Submissions on the *Administrative Review Tribunal Bill 2023*

By public law academics of the Western Sydney University School of Law

Bolstering the independence and functions of the Administrative Review Council

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1. This submission is drafted in response to the call by the Senate Legal and Constitutional Affairs Committee ('the Senate Committee') for submissions on the *Administrative Review Tribunal Bill 2023* ('ART Bill'). It is informed by the inquiry conducted at the request of the Attorney-General by the House of Representatives Standing Committee on Social Policy and Legal Affairs into the ART Bill ('the Standing Committee Report'), the many submissions received in relation to that inquiry and related media coverage.

2. Noting strong criticism by crossbenchers and the Greens of the "merit-based" selection process proposed in the ART Bill and the equally important need for "flexibility"[1] in the selection criteria, the following argues that the ART Bill's prospects of passing in the Senate could be improved by:

   (i) re-establishing the Administrative Review Council ('ARC') as a body separate from and independent of the Attorney-General's Department (a la the Commonwealth Ombudsman),
   (ii) increasing the functions of the ARC to specifically permit inquiry into qualifications required for membership of the proposed ART, and
   (iii) expanding the specialisation and diversity of ARC membership.

3. What follows elucidates the preceding three recommendations.

Re-establishing the ARC as a distinct legal entity

4. Responding to recommendations of the Robodebt Royal Commission Report and the March 2022 report of the Senate Legal and Constitutional Affairs Committee on the performance and integrity of the administrative review system ('the March 2022 Senate Report'), Part 9 of the ART Bill re-establishes the ARC and makes clear its functions relate to:

   (a) monitoring the integrity and operation of the Commonwealth administrative law system;
   (b) inquiring into and reporting on matters related to the making of administrative decisions and the exercise of administrative discretions; and

[1] Tom Crowley, 'Attorney-General Mark Dreyfus faces Senate obstacle on Administrative Appeals Tribunal reform', *ABC News*, 29 February 2024 (https://www.abc.net.au/news/2024-02-29/dreyfus-faces-senate-obstacle-on-aat-reform/103524168) ('Crowley, (2024)')

(c) supporting education and training in relation to the Commonwealth administrative law system, the making of administrative decisions and the exercise of administrative discretions.[2]

5. The ARC was originally created under the *Administrative Appeals Act 1975* (Cth) ('AAT Act') as a separate independent advisory body. Its existence is "a recognition … that the deficiencies of the previous system would not be overcome merely by establishing the Ombudsman and the AAT and reforming judicial review of Commonwealth administrative review."[3]

6. Indeed, just like other Commonwealth watchdog bodies, the ARC is considered "in fact (if not in law) a fourth branch of government."[4]

7. In 2015, however, the Liberal-National Coalition government announced its intention to abolish the ARC and to incorporate its functions into the Attorney-General's department. The ARC has since been "starved of funding and has not met regularly for years".[5]

8. Clause 248 ART Bill is a new provision which effectively treats the ARC as part of the Attorney-General's Department ('AGD'). To this end, AGD staff will assist the ARC in performing its functions, the AGD Secretary will prepare an annual report on ARC activities and the AGD will be responsible for managing funds allocated to the ARC.

9. Subclause 248(1) provides for the application of finance law to the ARC. Finance law has the same meaning in the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act'). As explained in the Explanatory Memorandum accompanying the ART Bill ('EM''):

> This also means that members of the [ARC] are officials of the Department for the purposes of the accountability obligations under the PGPA Act… Furthermore, an annual report prepared by the Secretary of the Department is required to cover the [ARC's] activities… Public resources expended for the purposes of the [ARC] will also be used and managed by the Department, through the Secretary as the accountable authority.[6]

10. However, subclause 248(2) provides that ARC members who are officials of a different Commonwealth entity are not considered officials of the AGD and thus not

[2] Clause 245 ART Bill.
[3] John Griffiths, 'The Administrative Review Council' (1984) *Law Institute Journal*, reproduced in Douglas, *et al*, *Douglas and Jones's Administrative Law* (8th edition) (Federation Press, 2018), 63 ('D&J (2018)').
[4] See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed) (Thomson Reuters, 2022), 11 ('AGW (2022)'). (citation omitted)
[5] D&J, 63. (citation omitted)
[6] EM, [1421].

subject to accountability obligations as ARC members.[7] This is because those members are already subject to existing accountability obligations under the *Public Service Act* 1999 (Cth) ('PS Act') *Australian Public Service ('APS') Code of Conduct*, unlike other Council members who are not already government officers.

