Submission to the Senate Legal and Constitutional Affairs References Committee on the Performance and Integrity of Australia's Administrative Review System

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1. The Legal and Constitutional Affairs References Committee has sought submissions on the performance and integrity of Australia's administrative review system, with particular reference to:
   (a) the Administrative Appeals Tribunal, including the selection process for members;
   (b) the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;
   (c) whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and
   (d) any related matter.

2. In summary, I make the following submissions:

   - that the Commonwealth respond without further delay to the report by the Hon Ian Callinan AC QC on the *Tribunals Amalgamation Act 2015 (Cth)* (the **Callinan Report**);[1]
   - that consideration be given to constituting the AAT with more than one member, at least one of whom is legally educated, in a greater number of hearings;
   - that an undergraduate law degree from an Australian university be considered to meet the statutory requirement of "special knowledge or skills" as a qualification for appointment to the AAT;
   - that criticism of the AAT or its members by members of the Executive or Parliament be temperate, considered, constructive and respectful and avoid the use of partisan rhetoric;
   - that the Administrative Review Council be re-established in compliance with Part V of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) as a statutory body independent of the Attorney-General's Department; and

[1] The Hon IDF Callinan AC QC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Final Report, 23 July 2019).

- that the Attorney-General consider the appointment of a person to the ARC under the terms of s 52(2) of the *AAT Act* to oversee the implementation of the measures suggested in the Callinan Report.

Administrative Appeals Tribunal (AAT)

3. The Callinan Report contains a thorough and detailed analysis of the AAT's functions. The Commonwealth should respond to its recommendations without further delay. Subject to the discussion of one point, addressed below, I respectfully endorse the recommendations made in the Callinan Report.

4. The AAT should be recognised as one of the main engines which drive the resolution of challenges to federal administrative action.[2] It has the statutory power to review decisions under more than 450 different enactments and resolves many more matters in a year than the federal courts. Even since the passage of the *Tribunals Amalgamation Act 2015* (Cth), following which the AAT has handled migration and refugee reviews and social services and child support matters which it is not required to finalise through pre-hearing processes, the AAT still finalises a quarter of all applications without a hearing.[3] Notwithstanding a backlog of cases in the Migration and Refugee Division (**MRD**) of the AAT,[4] it generally operates efficiently, given the size of its workload. However, supplementation of its resources may be required for that to remain the case.[5] The significance of the interest that the Commonwealth and the nation have in the AAT being a productive and effective body can hardly be overstated.

Appointments to the AAT

5. The Callinan Report includes the following passage:

> In my opinion, there should be a register kept by the [Attorney-General's Department] of persons expressing interest in appointment to the AAT. Availability of positions should be advertised and the Executive Government *should generally appoint qualified lawyers* with proved capacity and experience in forensic analysis

[2] See G Weeks, 'Attacks on Integrity Offices: a Separation of Powers Riddle' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25 at p 29.
[3] R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action: Text, Cases and Commentary* (5th ed, LexisNexis, 2019) p 170.
[4] *Callinan Report*, above n 1, p 5 [1.3].
[5] See Administrative Appeals Tribunal, *Annual Report 2020–21* (2021) at 7.

> and opinion or judgment writing. They should also be, of course, persons of good character, even temperament, courteous disposition and proved diligence.[6]

The opinion stated in that extract followed an observation about the perception that many appointments to the AAT are "political". Indeed, there is also a perception that decisions about re-appointing Members have frequently been made on a "political" basis.[7] I will address below the tensions that have occasionally arisen between the executive and the AAT.

6. It is important to note that appointing members to the AAT who have a background in politics is no absolute evil, any more than that is the case for appointments to judicial office. I respectfully endorse the following observation of Justice Griffiths:

> Given the role of the AAT in reviewing on the merits a wide range of Commonwealth administrative decisions, including some decisions made at a ministerial level and which are imbued with considerable political or policy content, it is desirable that the membership of the AAT include persons with knowledge of the inner workings of Government and public administration.[8]

It is only ever objectionable for an appointee to either a tribunal or a court to act according to partisan considerations following their appointment. I submit that allegations of such behaviour are easy enough to make for political purposes but that the behaviour itself is probably significantly less frequent than the complaints that are made about it.

