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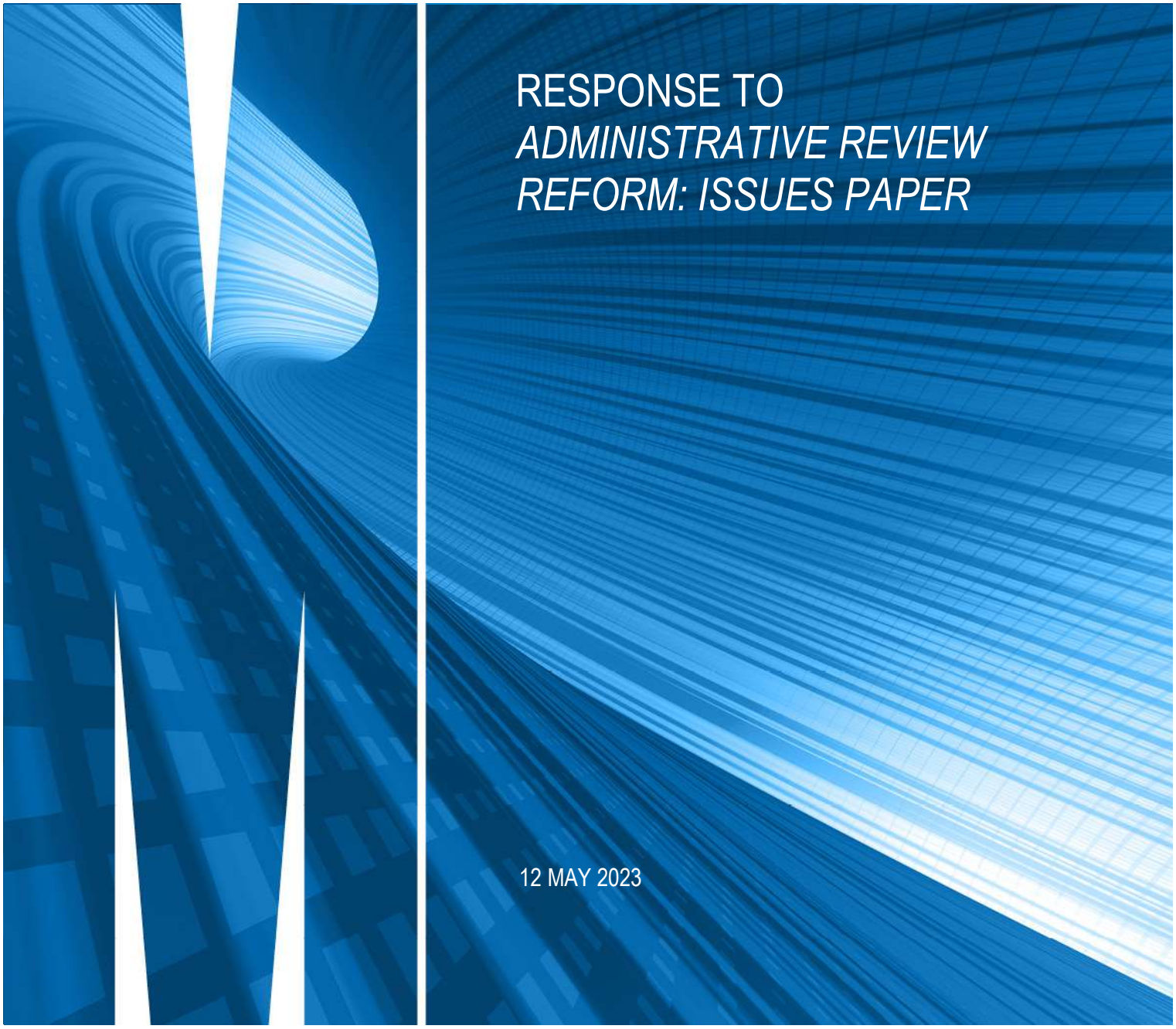
FACULTY OF LAW

ACCESSING ADMINISTRATIVE JUSTICE



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PART 1 INTRODUCTION AND EXECUTIVE SUMMARY

This submission has been prepared by members of the Faculty of Law at Monash University ("**Monash Law**"), with the input of staff at Monash Law Clinics ("**MLC**"). It brings together scholarly analysis of Australian administrative law, with the experience of direct service delivery to people navigating merits review processes, including the Administrative Appeals Tribunal ("**AAT**").

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 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 Monash Law Clinics and the Monash Clinical Legal Education Program, please visit: https://www.monash.edu/law/home/cle/clinics

This submission follows the structure of the *Administrative Review Reform: Issues Paper*, but does not respond item by item to each of the questions posed by that paper. Where relevant, it includes case studies which illustrate the arguments made. In summary, this paper argues, in respect of the establishment of a new body to replace the AAT:

1. That the basic structure of merits review in Australia, developed since the 1970s and exemplified by the AAT, is fit for purpose. It has a number of features which protect access to administrative justice. These features should be replicated in any new model, and their should be recognised in objectives revised from those set out in the *Administrative Appeals Tribunal Act 1975* (Cth) ("**AAT Act**").

2. The normative effect of merits review processes on administrative decision making of government is an important function, and has been imperfectly realised. This objective should be expressly affirmed in the creation of a new review body. Various measures in order to effect this objective should be taken, including the re-enlivening of the Administrative Review Council.

