SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

REFERENCE ON ADMINISTRATIVE REVIEW TRIBUNAL BILL 2023 AND RELATED BILLS

SUBMISSION

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BACKGROUND

I thank the Committee for the 14 February 2024 email inviting a submission.

I write as a leading academic authority on social security law (Emeritus Professor of Law University of Sydney, specialising in social security) and draw on nearly 40 years of experience sitting on social security appeals on the Social Services and Child Support division of the Administrative Appeals Tribunal and its predecessor the Social Security Appeals Tribunal.

SCOPE OF SUBMISSION

[1]. This submission concentrates on one main concern – the unwisdom of abolishing two tiers of 'as of right' review for social security or other areas of 'mass decision-making'. That concern hinges on the restrictions in Division 3 of Part 5 of the *Administrative Review Tribunal Bill 2023* (**ART Bill)** on access to the newly created Guidance and Appeals Panel and the absence of any other as of right second review

pathway equivalent to previous social security access to the General Division of the AAT.

[2]. The restrictions imposed by the ART Bill are two-fold:

1. The initial ART decision must either 'raise an issue of significance to administrative decision-making' or 'contain an error of fact or law materially affecting the decision' (ART Bill cl. 124(2)(b)(i) and (ii) respectively), and
2. Access to that further review is at the discretion of the President (cls. 124(4), 128).

[3]. Outside that concern, I generally applaud many of the innovations introduced by the ART Bills as an advance over the former AAT, in that they preserve or improve key attributes (see Appendix A), though I briefly note some provisions warranting refinement (see Appendix B).

THE CENTRAL CONCERN ABOUT ABOLITION OF TWO TIERS OF REVIEW.

[4]. Social security (along with a smaller proportion of child support reviews) accounted for 30% the AAT caseload in 2022-23. This amounted to 12,260 new lodgments and 11,162 cases finalised.[1] The vast majority of finalisations were achieved by the Social Services and Child Support Division (first tier or **AAT1**), where the standard hearing time is one hour per case with at least three such hearings in each morning or afternoon session. A second review by the General Division (**AAT2**), initiated either by the initial applicant or the Department, occurred in 1,146 cases,[2] dealt with by a tailored hearing time and more leisurely process for obtaining final resolution.

[5]. This two tier system (originally copied from the longer-standing UK practice) enshrines two main attributes:

- *Division of labour and filtering of complexity:* Nine out of every ten reviews did not proceed beyond AAT1; those that did lead to a second hearing tended to be more complex, with 28% varied either during pre-hearing conferences and alternative dispute resolution (ADR) or after a hearing;
- *Efficient use of scarce resources:* Although unforgivably 'gamed' in robodebt cases, procedures such as the non-publication beyond the parties of AAT1 Reasons for Decision, avoided very high costs associated with routine anonymising of reasons for decision for publication, or the costs associated with having tailored

[1] AAT Annual Report 2022-23 <https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2022-23-annual-report/2022-23-at-a-glance.>

[2] Ibid, <https://www.transparency.gov.au/publications/attorney-general-s/administrative-appeals-tribunal/administrative-appeals-tribunal-annual-report-2022-23/chapter-3-performance/social-services-and-child-support-division.>

hearing lengths and processing rather than standard and generally one hour hearing times.

[6]. Similar concerns and reasoning led the then Administrative Review Council to reverse a similarly ill-considered recommendation for single tier rather than two tier processes for social security between its 1980 and 1984 reports.[3]

What makes social security review special?

[7]. Access to merits review by ordinary citizens in areas of mass decision-making such as social security has long been known to raise access to justice issues of a markedly different order to those of better resourced or repeat players. Those barriers to access to justice are a product of high volume administration ('mass' decision-making) impacting unrepresented ordinary citizens unfamiliar with and wary of law or officialdom.

[8]. The greatest threats to such access arise when 'judicial' rather than administrative paradigms and ways of thinking are applied in welfare, and 'tidy minds' pursue 'one size fits all' designs for merits review. Both points were eloquently elaborated by the first President of the Supreme Court of the United Kingdom, Lady Brenda Hale, in her 2021 annual lecture to the equivalent of the AAT/ART.[4]

[9]. Until recently, debates about access to administrative justice were always conducted from first principles – in a data vacuum so far as key parameters are concerned. It was, for example, well known that departments and agencies such as Centrelink (Services Australia) made millions of 'decisions' each year. But no one knew how many of those decisions were flawed in some way, so there was no baseline from which to assess what proportion of such decisions found their way into external merits review. All that was available were impressive looking 'aggregates', such as the previously mentioned approximately 12,000 annual applications to the AAT. The same data-free picture prevailed internationally.

