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

Dear Secretary

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

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

Victoria Legal Aid and our experience in the Administrative Appeals Tribunal (AAT)

Victoria Legal Aid's (**VLA**) vision is a fair and just society where rights and responsibilities are upheld. VLA is a statutory agency responsible for providing information, advice, and assistance in response to a broad range of legal problems through 15 offices across Melbourne and regional Victoria. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, VLA assists people with legal problems related to family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

We provide lawyers on duty in most courts and tribunals in Victoria. Our clients are often people who are socially and economically isolated; people with a disability or mental health issue, children, older people, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

VLA has extensive experience working in the various divisions of the AAT, including the National Disability Insurance Scheme, Social Security and Child Support, and Migration.

The role and importance of the AAT

The AAT's broad statutory mandate is to provide a mechanism of review that is accessible, fair, just, economical, informal, quick, proportionate to the importance and complexity of the matter, and to promote public trust and confidence in the decision-making of the review body.[1] The AAT's statutory framework is essential to providing applicants with a fair hearing, which is a foundational component of Australia's legal system.

[1] *Administrative Appeals Act 1975* (Cth) s 2A.

In 2018, we prepared a submission to the Statutory Review of the AAT conducted by the Hon Ian Callinan AC QC (**the Callinan Review**). We **enclose** a copy of that submission, which contains the stories of four clients whose lives were directly and significantly impacted upon by decisions in relation to:

- Access to the National Disability Insurance Scheme (**NDIS**) to enable participation in wheelchair sports that they would otherwise have been excluded from;
- Their visa and whether they were able to continue to live in Australia with their family; and
- Overwhelming 'robodebts', which were subsequently agreed not to be owed.

In that submission, we made recommendations to maintain and strengthen the AAT as a fair, just, economical and important mechanism of review in Australia's legal system. A number of those recommendations are relevant to the current inquiry and address term of reference (d), including:

1. Any reform to the AAT should recognise the complexity and importance of decisions made by the AAT and should be informed by the high value and benefits of the AAT to individuals, the justice system and the community. The rigour of merits review currently provided by the AAT should be maintained.

2. An assessment of the AAT's efficiency and performance must consider the essential role it plays in reducing pressure on the Federal court structure. This should be optimised so that it is a high functioning body with sufficient time and resources to undertake full merits review.

3. In contemplating delays or inefficiencies in the AAT, attention should be paid to the essential role of the Model Litigant Guidelines in promoting efficient, good faith resolution of matters. Pro-active work should be done to promote adherence to the Model Litigant Guidelines and good faith conduct of government respondents as a way of reducing the time taken to run and resolve matters in the AAT.

4. An assessment of the AAT's performance or adherence to its statutory obligations should be assessed by the objectives under the *Administrative Appeals Tribunal Act 1975* (Cth), which include providing a mechanism of review that is accessible, fair, just, economical, informal, quick, proportionate to the importance and complexity of the matter, and that promotes public trust and confidence in the decision-making of the AAT.

Furthermore, in our evidence to the Senate Community Affairs References Committee's inquiry into Centrelink's compliance program, we identified that, when people exercise their rights to have Centrelink's decisions reviewed, consequent decisions of the AAT should be heeded by government and necessary changes flowing from these decisions should be implemented. As early as 2017, the AAT found that robodebt was unlawful, but no changes were made to policies and procedures in response to these decisions. It was not until the resolution of our client Deanna Amato's legal challenge that the government conceded that that the averaging method at the heart of the system was unlawful, and agreed to stop raising Centrelink debts based solely on income averaging. If the government had responded to the

AAT's decisions earlier and implemented changes, it could have prevented significant hardship for hundreds of thousands of people who were affected by robodebt after 2017.[2]

Impacts of reduced procedural protections

As we said in our submission to the Callinan Review, the merits review function currently performed by the AAT provides a number of significant individual and structural benefits within the justice system. In contrast, we note the diversion of certain asylum seekers, who are considered "fast track applicants", into the processes of the Immigration Assessment Authority (**IAA**). The IAA does not provide a hearing as of right, and does not provide a right to these asylum seekers to introduce new material on review. In VLA's experience, the introduction of this new system has resulted in a significant increase in applications for judicial review to the Federal Circuit Court. For example:

- During the 2020/21 financial year, 87% of applicants who received a negative IAA decision lodged an appeal in the Court.[3] We note that 86% of applicants in migration matters in the Federal Circuit Court do not have legal representation, and only 43% of matters are finalised within 12 months of filing.[4]
- In the same financial year, the Court finalised 523 appeals. Applicants were successful in 158 matters, meaning the decisions made by the IAA were found to be unlawful in over 30% of finalised cases.[5]

This experience with the IAA shows, in our view, the negative impact of a merits review process with diminished procedural protections for individuals seeking review of government decisions. It reinforces the value of the full merits review model exemplified by the AAT, not only for individual litigants but for the wider justice system. We encourage the Committee to reiterate the central place of full merits review in ensuring administrative justice.