3. In terms of structure of the new body, much depends on the specific category of government decision under review. For example, the question of whether an inquisitorial or adversarial approach is appropriate will depend very much on the subject matter of the decision.

4. Appointments processes need to be reformed substantially. We propose an independent Commission to recommend appointments.

5. Access to the new body should be facilitated. The new body should have a positive duty to effect this, and a low level of formality should be expected in order to ensure a formal application. There should be some degree of consistency in fees and time limits for applications, and discretion in respect of each. Assistance, including duty lawyer assistance, should be made available.

6. Decisions rendered by the new body (and other communications it makes) will need to be tailored to users of the body (and potential users). It may be important to make a Simplified English version of decisions available.

7. The new body should recognise that legal assistance is a requirement of meaningful merits review for many users and in many areas of the new body's work. It must develop and implement a process through which particular classes of users, across all divisions, are appropriately identified as requiring legal advice and assistance in order to meaningfully engage with the merits review process, and are referred to legal services accordingly.

We note a number of recommendations through the course of the paper. There are, of course, many questions involved in the creation of a new merits review body. We trust that the below discussions will make some useful contribution to the task of the Attorney-General's Department and the Expert Advisory Group.

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PART 2 DESIGN

a. The basic structure of merits review

The basic structure of merits review is fit for purpose, and its architecture should be retained. Particularly, the principle in *Brian Lawlor* (that the AAT can review decisions even if those decisions are legally flawed),[1] the independence of the Tribunal,[2] and the notion that the AAT stands "in the shoes" of the underlying decision maker,[3] should be retained. These features have become critical parts of merits review as "an integral part of the framework of government accountability", and a "useful tool of accountability both for individuals … and, in a more general sense, for the community".[4] They should expressly be guaranteed in the legislation underpinning the new merits review body.

Recommendation 1: The legislation creating the new merits review body should expressly set out the basic architecture of merits review processes, and confirm that the new body will conform in this respect to the basic structure of merits review, as it has developed since the 1970s. Particularly, the legislation should affirm the independence of the new body. In that respect, it should expressly provide that the body may, subject to clear contrary statutory intention, review decisions purportedly made pursuant to powers whose exercise it has jurisdiction to review, even if those decisions are invalid. It further should provide that the body has all of the powers and discretions of the decision maker whose decision it reviews, including power to receive new evidence and arguments (again, subject to contrary statutory prescription).

We note that the nature of contemporary decision-making, particularly the use of automated decision-making, allows government decisions to have a more significant impact on a large number of people than was the case when the AAT was first established. Thus, there are strong arguments in favour of updating the objectives of merits review to allow for this.

One of our recommendations is that, in response, an explicit reference to 'dignity' be included in the objectives of the new body. Dignity is a fundamental concept in human rights law (such as the Universal Declaration of Human Rights)[5] and is also explicitly recognised in a number of national constitutions, including Germany and India. This would assist to ensure that merits review processes are applied in a way which puts the individual applicant at the centre and to encourage decision-makers to accord applicants dignity in the review procedure.

Recommendation 2: The objectives for the new body include express recognition of the importance of human dignity as a guiding principle.

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[1] See *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338, and cases following.
[2] See generally *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, in relation to the important independent institutional role of the AAT.
[3] See *Minister of Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143, and the many cases which have applied this principle.
[4] Justice Deirdre O'Connor, 'Lessons from the Past/Challenges for the Future : Merits Review in the New Millennium' (Speech, National Administrative Law Forum, June 2000).
[5] For instance, the Preamble of the 1948 Universal Declaration of Human Rights: 'Whereas recognition of the inherent **dignity** and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (emphasis added).

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b. Merits review and normative effect

As the Monash submission to the Robodebt Royal Commission set out,[6] while merits review of government decision making (through processes such as that provided by the AAT is focussed on ensuring the "correct or preferable" decision is made in the instant case, it also has the function of improving government decision making more generally. In 1995, the Administrative Review Council ("**ARC**") articulated that amongst the objectives of the merits review system should be:

- 'improving the quality and consistency of agency decision making … by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions … and … by taking into account review decisions in the development of agency policy and legislation'; and
- 'enhancing the openness and accountability of government.'[7]

The Robodebt Royal Commission has exposed the failings of government to improve its decision making in light of merits review processes. There were multiple adverse merits review decisions dealing with the question of the lawfulness of robodebt, and government had the potential legal deficiencies of robodebt drawn to its attention on multiple occasions. Evidence before the Royal Commission makes it clear that the Commonwealth was aware, years before robodebt was brought to an end:

1. That decisions had been made by the first tier of the AAT, overturning debts raised on the basis of income averaging;
2. That these decisions were not idiosyncratic decisions, turning on their own facts, but rather shed real doubt on the lawfulness of robodebt more generally.

That robodebt was allowed by government to continue was a failure, on a massive scale, of the realisation of a key objective of merits review. We consider that a number of measures might be instituted, to reduce the prospects of such a failure in future.

We consider that an objective should be included in legislation establishing a new merits review body indicating that one of its purposes is to improve public decision making. A clear statement of statutory objective to this effect would inform the exercise of the range of the new body's powers, with a view to ensuring its decisions are made with appropriate systemic effect.

Accordingly, a reference to systemic issues should be reflected in the objectives. This would be similar to the *Civil and Administrative Tribunal Act 2008* (ACT), which provides that an objective of the Act is to 'identify and bring to the Attorney-General's attention systemic problems in relation to the operation of authorising laws.' Introducing such an objective would serve to highlight the need for systemic issues to be identified and given due attention.