7. I respectfully concur with Mr Callinan's statement, extracted above, subject to one caveat. While his point is well made that persons with legal qualifications possess an advantage in understanding the legal basis on which tribunal decisions are made, I would not go so far as to say that the government should "*generally* appoint qualified lawyers", if that description encompasses only persons who are enrolled as legal practitioners and who have been so enrolled for at least 5 years.[9] Members of the AAT without legal qualifications but who have "special knowledge or skills"[10] relevant to the duties of a member nonetheless have the capacity to contribute enormously to its merits review jurisdiction. Their contribution includes serving as a reminder that the

[6] *Callinan Report*, above n 1, p 127 [7.16] (emphasis added).
[7] See Weeks, above n 2, p 31 (n 47); The Hon Justice John Griffiths, 'Keynote Address: 50th Anniversary of the Kerr Committee' (Paper presented to the AIAL Symposium: *Kerr's Vision Splendid for Administrative Law: Still Fit for Purpose?*, 21 October 2021) at [57].
[8] Griffiths, above n 7, [58].
[9] See *AAT Act* sub-ss 7(2)(b) and (3)(a).
[10] *AAT Act* sub-ss 7(2)(c) and (3)(b).

AAT was not designed to function as a court, something that might be forgotten if almost all members were legal practitioners.[11] There is a view that the increased formality in tribunal decision-making in England and Wales has been caused by the loss of "specialist tribunal members who had accumulated a wealth of knowledge and experience which enabled matters to be dealt with more expeditiously and with greater compassion shown to litigants".[12] Such a state of affairs should not be allowed to befall the AAT.

8. Members with expertise in medicine, accountancy, engineering and other areas are an important resource when reviewing decisions within a number of the AAT's nine divisions, including but not limited to those relating to:

    - the National Disability Insurance Scheme;
    - security assessments;
    - the Taxation and Commercial Division;
    - veterans' appeals;
    - Comcare decisions;
    - aged care services; and
    - civil aviation.

9. Notwithstanding that point, I agree with Mr Callinan's observation that many decisions of the AAT are made within a highly complex matrix of legislation and policy and, where that is the case, that legal qualifications are likely to equip members to make better decisions. Mr Callinan referred specifically to decisions made within the MRD, which handles the majority of the AAT's workload and in which members seldom have the benefit of a legally qualified contradictor to the applicant's case.[13] The suggestion in the Callinan Report that provision could be made to appoint Counsel Assisting the AAT for decisions in complex cases within the MRD,[14] and possibly also the Social Services and Child Support Division,[15] merits further consideration.

10. I submit that there are at least two other ways in which subject matter expertise could appropriately be used in conjunction with the benefits of legal training in conducting

[11] See eg the Hon Justice Duncan Kerr, 'Keeping the AAT from Becoming a Court', (Speech delivered to the AIAL (NSW) Seminar, Sydney, 27 August 2013).
[12] Griffiths, above n 7, [50]; citing Rt Hon the Baroness Hale of Richmond, *Keynote Address* (delivered to the Council of Australasian Tribunals Conference, 10 June 2021).
[13] *Callinan Report*, above n 1, p 151-152 [8.20] and [8.24].
[14] Ibid., p 164 [10.14].
[15] Ibid., p 163 [10.10].

hearings in the AAT. The first is to constitute the AAT of more than one member, at least one of whom is legally qualified, in a greater number of proceedings. It could be the responsibility of the legally qualified member to ensure that the procedure of the hearing and the statement of reasons for its findings are legally sound. Hearings before multiple members might be of particular value in making Guidance Decisions in the MRD,[16] in which the AAT can carefully develop its position on certain recurring issues to improve the quality and speed of decisions in future similar circumstances.

11. The second is to alter the current qualification for appointment to the AAT so that a person with legal qualifications need not have been "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".[17] Expanding this qualification to include legally educated persons, who possess relevant experience but do not necessarily work as legal practitioners, is likely to expand the pool of appropriately qualified potential members. It could also bring the benefits of legal experience to more AAT decisions without necessarily making the AAT more closely resemble a court due to the increased involvement of legal practitioners. This expansion could be effected without legislative change by considering the qualification of an undergraduate law degree from an Australian university as satisfying, at least in part, the statutory requirement for "special knowledge or skills" relevant to performing the work of a member of the AAT.