Yours faithfully

ROWAN MCRAE
Executive Director, Civil Justice, Access and Equity

[2] Victoria Legal Aid, Senate Community Affairs References Committee's inquiry into Centrelink's compliance program, public hearing (19 August 2021) (https://www.legalaid.vic.gov.au/about-us/news/during-pandemic-fair-and-trustworthy-social-security-system-is-essential-our-evidence-on-robo-debt).
[3] Administrative Appeals Tribunal, *Annual Report 2020-21*, 36.
[4] Federal Circuit Court of Australia, *Annual Report 2020-21*, 39 and 41.
[5] Administrative Appeals Tribunal, *Annual Report 2020-21*, 36.

Victoria Legal Aid

On the Merits: Getting important and complex decisions right

Submission to the Statutory Review of the Administrative Appeals Tribunal

August 2018

Civil Justice Program – Victoria Legal Aid

Contents

Executive Summary and Recommendations

Victoria Legal Aid's contribution to this review is informed by our experience working with people whose matters are dealt with in multiple divisions of the Administrative Appeals Tribunal (**AAT**), including the General, Migration and Refugee, and Social Services and Child Support Divisions. It is also informed by our own organisational experience of demand pressure in relation to administrative decisions which are no longer amenable to review by the AAT.

This submission contains the stories of four clients whose lives have been directly and significantly impacted upon by decisions in relation to:

- Access to the National Disability Insurance Scheme (**NDIS**) to enable participation in wheelchair sports that they would otherwise have been excluded from;
- Their visa and whether they were able to continue to live in Australia with their family; and
- Overwhelming 'robodebts', which were subsequently agreed not to be owed.

These clients' stories highlight the important role of the AAT, as well as the impact on individuals and the system when merits review is not available.

In 2017/18 Victoria Legal Aid provided legal advice on AAT matters on approximately 850 occasions, and opened more than 130 files in AAT matters.

Through this work, we see that the AAT plays a crucial role in the Australian legal system in:

- Making complex decisions which affect people's lives and wellbeing. In our experience, the AAT is often better able to engage with the complexity of people's circumstances and the surrounding legal frameworks than the primary decision-maker. One reason for this is the barriers people face to engaging with the primary decision-maker for example because of language or literacy barriers or because they are in prison. For many of our clients, the AAT's contemplation of their evidence is the first time they have had the opportunity to present their circumstances. In other cases, however, the quality of primary decision is impeded by processes and practices – such as intransigence or inadequate consideration of evidence – of the primary decision-maker.
- Reducing pressure on courts and the executive where a person wants to question a decision made about them.
- Promoting accountability and better government decision-making, and providing a fair, just and economical safeguard against incorrect decisions.

Informed by this work and the evidence and insights it provides, Victoria Legal Aid makes **five recommendations to maintain and strengthen the AAT as a fair, just, economical – and crucial – mechanism of review in the Australian legal system**:

1. **Recognise the complexity and importance of decisions made by the AAT**. Any reform to the AAT, either by way of legislative or non-legislative change, should be informed by the high value and benefits of the AAT to individuals, the justice system and the community. The rigour of merits review currently provided by the AAT should be maintained.

2. **Acknowledge the burden on the courts that the AAT helps avoid**. Assessment of the AAT's efficiency and performance must take into account the essential role it plays in reducing

pressure on the Federal court structure. This should be optimised so that it is a high functioning body with sufficient time and resources to undertake full merits review.

3. **Maintain two levels of review for social security matters**. The two-tier model of review in relation to social security decisions is crucial to the AAT's effectiveness and overall efficiency in dealing with these matters. Each tier has its own clear benefits (i.e. tier one is fast and high volume and tier two is a public, more comprehensive process), but alone neither is adequate. In reviewing the AAT, the integral role of both tiers should be preserved.

4. **Promote model litigant conduct in the AAT**. In contemplating delays or inefficiencies in the AAT, attention should be paid to the essential role of the Model Litigant Guidelines in promoting efficient, good faith resolution of matters. Pro-active work should be done to promote adherence to the Model Litigant Guidelines and good faith conduct of government respondents as a way of reducing the time taken to run and resolve matters in the AAT.

