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Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By e-mail: legcon.sen@aph.gov.au

Re: ***Inquiry into the performance and integrity of Australia's administrative review system***

Dear Secretary

Thank you for the opportunity to make a submission to this Committee's inquiry into the performance and integrity of Australia's administrative review system.

We make this submission in our capacity as academic staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of Melbourne Law School by **Professor Kristen Rundle** and **Associate Professor Jennifer Beard**.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

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Introduction

We welcome the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee ('the Committee') inquiry into the performance and integrity of Australia's administrative review system ('the Inquiry'). We do so on behalf of Melbourne Law School at the University of Melbourne.

Structure of this submission

Corresponding with points (a), (b) and (c) of the Inquiry's Terms of Reference, our submission is structured into three Parts:

> **Part A:** The performance and integrity of the Administrative Appeals Tribunal, including the selection process for members
>
> **Part B:** The importance of transparency and parliamentary accountability in the context of the performance and integrity of Australia's administrative review system
>
> **Part C:** Arguments in support of re-establishing the Administrative Review Council

Part A. The performance and integrity of the Administrative Appeals Tribunal, including the selection process for members

1. Introduction and background

The AAT is established under the *Administrative Appeals Tribunal Act 1975* (*AAT Act*). The functions performed by AAT are well known today. The AAT conducts merits review of government decisions. Merits review is the process whereby an administrative decision of the government is reviewed by a person or panel of persons who consider the facts, law and policy aspects of the original decision to arrive at the correct and preferable decision by affirming, varying or setting aside the original decision. In general, the reviewing person may only exercise the powers and discretions that were available to the original decision maker.[1] The overall objective of merits review is to ensure that people affected by a diverse range of decisions have access to a relatively fair and accessible mechanism for having the decisions that affect them reconsidered so that the correct and preferable decision is made.[2]

Merits review was not always woven into the fabric of Australia's administrative law landscape. The AAT was a world first experiment in merits review that began in the late 1970s and grew quickly into a national asset. The great innovation was and remains that the AAT, along with other merits review tribunals, offered an avenue for the review of decisions on the merits; not merely to decide whether administrative decisions under review are

[1] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995).
[2] See Australian Public Service Commission, Merit and Transparency: Merit-based Selection of APS Agency Heads and APS Statutory Office Holders (4th ed, 2012)

infected by legal error but to make the correct or preferable decision on the material. Merits review is a form of executive accountability that enhances openness, good government and public trust in public administration.[3] But because the AAT is a creature of statute, its functions can be easily degraded structurally and culturally.

For too long the value of the AAT's contribution has been affected by a range of perceptions about its lack of independence including perceptions about the arrangements for the appointment of AAT members.[4] These perceptions damage the credibility of the AAT and Australian government.[5] We submit that these perceptions are best managed by means of legislative amendments to the *AAT Act* that establish an open, competitive, merits-based appointment process for member appointment. The performance and integrity of the AAT, including the selection process for members, is essential to the maintenance of public trust and confidence in the decision-making of the Tribunal. We urge this Committee to ensure that the AAT remains a bold, independent national asset.

2. The scope of the AAT's review powers

The *AAT Act* and the *Administrative Appeals Tribunal Regulation 2015* set out most of the AAT's powers and procedures. The AAT's powers and procedures concerning the review of migration or refugee decisions are found in the *Migration Act 1958* and review of decisions about social security, family assistance, child support, paid parental leave and student assistance are set out in around 6 separate statutes.[6] Overall, the AAT reviews decisions made under more than 400 Commonwealth Acts and legislative instruments and a small number of Norfolk Island laws.[7] In some cases, these reviews follow an internal review of the primary decision or review by a specialist review body like the Veterans' Review Board.[8] Regardless of which jurisdiction the AAT is exercising, in carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that:

(a) is accessible; and

(b) is fair, just, economical, informal and quick; and

(c) is proportionate to the importance and complexity of the matter; and

(d) promotes public trust and confidence in the decision-making of the Tribunal.[9]

3. Who constitutes the AAT?

[3] Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2019), 308.
[4] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 2.31.
[5] Ibid.
[6] https://www.aat.gov.au/AAT/media/AAT/Files/Lists/JurisdictionListNorfolkIsland1September2019.pdf and https://www.aat.gov.au/AAT/media/AAT/Files/Lists/JurisdictionListNorfolkIsland1September2019.pdf
[7] https://www.aat.gov.au/about-the-aat
[8] Ibid.
[9] *AAT Act*, s

The President of the AAT must be a Judge of the Federal Court of Australia.[10] A Deputy President must be a Judge of the Federal Court of Australia or the Federal Circuit and Family Court of Australia or enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory for at least 5 years; or, in the opinion of the Governor-General, have special knowledge or skills relevant to the duties of a Deputy President.[11] We submit that the appointment process and eligibility requirements for President and Deputy Presidents are appropriate. Otherwise, the membership consists of persons appointed as: a senior member or a member.[12] We submit that the current selection process for senior members and members requires reform.

4. Eligibility based on merit – section 7(3) of the *AAT Act*

The AAT is only as effective as its membership. To be effective, Tribunal members must be capable of performing the review function for which they are selected. The Administrative Review Council (ARC) has previously recommended that tribunals should be comprised of members with a wide range of skills and experience.[13] Section 7(3) of the *AAT Act* states that a person must not be appointed as a senior member or other member unless the person:

> *(a) is enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years; or*
>
> *(b) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a senior member or member.[14]*

Section 7(3) aims to ensure that appointments to the AAT are based on merit. Merit means that an appointee possesses the knowledge, skills and personal attributes required to perform the duties of the position.[15] Many have advocated for the repeal of section 7(3)(b) of the *AAT Act* on the basis that it is being abused by the executive as a means of political patronage or because the nature of the work of the AAT is such that members should be lawyers with few exceptions.[16] We submit that the repeal of s 7(3)(b) will not prevent political patronage or address threats to independence where irrelevant considerations or improper purposes are taken into account in appointment decisions. The repeal of s 7(3)(b) enables the appointment of persons with special knowledge or skills relevant to the duties of a senior member or member. Whilst acknowledging that much of the work performed by AAT members requires a high level of legal skill and experience, we submit that the repeal of

[10] *AAT Act* s 7(1).
[11] *AAT Act*, s 7(2). A member who is a Judge ceases to hold office as a member if he or she ceases to be a Judge.
[12] *AAT Act*, s 6.
[13] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995) (Recommendation 32).
[14] *AAT Act*, s 7(3). A member holds office for a maximum of 7 years, on such terms and conditions as are determined by the Minister in writing, but is eligible for re-appointment.
[15] COAT, Tribunal Independence in Appointments-Best Practice Guide (2015).
[16] In October 2019, for example, there were 234 appointments made under s 7(3)(a) and 183 (42%) appointments made under s 7(3)(b).

s 7(3)(b) would: weaken the AAT's performance of its diverse functions and jurisdictions and threaten the capacity of the appointment process to ensure selection is on the basis of merit.

