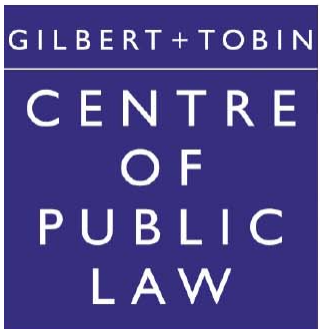

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
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Dear Secretary

Re: Administrative Review Tribunal Bill 2023 (ART Bill) and Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023 (Consequential Bill)

Thank you for the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs in its inquiry into the ART Bill and Consequential Bill.

We write in our capacity as academics at the Faculty of Law & Justice, University of New South Wales and the Faculty of Law, University of Technology Sydney. We are solely responsible for the views and content of this submission. We consent to this submission being published on the Committee's website and would be happy to speak with the Committee further regarding any aspect of it.

The Bills would establish a new federal administrative appeals tribunal and make extensive changes to administrative review in a range of complex policy areas, including social security and migration. In light of the scope and complexity of the proposed legislation, this submission examines only select aspects of the Bills.

The nature and purpose of the Administrative Review Tribunal

1 The ART Bill would establish a new federal Administrative Review Tribunal (ART) to replace the Administrative Appeals Tribunal (AAT), as recommended by the Senate Standing Committee on Legal and Constitutional Affairs' Interim Report on *The Performance and Integrity of Australia's Administrative Review System* (March 2022) (Senate Committee Report). The Senate Committee Report identified a number of significant barriers to the effective operation of the AAT.

2 The Bills also respond to some of the recommendations made in two other recent reports:

- Hon IDF Callinan, *Review, section 4 of the Tribunals Amalgamation Act 2015* (Cth) (Report, 23 July 2019) (Callinan Report).
- Catherine Holmes, *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023) (Robodebt Royal Commission Report).

3 The proposed ART would retain those core aspects of the AAT system which have worked well, while addressing the most significant problems with the AAT identified in those three reports.

4 The stated purpose of the ART (cl 9, ART Bill) draws on, but extends and alters the focus of, the purpose clause in the *Administrative Appeals Tribunal Act 1975* (Cth) s 2A (AAT Act). While only 'aspirational' in nature,[1] that purpose clause has proven effective in guiding the Tribunal and courts in interpreting and understanding the Tribunal's functions.[2] The content of cl 9 of the ART Bill expands upon that foundation in key ways that we believe will have a positive influence on the functioning of the ART.

5 First, cl 9 specifies that the Tribunal is to provide an 'independent mechanism of review'. S 2A(d) of the AAT Act refers to the expectation that the AAT will carry out its functions in a manner that will promote 'public trust and confidence' in its decision-making, and it is widely accepted that the AAT was intended to operate independently of the executive branch of government. For example, Brennan J noted in *Drake (No 2)* that '[t]he very independence of the Tribunal demands that it be apolitical'[3] when describing the AAT's role in the implementation of government policy. That independence has both limited the AAT's role in the *development* of government policy on the one hand, but solidified its autonomous role in determining whether and how to *apply* government policy on the other. The express mention of 'independence' in cl 9 is a welcome inclusion in the purpose clause as it emphasises the importance of the Tribunal's independence to its effective functioning. This will be reinforced by, and we expect will also inform, the implementation of the more robust and merits-based appointments process provided for in Part 8 of the ART Bill.

6 Secondly, cl 9 places an appropriate emphasis on the importance of fairness and accessibility in the performance of Tribunal functions. Cl 9(a) appropriately highlights the centrality of fairness and justice to the ART's functions, by listing this first. Cl 9(c) refers to the need for the Tribunal to be 'responsive to the diverse needs of parties'. This is a useful addition as it reflects the broad jurisdiction, and hence wide range of parties who appear before the Tribunal. Many of those who use the Tribunal's social security, NDIS and migration jurisdictions experience significant disadvantage. They may require a range of assistance and accommodations in order to access the Tribunal. It is important and apt that the purpose clause expressly recognise this fact.

[1] For example, these types of provisions are not a source of directly enforceable rights: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 [108] (Gummow J); *Fard v Secretary, Dept of Immigration and Border Protection* [2016] FCA 417, [80] (Griffiths J).
[2] See, eg, *Minister for Immigration and Border Protection v Haq* [2019] FCAFC 7, [18], [44].
[3] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644 (Brennan J).

7 Finally, cl 9(d) provides that the Tribunal's objectives include improving 'the transparency and quality' of government decision-making. This too is a welcome and useful addition and underscores the systemic role that external review can and should play in improving the quality of government decision-making.