11. Irrespectively, accountability obligations would not be undermined if the ARC were established as a distinct legal entity. Like any officer of a Commonwealth entity, ARC members will be subject to the PS Act and APS Code of Conduct in the event it is established as a separate Commonwealth entity. And any AGD staff seconded to the ARC would still be subject to its direction, as proposed under the current ART Bill.

12. Bolstering the legislative underpinning of the proposed ARC to establish it as a distinct legal entity separate from the AGD should enhance its independence and durability, making it harder for future governments to abolish it compared with abolishing or reshaping a government department.[8]

13. Having a strong and truly independent ARC is an important step to ensuring high quality administrative decision-making by Commonwealth agencies and, like the Ombudsman, "makes a government look good."[9] To this end, subclause 249(2) ART Bill introduces a "substantial change"[10], ensuring the ARC is no longer subject to ministerial direction, as is the case under s 51A of the AAT Act.

14. Nevertheless, the risk of defunding is likely to remain whether or not the ARC is established as a distinct legal entity with broader discretionary powers. This is because "[o]ne cannot assume that governments of either major persuasion take kindly to independent voices."[11] However, the durability of its tenure might ultimately be inextricably linked to its capacity to ensure the integrity and transparency of the merit-based appointment system.

Expanding the functions of the ARC

15. The March 2022 Senate Report recommended the establishment of a transparent merit-based selection process, informed by the operational needs of the ART. Such a process is considered important for achieving the objective of providing an independent mechanism for review that:
    - is fair and just
    - ensures that applications for review are resolved quickly, informally and inexpensively as a proper consideration of matters before the ART permits
    - is accessible and responsive to the diverse needs of parties to proceedings

[7] Subclause 247(1) ART Bill provides that ARC membership consists of:
(a) the President;
(b) the Commonwealth Ombudsman;
(c) the Australian Information Commissioner;
(d) at least 3, but no more than 10, other members.

[8] See AGW (2022), 11.

[9] *Cf* Denis Pearce, 'Minding the people's minder' (1992) *Canberra Times* reproduced in D&J, 194.

[10] EM, [1428].

[11] AGW (2022), 11.

- improves the transparency and quality of government decision-making, and
- promotes public trust and confidence in the ART.[12]

16. To be "merit-based", the selection process must be competitive and the candidate must have suitable expertise and experience. Pertinently, clause 4 ART Bill mandates the "assessment takes into account the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal."

17. Nevertheless, under clause 209 ART Bill the Minster has wide regulation-making powers to establish an assessment panel and change the methodology to be used by the panel in assessing candidates, and the procedures and operation of assessment panels without parliamentary oversight. According to AGD officials, this is necessary for "flexibility, for example if the future caseload of the tribunal changed in unexpected ways and required candidates with different backgrounds."[13]

18. The independent member on the Senate Committee, Kate Chaney, has taken issue with clause 209, remarking that:

> The politicisation of appointments is not a matter to be dealt with by a gentle regulatory model… Given past issues with politicisation of appointments, I am not satisfied that these issues can be appropriately addressed in regulations.[14]

19. Senators David Pocock and Jacqui Lambie agree with Senator Chaney. The Greens have expressed similar concerns, with the justice spokesperson, Senator David Shoebridge, remarking that "[d]iscretionary integrity measures are not integrity measures at all and that absolutely needs to be fixed."[15] Given this, and the ambivalence of the Coalition towards the ART Bill, the prospects of the Bill passing the Senate are slim.