It must not be forgotten that the overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable.[17] As previously noted by the ARC in respect of all merits review tribunals:

> *In carrying out merits review, Tribunals have to consider both the lawfulness and the merits of the decisions they are reviewing. While legal skills are clearly useful in respect of the first component, they may not be a relevant qualification the merits component. It is generally accepted that merits review benefits from the wider range of skills and experience that a diverse membership makes available*.[18]

We acknowledge that legal practice skills and experience are vital to a properly functioning tribunal, because lawyers have a deep conceptual and practical understanding of independence and adjudication.[19] Legal skills and experience may be a core competency but other professional skills and expertise in accountancy, aviation, cultural heritage, environmental science, indigenous laws and culture, health and veteran affairs are also core to some of the AAT's jurisdictions.[20] As the ARC has acknowledged:

> *4.13. … it is broadly agreed that tribunal members should have the capacity to interpret legislation, to understand legal arguments, and should know when and where to go for expert professional advice. Also, because of the ultimate supervision provided by the courts through judicial review, all members need to be well acquainted with the requirements of procedural fairness. The fact that tribunals are expressly relieved from the requirement to comply with the rules of evidence does not mean that members need not be aware of the reasons for the development and application of those rules. This understanding will help members to understand when and why, in specific cases, evidence should be treated particularly carefully.*
>
> *4.14. However, these skills are not exclusively correlated with formal legal qualifications. Many members without legal qualifications, particularly if they are familiar with a particular area of decision-making, will already possess these capacities, and others can be trained. Tribunal members are also generally able to access specialised advice from their Tribunal's legal or research staff, as well as through informal liaison with other members.*[21]

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[17] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 2.9.
[18] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 4.10.
[19] In its inquiry of merits review tribunals in 1995, the ARC lists skills and experience that are considered essential or desirable: see Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 4.12.
[20] https://www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf
[21] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 4.13 and 4.14.

We submit further that leadership within the AAT and proper resourcing are important factors here. The President, Deputy Presidents and Senior Members are leaders within the AAT. They ensure the integrity of the Tribunal's functions and should act as guardians of the AAT's capacity to remain independent, and perform its functions at an exemplary level. These AAT officers can and do demonstrate leadership by hearing and deciding cases of greater complexity and by making a significant contribution to the AAT's jurisprudence in their fields of expertise. These leaders can and do also demonstrate leadership through the highest standards of decision-making, including by dealing with cases remitted from the courts. They also act as mentors and exemplary decision-makers and should assume a leadership role in making available effective training courses and materials and professional development activities to ensure members develop the appropriate skills in interpreting legislation, understand procedural fairness requirements and the principles underpinning the laws of evidence. In short, we submit, these leaders bring with them into the AAT recognised and extensive legal ethics and practice experience as well as legal skill. We acknowledge the importance of this professionalism, experience and skill. Accordingly, **if enrolment as a legal practitioner for at least 5 years is to be required of anyone, it should be Deputy Presidents and Senior members, noting that the President must be a Judge. We submit that the restriction should not apply to members.** Whilst it is expected that almost all members will be expected to be experienced, enrolled legal practitioners, the ordinary membership should remain open to diversity in terms of professional capacities. We submit **that members who are not enrolled as legal practitioners may be appointed, but only if they demonstrate expertise in an area of government administration subject to the AAT's jurisdiction**. For example, expertise in accountancy, aviation or cultural heritage. We submit that over time an open and well-structured recruitment process can ensure a well-balanced, high performing membership.[22]

5. The appointment process

We submit that the preferred means of ensuring that AAT members bring the same quality of independent thought and decision-making to their task as do judges is to ensure that the process of their appointment is open and transparent.[23] In its current form, the *AAT Act* does not set out a process of appointing members that ensures that the merit of persons seeking appointment is assessed comparatively, in an open appointment process, against other applicants for the same position. We submit that it should.

The appointment of members determines the composition of the AAT's membership and has the potential to affect the interests of members in 'a direct, individual and concrete way'.[24] If the power is exercised improperly, the independence of the AAT may be impaired. We note the concern raised previously by the Council of Australasian Tribunals (COAT) that the risk is greatest for tribunals such as the AAT because it reviews government decisions

[22] Cf. Ian D.F. Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, [10.34] and [10.35]. See also Administrative Review Council, Report No. 29 (10 September 1987) at [87].
[23] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 4.1.
[24] COAT, Tribunal Independence in Appointments-Best Practice Guide (2015).

and adjudicates disputes in which a Minister or government body is a party or has a policy interest in the outcome.[25]

6. The need for an open, competitive process

The *AAT Act* has very little to say with respect to member appointments. Section 6 of the Act states that members shall be appointed by the Governor-General. The actual process of appointment otherwise remains opaque. Members of the public are left to glean how members are appointed from Hansard debates or the media. What is clear is that appointment processes have differed over time and within the same round of appointments.[26] When the process of appointment is conducted openly by calling for expressions of interest, applicants must address the following key criteria:

- Conducting hearings and other Tribunal proceedings
- Decision-making and reasoning
- Writing and communication skills
- Independence, integrity and collegiality
- Productivity, diligence and resilience.

Persons expressing an interest in appointment to the levels of Deputy President and Senior Member must also demonstrate the additional competency of leadership. Not all members are appointed having lodged an expression of interest. The precise process concerning the nomination and appointment of many members remains a mystery.[27]

Current calls for expressions of interest specify criteria for the appointment of its members, which are based on competency for the performance of the duties of office. However, because the process of appointment is neither formalised nor open and competitive, it is reasonable to assume that not all members appointed by the Governor-General are competent. This is unacceptable in a liberal democracy such as Australia as it threatens the performance and integrity of Australia's administrative review system and the vitality of principles such as transparency, equality and fairness**.** The public need to be confident that all members appointed to the AAT are appointed from a competitive field on the basis that they meet key assessment criteria. Accordingly, it is our submission that an adequate merit based recruitment process requires that *all* applicants be ranked against the same criteria to assess their relative merit. As stated above, amending s 7 of the *AAT Act* to limit membership to enrolled legal practitioners will not address this lack of accountability and transparency. We submit that **the lack of accountability and transparency is caused by the**

[25] Ibid.
[26] Hansard: Legal & Constitutional Affairs Legislation Committee, 22/10/2019 [link]
[27] According to Hansard records, the process of appointments in specific cases has been requested under freedom of information processes but has not been released. Hansard: Legal & Constitutional Affairs Legislation Committee, 03/03/2020 [link]

lack of an open, competitive, merits-based appointment process.[28] Such a process would strengthen public confidence in the functions of the AAT.

We therefore **urge the Committee to recommend** that a process of appointment is established that requires the Governor-General, acting on the advice of the Executive Council, **to appoint members who are best qualified for the position by their skills, knowledge and personal attributes**. Such a process must be merits-based and transparent, so that irrelevant considerations or improper purposes are not, or are not perceived to have been, taken into account in appointment decisions. We submit that the best way to do this is by reforms to the *AAT Act*, which introduce a structured and transparent process of recruitment, assessment and appointment.