[6] Monash University, Submission to Robodebt Royal Commission, 31 March 2023, 9 – 14.
[7] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, September 1995), [2.11].

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Recommendation 3: The new administrative review body should have, as a statutory objective, improving public decision making.

The ARC should continue to be provided for in legislation. It should be funded to exist as an independent body for scrutiny on administrative review processes, rather than its functions being integrated into the Attorney-General's Department (as they have been for the past several years).

We recommend that the ARC be re-established. The ARC was created as part of the pivotal 1970s Kerr Committee reforms of Australian Administrative Law and was designed to be a high level administrative authority to supervise the administrative review system. We would argue that the need for such supervision remains significant today. In fact, the need for a body such as the ARC could be said to be enhanced due to the integrity challenges and other complexities raised by modern developments such as the use of technology in government decision-making.

It is significant that a number of jurists and academic commentators have also recommended that the ARC be re-established. These include former High Court justice, Michael Kirby,[8] Justice John Griffiths of the Federal Court of Australia (writing extra-judicially),[9] Justice Susan Kenny of the Federal Court of Australia (writing extra-judicially),[10] Professor George Williams[11] and leading Administrative Law scholar, Narelle Bedford.

As Bedford notes, the Kerr Committee recorded that 'fundamental to our system for the introduction of a proper system of administrative review, both on the law and on the merits, is a *continuously operating* Council…'[12] Bedford has drawn attention to the words 'continuously operating' noting that 'the permanence of the Council was a deliberate design feature of the ARC as initially conceived.'[13] Bedford concludes that:

> The loss of its overarching role has created a vast gap that neither the Attorney-General's Department nor the ALRC can possibly fill. The comparatively small amount of funding saved by the government continues to be disproportionate to the loss of specific administrative law expertise and advocacy. As government becomes more complex and the nature of decision-making evolves into new areas raising novel issues (such as COVID-19 restrictions and the expansion of automated decision-making), the need for an overarching, expert body increases rather than diminishes.[14]

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[8] Michael Kirby, 'The Decline and Fall of Australia's Law Reform Institutions – And the Prospects of Revival' (2017) 91 *Australian Law Journal* 841 at 843-45.
[9] Justice John Griffiths, 'Access to Administrative Justice' Griffiths (Speech, Australian Institute of Administrative Law National Conference, 20 July 2017) 25 at 35-36.
[10] Susan Kenny, 'The Administrative Review Council and Transformative Reform' in *Public Law in the Age of Statutes* (Federation Press, 2015). Her Honour notes that 'Without an effective ARC, one may anticipate greater fragmentation and more failures in the administrative law system, with the accompanying costs, delays, and other inefficiencies that these entail.'
[11] Professor Williams has noted that the ARC played an 'essential role' and said moving its independent functions to the Department was 'not an appropriate substitute': cited in 'Long-term legal body faces the axe in Federal budget', *Daily Telegraph* 11 May 2015: https://www.dailytelegraph.com.au/news/nsw/grafton/longterm-legal-body-faces-the-axe-in-federal-budget/news-story/b07d49c0d222d61f095a1c97e6e76ecd .
[12] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/ (emphasis added).
[13] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) <https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/>
[14] Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality' (21 May 2021) https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/. See also Narelle Bedford, Submission Bedford to Attorney General, *Statutory Review of the Amalgamated Administrative Appeals Tribunal* (24 August 2018) https://pure.bond.edu.au/ws/files/27564242/N_Bedford_Submission_Amalgamated_AAT_August_2018.pdf.

By re-establishing the ARC and providing it with an explicit mandate to have oversight of the tribunal system, in addition to a function of reviewing and reporting on broader administrative law and integrity issues, the ARC will have the potential to address systemic issues beyond individual tribunal member adjudication.

Recommendation 4: The Administrative Review Council be re-established, and expressly authorised "to inquire into the response of government to the merits review by tribunals of administrative decisions".

In terms of encouraging improved decision making, in addition to the scrutiny of the Administrative Review Council, this could be done by ensuring the continued existence of, and the reform and use of, the power of the AAT to refer questions of law to the Federal Court. the more extensive use of s 45 and s 59 of the AAT Act. These provisions – respectively permitting the AAT to make a referral of a question of law to the Federal Court, and to issue an advisory opinion – are rarely made use of. In respect of the s 45 power, referral is contingent on approval by the President of the AAT. In respect of the advisory opinions power, this may only be exercised if an enactment (other than the AAT Act) provides.

In respect of s 45, we submit that a member of the new body, (like a member of the AAT undertaking a review of a decision) should have discretion to seek referral of a question of law to the Federal Court, and that the President of the new body should then be obliged either to give permission for such a referral, or publish written reasons for the refusal. We submit that this would strike an appropriate balance, ensuring proper scrutiny on important legal questions, and avoiding undue burden on the review body. We note that:

- This amendment would not allow an applicant to require the AAT to require reasons from the President for the refusal of permission for referral of a question of law to the Federal Court.
- The reasons provided by the President for refusal of permission need not be extensive.
- In the case of robodebt, if s 45 had operated as we propose, it is very likely that there would have been, much earlier than November 2019, when the Amato case was resolved, a public decision on the lawfulness of robodebt.

A similar arrangement should be put in place in relation to any tribunal (or other body) which succeeds the AAT.