8 The ART Bill retains key aspects of the procedural operations of the AAT. Div 5, sub-div A of the ART Bill would retain the procedural discretion and flexibility of the AAT, specifying that the Tribunal has discretion in relation to procedure (subject to the overarching requirement that it act fairly and justly) and is not bound by the rules of evidence. This flexibility is important in a tribunal with such wide ranging and diverse jurisdiction.

9 Cl 17 essentially retains the simple, broad standing test from the AAT Act, which has proven clear and effective.[4]

Guidance and Appeals Panel

10 One significant change from the AAT model is that the ART Bill would establish a Guidance and Appeals Panel (Pt 4, Div 4, sub-div C; Part 5) (the Panel). The Panel would be a second tier of review and constituted by two or three members, including a presidential member (cl 41). The Panel could only hear matters referred to it by the President. The President could refer matters to the Panel either on his or her own motion (cl 122) or on application by a party seeking to challenge a decision of the Tribunal (cl 123). In order to refer an application to the Panel at first instance under cl 122, the President must be satisfied that the application 'raises an issue of significance to administrative decision-making' and that 'it is appropriate in the interests of justice' to refer the application to the Panel (cl 122(b)). If a party seeks to appeal a Tribunal decision to the Panel, the President must be satisfied that 'the decision raises an issue of significance to administrative decision-making' or that the 'the decision may contain an error of fact or law materially affecting the Tribunal decision' (cl 128).

11 The purpose of the Panel seems to be to identify and provide guidance on significant and systemic issues raised in applications made to the Tribunal. This is consistent with the Tribunal's objective of improving the quality of administrative decision-making (cl 9(d)) and is consistent with the recommendations made in the Robodebt Royal Commission Report. Had such a Panel existed when the Robodebt scheme was rolled out, it may have identified the fact that many social security applications were raising similar issues and that the problem underpinning those applications was the use of an automated system that adopted an unlawful and erroneous method of calculating debts. For these reasons we support the addition of the Panel.

12 However, the criteria for referring a matter to the Panel could be clearer. In particular, the requirement that an application raise 'an issue of significance to administrative decision-making' is somewhat vague. It could be clarified by adding a non-exhaustive list of examples of such matters. For example, such a list might refer to situations in which an application or series of applications raise potential concern regarding:

(a) an ongoing pattern of similar decision-making errors or problems in a particular administrative area;

[4] See Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44(2) *Federal Law Review* 167, 190-91.

(b) a lack of accountability and oversight in a particular administrative area, including where decision-making tasks are divided, delegated or outsourced in a manner that reduces overall visibility to those charged with the primary exercise of power;
(c) the use of decision-making processes, procedures or tools that may produce errors or other problems in decision-making; or
(d) the implementation of unlawful policy.

13 It is likely that there will be a substantial amount of work involved for the President (or his or her delegate/s) in deciding whether applications meet the threshold for referral to the Panel. As noted, the President can refer any application to the Panel under cl 122, so must develop some system of filtering those applications which may be suitable for referral beyond those applications brought by individual parties under cl 123. It may be appropriate for the Tribunal Advisory Committee to assist the President in this identification and filtering function, particularly given the Committee's oversight role with respect to Tribunal caseload and monitoring patterns and systemic issues arising in jurisdictional areas (cl 236(4)).

Guidance decisions

14 Division 9 of the ART Bill provides for the making, by the Guidance and Appeals Panel, of guidance decisions. The Tribunal (except judicial members) must have regard to guidance decisions in cases that raise similar facts or issues (cl 110). The issuing of guidance decisions is designed to, and likely will, promote consistency in the Tribunal's decision-making. The EM explains that guidance decisions will be particularly useful in promoting 'rapid responses to emerging and systemic issues' (EM, p 100).

15 There are existing powers under the *Migration Act 1958* (Cth) for the President of the AAT (and formerly the President of the Migration and Refugee Review Tribunals) to issue various kinds of guidance decisions (see ss 353B, 420B, 473FC). Those powers do not appear to have been used frequently—we are aware of only two such decisions[5] (though we note we are not experts in the field of immigration law and encourage the Committee to take the advice of immigration experts on the use and effects of guidance decisions). There has been greater experience of the use of guidance decisions in the UK.[6] Indeed, UK country guidance decisions have been relied on by the AAT. The UK experience suggests that guidance decisions can result in greater consistency in decision-making and certainty for applicants.[7] But there is also need for caution as guidance decisions can result in substantive injustice in individual cases if they are treated as binding precedent and the facts of individual cases are not properly considered. This is especially likely when a guidance decision takes a restrictive approach, as UK country guidance decisions have tended to do.[8]

[5] B&*G Green Trading Pty Ltd (Migration)* [2018] AATA 3190*; "SRPP" and Minister for Immigration and Multicultural Affairs* [2000] AATA 878.
[6] Douglas McDonald-Norman, 'Country Guidance Decisions in the UK and Australia' *AUSPUBLAW* (Blog Post, 7 July 2016) https://www.auspublaw.org/blog/2016/07/country-guidance-decisions
[7] Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) (2008) 20 International Journal of Refugee Law 489, 494.
[8] Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) (2008) 20 International Journal of Refugee Law 489, 494.