[10]. A serendipitous side-wind of the robodebt saga was the generation of hard data about how many flawed debts were raised. As found by the class action litigation, 794,000 debt decisions were illegally (and arithmetically incorrectly) raised against 526,000 recipients. Of these, only 423 reached AAT1 before robodebt was ruled illegal

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[3] Administrative Review Council, *Social Security Appeals* (Report #8, 1980); *The Structure and Form of Social Security Appeals* (Report #21, 1984); Terry Carney, 'Welfare Appeals and the ARC Report: To ssat or not to ssat; Is that the question?'' (1996) 4 *Australian Journal of Administrative Law* 21.

[4] Lady Brenda Hale, 'Courts and Tribunals' (Annual Upper Tribunal Lecture 14 October 2021) Annual Upper Tribunal lecture 2021 (judiciary.uk). [Her first exposure to administrative decision-making was in the 1970s as legal chair of a mental health review tribunal.]

(accounting for 1% of its caseload).[5] Those AAT1 lodgments were made in just 5 out of every 10,000 illegal robodebts.

[11]. Although this 0.05% access rate to AAT1 review was deflated by 'gaming' of the mandatory authorised review officer review within Services Australia/Centrelink – such as in refusing to accept that a person unable to upload contradictory payslip information (e.g. due to its unavailability) constituted a 'decision' within the HCA *Bond* definition of what constitutes a reviewable decision[6] – it remains a staggeringly low figure. Staggeringly low because there is no doubt these unlawful debts imposed enormous human, emotional, economic and even professional cost on those affected, meaning there was no lack of 'will' on the part of this population to seek redress.

What are the ART design implications for merits review of social security?

[12]. The two most significant implications of such incredibly low access to merits review in social security are:

1. <u>*Maximising normative impact*</u>*:* It is vastly more important than anyone previously anticipated that ART review of mass decision-making in social security actually *achieves* its intended normative impact on primary decision-making.
    a. That normative feedback loop to prevent or minimise repetition of decisions that are other than the correct and preferrable decision has long been recognised – in the statutory obligations imposed on the Secretary under section 8(f) of the *Social Security (Administration) Act 1999* and more generally in the Explanatory Memorandum (**EM**) to the 2015 AAT amalgamation legislation.
    b. The Guidance and Appeals Panel (**GAP**), introduced for the first time in Part 5 of the ART Bill, will go some way to undermining the long-standing departmental 'excuse' within social security for giving too little (or sometimes not 'any') weight to AAT rulings on the basis that they are inconsistent or 'turn on their individual facts', but
    c. Boosting the normative or systemic impact of ART decisions will principally rely on *other* welcome innovations, such as the President's function of ensuring that relevant Ministers, entities and the Administrative Review Council (**ARC**) are informed of 'any systemic issues related to the making of reviewable decisions that have been identified in the caseload of the Tribunal' (cl. 193(i)) and the role of jurisdictional area leaders in feeding such issues to the President (cl. 197(5)(f)), EM paras [1065]-[1067]), as well as its inclusion in the ART

[5] See generally, Terry Carney, 'Automation and Conditionality: Towards 'virtual' social security?' (2024 forthcoming) 31(1) *Journal of Social Security Law* 32, pp. 41-42.

[6] This opportunity for gaming remains. It is not closed off by the new concept of a 'review pathway', at least as described in the ART Explanatory Memorandum: see para [1529].

Annual Report (cl 242(2)(i)) and the equivalent requirement in the ARC Annual Report (cl 264(2),(3), EM [1518]-[1521]).

2. *Accessibility, efficiency and justice of social security review:* It is critical that the ART is able to cope with and deliver administrative justice for an annual caseload of at least 12,000 social security reviews annually. The ART must be able to do so in an efficient and impactful way that delivers correct and preferable decisions to applicants as well as the normative and systemic outcomes so critical in mass decision-making areas. In my opinion this cannot be achieved under the architecture of the current Bill, because:
    a. The role played by the AAT General Division (AAT2) in providing mainly *single* member as of right second reviews, has been completely lost, with the new Guidance and Appeals Panel principally serving an entirely *different* function (of promoting greater consensus of opinion *within* ART decision-making[7]);
    b. It appears to me quite unlikely that a similar volume or composition of matters will reach the GAP and be reported publicly, diminishing the comprehensiveness of publicly available reasons for decision to inform stakeholders and the public at large of the work of ART review in social security cases;
    c. I predict that the unit cost, in terms of financial outlays and use of scarce member time, will increase significantly compared to the AAT's two level baseline comparator (as case management fails adequately to accommodate the requirements of more complex or time-consuming matters); and that the quality of justice experienced by applicants will also decline as a single tier system attempts to balance the unbalanceable tension between fairness and efficiency;[8]
    d. It is more likely under the ART single tier arrangement than under the AAT two tier system that contestable departmental positions will prevail in part by default of adequate counter argument. This is because of there will neither be adequate hearing time for experienced members to elicit finer grained legal issues (their inquisitorial role) nor input from properly

[7] Although there are some counterweights – such as reference to tribunal assistance to applicants in the event Legal Aid Commission representation is unavailable (cl 294, EM [1717]), or caveats around the power to issue directions to Members (cl 200, EM [1137]-[1138]) – there remains a sense that the ART will be less receptive to dissenting and diversity of opinions, and that imbalances between 'lawyered up government' and unrepresented applicants will suppress opportunities for adequate testing of alternative lines of argument on important issues.