Recommendation 5: The new review body should be given powers to refer questions of law to the Federal Court, equivalent to those provided to the AAT. The equivalent of s 45 of the AAT Act should provide that, if referral of a question of law to the Federal Court is requested by a member conducting a review, the President of the new body be required to publish reasons for refusing permission for a referral.

As discussed in the Monash submission to the Robodebt Royal Commission, the Australian Financial Complaints Authority ('**AFCA**') has established processes for the identification and reporting of systemic issues arising out of its handling of individual complaints. In allocating complaints for investigation, the Chief Ombudsman considers whether the complaint raises a systemic issue. If so, it refers the issue to the relevant financial firm, and can require remedial action. AFCA also refers systemic issues to relevant government regulators, in certain circumstances. While the role of the ARC may not precisely be parallel, it should

expressly be tasked to identify and report on systemic issues arising out of proceedings of the new review body.

Recommendation 6: The Administrative Review Council should be tasked to monitor the identification and reporting of systemic issues by the new review body.

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PART 3 STRUCTURE

The structure of the AAT is to some degree an accident of history, notably in the fact that it reflects the integration, by the *Tribunals Amalgamation Act 2015* (Cth), of the Social Security Appeals Tribunal, the Migration Review Tribunal, and the Refugee Review Tribunal, into the AAT. As a result, there is some variation in the operation of AAT lists which is not justified as a matter of public policy, but is a legacy of the historical development of the Tribunal.

In some instances, differences in process and procedure are appropriate, but they should not be the product of happenstance. The provision of a second 'tier' of review in social security (and child support) matters is an example of a structure of merits review which has been subject to considerable scrutiny. It was supported before the Callinan Review by the Department of Human Services,[15] and by advocates for social security recipients.[16] That there is, effectively, an internal appeal process in respect of social security matters indicates that the same should be considered in respect of other merits review proceedings.

In contrast, there does not seem to be any compelling reason why reviews of cancellations of visas under s 501 of the *Migration Act 1958* (Cth) ("**the Migration Act**") are reviewed in the General Division of the AAT, while cancellations under s 116 of the Migration Act are subject to review in the Migration and Refugee Division. This simply seems to be a function of the latter jurisdiction formerly sitting with the Migration Review Tribunal, before the amalgamation in 2015.

The new review body should have specialised lists, given the specialised expertise required or useful in some areas. However, careful consideration should be given, in the creation of the new body, to the questions of allocation of matters, and to the structure of review processes. This should include consideration of whether multiple 'tiers' of review should be retained only for social security and child support matters, or whether they should be used more widely.

Recommendation 7: A review of all AAT lists should be undertaken, to identify anomalies in the allocation of jurisdiction, in order to inform the structure of the new body. This process should pay particular attention to anomalies in the allocation of responsibilities in respect of visa cancellation matters.

Generally speaking, the structure of lists at a merits review tribunal is not a matter for primary legislation. The legislation for a new review process should lay out principles for its structure, but the detail should be in rules and regulations. There should be a requirement in the primary legislation to consult on rules and regulations bearing on the structure of the new body, and the allocation of matters across its lists.

It is appropriate for the head of the new review body to be a Federal Court justice. This gives the review process the appropriate standing in Australia's legal structure. It also reflects the fact that a review process of this sort should provide normative guidance on decision making, including on legal questions. Because of the important normative role of the body, and the legal questions with which it will deal, it is appropriate that it have other judicial members, apart from the President.

[15] Ian Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Final report, 19 December 2018), [6.73].
[16] Ian Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Final report, 19 December 2018), [6.160].

We also note that the Migration and Refugee Division of the Present AAT is inquisitorial in nature.[17] We support the retention of the inquisitorial aspects of the Migration and Refugee Division as we feel they are appropriate for that cohort of applicants. However, we note that, currently, legal representatives cannot make submissions to the AAT as of right as part of the hearing procedure. They must ask the permission of the member to do so. This is seen as an aspect of the inquisitorial system. Whilst we acknowledge that the inquisitorial system is structured to avoid the adversarial process and the prominence of legal representatives in a hearing, we believe that the inquisitorial system can be aided by the submissions of legal representatives at relevant times during a hearing and that this should not be at the discretion of an individual member. This can lead to inconsistencies amongst tribunal members which does not serve the interests of fairness or access to justice.

Therefore, we recommend the retention of the inquisitorial system for the Migration and Refugee Division of the new body but with a right of legal representatives to make submissions at the end of a hearing. This should not be 'by leave'.

Recommendation 8: Tthe inquisitorial process in matters before the AAT's Migration and Refugee Division be retained when those matters are dealt with by the new body, with legal representative submissions to be by right.

[17] This is because the RRT was established to have inquisitorial features and these were retained when amalgamation of the AAT occurred. We highlight that the High Court has differentiated the 'inquisitorial' nature of the RRT (now MRD) from a 'duty to inquire'. See eg *Minister for Immigration & Citizenship v SZIAI* (2009) 240 CLR 611 where the High Court noted that the RRT had many inquisitorial features but found that it was not inquisitorial in the full sense that required it to 'inquire, examine or investigate' the issues before it [18]. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ acknowledged that the RRT has an inquisitorial function in one sense, but said that it had no duty to make inquiries.

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PART 4 SENIOR LEADERSHIP

There is no substantial issue with the qualification requirements for the position of President. In terms of the role and functions, one key addition should be the President's role in ensuring the normative impact of the work of the new body, improving government decision making. However, we consider that the inclusion of an objective in respect of improving government decision making, and the vesting of overall responsibility for the conduct of the new body in the President, are sufficient in this regard.