16 The EM to the ART Bill provides that guidance decisions do not create binding precedent, and the ART Bill specifies that failure to consider a guidance decision does not affect the validity of a decision (cl 110(3)). However, it is possible notwithstanding this expectation that guidance decisions will be *treated* by ART members as precedents or used as pro-forma reasons. To reduce the likelihood of these negative effects, guidance decisions should:

(a) draw decision-makers' attention to the fundamental requirement to properly consider the individual circumstances or merits of a case when making use of the guidance decision;
(b) be phrased in non-prescriptive terms that allow decision-makers sufficient flexibility to permit individual circumstances to be recognised and to depart from the guidance decision in appropriate cases;
(c) be made in a transparent manner;
(d) be made following consultation and an opportunity for all interested parties to put their perspectives; and
(e) be regularly reviewed.[9]

17 These requirements could be inserted in the legislation or in regulations.

Abolition of second tier of social security and family assistance appeals

18 The proposed legislation has only one tier of Tribunal review for social security appeals. There are currently two tiers of review in social security and family assistance appeals – essentially an automatic right to appeal within the Tribunal. The first tier is typically informal, while the second tier is more formal and adversarial. Under the proposed legislation, social security and family assistance applicants, like those in other jurisdictions, will only be allowed an appeal if their application meets the criteria under cl 128 (raises an issue of significance or may contain an error of fact or law materially affecting the Tribunal decision).

19 Removing the automatic right to a second tier of review in social security and family assistance applications has the potential to improve efficiency and incentivise full engagement with review by both applicants and government agencies in the first instance. However, these benefits will only accrue if measures are put in place to ensure that the Tribunal process is fair and capable of considering all relevant issues at first instance. We note the concerns of Economic Justice Australia (EJA) in its submission to this inquiry (submission 7) about the loss of the automatic second tier of review. We strongly support EJA's call to **significantly** increase funding for legal assistance for social security and family assistance applicants. We believe this is a pre-requisite for the fairness and success of the proposed single tier model.

Abolition of Immigration Assessment Authority (IAA)

20 The Consequential Bill would abolish the IAA, which is a separate office within the AAT established to conduct 'fast track' applications. These are applications for protection visas

[9] These recommendations are adapted from: Douglas McDonald-Norman, 'Country Guidance Decisions in the UK and Australia' *AUSPUBLAW* (Blog Post, 7 July 2016) https://www.auspublaw.org/blog/2016/07/country-guidance-decisions

by 'unauthorised maritime arrivals' who entered Australia in 2012 and 2013. The review conducted by the IAA is a more limited form of review than that ordinarily performed by the AAT and has been criticised as fundamentally unfair, insufficient to correct errors in first-instance decisions, and compounding the vulnerability of asylum seekers.[10] The IAA process excludes the basic, common law presumption of procedural fairness that an applicant must be put on notice of adverse conclusions that a decision-maker has drawn, including those that would not obviously be open on the known material.[11] Only a very limited range of new information is required to be put to applicants. The IAA process is complex, has led to an enormous quantity of litigation and remains uncertain. It has been considered by the High Court of Australia on several occasions,[12] and remains subject to intense debate and controversy. The intended benefits of improving efficiency are vastly outweighed by the intense difficulty that reviewers and applicants experience in understanding and applying the provisions.

21 We strongly support the abolition of the IAA.

Re-establishment of the Administrative Review Council (ARC)

22 Part 9 of the ART Bill establishes the ARC. The ARC was established by the AAT Act, and was never formally disestablished. It remains part of the AAT Act (Part V). However, in the 2015-16 budget, the Government announced that it would no longer fund the ARC. This decision has been strongly criticised, as the ARC was an invaluable component of Australia's system of administrative law and had a strong track-record of providing advice on systemic issues and challenges.[13] While we have learned from this experience that the inclusion of the ARC in the ART Bill offers no guarantee of its actual existence, the EM to the ART Bill states that the government has committed $5.3 million in funding to its re-establishment. We endorse both the inclusion of the ARC and its funding.