[8] The AAT resourcing constraint, exacerbated by imposition of 'efficiency dividends', led the SS&CS Division of the AAT, for principally budgetary reasons, into delivery of a significant number of oral decisions (under the AAT Act written reasons only being required 'on request'). This lowered the quality of decision-making, and for this and other reasons as recognised in the ART Bill, oral reasons are now no longer to be an available option (cl 111, EM [708]. Other problematic pre-hearing case management processes were also at times adopted by SS&CS as expedients due to the same pressures.

resourced and represented applicants, to ensure adequate airing of such issues;[9]

e. The AGD suggestion that the Bill provides a 'more nuanced' two tier system, and 'brings forward' into the first tier valued aspects of second tier AAT adjudication, principally the ability to negotiate with the agency (who will not, and should not, routinely be present at the hearing in any event)[10] is – from any practical or realistic understanding of case management of high volume hearings – simply unconvincing. If true, why should veterans keep a two tier system (i.e. be denied these supposed benefits) given that the first level of review by the Veterans Review Board *already* has access to and is a heavy user of the front-ended ADR processes being touted as the supposed salvation in ART single tier review? and
f. 'Variation rates' provide an objective indicator of the level of need for review or further review, and despite the subjectivity of selecting the number, any figure above one in five is taken to unquestionably justify retention of that review body tier. That nearly one on three (28%) of AAT1 hearings taken to a second hearing led to changes at AAT2 provides a compelling case for keeping a second tier of review. It appears fanciful to think that the 'more nuanced' single level ART review will reduce that index figure below the threshold of need for retention.

[13]. For all the above reasons, **I recommend that two tier social security review as of right should be retained.**

[14]. This could possibly be achieved by amending clause 124 of the ART Bill to add an as of right entitlement to *single* member GAP review for cases decided by the Social Security jurisdictional area. However it would be better achieved by way of amendment of the primary social security legislation (i.e. amending rather than repealing provisions relevant to the current two tier AAT process) so that a separate pathway of single member as of right reviews is established as the general rule.

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9 The apparent divergence of departmental legal opinions regarding the 13,000-100,000 'apportionment' overpayments and underpayments revealed by the Ombudsman's own initiative investigation (Commonwealth Ombudsman, *Lessons in Lawfulness* (Canberra: Commonwealth Ombudsman, 2023) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0040/299947/Commonwealth-Ombudsman-public-statement-regarding-OMI-Income-Apportionment-Lawfulness.pdf> pp 2, 12;) and the subsequent conduct of hearings and tribunal acceptance of lines of reasoning in cases such as *Re Lyall* against unrepresented applicants, is a case in point: *Re Lyall and Secretary, Department of Social Services (Social services second review)* [2023] AATA 3356.

10 HRSC, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (Canberra: House of Representatives Standing Committee on Social and Legal Affairs, 2024) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/RB000319/toc_pdf/InquiryintotheAdministrativeReviewTribunalBill2023andtheAdministrativeReviewTribunal(ConsequentialandTransitionalProvisionsNo.1)Bill2023.pdf>: See the evidence of AGD representatives quoted in para [2.88].

OVERVIEW

Two tier social security review as of right should be retained. Its abolition and replacement by a single tier plus the discretionary referral to the Guidance and Appeals Panel, is a serious policy and administrative mistake that will not only impact adversely on vulnerable social security applicants but also prove counterproductive in terms of administrative and economic efficiency of the ART.

Some other provisions of the ART Bill also warrant reconsideration and amendment (Appendix B).

Terry Carney

Wednesday, March 6, 2024

APPENDIX A

'KEY ART RETENTIONS OR ENHANCEMENTS'

The following are a selection of the important features retained or enhanced in the ART Bills

