Public Interest Advocacy Centre

7 March 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

**Supplementary submission to inquiry into Administrative Review Tribunal Bill 2023 [Provisions] and related bills**

The Public Interest Advocacy Centre ('PIAC') is a leading social justice law and policy centre. We are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage – including people with disability. PIAC has a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability.

We refer to the above Inquiry, and our previous public submission dated 2 February 2024 ('First Submission') to the Inquiry into these bills by the House of Representatives Committee on Social Policy and Legal Affairs ('House Committee Inquiry'). We understand our First Submission is already before your Committee; we maintain our views and recommendations expressed there.

This supplementary submission responds to some of the views expressed in the House Committee Inquiry report ('House Inquiry Report') with respect to the matters raised in our First Submission.

**Consultation on prospective practice directions**

The House Inquiry Report referred to the support from submitters, including PIAC, for a requirement that practice directions of the Administrative Review Tribunal ('ART') be developed in consultation with users and their representatives.[1] The Report also referred to the response by the Attorney-General's Department ('AGD') in its supplementary submission, which outlined other consultation requirements in the ART Bill including:

- consultation by the ART President, when developing practice directions, with the Tribunal Advisory Committee ('TAC') – who in turn must 'have regard to any views expressed by stakeholders'; and
- general engagement and consultation by the President with civil society, and annual reporting on measures taken to engage with civil society.[2]

The AGD is correct to observe that these provisions have no equivalent in the current *Administrative Appeals Tribunal Act 1975* (Cth); we welcome their introduction as an appropriate step in the right direction. However, neither ensures that groups who will be

[1] House Inquiry Report [2.45].
[2] House Inquiry Report [2.46]; AGD, Supplementary to Submission 6, page 4.

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affected by ART processes will be given the opportunity to provide direct input on proposed practice directions.

In particular, the ART Bill does not impose any obligation on the TAC to actively seek or invite stakeholders' views. Given the central role these practice directions can be expected to play in defining the ART's processes, neither the possibility of indirect feedback through the TAC or the generalised canvassing of civil society's views by the President, provide users with sufficient confidence that practice directions will be developed to accommodate their needs. This is particularly important for groups facing systemic disadvantage or at risk of exploitation through the review process (such as people with disability). In this regard, we refer to the analysis at pages 4-5 of our First Submission, and maintain Recommendation 1 of that submission.

**Costs provisions against respondents**

The House Inquiry Report described support from PIAC and the Law Council of Australia for the introduction of a power for the ART to order costs against a government respondent in some cases, including where that respondent has behaved inappropriately in its conduct of the matter.[3] The Report also outlined three broad reasons given by the AGD for not including such a power in the ART Bill.[4] We respond to those reasons as follows.

First, AGD stated, '[c]osts are generally not consistent with the nature of merits review'.[5] We respectfully disagree with this statement. While some forms of merits review do not involve adverse costs orders, others do. Some merits review matters before the current AAT may result in adverse costs orders against government, such as in Comcare or Veterans Affairs proceedings.[6] Many state tribunals have the power to make costs orders in matters they hear, including merits review cases.[7] We see no inconsistency, in form or in practice, between merits review proceedings and the potential for costs to be ordered in exceptional cases.

Second, AGD stated, '[t]here is a risk that [the power for the ART to award costs] could make the review process more adversarial…'.[8] We disagree that this would result from a costs power that would apply only in rare cases such as where the respondent has behaved inappropriately. If anything, we consider it should result in *less* adversarial ART proceedings as the risk of adverse costs consequences should discourage respondents from unnecessarily combative conduct. This has been PIAC's experience acting in the NSW Civil and Administrative Tribunal, where relevant costs provisions exist.

