MONASH University

MONASH LAW CLINICS

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Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By email: spla.reps@aph.gov.au

Dear Secretary,

Administrative Review Tribunal Bills

Monash Law provided a submission in response to the Administrative Review Reform Issues Paper. A copy of that submission is attached. In relation to the Administrative Review Tribunal Bill 2023 (Cth) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) ("*the Bills*"), we make the following specific observations:

1. **Maintenance of longstanding principles of merits review**

It is pleasing that the Bills affirm the longstanding traditions of merits review, and maintain the strengths of the AAT. As Monash Law said in its submission to the expert panel undertaking the Administrative Review Reform inquiry, the basic structure of merits review is fit for purpose, and its architecture should be retained. We note that the Bills expressly guarantee some of the basic principles of merits review, and in respect of other key principles echo the language in the *Administrative Appeals Tribunal Act 1975* (Cth), on which those principles are founded.

2. **Emphasis on accountability and improving decision making**

We endorse reforms aimed at improved accountability for government decision making, informed by public controversies such as the robodebt scandal. Specifically, we endorse the re-

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establishment of the Administrative Review Council, and recognition as an objective of the new tribunal the improvement of "the transparency and quality of government decision-making".

3. Improving appointments and guaranteeing independence

While the Administrative Review Tribunal Bill 2023 (Cth) provides for significant improvements in the structure and transparency of processes for the appointment of members (in Part 8, Division 3), we maintain that a better means of ensuring high-quality, publicly-respected appointments is by creating an appointments commission with remit covering both courts and tribunals. Accepting that it will not be put in place as part of the establishment of the Administrative Review Tribunal, we encourage the Parliament separately to give consideration to the establishment of such a commission. We otherwise repeat the content of our Administrative Review Reform submission in this respect.

4. Eliminating inconsistencies in merits review

As we discussed in our Administrative Review Reform submission, there are inconsistencies in merits review rights which appear difficult to justify. By way of further illustration, we note the following two examples of variation in merits review rights which are at least arguably unjustified:

- Section 500(6H), s 500(6J), and s 500(6L) of the *Migration Act 1958* (Cth) impose limitations on new evidence in reviews of decisions to cancel visas on the grounds of character. These provisions were justified by the long AAT processes which left "the non-citizens involved, many of whom have committed serious crimes, either … in detention at great cost to the taxpayer or … at liberty in the community".[1] This seems a hard view to maintain, given the existence of 'mandatory cancellation', introduced to provide "a greater opportunity to ensure noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved".[2]

- Section 14ZZK of the *Taxation Administration Act 1953* (Cth) limits the grounds of objection to a tax assessment which a taxpayer may advance at the Administrative Appeals Tribunal. This is a limitation of very long standing. In the 1930s, a Royal Commission justified this limitation on the basis that a taxpayer was "conversant" with relevant facts in a way the Commissioner was not.[3] The same justification is relied on in the explanatory memorandum, for the maintenance of this limitation in matters to be heard before the

[1] Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998 (Senator Kemp, Assistant Treasurer), 59.
[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 (Scott Morrison, Minister for Immigration and Border Protection), 10327.
[3] *Royal Commission on Taxation* (Third Report, November 1934), 153.

Administrative Review Tribunal.[4] It is not clear whether, in the modern world and the modern tax system, the same rationale holds.

We provide these examples not in order specifically to advocate for reforms to change them. Rather, we provide them as illustrations of the fact that more broadly, it appears that there is substantial variation in terms of merits review rights across the Commonwealth statute book.[5] The creation of a new Administrative Review Tribunal provides an opportunity for a wider review of consistency in merits review rights. We submit that a review of this sort is well overdue, and encourage the Committee to recommend such a review be undertaken.

5. Loss of two-tier merits review structure for social security and family assistance decisions

We note the removal of the universal two-tier merits review structure in relation to social security and family assistance decisions. The previous system provided for two successive merits review proceedings in such matters, as of right. This was an important protection for vulnerable applicants who were generally unrepresented at the first tier and, often, unable to present all relevant material or present arguments in their favour. The agency in these matters has also typically been unrepresented at the first tier.

We accept that the Guidance and Appeals Panel established by Part 5 of the Bill will offer a review channel for social security and family assistance decisions. However, this will only be available when there is an issue of significance to administrative decision-making or where an error of fact and/or law affected the Tribunal's first decision. These circumstances might exclude matters where the applicant was, for reasons such as ill health, experience of family violence, experience of homelessness, or other compelling personal circumstances, unable to provide all relevant material to the Tribunal at first instance.

We urge the Committee to recommend changes to the circumstances in which a matter can be referred to the Guidance and Appeals Panel to include the capacity to refer a matter in other compelling or exceptional circumstances.

6. Other recommendations

A number of the recommendations we made in the Monash Law Administrative Review Reform submission relate to matters understandably not included in the Bills: they are recommendations for the conduct of the work of the new tribunal, not matters for primary legislation. In this respect, we note by way of example our recommendations in respect of fees, time limits, and case

[4] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 50.
[5] Vincent Thackeray, “Inconsistencies in Commonwealth Merits Review”; (2004) 40 *AIAL Forum* 54.

management. Recommendations of this sort will need to be implemented post-legislation (by rules, practice notes and policies). We continue to press them, and commend them to the Committee.

Yours faithfully,
MONASH LAW CLINICS

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ABOUT MONASH LAW

Monash Law is one of Australia's leading law schools, and the country's largest. It was founded in 1964, and from its earliest years has sought to ally excellence in teaching and research with a strong emphasis on the practical impacts of the law on the community. It has a strong emphasis on the intersection of law and technology, including through the work of the Australia Centre for Justice Innovation, and the work of a number of academic staff on the use of technology in public law.

Monash Law established Australia's first Clinical Legal Education Program in 1975, operating from the Springvale Legal Service, now the South East Monash Legal Service. Monash Law Clinics ("***MLC***") was established in 1978 and is now the centrepiece of the Monash Clinical Program. These legal services owe their existence to the passion and innovation of Monash University law students and academics, who identified and sought to redress the imbalances in access to legal advice and assistance to members of the community.

Since its inception, the mission of MLC has been the provision of accessible and comprehensive legal information and assistance as well as community legal education to disadvantaged members of the community. MLC provides members of the community with the means, which may otherwise be unavailable to them, to become informed about their legal rights and how to enforce them. MLC now operates from 2 sites – at Clayton and the Melbourne CBD – and provides a broad range of legal services with a strong focus on community law and family law. MLC also has an international focus, working on issues related to abolition of the death penalty, modern slavery, international human rights and international economic law. For more information about MLC and the Monash Clinical Legal Education Program, please visit: https://www.monash.edu/law/home/cle/clinics.