Submission to the Legal and Constitutional Affairs Committee review of the Administrative Review Tribunal Bill 2023

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I wish to thank the Attorney-General the Hon. Mark Dreyfus KC for inviting members to participate in this process and the President of the Administrative Appeals Tribunal who similarly encouraged members to engage.

1. Introduction

This submission takes a holistic approach to commenting on the *Administrative Review Tribunal Bill 2023* ("the draft Bill") by identifying consistent themes that run through the draft Bill and reflecting on what their impact would be in merits review administrative decision-making in Australia.

In doing so the submission does not engage with the nuanced stand-alone procedural changes that are being proposed, which are dealt with in detail by other submissions.

In addition, its primary focus is on the *inquisitorial* or specialist tribunals and not the 'old' AAT. This distinction is critical and as such is explained briefly below.

The key issues of concern that arise from this draft Bill are:

- The juridification of merits review
- A loss of member independence
- The importance of introducing term limits and retaining member levels

2. Brief background to inquisitorial and adversarial tribunals

The first merits review body, the Administrative Appeals Tribunal ("'old' AAT") was established in 1976. Concurrently, the first specialist social security tribunals were established in 1975 by Ministerial instruction and then by statute through the *Social Security (Administration) Act 1999*.

The first specialist migration tribunal, the *Immigration Review Tribunal,* was established in 1989 to deal with migration appeals. In 1999 it became a statutory body under the *Migration Act 1958* when it became known as the *Migration Review Tribunal* (MRT). In 1993 the *Refugee Review Tribunal* (RRT) was established as a specialist tribunal dealing with asylum appeals. In 2006 the separate MRT and RRT were amalgamated into a single Agency.

In 2016 these disparate statutory Tribunals—the 'old' AAT and the specialist tribunals including the SSAT, MRT and RRT—were brought together into one institution which took the name Administrative

Appeals Tribunal ("'new' AAT"). Although carrying the same name as the 'old' AAT the new body became an amalgamation of the four former tribunals into one institution but allowed for each to retain their unique features. The inquisitorial Tribunals remained so and the adversarial remained adversarial.

The crucial difference between the adversarial and inquisitorial tribunal was summarised in the 1992 *Committee for the Review of the System for Review of Migration Decisions* report which examined the operation of the *Immigration Review Tribunal*, whose inquisitorial features continued into the MRT, RRT and subsequently the Migration and Refugee Division within the AAT:

> *The most obvious characteristic of the IRT as a non-adversarial tribunal, when compared with a more traditional tribunal such as the AAT, is that there is no direct confrontation at a hearing between parties and between their lawyers. In an adversarial system, there are commonly two parties, each represented by lawyers, who argue the issues of law and fact to be resolved, and challenge the contentions of the opposing party. In the IRT, however, it is usually only the applicant who attends any 'hearings', and he or she is often not represented by anyone else, whether a lawyer or otherwise.* ***Tribunal members themselves are responsible for actively assisting the applicant to present his or her case, identifying all the relevant issues, thoroughly testing the evidence and protecting the interests of both applicant and the Department or Minister.***[1]

This broader burden of responsibility on members in inquisitorial Tribunals differs substantially from the responsibility of members in an adversarial tribunal and in turn requires a different set of member skills, different leadership, different support, and different processes. **For this reason, greater integration between adversarial and inquisitorial tribunals, homogeneity of member profiles, and establishing common processes under a strengthened presidency is not necessarily a panacea that will lead to better outcomes.**

2. *Juridification of Merits Review*

Any reform of the administrative appeals system must ensure that it remains accessible to applicants. The administrative system affords an avenue for mainly disadvantaged citizens, migrants, and aspiring migrants to have an adverse decision reviewed by an independent body. When a proposal to amend the system appears to lead to a more legalistic and more court like Tribunal, there should be concern over whether the changes will make it more difficult for disadvantaged people to access justice.