5. **Promote public trust and confidence in the decision-making of the AAT**. Assessment of the AAT's performance or adherence to its statutory obligations should be assessed by the objectives under the *Administrative Appeals Tribunal Act 1975* (Cth), which include providing a mechanism of review that is accessible, fair, just, economical, informal, quick, proportionate to the importance and complexity of the matter, and that promotes public trust and confidence in the decision-making of the AAT. This should not be confused with meeting the expectations of a segment of the community in relation to particular complex decisions made by the AAT.

1. Victoria Legal Aid and the Administrative Appeals Tribunal

Victoria Legal Aid

VLA is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner. VLA is the biggest legal service in Victoria, providing legal information, education and advice for all Victorians. We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria. We also deliver non-legal advocacy services to people receiving mental health treatment.

Our clients are often people who are socially and economically isolated; people with a disability or mental illness, children, older people, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

In 2017/18, Victoria Legal Aid helped 94,485 clients, including clients seen by a private practitioner duty lawyer:

- 5% were of Aboriginal or Torres Strait Islander background
- 29% had no income[1]
- 51% were receiving some form of government benefit
- 29% were living in regional or rural Victoria
- 5% required the assistance of an interpreter
- 22% were from culturally and linguistically diverse backgrounds[2]
- 11% were in custody, detention or psychiatric care
- 26% disclosed having a disability or mental illness
- 5% were experiencing homelessness.[3]

In addition to helping individuals resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account.

Victoria Legal Aid and the AAT

VLA provides advice and representation to clients in relation to current or potential proceedings in multiple divisions of the AAT. We also assist people to challenge decisions of the AAT in the Federal Courts.

In 2017/18 Victoria Legal Aid provided legal advice on AAT matters on approximately 850 occasions, and opened more than 130 files in AAT matters.

Our Economic and Social Rights Program (**ESR Program**) provides a weekly advice clinic at the AAT in relation to social security matters. In addition to its work in the clinic context, the ESR

[1] Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.
[2] This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.
[3] Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters, or participated in community legal education—we do not create an individual client record for these people. Neither does this client count include people assisted by our Independent Mental Health Advocacy service.

Program provides advice and representation to people seek merits review of and to appeal AAT decisions in relation to:

- Social security matters, including eligibility for the Disability Support Pension (**DSP**) and other social security entitlements, and Centrelink debts; and
- Decisions of the National Disability Insurance Agency (**NDIA**).

VLA also conducts a large practice assisting clients in relation to decisions made under the *Migration Act 1958* (Cth) (**Migration Act**). These include decisions to refuse or cancel a visa, including under s 501 of the Migration Act. In the majority of cases, we work with clients where the relevant visa is a refugee or humanitarian visa.

The core work performed by the migration team is in assisting applicants to seek judicial review, although in a narrow range of cases the migration team also provides assistance to clients at the AAT. The judicial review matters in which the migration team acts include challenges to the lawfulness of AAT decisions (for example, where the AAT is reviewing a decision of the Minister for Home Affairs (formerly Immigration)).

As we discuss in more detail below, many of the complex decisions affecting our migration clients' lives are now made outside the AAT. As a result of recent reforms to the Migration Act, many of the decisions made by the Minister to refuse or cancel a visa are not amenable to AAT review. In these matters, we repeatedly witness the demand imposed on the Federal courts and the legal assistance sector where our clients attempt to remedy primary decisions by way of judicial review in the absence of any, better-suited, option.

This diverse practice experience and direct work with our clients, both in the AAT and with the executive and judicial mechanisms that in some cases exist instead of the AAT, have informed our positions and recommendations in this submission.

2. The AAT makes complex decisions that affect people's lives and wellbeing

This part addresses TOR 3, 5 and 6

As the Administrative Review Council noted in 1995, the purpose of merits review is "to decide whether the decision which is being challenged was the 'correct and preferable' decision."[4] This reflects a key purpose of administrative review: the protection of the rights of individuals.[5] The work of the AAT spans areas of law which profoundly affect the lives of deeply disadvantaged people. From reviews of social security debts, to considering rights of access to the National Disability Insurance Scheme, to deciding whether a non-citizen ought to face removal, the AAT has a daily impact on the rights of people and their families and communities.

This forms a fundamentally important backdrop to the review of the operation of the AAT.

Liam's case: AAT confirms young man entitled to NDIS to support participation in wheelchair sports

Liam is a wheelchair user, and on supplementary oxygen 24 hours a day. Through the National Disability Insurance Scheme, Liam sought taxi expenses, and the flexibility to use unused funds to pay for increased taxi expenses, as well as the costs of a carer to accompany him on interstate wheelchair sports trips, where he competed at a high level. He was refused assistance initially and on internal review. It was only at the AAT that he was granted these supports.