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PART 5 MEMBERS

We note that the categories of membership of the AAT set out in the *Administrative Appeals Tribunal Act 1975* (Cth) are to some degree a legacy of the 2015 tribunal amalgamation process. It is not clear that the allocation of members and senior members across lists, by level, is tailored to the nature and complexity of the work. In conjunction with the happenstance of some aspects of the AAT's jurisdiction (notably, as we have set out above, in respect of visa cancellations), some analysis is warranted of the question of the engagement and allocation of members in the new review body.

We make the general comment that it will make sense for the new body to have members who are not legally qualified, given the variety of subject matter it will deal with. However, adherence to principles of procedural fairness, and correctness in legal analysis, will be central to the maintenance of public confidence in the new body. They should be considered in the appointment process (discussed below).

In our view, sessional membership is defensible, in order to meet fluctuating demand, but independence is a critical value for the new body, and it is important that it not be undermined. Sessional membership should not be used as a means of dealing with the recurrent ordinary work of the new body, instead of membership with some guarantee of tenure.

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PART 6 APPOINTMENTS

We suggest that the Australian Government should commit to a more transparent process to appointing members of the new body, than that which exists for the AAT.

The current processes for appointing tribunal members carry the risk of appointments based on political patronage, rather than merit. The integrity of the tribunal appointment process is integral to public confidence in the legal system and we believe that public confidence is affected when tribunal members are viewed as having been appointed due to their political affiliations rather than on merit.

Other scholars and commentators have also raised questions about the appointment process for the AAT. For instance, Arthur Moses SC - who previously served as President of the NSW Bar Association (2017-18) - has expressed concerns about the absence of a transparent merit-based, diverse appointments process for the AAT.[18] Similarly, scholar James Morgan has argued that the AAT must be independent from inappropriate influence, and the perception of such influence, in order to effectively perform its duties of *de novo* merits review of government decisions. Drawing on recent controversies surrounding the AAT in 2017, Morgan concluded that the current mechanisms of AAT member reappointment exposes the Tribunal to a risk of inappropriate influence by the government of the day or at least a risk of public perception to that effect. After examining several possible reforms to minimise this risk, he proposes the creation of an independent reappointment committee for the AAT.[19]

Guidance from Comparative Jurisdictions

It is useful in this regard to consider how tribunal appointments are made in comparative jurisdictions (particularly the UK and Canada).

A good example of a robust appointment process is the so-called 'Governor in Council' appointments to the Canadian Immigration and Refugee Board. These members are selected using a rigorous merit-based selection process, during which candidates are assessed through an exam, an interview and the verification of references.[20] Through its selection process, the Immigration and Refugee Board works to identify individuals with the following attributes: high ethical standards and integrity; impartiality; sound judgment; tact and discretion; and sensitivity to multicultural and gender issues. In addition, candidates should have suitable education credentials, recent experience in the interpretation or application of legislation, and the demonstrated ability to gather and assess complex information in order to prepare written and oral decision.[21]

Another relevant example is the UK Judicial Appointments Commission,[22] which selects candidates for judicial office in England and Wales, and for some tribunals with UK-wide powers. Members come from a wide background to ensure the Commission has a breadth of knowledge, expertise and independence, with the Chairman of the Commission being a lay member.[23] The Commission is responsible for running selection

[18] Arthur Moses SC, 'Accountability, Transparency and Diversity – The Importance of an Independent Tribunal Appointment Process' (Speech, Council of Australasian Tribunals National Conference, 7 June 2019)
[19] James Morgan, 'Securing the Administrative Appeals Tribunal's Independence: Tenure and Mechanisms of Appointment', (2017) 43(4) *Alternative Law Journal* 302.
[20] Immigration and Refuge Board of Canada, 'Governor in Council (GIC) Appointments' (Webpage, 24 November 2020) < https://irb.gc.ca/en/transparency/pac-binder-nov-2020/Pages/pac15.aspx> .
[21] Immigration and Refuge Board of Canada, 'Governor in Council (GIC) Appointments' (Webpage, 24 November 2020) < https://irb.gc.ca/en/transparency/pac-binder-nov-2020/Pages/pac15.aspx>
[22] 'Judicial Appointments Commission' <https://judicialappointments.gov.uk/>.
[23] Of the 14 other Commissioners, 6 must be judicial members (including 2 tribunal judges), 2 must be professional members (each of which must hold a qualification listed below but must not hold the same qualification as each other), 5 must be lay members, 1 must be a non-legally qualified judicial member.

exercises and making recommendations for posts up to and including the High Court, but not the Supreme Court (the highest court in the UK).

In light of the above, we recommend that an independent Judicial Appointments Commission be set up to select both judicial officers and tribunal members, with a statutory duty to attract diverse applicants from a wide field. The process for appointment should include a public call for expressions of interest and publication of criteria for appointment. This could be modelled on the UK Judicial Appointments Commission discussed above. In terms of appointment criteria, we support the 2015 Australasian Institute for Judicial Administration (AIJA) Suggested Criteria for Judicial Appointment.[24]

A Judicial Appointments Commission would implement a more rigorous and transparent process for judicial appointments, increase public confidence in the appointments process, encourage a wider range of candidates to seek appointment to judicial office, as well as ensure that appointments are based on genuine merit.[25]

Recommendation 9: An independent Judicial Appointments Commission be set up to select judicial officers and tribunal members, with a statutory duty to attract diverse applicants from a wide field.