7. A better recruitment process

We submit that a more appropriate process would be to advertise appointments several months before current terms of office expire. These positions should be advertised in a range of media, the APSjobs website and professional circles to capture the attention of underrepresented groups in the AAT's membership. We submit that an open recruitment process such as this would enhance public confidence in the independence of the AAT and its functions.

8. The executive should not be involved in the initial recruitment process

We agree with previous recommendations of expert bodies that the executive should not be involved in the initial recruitment process as this has the potential to damage the independence of the AAT and the integrity of government. **We strongly submit that *appointment by nomination should not occur at this stage*.** Instead, an explicit provision should be introduced into the *AAT Act* for the establishment of an **assessment panel**. Any such statutory amendment should ensure that these panels have an appropriate gender balance and at a minimum include the AAT President or delegate, a representative from the Public Service Commission to ensure that assessment of applicants is based on merit and a member of a professional, stakeholder or community body. The panel may also include a Deputy President or Senior Member required to represent relevant AAT divisions or jurisdictions. This panel should convene when a recruitment process commences and applications are received. With support from the Attorney-General's department, we submit that this panel should be responsible for shortlisting applicants for initial and further assessment by the panel at interview. Shortlisted candidates must be assessed by this panel against statutory criteria (see below). The panel should have the power to produce a ranked shortlist of suitable applicants that either exceeds the number of positions to be filled, or fills the number of available positions. In the former instance, responsibility for recommending proposed appointments to the Governor-General would be given to the Attorney-General. In the latter instance, the list of proposed appointees would be given

[28] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 4.35; COAT, Tribunal Independence in Appointments-Best Practice Guide (2015).

directly to the Governor-General and the Governor-General would then appoint the persons on that list.

9. An open and merits-based assessment

We submit all applicants should undergo the same open, merits-based assessment, including existing members applying for re-appointment.

As we submit above, rather than repealing and narrowing section 7(3) of the *AAT Act* to require all members to be experienced and enrolled legal practitioners, we suggest amending s 7(3) to ensure that all AAT members can demonstrate specific core competencies such as those listed above, as well as specialist expertise in any of the respective jurisdictions within the AAT (eg. migration, taxation, social security, etc) if they do not possess the legal practice experience currently required by s 7(3)(a) of the *AAT Act*. As submitted above, an open, competitive process does not require that all members be enrolled as legal practitioners. An open, competitive process enables the AAT to recruit a broad-based body of members to ensure that it can effectively perform its functions free from undue influence, and begin to drive down its back-log of cases to meet its objective of providing a mechanism of review that is fair, just, informal and quick.

10. Relevant considerations for the assessment panel or the Attorney-General

We also submit that **considerations relevant to the assessment of applicants should be explicitly stated in the *AAT Act***. These considerations could be relevant considerations for the assessment panel or for the Attorney General if the panel provides the Minister with a ranked shortlist of suitable applicants that exceeds the number of positions to be filled. In addition to good character and merit (see specific core competencies above), gender balance and social and cultural diversity including the inclusion of indigenous persons should be relevant considerations particularly where there are multiple applicants of equal merit.[29] A diverse membership will ensure that the adjudication undertaken by the AAT is performed impartially and free of any improper influence.[30] Organisations who employ a

[29] Our diversity and inclusion strategies, including the Commonwealth Aboriginal and Torres Strait Islander Workforce Strategy 2020–24, the Australian Public Service Disability Employment Strategy 2020–2025 and the Gender Equality Strategy should shape the AAT's approach to recruitment.

[30] 'Impartiality is a state of mind, while independence refers to the objective conditions which enabled Tribunal is to adjudicate impartially' COAT, Tribunal Independence in Appointments-Best Practice Guide (2015).

diverse workforce benefit from the value of diversity of thought, perspective, skills, experience and background. [31] Innovation has been found to increase by 20%.[32]

11. Irrelevant considerations for assessment

We support previous recommendations of expert bodies such as the ARC and COAT that **political patronage and interests are irrelevant considerations** in terms of merit.[33] The *AAT Act* should be amended to provide that a person may not be appointed as a member of the AAT unless that person has been recommended to the Attorney-General by an assessment panel, which should also be established under the *AAT Act* (see above).[34]

12. Conclusion

The AAT was established as an external merits review tribunal to ensure that its decisions are made, and are seen to be made, independently from the government agencies whose decisions it reviews. According to the ARC, 'independence is an attribute which can contribute to the overall objective of the merits review system by making it fairer and more credible, and by making government decision-makers more accountable'.[35] **Independence and impartiality** ensure that the AAT fulfils its functions of providing a mechanism of review that is fair and just and which promotes public trust and confidence in its decision-making.[36] Independence is also one of the **8 areas of measurement of tribunal excellence** developed under the Council of Australasian Tribunal's International Framework for Tribunal Excellence (April 2014). The Framework defines independence as 'the degree of separation from the Executive'.[37] An independent, diverse, high-quality membership is critical to fostering an effective and future-ready tribunal able to serve the Australian public. Appropriate appointment processes are key to ensuring that the AAT recruits, develops and retains a

[31] Erika Rackley and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 284; Juliet Bourke and Bernadette Dillon, *Only skin deep? Re-examining the business case for diversity*, Deloitte, 2011; Juliet Bourke and Bernadette Dillon, *Waiter, is that inclusion in my soup? A new recipe to improve business performance*, Deloitte and the Victorian Equal Opportunity and Human Rights Commission, 2012; Juliet Bourke and Bernadette Dillon, *Fast forward: Living in a brave new world of diversity*, Chartered Accountants Australia and New Zealand, 2015; Juliet Bourke, *Which Two Heads Are Better Than One? How Diverse Teams Create Breakthrough Ideas and Make Smarter Decisions* (Australian Institute of Company Directors, 2016); Juliet Bourke and Bernadette Dillon, *The six signature traits of inclusive leadership: Thriving in a diverse new world*, Deloitte University Press, April 14, 2016; Juliet Bourke et al., *Research summary: Toward gender parity: Women on Boards initiative,* Deloitte, 2016; Juliet Bourke et al., *Missing out: The business case for customer diversity,* Deloitte and the Australian Human Rights Commission, 2017.

[32] Juliet Bourke, 'Which Two Heads Are Better Than One?' (Australian Institute of Company Directors, 2016)

[33] As highlighted in the Callinan Report, 'Political engagement, either as a politician or an employee of a politician, is no more a disqualification for office than employment as a public servant'. Ian D.F. Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, [10.31].

[34] See Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), (Recommendations 33, 34, 35 and 36); COAT, Tribunal Independence in Appointments-Best Practice Guide (2014) Part D.

[35] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunal's, Report No 39 (1995), 2.14.

[36] Administrative Appeals Tribunal Act 1975 s 2A(b) and (d).

[37] COAT, International Framework for Tribunal Excellence (April 2014), 8.

diverse and inclusive, fair and effective, high-performing membership with a strong culture of integrity.