20. Nevertheless, opposition to clause 209 could well be pacified and the prospects of the ART Bill bolstered if the Attorney-General was required to consult with the ARC in formulating regulations detailing procedural requirements of the assessment panel.

21. Increasing the ARC's functions to specifically include inquiry into the selection process of ART members would improve the integrity and transparency of the appointment process. It bears recalling that one of the previous functions of the now-defunded ARC was, *inter alia*, to "inquire into … the qualifications required by other persons, engaged in the review of administrative decisions".[16]

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[12] See EM, [10].
[13] Crowley (2024).
[14] Crowley (2024).
[15] Crowley (2024).
[16] Section 51(1)(d)(i) of the AAT Act.

22. The EM explains (at [1426]) that "less prescriptive" language was purposefully used to outline the ARC's functions compared with s 51 of the AAT Act "to provide greater flexibility in the [ARC's] functions."

23. Be that as it may, it is unclear whether the power conferred on the ARC in subclause 249(1)(h) ART Bill "to do anything incidental or conducive to the performance of any of the above functions" will in fact allow it to inquire into and make recommendations about the adequacy of the merit-based selection process.

24. It follows that conferring specific power on the ARC to inquire into regulations establishing assessment panels and make recommendations about their consistency (or otherwise) with the merit-based process could assuage concerns about the politicisation of appointments.

25. Towards the immediately preceding end, clause 209 should be amended by inserting a requirement on the part of the Minister to consult the ARC prior to making regulations concerning the establishment of assessment panels and the methodology to be used in assessing candidates for appointment as a member.

Expanding the diversity and specialisation of the ARC

26. The ARC membership provision in clause 247 ART Bill differs from the equivalent in s 49 AAT Act, ensuring that the ARC's "ex officio membership is limited to office-holders with a strong or total focus on administrative decision-making."[17] It also differs from s 49 AAT Act by limiting ex-officio membership to 10, to provide "greater certainty about the size of the [ARC]."[18]

27. Whilst the new provision provides more certainty and "additional flexibility"[19] than is otherwise available under s 49 AAT Act, clause 247 ART Bill was nevertheless criticised by the Law Council of Australia ('LCA') (in its submissions to the House of Representatives Standing Committee) for its lack of specificity on the staffing requirements for the ARC.[20]

28. Meanwhile, the Women's Legal Services Australia ('WLSA') recommended in their submissions to the House of Representatives Standing Committee inquiry into the ART Bill that "the Minister should be required to take into account the need for a diversity of backgrounds within the ARC to ensure the diversity of the Australian community is represented."[21]

29. Likewise, the Inspector-General of Taxation and Taxation Ombudsman ('IGTO') noted ARC membership under the ART Bill, unlike that prescribed under the AAT Act, does not include a specialist taxation perspective.

[17] EM, [1415].
[18] EM, [1416].
[19] EM, [1419].
[20] Standing Committee Report, [2.164]
[21] Reproduced in Standing Committee Report at [2.165].

30. Notwithstanding that taxation matters "account for approximately 2% of the AAT' (and likely the ART's workload)",[22] expanding the diversity and specialisation of ARC members to include a specialist taxation perspective to inform the ARC's work would better facilitate achievement of high-quality administrative decision-making by Commonwealth agencies and minimise disputes. To this end, taxpayers and stakeholders have expressed "deep concern"[23] about how the Commissioner of Taxation uses the taxation power.

31. It follows clause 247 should be amended by providing more specificity about eligibility for ex-officio appointments on the ARC in a way that reflects WLSA and IGTO recommendations regarding increased diversity and specialisation of ARC members.

Conclusion

32. Given the vital role the ARC plays in the administrative review system, strengthening its legislative underpinning and broadening its functions and the diversity and specialisation of its members could well enhance its capacity to ensure the integrity and transparency of the merit-based selection process and ensure the new ART well fulfills its objective. Importantly, the changes recommended in this note should improve the prospects of the ART Bill passing in the Senate.