Third, AGD stated that adverse costs orders '…could be difficult to enforce in a tribunal setting.'[9] Leaving aside the question of whether appropriate enforcement mechanisms could be developed, the question of enforcement powers would only arise in circumstances where the ART ordered a government respondent to pay costs, and the respondent refused to comply with that order unless forced. This would be an extraordinary position for a government agency to take, and arguably inconsistent with its model litigant obligations. Even in the rare circumstance where a government body did refuse to comply with an ART costs order,

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3 House Inquiry Report, [2.22]-[2.27]. We note Disability Advocacy Network Australia ('DANA') also made this recommendation in its submission to the House Committee Inquiry, Submission 20.
4 House Inquiry Report, [2.28]; AGD, Supplementary to Submission 6, page 2.
5 Ibid.
6 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 67; *Military Rehabilitation and Compensation Act 2004* (Cth) s 357.
7 See, for example, *Civil and Administrative Tribunal Act 2013* (NSW) s 60; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.
8 House Inquiry Report, [2.28].
9 Ibid.

governments are already subject to a range of oversight and accountability mechanisms that do not apply to private parties and which could provide a remedy.

**Reasons for decisions**

The House Inquiry Report noted our recommendations in relation to requirements for decision-makers to provide reasons at [2.37]-[2.38] and [2.170], and the AGD's discussion of the ART Bill's reasons provisions at [2.39]. However, the House Inquiry Report does not fully reflect the AGD's discussion in its supplementary submission, which correctly outlines:

- there are two sets of reasons provisions in the ART Bill:
    - at clauses 23-24 (where the ART seeks further reasons from a decision-maker in the course of a review); and
    - at clauses 268-271 (where a person affected by a decision applies to the ART to compel the production of further reasons from the decision-maker); and
- the provisions in clauses 268-271 provide the ART 'must' order a decision-maker to provide an additional statement of reasons where the initial reasons were inadequate, while the provisions in clause 23-24 only provide that the ART 'may' make such an order at its discretion.[10]

The Report's abbreviated discussion at [2.39] describes both the clause 23-24 and clause 268-271 processes together, at the risk of confusing or conflating the two.

We do not understand anything in the AGD's submission to contradict or oppose our recommendations 5-7 from our First Submission in relation to these provisions in the ART Bill; and the concerns raised in our First Submission remain.

**Nature of reviews in the absence of the initial decision-maker**

We note the House Inquiry Report discussion of our recommendations in relation to reviews in the absence of the initial decision-maker drew upon an exchange at the public hearing held by the House Committee Inquiry regarding inquisitorial reviews.[11] To avoid doubt, PIAC does not oppose the use of 'inquisitorial' approaches to review, and agrees with the AGD's comments that such reviews may be more personal and more accessible.

Our recommendations in our First Submission are directed at ensuring the ART Bill gives sufficient structure to these reviews so as to enable the ART to adopt them effectively. Indeed, our recommendations largely align with the AGD's observation that 'inquisitorial' can be a loaded term that carries 'certain connotations'.[12] Our Recommendation 3 suggests the ART Bill provide greater clarity so as to address these connotations.

**Prescribed funding for legal and advocacy assistance**

The House Inquiry Report refers to the support for increased legal advice and advocacy services in a number of submissions, including from PIAC.[13] While the Report expresses the Committee's support for increased legal aid funding through the National Legal Assistance Partnership,[14] we stress recommendation 10 from our First Submission that the ART Bill contain a statutory annual funding formula for legal and advocacy assistance providers.

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10 AGD, Supplementary to Submission 6, pages 3-4.

11 House Inquiry Report, [2.52]-[2.55]; Evidence to House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 9 February 2024, 17 (Sara Samios, First Assistant Secretary, Administrative Review Taskforce, Attorney-General's Department).

12 Evidence to House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 9 February 2024, 17 (Sara Samios, First Assistant Secretary, Administrative Review Taskforce, Attorney-General's Department).

13 House Inquiry Report, [2.69].

14 Ibid, [2.188].

These providers' services are essential to the efficient functioning of the ART and access to justice for those before it. Funding should not fluctuate at the discretion of governments of the day or to lag behind shifts in the ART caseload (such as significant year-on-year increases in demand). A statutory funding formula would therefore provide security and stability for legal and advocacy services, and provide the community with confidence that legal support funding will be available to meet the changing needs of applicants to the ART.

We thank you for the opportunity to provide these supplementary submissions and would be pleased to provide any additional information to assist the Committee's consideration of the ART Bill. Please direct inquiries to Senior Solicitor Mitchell Skipsey

Yours sincerely,

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