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

1. Introduction and background

One of the key functions the Australian Parliament is to keep a check on the work of the government. Parliament therefore plays an important role in ensuring the performance and integrity of Australia's administrative review system including the AAT and the selection process for its members. Examples include this inquiry by the Senate Standing Committees on Legal and Constitutional Affairs; the Inquiry by the same Committee into the Administrative Appeals Tribunal Amendment Bill 2004; inviting the AAT and other Commonwealth tribunals to participate in Senate estimates hearings and by maintaining an ongoing watch over AAT and other tribunal decision making and by questioning the government during question time about the performance and integrity of Australia's administrative review system in both houses of Parliament. Government ministers' may rely on their officials to draft answers to parliamentary questions, or to advise them during the debate on legislation in the parliament or in responding to an order by one of the houses to produce documents. The Auditor-General for Australia, as an independent officer of the Parliament with responsibility under the *Auditor-General Act 1997* for auditing Commonwealth entities and reporting to the Australian Parliament, also has a role to play.

2. Access to full, accurate and up-to-date information is vital

These Parliamentary accountability mechanisms depend on the provision and receipt of full, accurate and up-to-date information. Currently information is onerous to access or collate. Members of Parliament have called for increased transparency through a 'national integrity watchdog'.[38]

We submit that the *AAT Act* be amended to explicitly require **additional annual reporting requirements to promote transparency around the appointment and remuneration of AAT office holders**, including the President, Deputy Presidents, Senior Members and members. In addition, the performance and integrity of Australia's administrative review system would benefit from a clear set of guidelines around the publication in annual reports of how and why such information is to be reported. This information, which could include information on the appointment of persons to tribunal offices, the actual remuneration paid to all office holders whether judicial or not, part time or fulltime, and the method of calculating that remuneration for part time or irregular work would assist Parliament, other accountability agencies and the public to annually scrutinise the review system. Published guidelines could also suggest other information that might assist Parliament and other accountability agencies to assess the continued integrity and performance of the system. Such information would also be useful to assessment panels (see above), if created, and could be read in combination with information gathered during the recruitment and assessment process to provide deep and longitudinal analyses of appointment practices and outcomes as well as year to year performance.

[38] Hansard: Elizabeth Coker: Federation Chamber – Constituency Statements – Commonwealth Integrity Commission, 28/10/2020 [Here]

We submit that the *AAT Act* should be amended to require annual reporting of information on the appointment of persons to tribunal offices, the actual remuneration paid to all office holders whether judicial or not, part time or fulltime, and the method of calculating that remuneration for part time or irregular work. Guidelines could also suggest other information that might assist Parliament and other accountability agencies to assess the continued integrity and performance of the system.

Part C: Arguments in support of re-establishing the Administrative Review Council

The establishment of the Administrative Review Council (ARC) was a critical piece of the 1970s New Administrative Law package. In addition to playing a companion role to the establishment of the AAT, particularly in relation to advising on the creation of merits review jurisdiction for the AAT across a wide range of statutory regimes,[39] the ARC was assigned a wider oversight role with respect to the performance and integrity of Australia's administrative law and administrative review system as a whole. With targeted and high level expertise in its prescribed membership,[40] independence from any other government agency, and freedom from political influence, from its inception the ARC was poised to play a critical part in ensuring the continuing integrity, efficacy and responsiveness of Australia's administrative review system.

The events that culminated in the ARC's functional abolition in 2015 as part of the Government's 'Smaller Government' reform program are well documented.[41] We do not propose to re-examine that history here, except to add that the coincidence of the functional abolition of the ARC and the commencement of questionable **AAT appointment practices** (addressed in **Part A** of this submission) is noteworthy.

The purpose of this Part of our submission is to elaborate **other reasons why the ARC needs to be re-established,** and why indications from recent and current administrative practice make it urgent to do so.

We make this submission on five grounds: **first**, that the ARC's unique role is not performed elsewhere; **second**, that the ARC was a crucial actor in attending to the individual's experience of administrative power; and **third**, that the ARC made a critical contribution in responding to and assessing the implications of new developments in administration. We also, **fourth**, speculate on how the ARC might have or might respond to some of the more controversial instances of government practice , and **fifth**, on how a re-established ARC might work in the future.

1. **The ARC's unique role is not performed elsewhere**

[39] See especially section 51, *AAT Act.*
[40] Section 49, *AAT Act*.
[41] We recommend Narelle Bedford's account of each of these points: https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/

Upon its functional abolition in 2015, the ARC's functions were 'consolidated into' the Attorney-General's Department (AGD). An inquiry made by one of the authors of this submission to the Administrative Law Section of the AGD as to what exactly this has meant returned the reply that the Council's advisory functions are now performed by the AGD as part of that department's responsibility for providing advice to the Attorney-General on all aspects of Commonwealth administrative law.[42] There is however no publicly available evidence to indicate that the AGD has performed any of the ARC's functions since its effective abolition.

(a) A different role to other actors

The notion that the ARC's statutorily required functions could be 'consolidated' into the AGD is based on the explicit or implicit assumption that those functions can be performed by others.[43]

We submit that the idea that the specific and unique functions of the ARC can be performed by other entities is completely misplaced. To begin, the ARC is the only entity uniquely charged with the function of advising the Attorney-General on **the operation and integrity of the administrative law system as a whole**. Its statutory functions are not replicated in those assigned to other entities. It was and by statute remains a standing Council dedicated solely to overseeing and ensuring the efficacy and responsiveness of Australia's administrative law system.

(b) A unique composition

The **composition** of the ARC is itself an indicator of how its role cannot be performed by other existing entities of government. In order to be an effective and responsive oversight body for Australia's administrative law system, the ARC was designed to be a forum in which key participants in the administrative law system and other parliamentary officers such as the Australian Law Reform Commission (ALRC) and the Australian Human Rights Commission (AHRC) could learn from each other with a view to the continuing efficacy, responsiveness and integrity of the system as a whole.[44] The additional requirement in 1999 to include persons with direct experience of being the subject of government decision-making in the membership of the Council demonstrated the strength of previous political commitment to the performance and integrity of the federal administrative law system, as assessed from a range of perspectives.

(c) Own motion investigations

A compelling indication of the ARC's unique contribution to Australia's administrative law system and public benefit generally is the breadth, depth and value of its **own motion**

[42] Email exchange initiated by Professor Kristen Rundle with the Administrative Law Section of the AGD, 13-17 August 2021.
[43] As well as the AGD, it was also suggested that the ARC's functions might be performed by the Australian Law Reform Commission. For a discussion of these points, see Narelle Bedford's helpful analysis at: https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/
[44] The President of the ALRC and the President of the AHRC are both mandated members of the ARC under section 49 *AAT Act*.

investigations. Of the 50 reports published by the ARC over the course of its operation, **28 were own-motion** while 22 were the result of referrals from the Attorney-General. Inquiries arising from Attorney-General's referrals have an observably different focus to those initiated at the Council's own motion: for example, the former were more likely to focus on the effectiveness of merits review and judicial review mechanisms. This suggests that some of the most important – and innovative – contributions of the ARC were initiated by the ARC itself.

We have provided **a table of the ARC's own motion inquiries** in **Appendix A** to this submission. Even a brief review of these own motion inquiries reveals that the ARC consistently turned its attention to sites within the administrative law system that needed fine-tuning or more substantive reform in order to operate effectively, from the perspective of those responsible for the relevant administrative regime as much as for those who interacted with it. We return to two of those important own motion reports in section 3, below.