The below table provides an insight into the skills and expertise required by each of the Tribunals prior to amalgamation and subsequently under the ART:

	Qualifications required for various member positions		
	Deputy President/Head of former Tribunal	**Senior Member**	**Member**
Former specialist MRT	Principle Member and Deputy Principal Member **- No legal qualifications requirement**[2]	**No legal qualifications requirement**	**No legal qualifications requirement**

[1] Quote from, N. Bedford, R. Creyke, 'Inquisitorial Processes in Australian Tribunals', Australian Institute of Judicial Administration, 2006 https://aija.org.au/wp-content/uploads/2017/10/Inquisitorial-Processes-in-Australian-Tribunals-BedfordCreyke-2006.pdf

[2] Migration Act 1958 s395 (as the Act was in December 2013)

Former specialist RRT	Principle Member and Deputy Principal Member **- No legal qualifications requirement**	**No legal qualifications requirement**	**No legal qualifications requirement**
Former specialist SSAT	National Convenor - **No legal qualifications requirement**[3]	**No legal qualifications requirement**	**No legal qualifications requirement**
'old' AAT	(b) as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least **5 years**; **or** (c) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President.	(b) as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least **5 years**; or (c) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President.	(b) as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least **5 years**; or (c) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President.
'new' AAT			
ART	(a) as a legal practitioner and has been so 5 enrolled for at least **10 years**; **and** (b) either: (i) the person is **a former Judge**; or (ii) the Minister is satisfied that the person has substantial expertise in one or more areas relevant to the jurisdiction of the Tribunal.[4]	(a) as a legal practitioner and has been so 26 enrolled for at least **7 years**; or (b) the Minister is satisfied that the person has at least **7 years'** specialised training or experience in a subject matter relevant 29 to the jurisdiction of the Tribunal.[5]	(a) as a legal practitioner and has been so enrolled for at least **5 years**; or (b) the Minister is satisfied that the person has at least **5 years'** specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal.

As can be seen from the above table, the MRT, RRT and SSAT did not require legal qualifications for any position. No effort was made over the two and three decades of operation to change this approach as they were recognised to be specialist tribunals that benefited from specialist skill sets. The amalgamation of the tribunals in 2015 continued this practice by allowing non-lawyers to hold senior positions including the Deputy President position which was equivalent to what was formerly the lead

[3] Social Security Act 1947 as amended to create the Society Security Appeals Tribunal – National Convenor (head)
[4] ART Bill s 207(3)
[5] ART Bill s 208(3)

role in the MRT, RRT and SSAT (these positions became Division Head roles held by Deputy Presidents).

The draft Bill proposes to upend the successful approach taken by the three specialist tribunals that have served the community for over thirty years by imposing requirements for legal qualifications. The ART Bill is proposing that the level of Deputy President requires legal qualifications and in addition raising the legal experience from the 5 years previously required to 'at least 10 years'.

I note that the qualification required to be a Federal Court judge and as such President of the tribunal is 5 years enrolment as a legal practitioner.[6] **It is not clear why the draft Bill requires a Deputy President of a merits review Tribunal which had historically not required any legal qualifications to now require double the amount of legal experience as the President.** Under this scheme it is conceivable that the President will be junior, in terms of experience, to the Deputy Presidents.

Furthermore, the draft Bill creates a loophole in that s 207(3)(b)(i) allows for a former 'Judge' to be a non-Judicial Deputy President, hence someone who has less than ten years of enrolment as a legal practitioner can become a Deputy President but only if they were previously a judge. It is not clear why a former judge with no merits review experience requires lower qualifications than others who may have specific and relevant merits review experience.

The requirements for appointment as a senior member have also been increased to seven years from five years but allow for non-legally trained appointments. Again, it is not clear why this bar has been raised above that required for a Federal Court judge or the President of the Tribunal.