The effect has been to permit a young man to participate in an activity he loves, from which he would otherwise be excluded. The review processes of the Tribunal permitted Liam to realise the rights which Parliament intended to confer, by the passage of the *National Disability Insurance Scheme Act 2013* (Cth).

The absence of adequate review processes to ensure the full realisation of rights would have a negative impact on the individuals in question, but would also have a wider social cost. For example, in the context of discussing the effect of limitations on access to disability support pension, VLA has observed that:

> The impacts on our clients of delays in being granted disability support pension or being placed back on Newstart following an incorrect cancellation are significant ... Those caught up in this process often find it very distressing. The delays increase risks of eviction and homelessness, and cause additional challenges for those unable to work and trying to meet expenses related to their disability such as medical treatment, transport costs, particularly travel in regional areas.[6]

Similarly, the National Disability Insurance Scheme is predicated, in part, on the notion that the full realisation of rights under the scheme will ultimately result in increased independence, better outcomes in terms of social functioning, and reduced need for more expensive public funded disability support services.

[4] Administrative Review Council, *Better decisions: Review of Commonwealth merits review tribunals*, report no. 39, Australian Government Publishing Service, 1995 (Canberra) 175.
[5] Ibid 174.
[6] Victoria Legal Aid, Evidence to the Joint Standing Committee of Public Accounts and Audit Inquiry into Commonwealth Risk Management, 30 November 2016 (Canberra) 1.

A substantial review right at the AAT is important both in terms of the protection of basic rights, and the wider social good done by ensuring access to the entitlements which the Tribunal protects.

Recommendation 1: Recognise the complexity and importance of decisions made by the AAT.

Any reform to the AAT, either by way of legislative or non-legislative change, should be informed by the high value and benefits of the AAT to individuals, the justice system and the community. The rigour of merits review currently provided by the AAT should be maintained.

3. Merits review prevents pressure on the courts

This part addresses TOR 3 and 4

As outlined above, Victoria Legal Aid has a large litigation practice in migration matters, including visa cancellation matters on character grounds and the refusal of refugee visas. In addition, through our daily telephone advice service, we encounter many people seeking assistance in relation to the primary decision to refuse or cancel a visa on character grounds or seek revocation of a mandatory visa cancellation.

In the majority of cases these decisions are made outside the AAT and are not amenable to AAT review. As a result, in our judicial review practice focused on visa cancellation matters, we repeatedly witness the demand imposed on the Federal courts and the legal assistance sector where our clients attempt to remedy these decisions by way of judicial review in the absence of any alternative (merits review) option.

The operation of the visa cancellation system is a strong indicator of the risks of stripping back the AAT's existing functions.

The role of the AAT in efficiently reviewing complex decisions – merits review of visa cancellations

If a decision to cancel a visa is amenable to merits review, this will in most cases be the first time a client has an opportunity to provide oral evidence about his or her circumstances. If an applicant remains in the prison system is it likely that he or she will have experienced significant difficulties in preparing any written submissions and supporting materials provided to the primary decision-maker.

In our experience, these clients are often some of the most vulnerable, presenting complex cases for decision-making. We repeatedly see examples of clients in the prison system who have low literacy and English language skills, who are isolated and lacking support in the outside community. It is our direct experience that these clients find navigating a system which requires them to understand and complete complex forms extraordinarily difficult. In addition, accessing a Justice of the Peace to witness a signature on forms is routinely difficult in some correctional facilities. Prisoners also have no control over when and how forms are filed in court.

Many clients have been living in Australia most of their lives and have extensive family and community networks in Australia. Most have serious mental health concerns or disabilities. In many cases, our clients were resettled under Australia's refugee program and cannot be returned to their home countries, or they may be stateless, leaving them subject to prolonged immigration detention when their visa is cancelled.

We also note that once a person in this situation completes their sentence, they must be taken into immigration detention pursuant to s 189 of the Migration Act and may be moved to detention facilities across Australia for operational reasons, at any time. Such disruption results in continuing difficulties in preparation and delivery of written material to the appropriate review agency.

In addition to these factors, the nature of decision-making in relation to visa cancellation is a complex and nuanced task, which requires balancing the seriousness of a person's offending with a number of countervailing factors, assessing risk to the community and, in some cases, contemplating non-refoulement obligations.

In these circumstances, errors in first instance decision-making will occur and the AAT is uniquely placed to correct errors made at the primary stage and make sure that individuals have a relatively low cost but sufficiently rigorous avenue to reach a reasonable state of satisfaction that the decision is objectively correct. The 84-day time limit for review of visa cancellation matters is an example of regulatory efficiency and contrasts with the delays being experienced in the court system.