[24] Australasian Institute for Judicial Administration (AIJA), Suggested Criteria for Judicial Appointment <https://aija.org.au/wp-content/uploads/2017/10/Suggested-Criteria-for-Judicial-Appointments-AIJA-2015.pdf>.
[25] R Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 143.

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PART 7 PERFORMANCE MANAGEMENT/REMOVAL

We note the high threshold for removal of members under s 13 of the AAT Act. Subject to our recommendation above in respect of appointments to the new body, our view is that it is appropriate that a high standard for removal be maintained, given the imperative of independence of scrutiny on government decision making.

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PART 8 APPLICATIONS

We return to the two central themes of this submission: that access to administrative justice should be the driving force for the new body, as it has been in the development of the AAT; and that the current operation of the AAT reflects, in part, accidents of history.

Given that the subject matter of many proceedings before the AAT is such that they necessarily involve applicants experiencing disability,[26] there is an imperative to ensure low barriers to entry when it comes to making an application for review to the new body. The prevalence of legal need, and the low level of legal capability, on the part of people experiencing disability, underline the importance of giving straightforward access to administrative justice, by ensuring application processes are not excessively formal, and that there is considerable discretion to accept applications not meeting formal requirements. At least in some areas of review, it may be appropriate to provide for oral applications. This should be guided by a process of consultation with likely users of the new body, and experts on access to justice.

Recommendation 10: A consultation process should be undertaken with stakeholders, academics and potential users of the new body, as to how application processes can be tailored to facilitate access to administrative justice.

There is substantial variation in fees payable on application to the AAT, and it is not clear whether and to what degree there is a sound rationale for the different fees payable. For example, the *Administrative Appeals Tribunal Regulation 2015* (Cth) provides, at s 22, that there is no fee payable for review of a social security decision at the first or second tier of review, but that a fee is payable for second tier review of a child support or paid parental leave decision. Only limited explanation is given in the relevant explanatory statement.[27]

More oddly yet, fees in respect of migration matters are governed by the *Migration Regulations 1994* (Cth), with some fees in those regulations relating to protection visa applications seeming to have a punitive or deterrent purpose, applying only where an adverse decision under review is affirmed.[28] There is considerable variation, also, as to whether and to what extent waiver of fees is available.[29]

Recommendation 11: Fees for applications to the new body should reflect consistent principle, with expressly articulated, rational justification for variation. Full waiver should be available for people experiencing profound disadvantage, on consistent criteria.

Similar problems exist in respect of time limits for AAT applications. Time limits, in some cases, are provided for under primary subject matter legislation (rather than the AAT Act).[30] In our view, time limits for applications to the new body should be consistent, generally not dictated in primary subject matter legislation, and capable of being waived or extended.

[26] For example, NDIS matters, workers' compensation matters, and a range of social security matters including those relating to disability support pension.
[27] Explanatory Statement, *Administrative Appeals Tribunal Regulation 2015*, [47] – [52].
[28] See s 4.31B *Migration Regulations 1994* (Cth) ("**Migration Regulations**").
[29] See, for example, s 20(3) *Administrative Appeals Regulation 2015* (Cth) and s 4.13 Migration Regulations.
[30] See, notably, provisions in the *Migration Act 1958* (Cth), notably s 347, s 412, and s 500.

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Recommendation 12: Time limits for applications to the new body should reflect consistent principle, with expressly articulated, rational justification for variation. Waiver or extension should be available for people experiencing profound disadvantage, on consistent criteria.

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PART 9 CASE MANAGEMENT

Case management is an appropriate and useful tool for modern merits review processes, but needs to be applied carefully and tailored to the case in question. Where an applicant is profoundly disadvantaged, it will be important for the new body to be mindful of power imbalance. The importance of case management tailored to the needs of disadvantaged clients is illustrated by Laura's case.

Laura's case

Laura* is an Age Pensioner living in Melbourne. She is single, has never married and has no children. She has limited support networks. Laura suffers from paranoid schizophrenia and severe hoarding disorder. Due to issues caused by these conditions, she has accrued a large Centrelink debt.

Laura seeks to challenge this debt on the basis of her medical conditions, financial hardship and other compelling personal circumstances. At no point before receiving an adverse decision from the AAT Social Services and Child Support Division does she receive any legal assistance.

Following receipt of her SSCSD decision, Laura is referred by a community health service to Monash Law Clinics. Monash Law Clinics assist her in her appeal to the General Division.

Had Laura been referred for legal assistance at the SSCSD, or had the Tribunal (through case conferencing) adequately ensured Laura was aware of what was relevant to her review application, her matter may have resolved at the SSCSD.

**Name and some identifying details have been changed*

Recommendation 13: Case management processes at the new body should be designed with a view to ensuring disadvantaged applicants are equipped effectively to put their case, including by providing referral to sources of support and assistance.

Apart from this imperative to be responsive to individual need, the new body also needs to be mindful of the importance of normative impact from its decision making. Given the problems which occurred as part of the AAT's review of robodebt decisions and the increasing use of automated decision-making by Australian governmental bodies, we argue that there is a need for any new merits review body to have a means of identifying systemic issues and to undertake collective or group-based review of claims (particularly those automated decisions which involve a common algorithm or data matching system). This could be undertaken by the ARC or internally in the new merits review body.