The increasing focus on legal skills and the prominence given to current and former judges is contributing to the judicialization of the Tribunal (as is discussed below, judicial deputy presidents are exempted from performance standards). This is problematic in many respects. Even in the context of the 'old' AAT, diversity of membership was recognised as a strength as it was in the specialist tribunals. The Hon. Justice Garry Downes AM, former President of the 'old' AAT noted in an address to the New Zealand Chapter of the Council of Australasian Tribunals in 2005:

> *The Tribunal's greatest flexibility comes from its diversity in membership…In addition to lawyers the members include former military personnel (majors-general, brigadiers, a rear admiral and an air marshall), medical practitioners (both general and specialist), scientists, accountants, business people, aviators and many others. A number of members have expertise in more than one discipline.*[7]

The overall impact of the changes proposed in the ART bill will be for the new tribunal to resemble a junior court within the federal court structure. While this is understandably the preference for industry groups representing lawyers such as the Law Council of Australia, who advocate for further legalisation including that even senior members must have legal qualifications[8], it should not become the aspiration for all jurisdictions of a merits review body. Especially as there is no data that supports the view that the level of complexity in the largest jurisdiction has been such that competent non-lawyers have been unable to excel. Conversely there is considerable data regarding the ability of non-lawyers to undertake merits review effectively (see the Annex). Problematically, the complexity of legal issues in the specialist tribunals is often overstated, and as discussed further below, the complexity of the merits of the case understated.

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[6] Federal Court of Australia Act 1976, section 6 and ART Bill s 205(3)

[7] https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/why-does-australia-have-a-general-review-tribunal

[8] Law Council of Australia submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2 February 2024

The culture of an organisation is shaped by the leadership. Having a leadership that is narrowly limited to legal expertise is an organisation that will imbue a legal culture in its procedures and practices. It will lead to a narrowing of future recruitment of members, redirect the allocation of resources to the needs of lawyers and focus training on legal issues.

This is not what a merits tribunal was ever envisioned to be. It will in turn impact the ability of the Tribunal to fulfil its objectives. From the perspective of the applicant, a court-like culture will work against the objects of the ART Tribunal which are listed in s 9 of the draft Bill as including applications being 'resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits' and being 'accessible and responsive to the diverse needs of parties to proceedings'.

In this regard, it is important to note the view of the former President of the United Kingdom Supreme Court:

> *There is a view that the increased formality in tribunal decision-making in England and Wales has been caused by the loss of "specialist tribunal members who had accumulated a wealth of knowledge and experience which enabled matters to be dealt with more expeditiously and with greater compassion shown to litigants".* ***Such a state of affairs should not be allowed to befall the AAT****."*[9]

The judicialization of the Tribunal is also in direct contradiction to the recommendations arising from the *Better Decisions: review of Commonwealth Merits Review Tribunals 1995* report, a critical report reviewing the federal merits review structures by the Administrative Review Council which was led at the time by then President Susan Kenny who is now a judge of the Federal Court, which states at 8.32:

> *It is likely that some members of the ART would have legal qualifications. However, the Council considers that,* ***save for the President, no member should be required to have legal qualifications in order to be eligible for appointment to the tribunal.***

The over emphasis on legal skills at the expense of specialists will lead to worse outcomes in the inquisitorial tribunals. The reason is that in an inquisitorial setting, where the member leads the inquiry, members with appropriate specialist backgrounds can build upon their life experiences and expertise to inquire effectively, and ultimately make the correct or preferable merits decision. Without some basis of knowledge in a relevant field it is difficult to ask the relevant questions and in turn undertake the necessary inquiry that is integral to inquisitorial tribunals. That is why other specialist tribunals, such as the mental health tribunal, require specialist qualifications for some members.

Unlike in the adversarial jurisdictions where applicants are financially resourced to be represented and there is a contradictor, in many of the social security, migration and refugee inquisitorial tribunals the applicants do not have the financial resources to be represented. As a result, for example, about 40 percent of applicants in the migration and refugee jurisdiction and the majority in the social security and child support division are not legally represented and instead the hearing proceeds in a one-on-one engagement between the member, applicant and witnesses if any.