The importance of AAT review for reducing pressure on the justice system – the limited review of migration decisions

The merits review function currently performed by the AAT provides a number of significant individual and structural benefits within the justice system. As a result of the removal of many visa cancellation and some visa refusal decisions from the AAT, VLA has witnessed an unmanageable surge in the demand for judicial review. This demand is felt by the Federal Courts system, as well as the legal assistance sector. Any further removal of merits review from the migration jurisdiction would have several significant, adverse, consequences for individual clients and the orderly operation of the visa cancellation scheme.

Similarly, it is uncontroversial that a similar surge would be experienced in other jurisdictions if the rigour or breadth of the AAT's role in merits review was reduced. This is evident from the surge in demand for judicial review of decisions of the Immigration Assessment Authority (**IAA**), which does not provide 'full merits review' to an Applicant.[7] These matters contribute directly to the current reality that the hearing date for a migration matter in the Federal Circuit Court is, on average, two years from the date of lodging an application in the Court.

In our view, the following matters are critical to understanding the central importance of AAT review (both in the migration context, and more generally) to the broader justice system.

First, merits review offers applicants the remedy that they are actually seeking. In this context, this will be the reinstatement of their visa. In the alternative context of judicial review, success for the applicant means a matter being remitted to Minister or to a delegate for reconsideration. Ibrahim's case below highlights the inefficiency of this process.

Second**,** the merits review mechanism presently performs an important accountability and supervision function. As you would be aware, there has been a continual increase in the inclusion of broadly framed executive powers in the migration jurisdiction. This is evident in relation to s 501 in particular. In this context it is fundamental to have checks in place to scrutinise the exercise of power by the executive, particularly where the potential detriment of an adverse decision to the applicant is so significant.

[7] *M174 v Minister for Immigration and Border Protection* [2018] HCA 16 at [95] (Edelman J).

Third, merits review is well-established as an effective mechanism for affording procedural justice to aggrieved persons. It performs and was intended to perform an oversight and correction function which quelled disputes and prevented the inefficient burdening of ill-adapted government entities (such as Courts) with individual merits disputes. In its design and operation, it reduces an otherwise unmanageable pressure which would be placed on the Federal court system by individuals who seek some supervision and oversight of an adverse administrative decision.

Fourth, the alternative to merits review – judicial review – is protracted, costly and inefficient when it's being used as a poor substitute for getting the decision right. Using judicial review in this way burdens individuals, the legal assistance sector, the court system and the executive. Removing visa cancellation (or any other administrative decision) from merits review would not increase overall efficiency. From our direct practice experience we know that it would result in much higher numbers of judicial review matters in a sector which is already stretched. This would be acutely felt in overworked federal courts.

Ibrahim's story illustrates the resulting inefficiency of forcing clients into a process involving judicial review and remittal for reconsideration, where the error could have been corrected more quickly in one step by the AAT.

Ibrahim's case: The personal and systemic burden when merits review is not an option[8]

Ibrahim is from a small ethnic and religious minority in Iraq. He left Iraq as a teenager and after several years living in a refugee camp with his wife and daughter in Syria, he was resettled to Australia under the Refugee and Humanitarian program. He had three more daughters, all born in Australia.

Ibrahim's refugee visa was cancelled under the mandatory cancellations provisions in 2015. He applied for revocation of this decision and waited over 12 months for a decision. The Assistant Minister refused his request for revocation. Because it was a decision of the Assistant Minister under s 501, the decision in Ibrahim's case was not amenable to merits review in the AAT. Instead, his only option was to apply to the Federal Court to challenge this decision. He waited five months for his hearing.

In June 2017, the Federal Court found that the Assistant Minister had misunderstood the legal effect of the relevant provisions of the Act, in relation to his ability to apply for a Protection Visa.[9] Ibrahim's case is now back before the Department for consideration.

Ibrahim has been in immigration detention for nearly two and a half years. He has been moved between various detention centres, which makes it very difficult for him to see his family.

Recommendation 2: Acknowledge the burden on the courts that the AAT helps avoid.

Assessment of the AAT's efficiency and performance must take into account the essential role it plays in reducing pressure on the Federal court structure. This should be optimised so that it is a high functioning body with sufficient time and resources to undertake full merits review.

[8] Not his real name.
[9] See *ALN17 v Minister for Immigration and Border Protection* [2017] FCA 726 at [25].

4. The two-tier model in social security is effective and efficient

This part addresses TOR 2, 4 and 5

This part relates specifically to Centrelink appeals at the Social Services and Child Support Division of the AAT (AAT-1) and at the General Division of the AAT (AAT-2) (**Centrelink jurisdiction**).