(d) Further influence: letters of advice

The ARC's self-understanding as a critical independent actor within the administrative law system was also evident in its provision of letters of advice on a wide range of issues relevant to the exercise of federal administrative power in Australia. These letters of advice on specific points were not only written in reply to requests from the Attorney-General, but also on the ARC's own motion. The Council also prepared letters of advice for the benefit of multiple other actors within Australia's constitutional system, including parliamentary inquiries.[45]

Even if, at the time of request, these letters of advice were sought and provided in confidence, they ultimately became publicly available through their publication in the Council's annual reports. This important transparency mechanism further supported the Council's ability to influence proposed legal and political developments relevant to its mandate for the public benefit as a component of its section 51C reporting functions. Relevantly for present purposes, this politically independent advisory function was another of the ARC's contributions to the performance and integrity of Australia's administrative law system that cannot be replicated in the current circumstance of its functions being 'consolidated' into the AGD.

2. The ARC and the individual's experience of administrative power

The position of the individual in the face of the ever-expanding administrative power of government was a central concern of the New Administrative Law reforms package of which

[45] See for example the multiple letters of advice appended to the ARC's 28th annual report, ranging from advice on veteran's compensation, the then *Legislative Instruments* Bill, child custody arrangements, and the administrative law implications of the proposed Trans-Tasman Therapeutic Goods Agency: https://webarchive.nla.gov.au/awa/20050615003605/http://arc.law.gov.au/agd/www/archome.nsf/Page/RWPE8CF26FE96453A46CA256F2E001CB87A.

the establishment of the ARC was a part. Arguing in favour of the establishment of the AAT and the ARC, the then member for Bennelong, John Howard, suggested that members of Parliament were well aware of the frustrations their constituents had in their experiences with government, their 'enormous frustration' at not being able to do anything about discretionary decisions made against them.[46] The New Administrative Law reforms were an acknowledgement of the fact that extant mechanisms of political and legal accountability were insufficient to provide effective and accessible recourse for individuals aggrieved by administrative decisions.

(a) Ensuring voices are heard

The ARC's concern for the individual's position in the face of administrative power manifested in a range of different ways. Over the course of its lifetime the ARC pursued a range of inquiries directly relevant to individuals' experience of different administrative law systems.[47] The Council also developed wide consultation practices to aid its inquiries.[48]

The ARC's commitment to informing its work through close attention to the individual's lived experience of administrative power was strengthened through amendments to the *AAT Act* in 1999 that implemented recommendations from this Committee's 1997 *Report on the Role and Function of the Administrative Review Council*.[49] That report specifically acknowledged that the impacts of administrative power on marginalised persons from low socio-economic backgrounds can be severe, and registered this Committee's concern to ensure that Council's membership sufficiently represented the 'users' of government services.

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[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1975, 2281 (John Howard)

[47] See, eg, Administrative Review Council, *Structure and Form of Social Security Appeals 1983* (Report No 21, 12 April 1984); Administrative Review Council, *Relationship between Ombudsman and Administrative Appeals Tribunal* (Report No 22, 2 January 1985); Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities* (Report No 34, 14 July 1991); Administrative Review Council, *Rule-making by Commonwealth Agencies* (Report No 35, 26 March 1992); Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 November 1995); Administrative Review Council, *Contracting Out of Government Services* (Report No 42, 25 August 1998); Administrative Review Council, *Automated Assistance in Administrative Decision Making* (Report No 46, 1 January 2004).

[48] See, eg, Administrative Review Council, *Relationship between Ombudsman and Administrative Appeals Tribunal* (Report No 22, 2 January 1985); Administrative Review Council, *Review of Migration Decisions* (Report No 25, 24 December 1985); Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities* (Report No 34, 14 July 1991); Administrative Review Council, *Rule-making by Commonwealth Agencies* (Report No 35, 26 March 1992); Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 November 1995); Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court* (Report No 41, 29 September 1997); Administrative Review Council, *Contracting Out of Government Services* (Report No 42, 25 August 1998); Administrative Review Council, *Internal Review of Agency Decision Making* (Report 44, 28 March 2001); Administrative Review Council, *Automated Assistance in Administrative Decision Making* (Report No 46, 1 January 2004).

[49] See the full report at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/Pre1999/arc/report/index

The **changes to the *AAT Act* introduced in 1999** accordingly added the requirement that membership of the ARC membership include at least one person who **'has had direct experience, and has direct knowledge, of the needs of people**, **or groups of people, significantly affected by government decisions**'.[50] It is notable that some of the most important ARC inquiries concerning the implications of new techniques and technologies of government were undertaken after the introduction of this section: a point to which we return in section 3, below.[51]

(b) Where we've arrived: attention or indifference?

The present era supplies much less confidence about concern for how people are treated by entities of administrative government. If the **'Robodebt' fiasco** (to which we return in section 4) is any indication, relationships between government and individuals affected by its administrative power are in serious need of attention and repair. In our submission, the worry today goes beyond the potential for overreach of government power that underscored the introduction of the New Administrative Law reforms. In the present era there is also increasing evidence of indifference towards how individuals experience the administrative power of government.[52]

We submit therefore that the concerns underscoring why the ARC was established in the first place, and why the *AAT Act* was amended in 1999 to ensure appropriate representation of individuals' experiences within the Council's membership, have **amplified rather than diminished with the passage of time**. The revival of the Council would demonstrate the Government's commitment to improving its recent record and ensuring that the experience of individuals in the face of government power is as important today as it was when the ARC was established. This need to protect individuals in their interactions with government is especially strong in relation to new techniques and technologies of administrative government: the issue to which we now turn.

3. The ARC and new developments in administration

It was always understood that the ARC would play a critical role in overseeing the operation of the Administrative Appeals Tribunal, including keeping 'under constant examination areas of legislation which ought to be added to those which come within the purview of the Tribunal's operations, and to recommend improvements and alterations to the procedures

[50] Section 50(c) *AAT Act*.
[51] See below Part III(a), discussing Administrative Review Council, *Contracting Out of Government Services* (Report No 42, 25 August 1998). See below Part III (b), discussing Administrative Review Council, *Automated Assistance in Administrative Decision Making* (Report No 46, 1 January 2004). See below Part III(c), discussing Administrative Review Council, *Rule-making by Commonwealth Agencies* (Report No 35, 26 March 1992).
[52] Professor Kristen Rundle, co-author of the present submission, recently discussed this issue in an ABC Radio National 'Big Ideas' broadcast/podcast: https://www.abc.net.au/radionational/programs/bigideas/lessons-from-the-pandemic/13611844.

under which the Tribunal operates'.[53] The strong view at the inception of the New Administrative Law reforms was that there was 'a very clear need to have as a companion to the Tribunal a council which can take a very much longer view of the operations of the Tribunal and generally make recommendations to improve its performance.'[54]

These and other key functions of the ARC – such as keeping close watch on new forms of discretion and recommending appropriate mechanisms for their review – were informed by understandings of the likely forms and likely patterns of exercise of administrative power in that era. The design and performance of administrative power, however, inevitably **changes over time** – and sometimes dramatically.