23 In his submission (submission 1), Professor Matthew Groves recommends that the APS Commissioner be added as a standing member of the ARC (cl 247). **We support this proposal.** Only a small proportion of administrative decisions will be appealed to a tribunal, court, or reviewed by an ombudsman. The APS is at the front line of ensuring that the values of good administration are upheld, and it is therefore crucial that the APS has input into, and is represented by, the peak advisory council on administrative law.

[10] Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *UNSW Law Journal 1003;* Joel Townsend and Hollie Kerwin, 'Erasing the vision splendid?: Unpacking the formative responses of the federal courts to the fast track processing regime and the 'limited review' of the immigration assessment authority' (2021) 49(2) *Federal Law Review* 185.
[11] *Commissioner of ACT Revenue v Alphaone Pty Ltd* [1994] FCA 1074; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63.
[12] *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; *Minister for Immigration and Border Protection v CED16* [2020] HCA 24.
[13] See generally Narelle Bedford, 'The Kerr Report's vision for the Administrative Review Council and the (sad) modern reality' *AUSPUBLAW* (Blog Post, 21 May 2021).

Merit-based appointments

24 The appointment of members to the AAT who were prominent members of political parties led to the appearance that the AAT lacks independence.[14] The appearance of independence is critical to the success of an external appeals body.

25 The ART Bill requires the Minister to be satisfied that members appointed to the Tribunal were assessed as suitable by an assessment process that was merit-based, included public advertising, and complied with any requirements in the regulations (cl 205, 207, 208). The definition of 'merit-based' in cl 4 provides an appropriate level of detail. It is sufficiently broad to allow appropriate flexibility in the assessment process while offering some assurance that members will be appointed for their skills and experience rather than their political links.

26 One area of uncertainty in the ART Bill is the nature of the 'assessment process' by which potential members are to be identified. Cl 209 provides that the Minister may establish an assessment panel or panels to assess candidates. Presumably an assessment undertaken by an assessment panel would be one that the Minister might rely on for the purpose of making an appointment recommendation, however the connection between these provisions is not spelled out. While it can be expected that some of these details will be fleshed out in regulations, we think the role of assessment panels could be made clearer in the legislation.

Publication of decisions

27 The Tribunal is required to prepare a statement of reasons in a variety of contexts, including after making a decision on review of a reviewable decision (cl 111) and (on the request of a party) on finalising some other types of Tribunal proceedings (cl 112). The Tribunal is obliged to provide copies of decisions and statements of reasons in these contexts to the parties. Despite the breadth of the Tribunal's obligation to *prepare* reasons, the ART Bill imposes a comparatively limited obligation to *publish* those reasons.

28 Some special categories of case are specifically excluded from disclosure or publication (eg where a public interest certificate has been issued (cl 91) or orders have been made limiting disclosure (cl 70)). Beyond those special cases, cl 113 of the ART Bill envisages a two-tiered approach to publication: decisions generally *may* be published, but decisions involving 'a significant conclusion of law' or with 'significant implications for Commonwealth policy' *must* be published.

29 The current AAT Act includes the same permissive language (*may*) regarding publication as provided for in cl 113. There is no equivalent to cl 113(2) (the requirement to publish significant decisions) in the AAT Act. In practice, however, the AAT's policy is to publish all decisions (unless there are reasons not to publish) in most jurisdictional areas, as well as a representative cross section of decisions in the Migration & Refugee and Social Services & Child Support Divisions.[15]

[14] Janina Boughey, 'A call for ongoing political commitment to the administrative law project' (2021) 28 *Australian Journal of Administrative Law* 242, 247-9.

[15] AAT Publication Policy: https://www.aat.gov.au/AAT/media/AAT/Files/Policies/AAT-Publication-of-Decisions-Policy.pdf

30 As observed in the EM to the ART Bill, the publication of decisions and reasons is important for transparency, public trust and confidence in the Tribunal (EM, p 103). The EM suggests that introducing a mandatory obligation to publish reasons in 'significant' cases is consistent with the objective of improving the transparency and quality of government decision-making (EM, p 103). However, we are concerned that in singling out certain cases for mandatory publication, this might be read as suggesting that, by comparison, it is not equally important to continue the current AAT practice of routinely publishing other Tribunal decisions. We suggest that a more robust approach is taken to ensure the current practice of publication continues. For example, a provision could instead impose a positive obligation on the Tribunal to publish reasons where they have been prepared, subject to appropriate carve-outs and limitations (eg as already reflected in cl 113(4)). If necessary, this could be accompanied by a discretionary power not to publish where the Tribunal considers that approach to be in the public interest.

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