Transparency and parliamentary accountability

12. The non-judicial bodies which operate within Australia's administrative review system are creatures of statute and, in constitutional terms, are part of the executive branch of government. They operate subject to the terms of their governing legislation and are answerable to the Parliament. It is proper that they are accountable for the performance of their statutory functions.

13. There is a long history of politicians questioning or otherwise criticising decisions of Australian courts. The responses to the High Court's decisions in *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 are prominent examples of a phenomenon that extends to all Australian courts. It has also been noted on many occasions that elected members of Parliament, frequently Ministers whose decisions (or the decisions of

[16] *Migration Act 1958* (Cth) ss 353B, 420B and 473FC.
[17] *AAT Act* sub-ss 7(2)(b) and (3)(a).

whose departments) are under review, have publicly expressed concern about decisions of the AAT. There is, however, a distinction to be drawn between judicial and non-judicial bodies which are subject to criticism.

14. Criticisms levelled at judicial decisions are necessarily informed by the context that federal judges are appointed until the age of seventy and cannot be removed save for "proved misbehaviour or incapacity".[18] Members of the AAT do not have the security of tenure which is a feature of judicial appointments. They are appointed for fixed terms and can be dismissed for a range of reasons.[19] Sitting as Acting President of the AAT, Logan J remarked that

> any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction.[20]

His Honour noted, however, that such independence from political pressure demands a greater level of "moral courage and depth of character" for members who do not have concurrent judicial appointments.[21]

15. Whenever a Minister criticises decisions or members of the AAT, he or she must be aware that such criticism might reasonably be perceived as an attempt to influence AAT members to reach decisions other than on the merits of the cases before them. Such criticism comes with an implicit (and sometimes explicit) threat that failure to decide consistently with the Minister's views might result in members' appointments not being renewed upon their completion.

16. I do not suggest that the AAT or its members should be immune from considered public discussion or even criticism, including by members of the Executive government. However, I submit that Ministers and others in positions of power be temperate, considered, constructive and respectful when engaging in such discussion. To criticise decisions made by the AAT is entirely proper provided that, in doing so, pending appeals or judicial review challenges to those decisions are not prejudiced. However,

[18] *Australian Constitution* s 72(ii).
[19] Weeks, above n 2, pp 30-31.
[20] *Singh (Migration)* [2017] AATA 850, [18].
[21] See Weeks, above n 2, p 35.

to criticise the AAT or its members in partisan terms affects the standing of that body and reduces its capacity to perform its functions effectively.

Administrative Review Council (ARC)

17. The ARC was established under Part V of the *AAT Act* and remains a part of that legislation. It is anomalous that the legislation remains operative but the ARC does not, having been functionally "abolished" by a single sentence in the Commonwealth Government's Budget, delivered in May 2015.[22] The justification for that decision was that it formed part of the "Smaller Government reforms which reduce the size and complexity of government".[23] The Budget did not indicate that the ARC was "abolished" as a cost saving measure, although the Attorney-General stated in a Senate Committee hearing in 2016 that the decision no longer to "constitute" the ARC was to make "a relatively small saving" from the budget.[24] Indeed, the annual cost of maintaining the ARC had diminished to a "relatively small" sum long before its audited financial statements were no longer made available by the Attorney-General's Department.[25] As I will argue below, the costs of maintaining the ARC are dwarfed by the costs of the failures of public administration that its advice might prevent.

18. Two issues arise from the putative "abolition" of the ARC:

    i. The first is that it is far from satisfactory for a statutory body to exist under a statutory scheme and to have statutory functions which it is unable to perform because the government has made the decision no longer to fund that body.[26] In this sense, the government's characterisation of the ARC as having been "abolished" is misleading. It continues to exist as a matter of law but has been prevented from exercising its statutory functions in fact. The Committee's terms of reference refer to "re-establishing" the ARC, a query that should be understood as altering its *factual*, rather than its *legal*, circumstances.