In such an environment being able to understand the context of the case becomes critical. The risks in failing to do so are high. In the refugee decision making context many applicants are poorly educated

[9] Submission to the Senate Inquiry into 'The Performance and Integrity of Australia's Administrative Review System'
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/

or illiterate. Their ability to convey their claims are limited. It is critical for members to have some experience in cross-cultural communication and foreign cultures that can facilitate the applicant giving evidence and presenting arguments (s425 *Migration Act*).

Unfortunately, this can be stymied at the start through the projection of Western cultural norms of rationality that often leads to findings of implausibility or lacking credibility which can be no more than a misunderstanding of how life is lived beyond our shores. Another example is how in applications from patriarchal societies the male's situation is often presented as the sole basis of seeking protection when often it is his wife's or daughter's claims, unarticulated especially if unrepresented, that has the strongest chance of success. Understanding the context of the places from where asylum seekers come from is critical in an inquisitorial setting in which, as noted above, 'Tribunal members themselves are responsible for actively assisting the applicant to present his or her case, identifying all the relevant issues, thoroughly testing the evidence and protecting the interests of both applicant and the Department or Minister.'

Despite the importance of cultural competency in its broadest sense, this Bill prioritizes legal smarts. It proactively diminishes the place of specialist skills despite being repeatedly identified by experts and in reports as necessary for merits review.

Examples of the need for specialist skills in the migration and refugee jurisdiction include:

- Members who have previously run a business will have a foundational understanding of key issues and be able to communicate with a business owner who is appealing a refused business visa. They will be better able to understand the full breadth of issues that arise when considering whether there is a genuine need for the position (*Migration Regulations 1994* r.5.19(4)(h)), or whether the company is able to afford to employ the visa holder for at least 2 years, a consideration which requires competent skills in reading financial reports and understanding cost structures for a business in a particular sector (i.e. restaurant cost structures are different to mining cost structures) (*Migration Regulations 1994* r.5.19(4)(g)).

- People who have lived in countries where refugees are fleeing from or have appropriate cross-cultural backgrounds or experiences are more likely to be able to understand the context and convey and apply the critical concepts of refugee law than those who don't. It would be difficult for a member who has never left Australia to conceptualise and then formulate questions and draw conclusions appreciating the impact of non-Western cultural and social dynamics, interactions and influences of tribal structures, or the nature of life in a failed state when undertaking their role of considering whether the applicant faces a well-founded fear of persecution.

As someone who has lived abroad for twenty years including ten years in war zones where refugees flee from, completing a doctorate in a relevant field, and being able to communicate in multiple languages, I draw upon the insights and expertise gathered through these experiences in every case that I hear just as a lawyer would draw upon their expertise.

I also recognise during moments of self-reflection how the level of expertise I bring on cases where I have lived experience or scholarly expertise positively impacts my confidence in knowing that I am making the right decision (as opposed to the legally correct decision).

This is not by introducing personal prejudices but rather by shaping the questions to ask and in which direction to enquire further, especially with unrepresented applicants. In cases arising from countries where I am unfamiliar with the context, I wonder how many wayward decisions I have made based on

only a passing knowledge of the culture and context of the places from which asylum seekers are fleeing (bearing in mind we have only a few days to read the application and submissions; hear the case; understand the political, geopolitical, social and cultural context of the community, society and country; and then write a decision on whether the person will be persecuted and potentially tortured or killed upon return to their country).

The ignorance among many of this crucial aspect of inquisitorial decision making can best be summed up with the adage of not knowing what you don't know, an unacknowledged cause of poor decision-making which risks being perpetuated through these reforms.

Consider the following:

> Member A has 6 years of experience in this jurisdiction as a non-legally trained member but 20 years of international experience with refugees working across cultures and engaging with the circumstances of people fleeing persecution. Member B, a twenty something year-old lawyer has 7 years of experience in refugee decision making as a member and has never left Australia. Both apply for the position of Senior Member. Under the ART Bill Member B can be appointed as a Senior Member whereas Member A cannot.

