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

The performance and integrity of Australia's administrative review system

This submission responds to the invitation to contribute to the inquiry by the Legal & Constitutional Affairs References Committee into the performance and integrity of Australia's administrative review system.

Summary

The national administrative review system is significant in relation to the accountability of public administration, improving the performance of government agencies and strengthening the legitimacy of government in an environment where authoritative independent studies indicate many Australians are concerned about corruption.

The submission addresses the inquiry Terms of Reference as follows –

- operation of the Administrative Appeals Tribunal (AAT) can be improved by restricting AAT membership to people with legal qualifications
- perceptions among legal practitioners and the wider community that AAT appointments are on a partisan 'jobs for mates' basis can be addressed through selection for people for the Tribunal being made by an independent body on the basis of skill, not political affiliation
- drawing on recommendations by former High Court Justice Ian Callinan in his 2019 *Statutory Review of the Tribunals Amalgamation Act 2015* report, the Administrative Review Council should be re-established and provided with support sufficient for effective conduct of its duties.

Basis

The submission reflects teaching and research as a law academic over the past fifteen years regarding administrative law, accountability and Australian community engagement with political processes.

The submission does not represent what would be reasonably construed as a conflict of interest.

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The following paragraphs address the Terms of Reference.

The Administrative Appeals Tribunal, including the selection process for members

An inconvenient truth underlies questions about the national administrative appeals system and by extension the state/territory administrative appeals regimes. That truth is the increasing community distrust of both government and political processes, with independent studies reporting that many people – irrespective of political affiliation and location – believe that public administration is being run for the benefit of a small number of stakeholders, that being a 'mate' of those in power is more important than merit and that Governments are indifferent to corruption or behaviours that most people consider to be reprehensible. Public disquiet is deepened by ministerial disregard of accountability, a disregard that on occasion has rightly resulted in condemnation by Australian courts.

One basis for a growing 'democratic deficit' (a disengagement that results in the sort of civil unrest and systemic disregard of law evident in the United States over the past two years) is the perception that the Administrative Appeals Tribunal is politicised – an entity in which people are appointed on the basis of political affiliation (and cease to hold positions on the basis of affiliation) rather than expertise.

That problem can be addressed in two ways.

The first is restricting AAT membership to people who have legal qualifications (for example a LLB degree) and who meet a 'fit and proper person' test (for example not excluded on the basis of bankruptcy or a serious criminal offence). The Tribunal is not a court. As a body that provides administrative review of matters of concern to both Australians and prospective Australians it does however need to be independent and rely on skill as the basis for decision-making that is timely, just and therefore respected.

The second is that the AAT should be depoliticised by transferring selection of appointees from a minister to an independent body that operates on a non-partisan basis. Proposals for what might otherwise be characterised as a judicial appointments commission – selecting judges and tribunal members on the basis of merit rather than an expectation that the appointee will produce decisions favoured by a Minister – are not new. They are not radical. They do not deprive the Attorney-General or Prime Minister of authority; they do not take responsibility from the Executive.

Such a selection body might comprise former judges and distinguished members of the community from outside the legal profession, assessing applicants on the basis of the expertise noted above and – ensuring independence – publishing a list of those people whose appointment is recommended. A Government might be expected to fill every vacant position on the AAT on that basis, with rejection of a nominated person raising questions about bias.

The process would involve expenditure. Such expenditure is appropriate. It is consistent with funding of courts, tribunals and the national legislature: in essence it is one of the legitimate costs of a liberal democracy and a price worth paying for the legitimacy of administrative review.

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

The preceding comments reflect the importance of transparency in public administration, something imperilled by the Government's amnesia regarding past Open Government commitments and the weakness of the national Freedom of Information regime. That regime is vitiated by underfunding of FOI units on an agency by agency basis and the ongoing incapacitation of the Office of the Australian Information Commissioner, an entity that in practice is frequently disregarded by both the Government and individual agencies. Disregard is unsurprising given instances such as a recent Public Service Commissioner describing FOI as 'pernicious' and ignoring the Objects in the FOI statute.

It is exacerbated by the Government's tacit punishment, through ongoing budget cuts, of the Australian National Audit Office for the grave sin of bringing bad news about policy failures and administrative inadequacy. Those failures have a cost for national productivity. More viscerally they have a cost for individuals and businesses who are affected by egregious bungles such as RoboDebt, bungles that are frequently blithely denied by Ministers and have to be fought by people without the resources available to a Minister.

The comments also reflect community concern regarding the accountability of both the Executive (evident in the Government's resistance to calls from former judges, business leaders, the legal profession and others for establishment of a well-equipped independent commission against corruption) and accountability by government agencies to the national parliament.

Action to enhance the integrity and effectiveness of administrative review is one aspect of an overdue broader reform of public administration. Last year in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354 a distinguished judge queried ministerial disregard of the justice system, stating

> A party to a proceeding in this Court, be it a Minister of the Crown or otherwise, cannot fail to comply with findings and orders made by the Tribunal or this Court simply because he "does not like" them. Decisions and orders or directions of the Tribunal or a court, made in accordance with law, are to be complied with. The Minister cannot unilaterally place himself above the law

The community at large is more likely to trust Governments if the administrative review system is seen to be fair (rather than 'jobs for the boys'). Trust is more likely if MPs are seen by people outside the 'Canberra Bubble' (or Macquarie Street and Spring Street 'Bubbles') to swiftly and meaningfully condemn abuses that range from financial conflicts of interest and egregious pork-barrelling through to mystery million dollar blind trusts and litigation that seeks to squash personally inconvenient but legitimate criticism.

Whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established

In his 2019 *Statutory Review of the Tribunals Amalgamation Act 2015* report former High Court Justice Ian Callinan recommended that the Administrative Review Council should be re-established and provided with support sufficient for effective conduct of its duties.

That report stated

> The AAT Act clearly assumes the existence of the ARC. It is the duty of the Executive under s 61 of the Constitution to execute and maintain the laws of the Commonwealth. … At the first meeting of the ARC on the 15th of December 1976, the Attorney-General, then Mr Robert Ellicott QC, said that the role of the ARC was "… to ensure that our system of administrative review is as effective and significant in its

> protection of the citizen as it can be". The work done by the ARC in the preceding 40 years was useful. There is, in my opinion, a present need for its reinstatement to ensure the implementation of such measures as the Executive and the Parliament may adopt for reform of the AAT in furtherance of the TA Act.

The report highlighted the value of the ARC as an independent reviewer of the AAT, in contrast to officials in a department reviewing a tribunal that on occasion rejects the decision-making and condemns the policy interpretation of their peers. Reinstatement of the ARC will require funding. That funding is significantly less than expenditure on initiatives that Ministers consider to be unremarkable but properly attract scathing criticism from the ANAO.