[22] Australian Government, *Budget Measures: Budget Paper No 2, 2015-16* (2015), 65.
[23] Ibid. See also the statement of the Finance Minister, Senator Mathias Cormann: 'Smaller Government – Transforming the Public Sector' (Media Release, 11 May 2015).
[24] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Official Committee Hansard*, 18 October 2016, 161 (Sen. George Brandis, Attorney-General).
[25] The Hon Justice Susan Kenny, 'The Administrative Review Council and Transformative Reform' in AJ Connolly and D Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 140 at 145-146.
[26] Senator McKim described it as "shoddy", a description with which the Attorney-General did not take issue: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Official Committee Hansard*, 18 October 2016, 161.

ii. The second is that it is open to question whether a government can or should achieve budgetary economies by defunding statutory bodies rather than taking legislative steps to abolish them.

19. The Callinan Report expressed doubt whether the decision of the Commonwealth to "transfer" the residual functions of the ARC to the Attorney-General's Department was "legally possible without legislation".[27] Mr Callinan noted that the "*AAT Act* clearly assumes the existence of the ARC" and pointed out that "it is the duty of the Executive under s 61 of the Constitution to execute and maintain the laws of the Commonwealth".[28] I respectfully agree with Mr Callinan's opinion of the Commonwealth's capacity to "abolish" the ARC by defunding it.

20. However, it is doubtful whether the Commonwealth government's duty to "execute and maintain the laws of the Commonwealth" is directly enforceable in a way that would compel it to "re-establish" the ARC. It is most unlikely that mandatory injunctive relief would issue to compel the ARC to be funded sufficiently to perform its statutory functions. A court might issue a declaration that it is unlawful not to fund the ARC sufficiently to perform its statutory functions, but such relief might not operate to compel the Commonwealth to take action.[29]

21. Mandamus could issue at the suit of a person with the necessary standing to require consideration of a relevant public duty. While the ARC's ex officio members[30] still serve on the ARC under the terms of the *AAT Act*, no other member has been appointed since 2012.[31] The *AAT Act* states at s 49(1)(d) that the ARC "shall consist of … not fewer than 3 other members" in addition to the ex officio members and at s 49(2) that such members "shall be appointed by the Governor-General and shall be appointed as part-time members". The use of the word *shall* in entrusting a statutory function "is taken prima facie to impose an obligation to exercise that function".[32] In other words, it denotes a duty. Mandamus may not lie against the Governor-General but a declaration that the Governor-General owes a duty to appoint members to the ARC

[27] *Callinan Report*, p 19 [1.27].
[28] Ibid.
[29] See M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Thomson Reuters, 2017) at [15.140]; and M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, Thomson Reuters, 2021) at [18.270] (forthcoming).
[30] *AAT Act* s 49(1)(a)-(ca).
[31] Administrative Appeals Tribunal, *Annual Report 2015-16* (2016), p4. The ARC has not been mentioned in an Annual Report of the AAT since 2016.
[32] D Pearce, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) at p 390 [11.5].

could be sought against the Attorney-General, representing the Crown.[33] For all that this outcome is practically unlikely, it supports the view that the Commonwealth cannot simply elect not to conform to the provisions of Part V of the *AAT Act*.

22. The Callinan Report cited no fewer than 22 publications of the ARC, published between 1979 and 2012,[34] a fact which supports Mr Callinan's description of the ARC's work as "useful".[35] In fact, the functions of the ARC set out in s 51(1) of the *AAT Act* go significantly beyond its written output. Without restating those functions in detail, the statutory role of the ARC includes:

    - monitoring the administrative law system, from the role of administrative decision-makers courts to tribunals and other bodies through to the courts;
    - developing knowledge and understanding of that system;
    - considering the adequacy of that system and desirable improvements to it; and
    - crucially, advising the Attorney-General from its position as an independent, expert observer of Australian administrative law at all levels.

    These functions are "far from straightforward" but have always been approached on a consultative basis, in order that the ARC's advice will improve the quality of action taken by other entities within government.[36]

23. I respectfully agree with the recommendation of Mr Callinan that a re-established ARC is the appropriate body to have oversight of the performance of the AAT and to deal with any complaints in that regard.[37] I also respectfully endorse the extra-judicial observation of Justice Griffiths that

> Some of the controversy surrounding the appointment or reappointment of AAT members, as well as that relating to the AAT's role in reviewing citizenship decisions, could have been avoided or perhaps minimised if the ARC were involved. At the very least, the public debate would have been better informed.[38]

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[33] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 146 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ, referring to the Governor of South Australia). Their Honours cited *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
[34] *Callinan Report*, pp 182-184. The ARC's productivity is further described in Weeks, above n 2, p 40.
[35] *Callinan Report*, p 19 [1.27].
[36] Kenny, above n 25, 150.
[37] *Callinan Report*, pp 76-77 [6.51].
[38] The Hon Justice John Griffiths, 'Access to Administrative Justice' (2017) 89 *AIAL Forum* 25 at 36.