- Ease of application for review (ART Bill cls 34(1) ['in writing *or any other manner prescribed in a practice direction*'], 35 [applications 'on behalf' of a person]);
- Retention of privacy of initial social security hearings through a practice direction (cl. 69);
- Flexibility, informality and accessibility of hearings (cls. 49-52);
- Provision for appointment of a litigation guardian (cl. 67) that – with one exception (see Appendix B) – incorporates principles of the *Convention on the Rights of Persons with Disability* (**CRPD**) and Disability Royal Commission, such as the lodestar of 'will and preferences';
- The availability for the first time in initial social security reviews of alternative dispute resolution (cl. 87);
- Provision of written reasons for ART decisions (cl. 111(2)) and elimination of the option for oral reasons (other than for associated steps);
- Revival of the Administrative Review Council (ARC) and fidelity to Robodebt Royal Commission recommendations (e.g. cls. 56 model litigant assistance to tribunal) particularly around publication of significant decisions (cl. 113) and the role of the President and the ARC in dealing with systemic issues (EM paras [35]-[36]);
- Independent merits-based assessment of appointments to the ART (Part 8 Div 3, esp. cl. 209) including taking account of 'the need for diversity of skills, expertise, lived experience and knowledge' (para (c) of the definition of merits-based in clause 4), though see a critical omission discussed in Appendix B;

APPENDIX B

'ART PROVISIONS WARRANTING FURTHER REFINEMENT OR RECONSIDERATION'

The following aspects of the ART Bill call for further consideration in my opinion:

- The inclusion of provision for a litigation guardian (cl. 67) goes too far in cl. 67(5)(a) with its 'one voice' rationale for a blanket exclusion of participation by applicants (EM [503]) and its excessively 'substitute', rather than 'supported' decision-making model,[11] and should instead take the more nuanced approach such as is evident in cl 377 of the *exposure draft Aged Care Act 2023*, which expressly preserves any retained abilities for participation (in the ART case this should also be at the discretion of the tribunal);
- Clause 84, requiring lodgment of a request for continuation where an applicant has died or is bankrupt etc., may or may not be appropriate outside social security. However bankruptcy is not rare or unusual in social security debt matters and there is no warrant at all for requiring such an 'application' to be made in the case of bankruptcy of a social security applicant;
- Use of alternative dispute resolution in social security (cl 87) needs to be judiciously exercised to protect against it becoming a new source of 'gaming' that avoids adverse rulings to the department being made public (there were instances of this in the NDIS) and/or vulnerable and usually 'first time player' applicants having their legitimate rights and interests overborne. A way needs to be found to build that protection into the Bill in some way, it is not sufficient to leave this to the whims and chance of being realised by way of the quality or training of those involved in ADR;
- The obligation to publish significant ART decisions (cl. 113) may generate too small and too restricted a range of publicly accessible decisions to provide adequate transparency, or a sufficient 'window' into social security review. AAT practice of setting and publicising in the Annual Report outcomes in meeting KPI targets on the aggregate number of decisions published (≈5,000) might at the least be refined to set a jurisdiction specific 'sub-KPI' for the social security jurisdiction area of the ART;

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[11] In this respect I echo the views of the Parliamentary Joint Committee on Human Rights, *Report snapshot, Report 1 of 2024*; [2024] AUPJCHR 2, pp 7-8 <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2024/Report_1/Report_1_of_2024.pdf?la=en&hash=FB023771035EE7B2963D38C637A2B9F56E10778E>; see also HRSC, n 10 above, para [2.66].

- The establishment of an ART appointments panel (cl 209) should be mandatory, not discretionary, and circumstances where its recommendation is departed from or not engaged should be narrowly confined and publicly justified by tabling of reasons[12];
- ART appointment principles and observations in the EM unduly skew the membership in favour of lawyers at the expense of other disciplinary or lived experience backgrounds, and unduly skew the membership toward an excessive proportion of full-time at the expense of sessional members[13] who are better able to realise the 'diversity' attribute in paragraph (c) of the tripartite definition of 'merits-based' selections.[14] Rarely are primary decisions made by legally qualified public servants and there is no basis for thinking that legal training better qualifies a tribunal member to 'step into those shoes' and determine what is the 'correct and preferable' decision on review. To think otherwise I contend is to commit the sin of 'judicialisation of administrative review' by stealth.[15]

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[12] In this I broadly mirror the position held by for example the Accountability Round Table: see HRSC n 10 above, para [2.131].

[13] The Explanatory Memorandum inappropriately identifies a role in providing 'surge capacity' and indicates that they would have neither 'guaranteed minimum hours' nor 'regular work': EM [1191].

[14] As Lady Hale wrote of one of the strengths of the pre-2007 British model:

> '*Yet another strength was the diversity of tribunal membership. In part this was down to the wing members. But it also applied to the legally qualified chairmen. These were recruited from all walks of legal life, not just from barristers and solicitors in self-employed practice. There were a lot of academics. And it was helped by the fact that a great many were fee-paid part-timers rather than full-time salaried appointments.*': Hale, n 4 above, p. 5.

[15] See Hale, p 12 where she described her: '*…biggest worry of all*' regarding post 2007 developments, namely: '*Does this "one size fits all" approach lead to tribunal processes becoming more and more like court processes?*', before concluding that the answer is that too many '*had already become courts in all but name*'.