Relevant expertise, be it grasping the nuances of running a small business, cross cultural communication or understanding complicated matters of war, isn't developed through the practice of the law. This is not to say that legally qualified members without such experiences or qualifications can't learn about the society from which asylum seekers flee or business cost structures. They can. But it would take some time and many problematic decisions (that may well be legally sound) before the right skill set is developed. This works both ways, people with the right specialist skills but without legal skills will take time to learn the relevant laws and regulations and how to apply them in a procedurally fair manner. **The best way that these two groups can build the necessary skills is to ensure that the Tribunal brings together at all levels of seniority people of diverse skills and experiences to share their insights between each other.**

The aim should be an organisation that understands and appreciates the entirety of the complexities of merits review and not just the complexities that arise when looking at a case through a legal lens.

Recommendations: To avoid the judicialization of the Tribunal where the new Tribunal resembles a junior court:

1. Retain the current Deputy Division Head level (senior member level 1, i.e. have two senior member levels) and not limit the position to legally trained applicants. This will ensure that there is a place for specialist skills at a senior leadership level within a jurisdiction in line with the past thirty years of Australia's administrative appeals practices.
2. Establish in the Bill a target of at least 50% of members assigned to inquisitorial jurisdictions to be non-lawyers and a target of at least 10% of members assigned to adversarial jurisdictions to be non-lawyers. This will require at the very least a separate recruitment stream for non-lawyers including actively advertising for diversity of background and skills.

3. Weakening of Member independence

This draft Bill is a complete overhaul of Australia's administrative law system. When undertaking such major changes, it is important to consider not just the current circumstances and present office holders but also future circumstances and how those office holders will wield their powers into the future.

A fundamental characteristic of the draft Bill is a shift away from a dispersed authority structure to a system in which two individuals, the Attorney-General and President, have considerable powers including terminating member appointments and as a result member independence is greatly diminished.

In an oration by the former Attorney-General and President of the Administrative Appeals Tribunal the Honourable Duncan Kerr, he noted that the 'new' AAT **protected the independence of members in part by leaving the ability to remove members only through an address of both Houses**.[10] This has been a central facet of the current AAT, and former MRT, RRT and SSAT. This foundation stone of independence will be removed under the draft Bill with no clear reason given for why this change needs to occur.

A heightened risk to member independence arises from the President's proposed powers to terminate an appointment based on performance standards.

Section 221(1)(g) allows for the termination of a member's appointment if they engage in 'a serious breach of the performance standard.'

Section 202 defines a performance standard. It states that the President must determine a performance standard for non-judicial members (why only non-judicial members have to meet a performance standard is unclear).

Section 203 explains the mechanism by which an assessment is made of whether a performance standard has not been met. While it provides for the referral of the matter to an investigative body it also allows under s203(2)(a)(i) for the President to solely investigate the matter, under s203(2)(a)(ii) for the President to report on the investigation and then under s203(3) for the President to form an opinion on the matter and immediately restrict the duties of the member.

The President can then report to the Attorney-General the grounds for termination under s222. The Attorney-General can then request the Governor-General that the member's appointment be terminated on the basis of not meeting performance standards repeatedly (s221(2)(a)). What constitutes 'repeatedly' is not defined but self-evidently it is inherently subjective.

The combination of these provisions severely undermines the independence of members in how they perform their fundamental decision-making responsibilities.

To understand why, we need to look at how the performance expectations of members have changed over time. One representative example is refugee decision making. Anecdotally, former members of the RRT have described how in the early days refugee decision making could take weeks for each case to be determined. There were no KPIs or time standard benchmarks. Instead, the message was to prioritise getting it right. Today we have benchmarks that allow four days for the most complex cases and two days for cases that would be considered more routine. Some members believe this to be insufficient to adequately consider the complexities of each matter. Some members prioritise just decision-making over institutional KPIs.