The ARC's capacity to anticipate, explain and assess the likely implications of such changes were among its most valuable contributions. Over the course of its operation, the Council **proactively** sought to address the likely implications of new developments in the administration of government power. Its engagement with **new techniques and technologies** of government is especially notable, particularly in relation to how such developments might **impact 'users'** of government services. It is fruitful to examine this point in relation to the ARC's reports on contracting out of government services[55] and automated assistance in government decision-making.[56]

(a) Report No. 42: Contracting Out of Government Services

The introduction to the ARC's Report No. 42, *Contracting Out of Government Services*, places members of the public at the centre of the perceived need for the report and its recommendations. It states that the Report 'is based on the principle that rights and remedies which are available to members of the public when services are delivered by government agencies should not be lost or diminished as a result of contracting out'.[57] Its recommendations were accordingly designed to ensure 'that members of the public have access to avenues of complaint and redress where government arranges for the provision of services or the performance of activities by private contractors'.[58] Presciently, the Report also noted that its discussion and recommendations were also relevant 'to members of the public who are not themselves service recipients but who are affected by the activities of contractors who provide services directly to the Government (for example, debt collection services'.[59]

(b) Report No. 46: Automated Assistance in Government Decision Making

Among the many issues addressed in the ARC's 'ahead of the curve' 2004 Report on the role of automation in administrative decision-making was the potential implications for individuals of this technological turn. Concerns raised in the Report included the important

[53] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1975, 2281 (Member for Bennelong: John Howard)
[54] Commonwealth, *Parliamentary Debates*, ibid.
[55] ARC Report No. 42, 1998.
[56] ARC Report No. 46, 2004.
[57] ARC Report No. 42, 1998, Chapter 1 'Introduction', 1.3.
[58] Ibid 1.2.
[59] Ibid, 1.6.

observation that automated technologies could 'give rise to the potential for decisions to be made without reference to the person affected by the decision'.[60] The Council also took seriously the submissions of those who highlighted that some of the most vulnerable recipients of government services would struggle to interact with automated decision-making technologies due to low literacy or other necessary skills, or because they might be intimidated by, or lack experience and confidence in using, new technologies'.[61] Concerns were equally raised about the interface between the structural requirements of the technologies and discretionary powers designed to be responsive to individual circumstances, with the Report noting that 'the range of circumstances that individuals find themselves in are not easily reduced to business rules'.[62]

(c) The need for the ARC in the face of new technologies of government

The need for close and ongoing oversight of the role of automated technologies in administrative decision-making has radically increased since the ARC's functional abolition in 2015. During this period, digital technologies have become more and more integrated into the basic processes of government. Indeed, digital is no longer a mere tool of government, in the sense of providing a way of doing government. It is increasingly a way of *being* government.[63] The role of a re-established ARC in this space, therefore, could not be more important.

That said, the ever-increasing reliance on contracting out and the ever-expanding integration of digital technologies in contemporary government are only two of the trends that define the character of governmental in the present era. Other developments include the role of non-binding but increasingly influential **'soft law'** (policies and guidelines) in administrative decision-making, the extensive use of **delegated legislation** (to which we return in section 4), the proliferation of broad discretions conditioned on the **'national' or 'public' interest**, as well as **new kinds** of discretionary powers.[64]

The potential value of a re-established ARC in relation to these techniques and technologies of contemporary administrative government goes further than an ability to keep an eye on these developments at the singular level.[65] A re-established ARC would equally be positioned to pay close attention to problems arising at the **interface** between these new

[60] ARC Report No. 46, 2004, 4.3.1.
[61] Ibid, 4.16.
[62] Ibid, 3.2.2.
[63] See the excellent discussion of this point in this 'Disruptive Ideas' seminar on digital government recently convened by the Melbourne School of Government at the University of Melbourne: https://www.youtube.com/watch?v=LLtyhe_voNA
[64] A prime example is the device of the 'non-compellable' power. This innovative form of discretion appears within a wide range of Commonwealth, and can leave those seeking their exercise with little or no recourse to review. See Emily Hammond, "Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?" (2018) 25(2) Australian Journal of Administrative Law 122, and Kristen Rundle, 'Non-compellable powers: A relational analysis', (2019) 30(4) *Public Law Review* 300.
[65] That is, in the manner seen in its reports specific reports on contracting out and automated decision-making.

techniques and technologies: an emerging area of concern that is largely yet to receive close attention.[66]

4. What if we still had the ARC? Five speculations

The new developments in government administration just noted invite a thought experiment. If the ARC was still functioning, how might it have responded to some of the more publicised recent examples that illustrate issues with and challenges to the quality of administrative decision-making?

By engaging with these examples we do not mean to suggest that a properly functioning ARC would necessarily have addressed each specifically. Rather, we raise these examples to make the point that each represents patterns within contemporary administrative practice – the rise of automation in government administration, the increasing role of delegated legislation as a tool of contemporary government, the importance of effective government transparency in emergency and 'normal' circumstances alike, the implications of non-statutory Ministerial discretions for the rule of law, and the interface between administrative decisions and key public policy concerns – with which by virtue of its statutory mandate the ARC might historically have been concerned.

(a) The 'Robodebt' fiasco

The now notorious 'Robodebt' fiasco saw the Commonwealth raise, demand or recover asserted debts from allegedly overpaid social security payments based on income averaging from Australian Tax Office data. In a class action brought by victims of the scheme, the Commonwealth admitted that it did not have a proper legal basis to raise, demand or recover the asserted debts against approximately 433,000 Australians, totalling at least $1.763 billion. Through private debt collection agencies, the Commonwealth pursued people to repay these wrongly asserted debts, and recovered approximately $751 million from about 381,000 of those people.

Presiding over the class action and its ultimate settlement, Justice Bernard Murphy of the Federal Court of Australia described the Robodebt fiasco as 'a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration'.[67] Justice Murphy also observed that the 'group of Australians who, from time to time, find themselves in need of support through the provision of social security benefits is broad and includes many who are marginalised or vulnerable and ill-equipped to properly understand or to challenge the basis of the asserted debts so as to protect their own legal rights', and that the Commonwealth's complete failure in fulfilling its obligation to have a proper legal basis for its claims was 'particularly acute given that many people who

[66] See, for example, Janina Boughey's illuminating analysis of government outsourcing of information and communications technology in 'Outsourcing Automation: Locking the "Black Box" Inside a Safe', Chapter 8 in Janina Boughey and Katie Miller (eds), *The Automated State* (Federation Press, 2021).
[67] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [5].

faced demands for repayment of unlawfully asserted debts could ill afford to repay those amounts'.[68]

The Robodebt fiasco was the subject of multiple public inquiries.[69] Whether lessons have been learned from its example remains to be seen. These lessons span the legality of administrative action in circumstances of a high degree of reliance on automated technologies through to the intelligibility of relationships between the Government and those subject to its power.[70]

For present purposes the point to highlight is that Robodebt occurred during the period in which the ARC was functionally obsolete. The factors leading to it were matters squarely within the remit of the Council's oversight functions. In our submission, it is highly likely that a properly functioning ARC would have kept close watch on the relevant debt recovery processes and would very likely have undertaken inquiries and issued strong letters of advice with respect to it. The Robodebt experience provides among the strongest of arguments for why we need to re-establish the ARC.