We anticipate that the two-tier model of decision-making within the AAT's Centrelink jurisdiction may be considered as part of this review, including because of the two-tiered decision-making model and in relation to the AAT's overall efficiency.

While removing one tier of the Centrelink jurisdiction may appear to be an opportunity for efficiencies or savings, each tier has a distinct function and removal of either would:

- Adversely impact on the rights of Centrelink recipients; and
- Increase the time and cost of resolving Centrelink matters.

Meaningful differences between the two tiers

There are a number of differences between the two tiers of review in Centrelink decisions.

The costs of the Tribunal in an AAT-1 review (administration and hearing costs) are less than of an AAT-2 review, including because an AAT-1 appeal is generally listed for one hour and there is no appearance by Centrelink or the Department of Social Services; and the process is informal with no requirements for the lodgement of documents such as statements of facts, issues and contentions.

The AAT-1 is a quicker process. In 2016/17, the median time to finalise a proceeding was 13 weeks with more than 99% finalised within 12 months, compared to 21 weeks for the AAT-2 and 9% taking more than 12 months.[10] There are no preliminary proceedings in the AAT-1, compared with the AAT-2 where the Secretary to the Department is represented and there will at least one preliminary conference before an AAT Conferencing Registrar and in many cases other interlocutory proceedings, including directions hearings, and extension of time or stay applications.

The volume of appeals dealt with at each tier is significant. From the AAT's 2016/17 Annual Report, there were 14,949 applications to the AAT-1 for review of Centrelink decisions,[11] and 2,532 applications to the AAT-2 for a second review of a Centrelink decision.[12]

Benefits of the AAT-1

The AAT-1 provides a relatively economical and, importantly, quick avenue of redress for Centrelink recipients who disagree with decisions made by Centrelink. As applicants are often in financial hardship awaiting the outcome of their appeals the ability to have an independent review by a specialist Tribunal in a relatively short time is of critical importance to those adversely impacted by decisions of Centrelink.

To remove this tier of review would significantly increase the costs to the Commonwealth, including because of the higher cost nature of AAT-2 we have outlined above. It would leave many people in

[10] Ibid 25 and 32.
[11] Administrative Appeals Tr bunal, *Annual Report 2016/17* (25 September 2017) 32.
[12] Ibid 25.

significant hardship awaiting an independent review of their case. Relevantly, we note that at least one in five decisions made by Centrelink's Authorised Review Officers are changed on review.

Benefits of AAT-2

To remove the AAT-2 and the capacity for Centrelink recipients (and the Secretary to the Department) to have a 'second review' in a more formal and public process, would mean that there was no body of case law arising from Centrelink decisions of the AAT. This would largely, if not totally, obviate the normative effect on Centrelink decision-making.

In addition, it would dramatically increase the number of matters taken on appeal to the Federal Court. Currently only a very small percentage of decisions of the AAT-2 are appealed to the Federal Court. In 2016/17 there were 15 appeals, or 2% of the AAT-2 Centrelink decisions lodged and 22% of finalised Court appeals were allowed.[13] The cost to the Commonwealth of these Federal Court appeals are significant. If the only avenue of appeal from a decision of the AAT-1 was to the Federal Court we would expect that the numbers of appeals, and consequent costs, would increase substantially.

Recommendation 3: Maintain two levels of review for social security matters.

The two-tier model of review in relation to social security decisions is crucial to the AAT's effectiveness and overall efficiency in dealing with these matters. Each tier has its own clear benefits (i.e. tier one is fast and high volume and tier two is a public, more comprehensive process), but alone neither is adequate. In reviewing the AAT, the integral role of both tiers should be preserved.

5. Efficiencies can be gained through improved practices of government respondents

This part addresses TOR 3, 4 and 5

The primary inefficiencies observed by VLA lawyers in AAT proceedings are caused not by the processes of the Tribunal, but by the conduct of government respondents. There are three key ways in which the conduct of government respondents can limit the efficiency of AAT proceedings:

- Some government respondents apply insufficient rigour in their primary decision-making processes, meaning matters reach the Tribunal without all relevant information, complicating Tribunal processes.
- The conduct of some government respondents in AAT proceedings results in longer and more complicated proceedings.
- Government respondents do not always respond to Tribunal decisions by altering their decision-making to accord with directions set by the Tribunal.

The impact on the Tribunal of poor first instance decision-making

In VLA's experience, approaches to decision-making at first instance can impose additional and unnecessary burdens on the AAT. In some instances, the Tribunal will have to do additional

[13] Ibid 129.

evidence-gathering to conduct a proper review. In other cases, it may be that the Tribunal is never alerted to matters essential to conducting a proper review, and the applicant is denied a fair and full administrative appeal.