It should not be beyond our imagination that some time into the future a President, whether as an unwritten condition of appointment or under pressure from the government to finalise more decisions or to prove their leadership ability, will amend the benchmarks again by reducing them to, for example, two days.

In this situation a conscientious member who is assigned multiple difficult cases may object to completing them in two days, she may say that it is simply not enough time to undertake a fair assessment of the evidence. She may prioritise the fair and just objectives of her powers. If this member

[10] https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-kerr/kerr-j-20150915#_ftn43

were to repeatedly fall behind on her benchmarks, under the current draft Bill that member could be in serious breach of the President's Code of Conduct. That member could have their statutory appointment terminated without recourse to any appeal body.

In this regard it should be noted that in his 2018 review of the AAT the Hon Justice Callinan AC wrote regarding the performance measures:

> *There is in the MRD a "Dashboard", a display of the numbers of matters finalised by each Member from time to time, a target in effect disguised as a "benchmark". It has proved to be a distraction of the Members from their work. The work of a Member, as with that of a judge, is not to be evaluated exclusively on a quantitative basis. The complexity of matters is variable. Quantitative evaluation can only be a partial and not always reliable measure of performance.*[11]

While he did not associate the benchmark with independence, the vagaries of a data driven performance management system were rightly identified as not being a 'reliable measure of performance'. While benchmarks can add value when working with members to support the attainment of optimal performance in decision making, they should not be used as a basis for terminating an appointment.

The *Parliamentary Joint Committee on Human Rights* when considering the ART Bill's compatibility with international human rights obligations referenced the United Nations Human Rights Committee in ultimately finding that the termination provisions for current members were not compatible:

> *A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of independent tribunal.*[12]

The fast-track nature of the proposed termination provisions for future members, ending abruptly with the President and Attorney-General, would similarly breach international norms of what constitutes an independent tribunal for reason of the government's ability to control the membership.

This Bill provides a pathway for the loss of independence in decision making and opens the door to a risk of subservience to the priorities of the government of the day. That is why a high bar for the basis of terminating the appointment of members has always been associated with an independent tribunal and the independence of members.

Independence in decision making is central to the administrative merits review process, without amendments to this provision the ART risks becoming no different to a second-tier review within a government department, beholden to the Agency head, yet lacking the protections that equivalent levels of the Australian Public Service staff have.

Furthermore, any change to the basis upon which members of the ART can be terminated needs to be considered more broadly across all statutory appointments. Should Fair Work Commissioners or Human Rights Commissioners have performance standards that if breached lead to their appointment being terminated without any right of appeal? If not, why not? Why only ART members?

The other problematic subclause that diminishes the independence of members is s 221(1)(f) which arises from conduct by a member that constitutes a serious breach of the code of conduct. While this appears on its face not to differ substantially from the current wording of 'misbehaviour'

[11] Report Review: section 4 of the Tribunals Amalgamation Act 2015 (CTH) at [1.5]
[12] UN Human Rights Committee, General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial (2007) [19]

(*Administrative Appeals Tribunal Act 1975* Act s13) the problem with the draft Bill is in the disproportionate power granted to the President without an avenue of appeal.

Again, in this instance, the code of conduct from which the serious breach arises is to be written by the President and as above, the President can investigate, report and recommend the termination to the Attorney-General who can then unilaterally make the recommendation to the Governor-General.

Because a serious breach of the code of conduct can lead to termination of only a non-judicial statutory appointee it will shape different standards of behaviour between judicial and non-judicial members of the Tribunal. It is not inconceivable that a situation will arise where two members, a judicial and non-judicial appointee are involved in an incident for which one can have their appointment terminated and the other continues in their role with the Tribunal.

It is relevant to note that no data was provided that would justify the introduction of these additional and novel termination powers.

