculty of Law and Justice at UNSW to the Senate Legal and Constitutional Affairs Committee Inquiry: *The performance and integrity of Australia's administrative review system*, 23 November 2021, pp 16-18.

[50] Submission by G Appleby, L Blayden, C Bostock and J Boughey, Faculty of Law and Justice at UNSW to the Senate Legal and Constitutional Affairs Committee Inquiry: *The performance and integrity of Australia's administrative review system*, 23 November 2021, p 18: 'It is important that the ARC is not only reinstated, but that any advice it provides regarding best practices is heeded by government. Policy failures such as the one embodied by 'Robodebt' are not only wasteful of public money but potentially further deleterious to public trust in government. These failures often begin at the policy design stage. They can be avoided if steps are taken by the executive to ensure that identified best practices are complied with'.

TERMS OF REFERENCE 4: OTHER MATTERS

Reforms to Regulatory Oversight

Regulatory oversight of government activities is essential in a robust democracy to ensure that governmental action remains within legal boundaries.

We would suggest two main recommendations to reform the regulatory oversight within the Australian administrative law system:

- ***Strengthening the legislative framework of oversight bodies; and***
- ***Introducing a Robust Commonwealth Integrity Commission.***

1. Strengthening the Legislative Framework of Oversight Bodies

One way in which the demand for accountable government might be met is through oversight bodies, whose number and powers have grown rapidly in recent years. To enable them to perform their watchdog function more effectively, the integrity bodies should be granted a level of independence from the executive through a closer link to Parliament.

There should be a more coherent legislative framework for Commonwealth oversight bodies, including the Ombudsman, Auditor-General and Information Commissioner. In Canada and New Zealand, there is a well-articulated concept of the officer or agent of Parliament, where integrity bodies have a link to Parliament in term of appointments, budget-setting, and scrutiny.[51]

All oversight bodies should be provided with independence from executive interference, including institutional protections such as having statutory protections in terms of tenure and removal, as well as operational freedom such as the power to conduct 'own motion' investigations, and having a statutorily-protected budget to fulfil their mandate or budget approval processes through a parliamentary committee.[52]

There have been instances where integrity agencies have been deprived of funding to the extent that their ability to perform their functions have been impeded,[53] the most ignominious example being the Australian federal Information Commissioner being defunded in 2015 to the extent that he had to shut his office and work from home,[54] while the supporting Freedom of Information Commissioner position was left vacant.[55]

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[51] Paul G Thomas, 'The Past, Present and Future of the Officers of Parliament' (2003) 46(3) *Canadian Public Administration* 287, 288.
[52] See discussion in Yee-Fui Ng, 'Institutional Adaptation and the Administrative State' (2021) 44(3) *Melbourne University Law Review* 889, 902-3.
[53] Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455, 465.
[54] Richard Mulgan, 'The Slow Death of the Office of the Australian Information Commissioner', *The Canberra Times* (online, 26 August 2015) <http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>.
[55] SBS News, 'Govt to Leave FOI Commissioner Role Vacant' *SBS* (online, 18 October 2016) <https://www.sbs.com.au/news/govt-to-leave-foi-commissioner-role-vacant> .

Recommendation:
We recommend that oversight be provided with a coherent legislative framework that ensures independence from executive interference, including institutional protections such as having statutory protections in terms of tenure and removal, as well as operational freedom such as the power to conduct 'own motion' investigations, and having a statutorily-protected budget to fulfil their mandate or budget approval processes through a parliamentary committee.

2. Introducing a Robust Commonwealth Integrity Commission

To uncover and investigate allegations of corruption, a Commonwealth integrity commission modelled on NSW's Independent Commission Against Corruption (NSW ICAC) should be introduced. In this way, there will be more complete regulatory oversight over the public sector. All States have anti-corruption bodies, and the federal government is lagging behind in this crucial area. A federal integrity commission would boost and enhance the operation of independent statutory oversight bodies, such as the Ombudsman and Auditor-General.

There are concerns about the proposed model by the Commonwealth government, in terms of the threshold of investigation, lack of ability to conduct public hearings and inability to conduct own-motion investigations.[56] A weak model would mean that the Commonwealth Integrity Commission would fail to achieve its main aim of exposing corruption in the public sector.

Accordingly, we would recommend the Commonwealth Integrity Commission be modelled upon the NSW ICAC, which has exposed many instances of corruption in the public sector.

The need for a federal integrity commission is just as important as ever, with the federal government being plagued by multiple scandals involving the misuse of federal funds, such as the Western Sydney airport deal,[57] the ASIC chair's tax advice bill,[58] the Angus Taylor

[56] Yee-Fui Ng, 'As the Government Drags Its Heels, a Better Model for a Federal Integrity Commission Has Emerged', *The Conversation* (Web Page, 26 October 2020) <https://theconversation.com/as-the-government-drags-its-heels-a-better-model-for-a-federal-integrity-commission-has-emerged-148796>; Yee-Fui Ng, 'The 'Sports Rorts' Affair Shows the Need for a Proper Federal ICAC – With Teeth', *The Conversation* (Web Page, 4 February 2020) <https://theconversation.com/the-sports-rorts-affair-shows-the-need-for-a-proper-federal-icac-with-teeth-122800>; Yee-Fui Ng, 'Government's Commonwealth Integrity Commission Will Not Stamp Out Public Sector Corruption — Here's Why', *The Conversation* (Web Page, 25 November 2019) <https://theconversation.com/governments-commonwealth-integrity-commission-will-not-stamp-out-public-sector-corruption-heres-why-127502>.

[57] Katharine Murphy, ''Senator, I Agree': $30m Western Sydney Airport Land Deal 'Looks Like' a Cover-Up, Says Infrastructure Chief', *The Guardian* (online, 19 October 2020) <https://www.theguardian.com/australia-news/2020/oct/19/senator-i-agree-30m-western-sydney-airport-land-deal-looks-like-a-cover-up-says-infrastructure-chief>.

[58] Gareth Hutchens, Georgia Hitch and Matthew Doran, 'ASIC Chair James Shipton Steps Aside Pending Outcome of Investigation into $118,000 Tax Advice Bill' *ABC News* (online, 23 October 2020) <https://www.abc.net.au/news/2020-10-23/investigation-asic-launched-chair-james-shipton-stepping-aside/12807278>.

water buyback scheme[59] and the "sports rorts" affair.[60] A strong — and independent — integrity commission would be able to investigate such issues thoroughly.

Recommendation:
We recommend that the Commonwealth Integrity Commission be modelled upon the New South Wales Independent Commission Against Corruption (ICAC) in terms of threshold of investigation, ability to conduct public hearings and own motion investigation.

Contact details for Submission:

We consent to this submission being published on the Committee's website and would be happy to speak with the Committee further regarding any aspect of it.

[59] Anne Davies, 'Not a Drop of Water After Government Spends $80m on Rights from Agribusiness' *The Guardian* (online, 31 October 2019) <https://www.theguardian.com/australia-news/2019/oct/31/not-a-drop-of-water-after-government-spends-80m-on-rights-from-agribusiness>.
[60] Yee-Fui Ng, 'The 'Sports Rorts' Affair Shows the Need for a Proper Federal ICAC – With Teeth', *The Conversation* (Web Page, 4 February 2020) <https://theconversation.com/the-sports-rorts-affair-shows-the-need-for-a-proper-federal-icac-with-teeth-122800>.