24. The importance of the ARC's role as a developer of policy advice to government should not be underestimated. The proposition that the Attorney-General can obtain the advice that he or she needs from within the Attorney-General's Department was open to doubt at the time of the ARC's functional "abolition". Events since that time have justified that doubt. For example, the costly[39] and damaging "Robodebt" affair emphasises the need for independent advice to government about administrative law matters. In a judgment approving the settlement of a class action brought against the Commonwealth by those affected by the "Robodebt" system, it was described by Murphy J as "a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration".[40] His Honour noted that the inherently flawed nature of essential aspects of the scheme "should have been obvious to the senior public servants" but were not.[41] Although it is necessarily a matter for speculation whether the eventual outcome might have been avoided had the ARC's advice been available to government at the time, "Robodebt" was precisely the kind of scheme about which independent advice might have benefited the Commonwealth.

25. As Sir Anthony Mason noted some years before the ARC was defunded in 2015, the facts that its independent secretariat had been withdrawn and its budget was controlled by the Attorney-General's Department constituted

> a deliberate transformation in its role from that of an independent body into an advisory role of assisting the Department '*on matters of current Government priority*'. In that role, it has to rely on departmental officers whose primary loyalty is naturally to the government, not to the Council.[42]

26. Sir Gerard Brennan, a former president of the ARC, was also reported as saying that the ARC is

> not merely a ministerial adviser; its remit is 'to keep the Commonwealth administrative law system under review' and to report its activities to the Parliament. It is the public guardian of a system which is an important feature of open government. It should have the resources to critically assess and publicly

[39] The plaintiffs' legal costs alone came to $8,413,795.71: *Prygodicz v Commonwealth of Australia [No 2]* [2021] FCA 634. This sum, for which the Commonwealth is liable under the settlement deed approved by the Federal Court, puts into perspective the argument that abolishing the ARC is justified as an economic measure.
[40] Ibid. at [5].
[41] Ibid.
[42] Sir A Mason, 'Delivering Administrative Justice: Looking Back With Pride, Moving Forward With Concern' (2010) 64 *AIAL Forum* 4 at 8 (emphasis in original).

> report on the system which gives individuals and corporations the right to seek independent review of the administrative decisions of government.[43]

27. These statements in favour of an independent ARC by two former Chief Justices of Australia were made in the context of reductions to its funding. They apply with even greater strength following the ARC's effective abolition.

28. Given that the Attorney-General possesses a statutory power under s 51A of the AAT Act to "give directions to the Council in respect of the performance of its functions or the exercise of its powers and the Council must comply with any such directions", it would be preferable that the ARC were re-established as an independent body which operates separately to the Attorney-General's Department and controls its own budget, reporting directly to Parliament. The benefits of that independence might include the Commonwealth – both the executive government and the Commonwealth Parliament[44] – receiving advice that it has not sought but nonetheless needs to hear.

29. I note the suggestion in the Callinan Report that a person be appointed as a member of the ARC under s 52(2) of the *AAT Act*, which provides for appointments to be made "for the purposes of a particular project specified in the instrument that is being, or is to be, undertaken by the Council". I agree with Mr Callinan that the Attorney-General should consider advising the Governor-General to make such an appointment "to oversee the implementation of the measures suggested" in the Callinan Report.[45] Advising the Commonwealth about the detailed recommendations in the Callinan Report is a task for which the ARC is well suited.

Concluding remarks

30. I thank the Committee for the opportunity to make submissions on matters of great importance to the functioning of the federal administrative law system.

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2 November 2021

[43] J Eyers, 'Administrative council left to starve', *The Australian Financial Review*, 22 April 2010.
[44] Justice Kenny noted both the statutory intention of the *AAT Act* that Parliament consider the work of the ARC and the fact that the ARC's role cannot be performed by federal courts: Kenny, above n 25, 159.
[45] *Callinan Report*, p 20 [1.27].