Recommendations: To avoid the loss of independence among decision-makers which has been a hallmark of Australia's merits review system for over fifty years:

1. All references to performance standards as a basis for termination be removed.
2. Considering that the Administrative Review Council had in the past been tasked with developing standards of conduct for Tribunal members,[13] section 201 which deals with the code of conduct should be moved to Part 9 as a responsibility of the ARC and not the President.

4. Member levels and term limits

There is a risk that the current draft Bill will entrench a tenured cadre of unaccountable members sitting above the government of the day with the power to overturn a government's administrative decisions, not based on error, but because of a different worldview.

This is contrary to the essence of our democracy.

Many merits review decisions overtly incorporate discretion into decision making (for example visa cancellations, where a member considers how much weight to place against cancelling a visa based on the applicant, for example, having a child and the impact on that child of the cancellation). Most others, by the nature of weighing evidence, are open to different decision makers reaching different outcomes.

Considerable research from various jurisdictions shows how individual characteristics of merits review decision makers, most notably career background and gender but also political persuasion of the government making the appointment, at a group level, reach statistically significant different outcomes in decision making.[14]

An entrenched and unaccountable cadre of members selected from a narrow pool who operate in an echo chamber of ideas can skew administrative decisions regardless of the policies of a democratically elected government.

[13] 'A Guide to Standards of Conduct for Tribunal Members', September 2001/Revised August 2009, Administrative Review Council

[14] Schoenholtz A., Ramji-Nogales J., Schrag P.G., 'Refugee Roulette: Disparities in Refugee Decision Making', Stanford Law Review, 2007; and in Australia the work of Data Lab of the Kaldor Centre for International Law https://www.unsw.edu.au/kaldor-centre/our-resources/kaldor-centre-data-lab/changing-picture-aat-new-data-shows-success-down-consistency

While independence for Tribunal members means that there isn't undue interference by the Executive on individual decision making it should not allow for a sense of permanence and practical separateness from the Executive.

Yet, as Tribunal decision making is a niche profession, once a member takes up this privileged position it is difficult to dislodge them through a merits-based recruitment and reappointment process unless the government changes the qualifications requirements and disassembles the Tribunal as this Bill does. This is because the skills and experiences of Tribunal members are unique leaving outsiders who could bring considerable relevant expertise and good judgement uncompetitive in a recruitment process that values insider knowledge.

Assuming that disassembling a Tribunal will not become a regular path forward, introducing term limits prevents the danger of Tribunal members who are and should remain a part of the Executive having the same tenure as judges who rightly have secure lifetime tenure under the Constitution. Term limits prevent the establishment of what practically would amount to a permanent bureaucracy separate from the Executive led by a Chapter III judge.

Establishing term limits would limit the incentive for governments frustrated by the decisions emanating from the Tribunal to massage the recruitment process.

Alternatively, from an individual member perspective, term limits tie into the issue raised in the Explanatory Memorandum of the draft ART Bill at [1127]: 'if a member is at risk of suffering vicarious trauma through exposure to particular subject matter as a result of a particular jurisdictional area's caseload, reassigning that member to a different part of the Tribunal for a period of time supports member wellbeing.'

Unfortunately, this justification for the power to cross-assign members is an incomplete understanding of vicarious trauma. Poor decision-making in an individual's professional sphere is a symptom of vicarious trauma.[15] Reassigning members suffering vicarious trauma to another Division to make bad decisions there is not a viable solution. If the government is to take vicarious trauma seriously then there is a need to immediately assess members (and not wait for the passage of the Bill) or alternatively establish term limits for members working in jurisdictions that expose them to triggers of vicarious trauma.

As for member levels, the draft Bill removes the multiple member levels currently in place and common to other tribunals (note NCAT has general members, senior members, principal members, deputy president and president). This effort to reduce the number of member levels wasn't explained in the Explanatory Memorandum other than noting that it is 'simpler'.[16] But simpler is an aesthetic, it's not a reason. A problem that arises with this change is that it brings with it an inherent view that a member should be content with working at the same level and same pay scale for their entire career of twenty years or more (or 10-12 years if my above recommendation is adopted). This is an unreasonable expectation and can be counterproductive to the Tribunal as it may force many experienced members to seek employment elsewhere just as their skills and experience are developing. There are members who may not succeed in their pursuit of a senior member role but nevertheless have skills and experience, gained through years of contribution to the Tribunal, which should be recognised.