(b) The exponential growth of executive lawmaking

Before as much as during the ongoing COVID-19 public health emergency, Australia has witnessed an exponential growth in executive lawmaking through delegated legislation and other legislative instruments. The scale of this executive lawmaking, and the corresponding scale of the exemption of delegated legislation from parliamentary oversight, has prompted several concerned inquiries by the Senate Standing Committee for the Scrutiny of Delegated Legislation.[71]

Through its Centre for Comparative Constitutional Studies (CCCS), Melbourne Law School made primary and supplementary submissions to that Committee's 2020 inquiry into the exemption of delegated legislation from parliamentary oversight.[72] Following evidence

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[68] Ibid at [7].

[69] These included a Senate inquiry (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Centrelinkcompliance) and an Ombudsman inquiry (https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf)

[70] This last point was argued strongly the submission by Professor Cheryl Saunders AO and Professor Kristen Rundle (co-author of the present submission) in their submission on behalf of the Centre for Comparative Constitutional Studies to this Committee's 2019 inquiry into the impact of changes to service delivery models on the administration and running of Government programs: https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3170698/CCCS-Senate-submission-Government-service-delivery-23-August-2019.pdf

[71] See especially the following three reports published since 2019: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation/Report; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report.

[72] https://law.unimelb.edu.au/__data/assets/pdf_file/0008/3423734/Senate-Scrutiny-of-Delegated-Legislation-Committee-CCCS-Submission-25-June-2020.pdf;

given to a hearing of the Committee by Professor Kristen Rundle (co-author of the present submission), CCCS was asked to comment on the AGD's submission on the categories of legislative instruments that should be exempt from disallowance. The CCCS advised that – at most – they would agree with **only one of the AGD's proposed 12 categories of justifiable exemptions** from oversight.[73]

This example is instructive. As explained earlier, the ARC's statutory functions have been 'consolidated' into the AGD. Yet it was also the AGD that argued before the Senate Standing Committee for the Scrutiny of Delegated Legislation that an astonishingly wide range of legislative instruments should be exempt from parliamentary oversight. We submit, therefore, that it is implausible to suggest that advice from the AGD on matters on which the ARC historically would have advised – on referral or on its own motion – could be as independent as that which was historically provided by the ARC. We further submit that it is not at all far-fetched to speculate that the ARC would have turned its close attention to the exponential increase in executive lawmaking in the period since its functional abolition in 2015, given its historical concern for the growth, character and oversight of delegated legislation.[74]

(c) The National Cabinet FOI request

Freedom of information (FOI) has become a highly charged issue during the COVID-19 public health emergency. In addition to an (ultimately refused) FOI request to obtain access to the Commonwealth's contracts for purchase of vaccines,[75] an FOI request was made by Senator Rex Patrick in relation to the deliberations of the National Cabinet. The Government argued that the National Cabinet was exempt from FOI requests in the same manner as the Federal Cabinet.[76] The AAT, constituted by Justice White ultimately found against the Government, and ordered release of the documents. However instead of complying with the AAT's orders, the Government introduced a controversial Bill to amend the *FOI Act*.[77] At the time of this submission the Bill has not yet been finally considered in the Senate.[78]

We speculate that a properly functioning ARC might have taken up this example as a systemic issue of compliance with AAT decisions.

(d) The 'sports rorts' affair

https://law.unimelb.edu.au/__data/assets/pdf_file/0020/3540521/CCCS-Delegated-Legislation-Supplementary-Submission-10-Sept-2020.pdf.

[73] See especially pp 3-7: https://law.unimelb.edu.au/__data/assets/pdf_file/0020/3540521/CCCS-Delegated-Legislation-Supplementary-Submission-10-Sept-2020.pdf

[74] See for example ARC Report No. 35, *Rule-making by Commonwealth Agencies* 1992.

[75] See media reporting on this FOI refusal decision here: https://www.abc.net.au/news/2021-07-05/australia-covid-astrazeneca-deal-withheld-national-security/100261920

[76] Section 34, *FOI Act* (1982).

[77] https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6782

[78] See the following analysis on the Bill by our colleague Laureate Professor Emeritus Cheryl Saunders of Melbourne Law School: https://theconversation.com/the-government-is-determined-to-keep-national-cabinets-work-a-secret-this-should-worry-us-all-167540

What has become known as the 'sports rorts' affair saw the then Minister for Sport, Senator Bridget McKenzie, intervene into the statutorily defined Community Sport Infrastructure Grant Program to override decisions with respect to the allocation of funds to sporting facilities. The Minister asserted that she could so because she held an overarching discretion in relation to all matters in her portfolio that applied irrespective of the fact that no such discretion was vested in her through the relevant governing legislation.

The 'sports rorts' affair (and its more recent analogues in relation to grants decisions for funding car parks and swimming pools) has attracted widespread condemnation.[79] It has also been key among the catalysts for ongoing calls to establish a federal anti-corruption 'integrity' commission.

The point of relevance to the present submission is that the 'sports rorts' affair involved legally unsupported Ministerial action that effectively overrode Parliament's statutory process for grants decision-making. As such the affair represents the kind of misuse of power that would likely have attracted the attention and condemnation of the politically independent ARC in the performance of its function of monitoring developments in the administrative law system and their connection with the integrity and effectiveness of governing institutions in Australia.

(e) Review of decisions with serious environmental implications

Among the ARC's functions was its responsibility under s 51(1)(a) of the *AAT Act* to keep under review the classes of administrative decisions that are not the subject of review by a court, tribunal or other body. A recent high profile case on the responsibilities of statutory decision-makers with respect to the potential climate change impacts of their decisions has thrown this previously core business of the ARC into relief.[80] The case was brought by a group of children who claimed that the Minister had a duty in tort to take reasonable care not to cause them personal injury by contributing to likely future climate change events when exercising her power under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in relation to an application to extend a mining licence. Finding for the applicant children, the case introduced duties of care under the law of tort into the considerations relevant to exercises of Ministerial discretion under that Act.

The salience of this example to the present submission lies in the question of how the ARC might have responded to increasing public concern around climate change and the role of administrative decision-making with respect to this pressing issue. The crucial contribution made by the ARC in responding to matters of public concern through its many own-motion investigation and reports, and through its additional function of providing letters of advice, suggests that the interface between Government decision-making and the likelihood of

[79] See the submission made by Professor Michael Crommelin AO and Professor Cheryl Saunders AO on behalf of the CCCS to the Senate Select Committee inquiry into the administration of sports grants at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/3303765/CCCS-Submission-to-Senate-Select-Committee-on-Administration-of-Sports-Grants-21-February-2020.pdf

[80] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (Bromberg). An appeal against Bromberg J's to the Full Court of the Federal Court of Australia is currently reserved for judgment.

adverse environmental and climate impacts could have been a matter into which the Council would have seen itself as positioned to inquire.