Submission in relation to the rights of children

Dr Meda Couzens, Lecturer

1. Australia is a party to the *Convention on the Rights of the Child* done at New York on 20 November 1989 ([1991] ATS 4) ('the CRC'). The *Human Rights (Parliamentary Scrutiny) Act* 2011 (Cth) requires that the Parliament conducts a scrutiny of a Bill against the human rights standards that bind Australia, including the CRC.[24]

2. The Statement of Compatibility with Human Rights does not consider the CRC in detail.[25] It simply states that *inter alia* 'the Bill promotes: … the right of a child to express his or her opinion in Articles 3 and 12 of the Convention on the Rights of the Child (CRC) - for example, by providing for reviews of decisions affecting children'.[26] No further attention is given to the CRC and the obligations arising from the mentioned articles. This is inconsistent with the objective of creating a body that is 'critical to protecting the rights and interests of individuals and organisations, particularly the rights and interests of the most vulnerable members of our

[22] See Standing Committee Report at [2.163], referring to submissions of the IGTO.
[23] John Azzi, 'Judicial review and tax assessment-making process' (2022) *UNSWLJ* 251 ('Azzi (2022)').
[24] In this submission, the word 'child' refers to every person under the age of 18 (article 1 of the CRC), and includes the term 'youth', which is use for, *inter alia*, adolescents up to the age of 18.
[25] *Explanatory Memorandum to the Administrative Review Tribunal Bill 2023* pg. 7 onwards.
[26] Ibid pg. 19 para 101.

community'.[27] The overlooking of the CRC draws attention to a practice that should be discouraged in the scrutiny process, i.e. considering the CRC and the rights of children only when the links between the proposed legislation and children are glaring or unavoidable. This approach leaves outside a children's rights scrutiny proposed legislation that may significantly affect children although it is not about them.

3. The Statement of Compatibility with Human Rights discusses extensively the right to access to an effective remedy under the *International Covenant on Civil and Political Rights*, 1966. A right to access to an effective remedy is implicit, rather than explicit, in the CRC.[28] Article 12(2) of the CRC provides for children's right to be heard in administrative proceedings, including as claimants. Like its predecessor, the Administrative Appeals Tribunal, the ART is a core mechanism of access to administrative justice and its founding legislation should make it clearer that it protects children's access to justice.

4. While the Bill does not explicitly prevent children's access to the ART, it neither acknowledges nor encourages it. General laws, such as the proposed Bill, are not always used to protect children and their rights although they have potential in this regard. The drafting of the CRC, despite the existence of a comprehensive *International Bill of Rights* is a clear illustration. The failure of the ART Bill to acknowledge children is inconsistent with its objective to create a review mechanism that 'is accessible and responsive to the diverse needs of parties to proceedings' (Clause 9(c)). It leaves a great degree of discretion to individual decision-makers to make their own assessment of the 'diverse needs of the parties' and whether they warrant procedural flexibility or special accommodation.

5. The phrase 'diverse needs' may be seen as accommodating children's needs, but it creates the risk that children become invisible in the ART context. Just as child-related concerns have been quasi-invisible in the Bill, the *Explanatory Memorandum* and the scrutiny process, so may they become invisible to the ATR under the umbrella of 'diverse needs of parties'. By using this formula, the executive may have intended the accommodation of a wide range of vulnerabilities and abilities. Concerns about limiting the scope of that phrase through defining it can be avoided by using inclusive formulae, i.e. 'such as' or 'including', for example. Further, explicitly identifying persons with diverse needs in legislation is a common technique (see for example Aboriginal or Torres Strait Islander children in section 60CC(3)(h) of the *Family Act* 1975 (Cth)).