Currently there are three membership designations, Deputy President, Senior Member and Member. Within the senior member designation there are two remuneration levels and within the member designation there are three remuneration levels. That there is no pathway for an experienced member to

[15] Ana B Méndez-Fernández, Francisco J Aguiar-Fernández, Xoan Lombardero-Posada, Evelia Murcia-Álvarez, Antonio González-Fernández, 'Vicariously Resilient or Traumatised Social Workers: Exploring Some Risk and Protective Factors', *The British Journal of Social Work*, Volume 52, Issue 2, March 2022
[16] Explanatory Memorandum of the Administrative Review Bill 2023 at [244]

progress in their career even after decades dedicated to the Tribunal is a reason to maintain the three levels as it will help the Tribunal retain experienced members.

Recommendations: To avoid the establishment of a permanent bureaucracy within the Executive led by a Chapter III judge that has the power to influence the lawful policies of democratically elected governments:

1. Introduce term limits of 10 or 12 years at any single level on any Tribunal that undertakes merits review.
2. To ensure that experience is retained within the institution, the clock should be reset if a member is promoted to a new level of membership (i.e., from member to senior member or senior member to deputy president).
3. To provide for career progression and the retention of skilled members retain the multiple levels within the Member band.
4. New members should start on the lowest rung within each band allowing for progression based on merit.

Annex

The below data is provided in the context of the question of whether non-lawyers can effectively undertake the role of merits review. Considering that the appointment of non-lawyers to the Tribunal was a cornerstone of the Coalition governments between 2017 to 2022 data from this period provides insight into the performance of an inquisitorial Tribunal when there is a balance of lawyers and non-lawyers.

Relevant Data from the MRD user satisfaction survey[17]:

From Applicants:

- I understood what was happening (representative responses in brackets):
  2016: 87%
  2022: 92%
- The level of formality of the hearing was appropriate:
  2016: 86%
  2022: 90%
- The member was courteous and respectful to me:
  2016: 79%
  2022: 87%
- The member explained things clearly:
  2016: 81%
  2022: 88%
- The member gave me or my representative a chance to present my case:
  2016: 81%
  2022: 87%

From Representatives:

[17] User Satisfaction Surveys 2016 through to 2022. While there has been some criticism of this data in the Senate Legal and Constitutional Affairs Committee estimates, I note that the organisation that undertakes these surveys is a leader in its field, provides data services to other government organisations and that despite there being challenges in obtaining perfect data, something that is common to all statistical endeavours, the available data collected in a consistent manner shows consistent improvements.

- The level of formality of hearings is appropriate:
  2016: 85%
  2022: 97%
- Tribunal members are courteous and respectful:
  2016: 76%
  2022: 83%
- Tribunal members explain things clearly:
  2016: 81%
  2022: 87%
- Tribunal members give parties an adequate opportunity to present their case:
  2016: 72%
  2022: 85%
- Tribunal members conduct hearings efficiently:
  2016: 75%
  2022: 88%

Rate of appeals allowed by the courts

This is a proxy measure of the ability of non-lawyers to deal with the legal complexities of merits review.

Table: Target of less than 5%[18]

	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022	2022-2023
AAT	3.0%	3.1%	2.3%	4.4%	1.8%	1.3%	1.5%
MRD	3.6%	3.6%	2.6%	4.1%	1.9%	1.3%	1.4%

*Note: there is an approximate two to three-year lag between member cohort and finalisations by the courts as such it isn't until 2018-2019 that we start to see the impact of a more diverse membership

[18] Data obtained from Annual Reports