5. A re-established ARC: what vision for the future?

The 2015 functional abolition of the ARC and its slow death by progressive defunding in the years immediately prior completely ran against the trajectory of the Council's operation and consolidation to that point. It is worth recalling here that the 1999 changes to the *AAT Act* were made with a view to strengthening – not diminishing – its capacity to be a crucial actor in our constitutional system specifically concerned with the performance and integrity of Australia's administrative review system.

(a) Why now?

Public confidence in government is arguably at an all-time low in the wake of administrative law scandals like the Robodebt fiasco, a protracted period of living under executive-made laws during the COVID-19 public health emergency, perceptions of uneven governmental approaches as between individuals and businesses in relation to overpayment repayment strategies (for example, in relation to overpaid 'JobKeeper' payments), amongst other possible examples.

The present era is also one in which calls for the establishment of a Commonwealth anti-corruption (or 'integrity') commission have become louder. A re-established ARC would obviously perform a different function to such an 'integrity' commission. Still, calls to re-establish the ARC equally point to the urgency of restoring public confidence in government through the operation of fully independent oversight institutions.[81]

(b) What would a 'new' ARC need?

Little imagination is required to determine what a re-established ARC would need in order to be effective. The template is inscribed in statute, waiting to be revived. We further submit, however, that any re-established ARC should take its cue from the early days of its operation when the Council's membership was comprised of senior actors in the administrative review system, was **adequately funded** to perform its role, and was both **functionally** and **physically independent** from the AGD.[82] Combined with the changes made to the *AAT Act* in 1999 to ensure the appropriate qualification of its members – particularly in relation to the inclusion of members with direct knowledge of the needs of people significantly affected by government decisions discussed in section 2, above – the model required for an independent, robust, responsive and effective ARC is already available.

[81] See for example the following speech by former AAT President, Justice Duncan Kerr, given in 2015 at the time of the ARC's abolition, (https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kerr/kerr-j-20150915), and the 2017 speech by leading administrative lawyer and Federal Court Justice John Griffiths (http://138.25.65.17/au/journals/AIAdminLawF/2017/18.pdf)

[82] The early era of the ARC saw the Council housed in premises entirely separate to the AGD.

6. Conclusion

In conclusion, it is worth emphasising that the very same concerns to which the reports of the Bland and Kerr Committees responded, and which led to the ultimately bipartisan pursuit of and support for the 1970s New Administrative Law reforms, are upon us again in distinctly contemporary forms. Our administrative law system as it stands is no longer adequate to meet those concerns, and not least from the perspective of those directly affected by them. We have surely learned enough from recent experience to conclude that measures to restore integrity to and responsiveness within our administrative law system are urgent.

It is accordingly our strong submission that re-establishing the ARC and ensuring that it is equipped to perform its role in contemporary conditions is a core pillar of restoring integrity to Australia's administrative review system.

We thank you again for the opportunity to make this submission to your Inquiry.

RECOMMENDATIONS

Recommendations in relation to point (a) of the Inquiry's terms of reference

1. We recommend that section 7(2) the AAT Act be amended to require that a person must not be appointed as a Deputy President unless the person is a Judge of the Federal Court of Australia or the Federal Circuit and Family Court of Australia or enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory for at least 5 years.

2. We recommend that section 7(2) the AAT Act be amended to require that a person must not be appointed as a Senior Member unless the person is enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years.

3. We recommend that the AAT Act be amended to provide for a process of appointing members that ensures that the merit of persons seeking appointment is assessed comparatively, in an open appointment process, against other applicants for the same position. These amendments should require vacancies to be advertised 9 months before current terms of office expire.

4. We further recommend that an explicit provision should be introduced into the AAT Act for the establishment by the Attorney-General of an assessment panel when a recruitment process commences and applications are received. This amendment should ensure that the panel has an appropriate gender balance and preferably include a representative of Public Service Commission and a member of a professional, stakeholder or community body.

5. We recommend that, with support from the Attorney-General's department, this panel should be given the power to shortlist applicants for initial and further assessment at interview against statutory criteria. The panel should then have the power to report its

findings by providing a ranked shortlist of suitable applicants that either exceeds the number of positions to be filled, or fills the number of available positions. In the former instance, responsibility for recommending proposed appointments to the Governor-General would be given to the Attorney-General. In the latter instance, the list of proposed appointees would be given directly to the Governor-General and the Governor-General would then appoint the persons on that list.

6. We recommend that the AAT Act be amended to provide that a person may not be appointed as a member of the AAT unless that person has been recommended to the Governor-General in line with the assessment process outlined above.

Recommendations in relation to point (b) of the Inquiry's terms of reference

1. We recommend that the AAT Act should be amended to require annual reporting of information on the appointment of persons to tribunal offices, the actual remuneration paid to all office holders whether judicial or not, part time or fulltime, and the method of calculating that remuneration for part time or irregular work.

Recommendations in relation to point (c) of the Inquiry's terms of reference

1. We recommend that the Administrative Review Council be re-established and be given adequate funding and other supports to perform its functions under the *AAT Act.*

APPENDIX A – ARC 'own motion' inquiries and reports[83]

Report	Title	Date
4	Administrative Appeals Tribunal Act 1975 Amendments	26-Jun-79
7	Citizenship Review and Appeals System	13-Jun-80
8	Social Security Appeals	27-Jun-80
10	Shipping Registration Bill	06-Aug-80
11	Student Assistance Review Tribunal	23-Jan-81
13	Commonwealth Employees' Compensation Tribunal	08-May-81
17	Review of Tax Decisions by Boards of Review	06-Jun-83
18	Compensation (Commonwealth Government Employees) Act 1971 –Amendments	27-Jun-83
20	Review of Pension Decisions under Repatriation Legislation	16-Aug-83
22	Relationship between Ombudsman and Administrative Appeals Tribunal	02-Jan-85
25	Review of Migration Decisions	24-Dec-85
26	Review of AD(JR) Act 1977: Stage 1	13-Jun-86
27	Access to Administrative Review: Stage 1 Notification of Decisions and Rights of Review	11-Aug-86
29	Constitution of AAT	10-Sep-87
30	Access to Administrative Review: Provision of Legal and Financial Aid in Administrative Law Matters	02-May-88
34	Access to Administrative Review by Members of Australia's Ethnic Communities	14-Jul-91

[83] See relevant discussion in Part C, section 1(c) of this submission.

35	Rule-making by Commonwealth Agencies	26-Mar-92
36	Environment Decisions and the Administrative Appeals Tribunal	15-Jun-94
38	Government Business Enterprises and Commonwealth Administrative Law	23-Feb-95
41	Appeals from Administrative Appeals Tribunal to the Federal Court	29-Sep-97
42	Contracting Out of Government Services	25-Aug-98
43	Administrative Review of Patents Decisions	16-Oct-98
44	Internal Review of Agency Decision Making	28-Mar-01
46	Automated Assistance in Administrative Decision Making	01-Jan-04
47	Scope of Judicial Review	01-Jan-06
48	Coercive Information-gathering Powers	01-May-08
50	Federal Judicial Review in Australia	01-Sep-12