Wendy's case: Lack of attention to proper primary decision-making

Wendy was receiving a carer's payment until her husband died at the end of 2015. Prior to his death Wendy's husband received a superannuation pension. In January 2016 Wendy got a letter from the superannuation fund telling her she might be eligible for a spouse reversionary benefit. Wendy does not speak or read English so she appointed a nominee to help her deal with Centrelink. Wendy started to receive Newstart Allowance. Her nominee knew about the superannuation pension but told Wendy she did not have to report it as Centrelink did not treat it as income. The nominee signed forms stating that Wendy was not receiving income.

At the end of 2017 Wendy was investigated after a Centrelink data match suggested a discrepancy in her income. Centrelink automatically raised a debt of $22,000. Wendy appealed to the AAT Social Services and Child Support Division. The Department prepared a set of documents for the hearing. The documents did not satisfactorily show how the debt had been calculated. Prompted by Wendy's lawyer, the AAT made a request to the Secretary for more information. In the course of responding to that request, Centrelink reduced Wendy's debt as it became apparent that the original calculations, including the information about the rate of indexation for the pension, were incorrect. Indeed, it was clear that delegates of the Secretary to the Department of Social Services, in making decisions about Wendy's debt, had not taken steps to obtain details of the indexation of Wendy's pension, despite their power to do so. It was only because of the thoroughness of Wendy's lawyer that the inattentiveness of the Secretary's delegates was identified, and Wendy's debt reduced.

Failure by government respondents to abide by model litigant obligations

Government respondents do not always approach AAT litigation with a view to the efficient conduct of proceedings, or the early resolution of matters. VLA has, for example, raised concerns directly with the National Disability Insurance Agency about its conduct of litigation before the AAT. There are multiple reasons why government decision-makers ought to approach AAT litigation with a view to prompt and efficient resolution of matters, including general principles of good government administration, and model litigant obligations. There are also efficiencies to be gained in the operation of the AAT by improving the conduct of government respondents.

Todd's case: Poor conduct by a government respondent

VLA's client Todd is nearly 4 years old and has autism spectrum disorder, ADHD, a generalised anxiety disorder and a developmental delay. Soon after diagnosis, Todd received early intervention supports through the NDIS. He received a range of supports, including intensive behavioural therapy. When Todd's plan was renewed by the NDIA and a second 12-month plan prepared, Todd's supports were reduced. His parents, on his behalf, applied to the NDIA for an internal review of this decision. The NDIA confirmed its original decision. As a result, Todd applied for a review of that decision to the AAT.

Detailed medical evidence supporting Todd's application was submitted at the time of his plan review, was before the NDIA on internal review and was given to the NDIA when Todd applied to the AAT. Despite having this material, the NDIA failed to make any offer of settlement, and indeed maintained a position until the day before the hearing that the NDIA would not make any offer to increase the supports funded for Todd.

VLA prepared and filed Todd's statement of facts, issues and contentions, obtained witness statements, funded further expert reports to support Todd's application and arranged for witnesses to be available to give evidence at the hearing of the matter. VLA was preparing for the hearing of this matter when the NDIA made a settlement offer at 1.00pm the day before the scheduled hearing, and a settlement was agreed after business hours the evening before the hearing. Under the settlement reached that evening, the NDIA agreed to fund nearly all the supports originally sought by Todd. This conduct suggests that the NDIA had failed to make an early assessment of the matter and had failed to keep costs of the litigation to a minimum.

The conduct raises the question of adherence to the obligation to act as a model litigant as required by Appendix B to the Legal Services Directions 2017, made under s 55ZF of the *Judiciary Act 1903* (Cth) (**the Model Litigant Guidelines**).[14] As a model litigant, the NDIA is required to deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation[15] and is also required to pay legitimate claims.[16] It is also required to make an early assessment of its prospects of success in legal proceedings brought against it.[17]

During the course of the litigation, on a number of occasions the NDIA failed to comply with deadlines for filing. The NDIA filed a statement of position a week late, and failed to file a statement of facts, issues and contentions. This led to the listing of an additional directions hearing, and substantial extra resources being devoted to the case, by the Tribunal, and by VLA on behalf of Todd.

The Model Litigant Guidelines require government respondents before the Tribunal to act with complete propriety, fairly and in accordance with the highest professional standards. The conduct of Todd's matter fell short of this standard. In VLA's experience, this failing is not uncommon on the part of government respondents before the Tribunal.

We encourage the review to contemplate the efficiencies and improvements to be gained by better adherence of government respondents to model litigant obligations, and to high standards of litigation practice.

