SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

REFERENCE ON 'THE PERFORMANCE AND INTEGRITY OF AUSTRALIA'S ADMINISTRATIVE REVIEW'

SUBMISSION

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BACKGROUND

This submission is narrowly confined to stating my position with regard to Administrative Appeals Tribunal ('AAT') member selection and whether the Administrative Review Council ('ARC') should be revived. It thus addresses aspects of terms of reference (a) and (c).

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 my 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.

This submission simply conveys my main conclusions on the above two topics, with but a brief overview of the underlying reasoning. While I have touched on some of that reasoning in previous publications,[1] other people have made much more progress in illuminating the difficult to unearth facts about the opaque AAT appointment process over recent times,[2] and the 'suspension' of the ARC.[3]

1 AAT APPOINTMENT PROTOCOLS (TERM OF REFERENCE (a))

A favourable recommendation from an appropriately constituted screening and evaluation process, overseen by the President and senior leadership of the AAT, should be established as a mandatory precondition for all future appointments of members of the AAT.

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1 See for example, Terry Carney, 'Robo-debt Illegality: The seven veils of failed guarantees of the rule of law?' (2019) 44 *Alternative Law Journal* 4.

2 Mike Seccombe, 'Political stacking leaves appeals tribunal in chaos' on *The Saturday Paper* (24-30 November)<https://www.thesaturdaypaper.com.au/news/politics/2018/11/24/political-stacking-leaves-appeals-tribunal-chaos/15429780007187>; David Hardaker and Justine Landis-Handley, 'The Big Stack: How the government hijacked the AAT', *Crikey* September 2019 <https://www.crikey.com.au/inq/the-big-stack/>.

3 Hon Ian Callinan, 'Report: Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)' (Canberra: Australia Attorney-General's Department, 2018/19) <https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/report-statutory-review-aat.pdf> paras [1.27], [7.56].

Public trust and confidence in the work of merits review tribunals hinges on the calibre of its membership. Independence, technical competence and understanding of the role, and what may be termed 'tribunal-side manner' are critical. Those qualities cannot be ascertained other than by a purpose-built and arms-length screening and assessment process.

In the course of nearly four decades as a member of the AAT's Child Support and Social Services Division and its predecessor, I was fortunate to serve with many outstanding members from various backgrounds and disciplines. It was no accident that the ARC reports on social security review characterised the social security jurisdiction as the exemplar of what high quality merits review entails.[4]

It was no accident principally because, irrespective of their former life, an adequately rigorous selection and reappointment process generally ensured that nearly all appointees had the requisite intellectual calibre and commitment, understood the difference between merits review and judicial review, had the capacity to engage with applicants from all walks of life, and understood the responsibility of the tribunal to actively elicit information and produce accessible and timely reasons for their decisions.

When appointments are made without any proper evaluation of suitability, or against the advice of that process, harm is done both to applicants (see A) and to the institution of justice (see B):

A. Applicants are denied justice on the merits (due to lack of member competence) and/or both procedural fairness and procedural justice (due to unsuitable hearings):
   - 'Denial of justice' due to lack of competence of an appointed member in my experience tends to lie in the more complex or rarer types of issues presented. If lacking the research skills to identify and resolve the point, a flawed decision often results. This is particularly so in Divisions such as the Child Support and Social Services Division, since there are no informed submissions made either by applicants or the agency unless a body like the welfare rights or legal aid is involved (as is rarely able to be the case);
   - 'Procedural fairness' as I have used it here, is the contemporary term for the narrower principles of 'natural justice' and its rules about fair hearings and lack of bias. Unsuitable appointments can inadvertently contravene these principles such as by expecting a social security applicant to have stated their concern in their application for review, and wrongly confining the discussion to the issues there stated;
   - 'Procedural justice' as I use it above is a reference to a much wider and more relevant concept, one which engages notions of 'participation', 'voice' and 'respect' (being treated with dignity) from the perspective of applicants.[5] Administrative empathy in the conduct of hearings is a quality of very great significance for often vulnerable applicants in the Child Support and Social Services jurisdiction of the AAT.[6]

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[4] 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.