6. Explicit mention of children in legislation would communicate their recognition as potential users of the ART, and thus promote children's access thereto. It would also legitimise and encourage the use of procedural flexibility by Tribunal members to enhance children's access to justice. It would signal to the ART President that

[27] Ibid pg. 1 para 1.
[28] Committee on the Rights of the Child *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* para 24

children should not be overlooked when issuing practice directions in relation to the accessibility and responsiveness of the Tribunal (Clause 36(1)(k)). In the context of practice directions, explicit mention of children in the Bill would encourage the President to consider children beyond migration proceedings,[29] to all other proceedings involving or concerning children.

7. The invisibility of children in the Bill and its *Explanatory Memorandum* denies them recognition as subject of rights. Permeating the above documents are the assumptions that children's interests are best represented before the ART by their parents or carers; or that children are incapable of participating in ART processes and thus need a litigation guardian appointed under Clause 67. Thus, children are portrayed as either appendixes of their parents or as incapable of participation.

8. In many cases, the interests of children and parents/carers align, and the latter are able to represent and advocate effectively for their children. However, risk of divergent interests or ineffective representation by parents/carers cannot be excluded. If the Tribunal does not appear accessible to children, they will be discouraged from appealing to the ART and would rely on parents or carers to continue representing them. Parents and carers may be well-intended but they may find it difficult to articulate the distinct interests of children and disentangle them from their own interests. Proceedings that do not guide toward or facilitate the articulation of children's interests as distinct and autonomous go against the tenor of the CRC which recognises children as holders of own rights. If the Bill encourages a mediated involvement of children in the proceedings of the ART as the paradigm involvement, children's distinct interests will remain insufficiently articulated before the Tribunal, and unlikely to be given the visibility and weight in decision-making that they deserve.

9. The participation of a child in the ATR proceedings through a litigation guardian appointed by the ATR under Clause 67 completely excludes the involvement of a child in proceedings, under Clause 67(5)(a). The appointment of the litigation guardian follows an assessment of a child's capacity to understand the nature and possible consequences of the proceedings, or to conduct or giving instructions for the conduct of proceedings (Clause 67(1)(a)). Given the severe consequences of a finding that a child lacks capacity (i.e. the exclusion of the direct participation of the child in proceedings), it is problematic that the Bill provides no clarity on how the Tribunal will establish that capacity. In its *General Comment No. 12 (2009) The right of the child to be heard*, the CRC Committee stressed that article 12(2) of the CRC does not require that the child 'has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views'.[30] Acting contrary to the Committee's approach creates the risk of employing an unrealistically stringent capacity test which has the potential to exclude children from proceedings at the ART. This would clearly disregard article 12(2) of the CRC as interpreted by the CRC

[29] As done by the Administrative Appeals through the Tribunal *Migration and Refugee Division Guidelines on Vulnerable Persons* 2018.
[30] *General Comment No. 12 (2009) The right of the child to be heard* para 21.

Committee, which encourages listening to children directly whenever possible to do so.[31]

10. In brief, it is submitted that a closer scrutiny of the Bill against the CRC was warranted, and that children should have been given some explicit attention in the Bill.

Retaining the two-tier right of review for social security applicants

Professor Michael Head

1. This submission shares the concerns raised by submissions to the Senate Legal and Constitutional Affairs Committee ('the Senate Committee') that the *Administrative Review Tribunal Bill 2023* ('ART Bill') and companion bills would remove the two-tier review process for social security and family assistance matters. Under the new regime, applicants would have access to a single review in the ART, with no guaranteed right of a second review, only the capacity to request review of the ART's decision in the Guidance and Appeals Panel (GAP).
2. As numbers of submissions explained, a two-tier review structure for social security and family assistance applicants can be a vital protection for vulnerable applicants who are often unrepresented and may be unable to present relevant material or make arguments on their own behalf. Submissions expressed strong concern that the loss of a right to two-tier review may increase and entrench disadvantage for these applicants.
3. As Economic Justice Australia (EJA) stated, abolishing the two-tier structure would make administrative review less accessible, deter potential applicants from lodging applications, increase attrition (withdrawal of applications), and reduce overall fairness and equity. As EJA warned:

> *… vulnerable people will have one shot at correcting decisions. If they are unsuccessful because they are not afforded an opportunity to provide information [or] supporting evidence regarding the facts of their case and their circumstances … haven't received comprehensive advice … or have misunderstood the issues in question, the decision will stand. This is a significant step backward from the current AAT system.*

4. EJA pointed out that GAP would be unlikely to consider cases with substantial impacts on individuals—such as refusal of Disability Support Pension on medical grounds or debt waiver decisions—unless they raised issues of significance to administrative decision-making. Moreover, even where the matter raised an issue of significance, the ART President would retain the discretion to refuse to refer the matter to the GAP.