Maria O'Sullivan, Deputy Director of the Castan Centre for Human Rights Law, has argued in a scholarly paper[31] that the systemic, group-based nature of automated decisions should be dealt with in a merits review

[31] Maria O'Sullivan, 'Automated Decision-Making and Human Rights: The Right to an Effective Remedy' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law*

body in three ways. These proposals are set out in detail in an excerpt from her paper (Appendix 1) and are summarised here:

- *Proposal 1:* The systemic, group-based nature of automated decisions should be dealt with in the AAT by the introduction of a case management process which identify those claims involving automated decisions and triage those into a distinct cohort/case list. This would need to be facilitated by the 'tagging' of decisions at an early stage which would rely on the identification in the application form of the element of automation or by the respondent department as part of the case management processes. A principal member should be appointed to coordinate the management of this cohort of applications and that person would be responsible for determining whether an aggregation or consolidation of certain claims was necessary (for instance, if it appeared that a common algorithm was being utilised). It would be preferable if this principal member had training or a professional background in a technology field (IT/data science) in addition to a legal background so that they could accurately and efficiently identify the systemic algorithmic issues in a group of cases.

- *Proposal 2:* Challenges to automated decisions would be heard by a multi-member panel comprising a legally qualified member and a member who has technical knowledge (IT/data scientist). The establishment of multi-member panels would allow the AAT to properly assess the complex and technical operation of algorithmic systems underpinning government decisions.

- *Proposal 3:* Due to the public interest nature of automated decisions, reviews involving algorithms should be amenable to the submission of amicus briefs from relevant groups which have a special interest in the subject matter of the decision (digital rights organisations and human rights organisations, for instance).

As O'Sullivan notes in her paper, permitting the aggregation of claims would presumably increase the efficiency of assessing claims and result in economies of scale. The aggregation of claims will also assist in improving the consistency of review decisions by the AAT.

The proposal for a contextual, aggregated procedure also emphasises the broader role of the AAT in ensuring that decisions are 'correct and preferable', not only for the parties to an action, but also more broadly to the community. A case management procedure for dealing with automated decisions outlined above, would assist in ensuring that any problems with the operation of algorithms can be identified quickly by the new merits review body and used to influence the operation of these automated decisions by departments. This would assist in avoiding algorithmic errors being replicated and continued over extended periods and groups (as occurred with Robodebt). The model also gives effect to an access to justice goal by improving the ability of affected individuals and groups to effectively challenge automated decisions of government.

Recommendation 14: The new body should develop case management principles which include guidance on dealing with systemic issues and with high volume and automated decision making.

(Federation Press, 2021). The full chapter is available to download as part of the ebook at https://federationpress.com.au/product/the-automated-state-ebook/

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PART 10 INFORMATION PROVISION

Transparency will be a key value of the new body, so all documents and information should be provided to an applicant, with limited exceptions (including privacy and consistent national security principles).

As such, no applicant (such as applicants seeking review of protection visa decisions) should have to request access, eg by way of freedom of information laws, in order to obtain access to documents relevant to their application that have been lodged with the new body. Forcing applicants to use freedom of information laws to obtain such documents, or otherwise make a request for documents, is an unnecessary hurdle which only serves to delay the resolution of proceedings.

Timely (and just) resolution of matters is a key objective of the current AAT (s 2A(d)), as well as various state tribunals[32] and should continue to be an objective of all matters before the new review body, including applications arising out of the Migration Act. Although governed by the Migration Act, there is no logical justification for protection and migration decision reviews to have a different and more onerous regime for applicants to obtain documents relevant to their applications compared to other applications for review. Such documents should be provided as a matter of course, ie automatically. The recommendation of the Metcalf Review as outlined in the Issues Paper, namely that the requirements for providing documents and information to the AAT and parties be harmonised, would largely address this concern in relation to the new body.

The new body should also have power to summon a person to give evidence and compel the production of relevant documents and information, as is the case currently in the AAT (s 40A(1)).

Recommendation 15: The provision of all relevant documents by decision-makers to the new review body and any other party to a proceeding should be harmonised across all matters before the new review body so that those documents are routinely provided unless they fall within specified exemptions.

[32] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 6(c); *Civil and Administrative Tribunal Act 2013 (No 1)* (NSW) s 3(d) and (e); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10(d); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(c); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 10(c); *State Administrative Tribunal Act 2004* (WA) s 9(b). There are no legislated objectives in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

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PART 11 RESOLVING

There is, in our view, value in the new body making greater use of alternative dispute resolution (ADR). We note, in this regard, the observations of the Callinan Review in respect of the wider use of ADR and case conferencing across the AAT,[33] and the work of Cassandra Holford in respect of negotiated settlements as a means of adding meaning to the concept of a 'preferable' decision.[34]

One important issue in respect of ADR at the AAT has been the degree to which information about settlements might usefully inform decisions by government agencies and by potential applicants. In respect of NDIS settlements, the Joint Standing Committee on the NDIS found that publishing outcomes would be a "means of increasing transparency and accountability".[35] The same reasoning would seem to apply in respect of matters across a range of lists.

Recommendation 16: Government respondents should be encouraged to prepare summaries of settlements reached in the course of ADR at the new body, and to make these publicly available.

[33] Ian Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Final report, 19 December 2018), [1.6].
[34] Cassandra Holford, 'Evaluating the 'Merits' of Alternative Dispute Resolution (ADR) at the Administrative Appeals Tribunal (AAT)' (October 19, 2020), 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965288
[35] Senate Constitutional and Legal Affairs References Committee, Parliament of Australia, *The performance and integrity of Australia's administrative review system* (Interim Report, March 2022), [3.96].