[5] The concept is usually attributed to Tom Tyler and Alan Lind, and most recently elaborated in Tyler, Tom R.. *Why People Obey the Law*, Princeton: Princeton University Press, 2021. https://doi.org/10.1515/9781400828609

[6] As someone who sought to dispense justice in all of these forms when running hearings I am distinctly incapable of speaking to the view from the applicant side of the table. Bodies such as legal aid commissions and

B. <u>The perceived independence and public trust in the AAT as an institution is brought into doubt, and the morale of members suffers</u>.
   - The Callinan Report eloquently documented those concerns.[7]
   - Trust in systems of justice is a fundamental democratic value that takes a long time to engender, but can all too readily be undermined, as exemplified by robodebt.[8]

The proposed screening and evaluation protocol, in my opinion, is all that is required to allay the above concerns:

- I vigorously disagree with some media and other commentary suggesting that party political background, service or representation should be a bar to appointment. In my experience some of the very best members have come from such backgrounds, from all sides of politics; and
- I flatly reject the suggestion that only legally qualified members be appointed, a view originating with the Callinan Report but also adopted and expanded in media commentary (sometimes as if already a requirement being breached). Lawyers from outside a background or understanding of administrative law (and sometimes those within it) can be the least capable of understanding what is entailed in 'standing in the shoes' of the original decision-maker, of eliciting facts or shedding a 'pleadings' and passive approach to hearings. And the expertise of other disciplines and domains of life (especially public administration) is a vital component of merits review of administrative decisions.

2 RESTORATION OF THE ADMINISTRATIVE REVIEW COUNCIL (TERM OF REFERENCE (c))

<u>The ARC should be restored.</u>

The AAT is one key part of Australia's system of administrative review developed by the Kerr and Bland Reports and other inquiries, but it is by no means the only part of that system. *Individual justice* for affected citizens and accountability of the administration for mistakes or failures in obtaining sufficient or correct factual information, or simply for decisions that are not optimally 'correct and preferable', are of course all very important goals.

But the AAT and associated machinery was also conceived as having a normative role by way of feedback to primary decision-makers to reduce the risk of future errors or sources of individual grievance (actual or perceived). The ARC was conceived as a major avenue for addressing such *systemic* as distinction from individual concerns about public administration. Together with institutions such as the Ombud, Auditor-General and Parliamentary committees, the ARC was designed to focus on systemic quality improvement of public administrative decision-making, ideally in anticipation rather than after the event.

The ARC over its life, achieved an enviable reputation for contributing to public administration. This was a result of the quality of its published reports, a product not only of a dedicated staff but

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Economic Justice Australia are best placed to elaborate on the scale and significance of shortfalls in realising these goals.

[7] Callinan, 'Report: Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)', above n 3 para [3.7].

[8] Valerie Braithwaite, 'Beyond the Bubble that is Robodebt: How governments that lose integrity threaten democracy' (2020) 55 *Australian Journal of Social Issues* 242.

a reflection of the wisdom and experience of the highly talented governing body. The reports on the proper design, deployment and use of artificial intelligence in government administration are a case in point. Given the failure of other parts of the administrative review system to promptly identify and rectify the illegality and system maladministration in the design of the on-line compliance initiative ('OCI') known as robodebt,[9] it is reasonable to ask whether this would have occurred at all, or persisted for so long, if the ARC had still been functioning.

In my opinion a functioning ARC certainly would have led to a much shorter duration of OCI, and it would have had a better than even money chance of avoiding altogether its roll-out in the defective form in which it was introduced. As I have previously observed, the fatal flaws of OCI was not something that was a 'deliberately *intended* goal[s]of OCI, but … a particularly egregious example of the *unintended policy consequences* commonly encountered in policy and program development.'[10]

In short, what turned out to be a $1.7 billion disaster for public administration and 400,000 or so citizens against whom false or unsupportable debts were alleged, might have been avoided altogether, or at least corrected much more rapidly, had the ARC still been operative.

Because systemic challenges to good administration continue to be posed, including how to introduce new technologies such as AI and machine learning,[11] the case for restoration of the low-cost but highly effective mechanism that was the ARC is in my opinion an overwhelming one. The Callinan Report came to exactly the same conclusion.[12]

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9 Carney, 'Robo-debt Illegality', above n 1.

10 Terry Carney, Submission to the Senate Legal and Constitutional Affairs Reference Committee, reference on 'The impact of changes to service delivery models on the administration and running of Government programs' (19 August 2019), page 6. A similar conclusion was later reached by Murphy J in approving the class action settlement: *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, para [6] 'I am reminded of the aphorism that, given a choice between a stuff-up (even a massive one) and a conspiracy, one should usually choose a stuff up.'

11 Terry Carney, 'Artificial Intelligence in Welfare: Striking the vulnerability balance?' (2020) 46 *Monash University Law Review* Advance 1; Terry Carney, 'Automated Decision-making in Social Security Administration: Implications for vulnerability, transparency and decision-making quality' (Paper presented at the Economic Justice Australia, Wednesday 15 September 2021).

12 Callinan, 'Report: Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)', above n 3 paras [1.27], [7.56], Measure 26.