[31] *Ibid* para 35.

5. This submission also shares the apprehensions raised by National Legal Aid (NLA) about the abolition of two-tier review, and supports its call for the introduction of two-tier review for NDIS applicants. This could help to overcome problems with current NDIS appeals, including overly formal and adversarial processes and lengthy wait times.
6. Further, this submission agrees with the warnings made that the ART Bill's provisions for the referral of decisions to the GAP are unclear, confer significant discretion on the President of the ART, and may not be adapted to the circumstances of disadvantaged applicants. As the Monash Law Clinics noted, applicants may be prevented from seeking further review where they were unable to provide relevant material to the ART in the first instance.

7. Before referring an application to the GAP, the President must be satisfied that the application raises an issue of significance to administrative decision-making, and that it is in the interests of justice for the GAP to consider the matter and must have regard to the circumstances of the parties to the proceeding. This process is onerous, narrowly focussed and likely to be discouraging, if not intimidating, for disadvantaged applicants.

8. An applicant seeking to have a decision of the ART referred to the GAP must make an application in 28 days. The application must explain why the decision raises an issue of significance to administrative decision-making or contains a material error of fact or law. It must also provide information specified in the practice directions. The President may refuse the application if these requirements are not met. Nor is there any obligation on the President to make further inquiries where an application does not contain specified information.

9. Moreover, this submission shares the warning made by the NLA that applications from disadvantaged and unrepresented litigants could be refused on technical grounds, and supports its call that fees should not be charged for GAP applications because this could put GAP review out of reach of, or create additional hardship for, financially disadvantaged people.

10. In the view of this submission, the government and the Senate Committee gave no adequate explanation for rejecting the serious concerns about the abolition of two-tier review rights. In one cursory paragraph, the committee said it was satisfied that the best elements of first and second tier review had been incorporated into the ART and that systemic issues will be escalated. It said the new model would allow people to resolve their matters as quickly as possible without unnecessary formality, while the GAP would then provide a critical safeguard to deal with material errors of law and fact.

11. At the same time, however, the Senate Committee declared that it was important that the new Tribunal enjoyed the confidence of users of the social security system, and the confidence of those who advocate for those users, including organisations

like NLA. Yet, the Senate Committee merely encouraged the government 'to continue to engage with – and, to the extent possible, address – the concerns that have been raised by some submitters in relation to the proposed changes to the existing two-tier merits review structure for social security and family assistance decisions'. That request provides no assurance for those who could suffer from the removal of two-review rights.

12. This aspect of the ART Bill is reminiscent of similar legislation introduced by the Howard government for an ART in 2000. That plan came under criticism from the legal profession, academics and welfare groups. In 2001, the Attorney-General acknowledged the defeat of the ART Bill in the Senate.

13. Similarly, in 2019, the Morrison government tabled the Statutory Review of the AAT, conducted by former Justice of the High Court of Australia, the Hon Ian Callinan AC. That report's major recommendations included the abolition of the right to seek review by the General Division of decisions by the Social Services and Child Support Division (SSCSD). The Morrison government did not proceed with that recommendation, perhaps fearing a similar defeat in the Senate. Yet, now the Albanese government is proceeding down a like path.

14. This submission also endorses the criticism made by Professor Mary Crock that excluding intelligence and security decisions from GAP review could be exploited, stating 'it could be possible to cynically label a decision as "intelligence and security" to render it less susceptible to review without good reason'.