Responsiveness of government respondents to decisions

A troubling feature of the recent conduct of government respondents involved in AAT litigation, has been a tendency to ignore the reasoning of the AAT as relevant to later decision-making. The AAT, as a merits review body, deals with the facts of the case before it, and as such does not declare the law binding the government decision-makers whose decisions it reviews. Nonetheless, as a matter

[14] The Model Litigant Guidelines extend to Commonwealth agencies involved in merits review proceedings, including review of decisions of the NDIA in the AAT concerning the NDIS.
[15] Model Litigant Guidelines s 2(a).
[16] Model Litigant Guidelines s 2(b).
[17] Model Litigant Guidelines s 2(aa)(i).

of efficient public administration, and in the interests of transparency in decision-making, guidance should be taken from Tribunal decisions.

Robodebt decisions

A number of applicants to the Tribunal, in the course of 2017, sought review of debts arising from the Online Compliance Initiative, colloquially known as 'robodebt', in which a data-matching algorithm drawing on Centrelink and Australian Taxation Office records identify potential debts to Centrelink. Letters are sent to social security recipients identified by the algorithm as possibly owing debts. In any case in which no response is received to such a letter, a debt is raised.

In reviews of debts raised under 'robodebt', the AAT (conducting a "Social services first review") has suggested in several cases that the Online Compliance Initiative provides no lawful basis for the raising of a debt. The Secretary to the Department of Social Services has neither sought to appeal these decisions, nor discontinued the 'robodebt' program. This has both spurred additional applications for review of debts raised under the program, and has left in a state of uncertainty a legal question with significance for a large number of people in the Australian community.

There are good reasons, both in terms of potential efficiency gains and in terms of the transparent administration of the law, to set an expectation that government respondents will treat AAT decisions as at least prima facie indications of the law.

Recommendation 4: Promote model litigant conduct in the AAT.

In contemplating delays or inefficiencies in the AAT, attention should be paid to the essential role of the Model Litigant Guidelines in promoting efficient, good faith resolution of matters. Pro-active work should be done to promote adherence to the Model Litigant Guidelines and good faith conduct of government respondents as a way of reducing the time taken to run and resolve matters in the AAT.

6. The community expects a decision-making system that provides finality, certainty and correctness

This part addresses TOR 3 and 5

The AAT Act provides that the Tribunal must pursue the objective of promoting "public trust and confidence in" its decision-making processes. This objective must be seen against the background of the Tribunal's establishment. The Kerr Committee's 1971 report, which formed a critical part of that background, emphasised that the Tribunal was to have jurisdiction to determine an application to review a decision "on the ground that the decision was erroneous on the facts and merits of the case". In articulating the importance of independent merits review, the Committee elaborated its conception of review by endorsing a right of hearing before the tribunal, of wide permission for the applicant to address the tribunal on "questions of law, fact, discretion and policy", and of wide powers being vested in the tribunal in respect of the disposition of the matter.

From the outset, public trust and confidence has been an essential rationale for the AAT. However, this has always been understood as public trust and confidence in the independent decision-making power of the AAT, and the independent scrutiny which it brings to bear on government decision-making.

It is not part of the work of the AAT to make a decision in any given case so as to "meet community expectations". The Tribunal's role is to make the correct and preferable decision in all the circumstances, providing independent and transparent review of government decisions.

The Tribunal's objective of ensuring public trust and confidence is thus best seen as reflecting a concern with ensuring transparent and principled review of government decision-making, rather than with promoting the making of decisions with popular appeal. It is by ensuring a rigorous review process that public trust and confidence in the Tribunal is best engendered.

The procedural fairness of a legal process shapes both whether people accept decisions that are made, and the way people judge the decision-maker and the wider legal system.[18]

In VLA's view, there is no reason to alter the objective of promoting public trust and confidence in the Tribunal's decision-making, nor to reframe the measures by which its performance of those objectives should be assessed.

The AAT, in VLA's view, promotes that trust and confidence when it provides a fair hearing which meets community expectations of the transparent and independent review of government decisions.

Recommendation 5: Promote public trust and confidence in the decision-making of the AAT.

Assessment of the AAT's performance or adherence to its statutory obligations should be assessed by the objectives under the *Administrative Appeals Tribunal Act 1975* (Cth), which include providing a mechanism of review that is accessible, fair, just, economical, informal, quick, proportionate to the importance and complexity of the matter, and that promotes public trust and confidence in the decision-making of the AAT. This should not be confused with meeting the expectations of a segment of the community in relation to particular complex decisions made by the AAT.

[18] See, eg, John McMillan, ed, *The AAT Twenty Years Forward* (1998 Australian Institute of Administrative Law Inc).