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PART 12 DECISIONS

Broadly, the principles applying to the provision of reasons for the AAT should, in our view, apply to the new body. One important improvement in terms of access to administrative justice would be the more careful tailoring of reasons to individuals for whom technical legal reasoning might be difficult to understand. This is illustrated by Edward's case:

Edward's case

Edward* is a single parent with 4 children between the ages of 9 and 16. He is experiencing ongoing family violence from his ex-partner, and has ongoing impacts from the physical, financial and psychological violence he endured in their relationship before they separated. Edward suffers from anxiety. He has a low level of education and difficulties with memory and the cognition of complex information.

Edward has received various Centrelink benefits whilst raising his children. He is experiencing financial hardship.

Edward has been to the AAT on four occasions; twice to the Social Services and Child Support division and twice to the General Division. He has not had legal representation in any of these matters. All these applications were complex and Edward found the Tribunal's systems and communications hard to navigate and hard to understand.

After almost 10 years of disputing Centrelink decisions, Edward remains unclear about the outcomes of the Tribunal matters, their implications for his ongoing financial support, their relevance to his Centrelink debts, and whether they have been properly implemented.

**Name and some identifying details have been changed*

In our view, the obligation of the new body to provide reasons for decision, while paralleling the provisions binding the AAT, should make clear the imperative to provide an explanation of the decision in language adapted to the applicant. It may be that a Simplified English version of the decision should be made available, at least in matters involving litigants with significant cognitive impairments.

Recommendation 17: The new body's obligation to provide reasons for decision should extend to providing reasons in language adapted to the communication skills of the applicant, with a right vested in an applicant to request a Simplified English version of a decision (if one has not already been produced) where their communication needs warrant it.

Decisions of the AAT serve two ends: the resolution of the individual matter, and the improvement of government decision making more generally. In respect of the latter, we have noted above a number of measures to improve the prospects that decisions of the new body have appropriate normative impact. We note that we have, above, recommended that the normative role of the new body should be recognised in an objective, which we expect would inform the practice of decision making in preparing reasons for decision.

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PART 13 SUPPORTING PARTIES

Accepting that the new body will, like the AAT, be designed to be a forum where legal representation is not required, it will be warranted in at least some areas. In NDIS matters, for example, and in any matter where by reason of language or disability, the applicant will struggle to self-represent, it will be important to ensure that applicants are given access to legal advice and representation. Juliet's case illustrates the difference this can make.

Juliet's case

Juliet* is a single mum of 3 children. Two of her children had severe behavioural and psychological conditions as children and required a high level of care and medical intervention. Juliet is functionally illiterate. She left school at the age of 14 as she was not progressing. She has had limited work and has experienced ongoing mental health issues.

Juliet relied on Parenting Payment (Single) from the time her first child was born. For a variety of complicated reasons, she ended up receiving the Carer Payment for many years when she wasn't technically entitled to it. This led to a debt of over $140,000.

After an unsuccessful Authorised Review Officer review, Juliet applied to the AAT and was sent a bundle of over 1000 pages of documents she was told were relevant. She did not know how to review and understand these documents, or how to run her case in response.

Thankfully, Juliet is supported by a community health organisation which referred her to Monash Law Clinics. Monash Law Clinics assisted Juliet to review and understand the Centrelink documents, and to understand her rights, the applicable law, and the what was relevant for the review. Monash Law Clinics assisted Juliet to provide relevant information, and to put forward submissions on debt waiver provisions.

Without legal assistance, it is likely Juliet would not have ever known what was relevant to provide to the Tribunal and the review would have proceeded on the basis of incomplete information.

**Name and some identifying details have been changed*

There is considerable variation as to the availability of legal and non-legal services for AAT applicants. As part of the establishment of the new body, work should be done on the universal provision of duty lawyer services, and clear referral pathways to sources of non-legal support.

Recommendation 18: The Attorney-General's Department, in consultation with Legal Aid Commissions, should develop a comprehensive duty lawyer service to assist applicants to the new body, and to provide appropriate referral to providers of non-legal assistance.

In respect of the availability of litigation guardians, we consider that specific provision needs to be made for litigation guardians to be appointed by the new body. We note that in the Victorian Civil and Administrative Tribunal, this power is provided in respect of particular lists, rather than a power to appoint in respect of any proceeding.[36] Our view is that issues of disability can arise across a wide range of merits review matters, so the power should not be restricted to particular lists.

Recommendation 19: The new body should have power to appoint a litigation guardian where an applicant would be unable, without a litigation guardian, to run the proceeding. Rules should specify that the guardian must give effect to the rights, will and preferences of the person; and wherever possible ensure that the applicant is able to participate in decisions respecting the conduct of their proceeding.

[36] *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Schedule 1, cl 11AC and cl 77B.

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AUTHOR DETAILS

This submission has been prepared by the following members of the Faculty of Law at Monash University:

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Dr Yee-Fui Ng is an Associate Professor and the Acting Director of the Australian Centre for Justice Innovation at Monash University, and was a 2021-22 Fulbright Scholar. Yee-Fui's research centres on strengthening political institutions and enhancing executive accountability. As a Fulbright Scholar, she visited New York University and researched issues relating to the digital welfare state. Yee-Fui has conducted significant research in the field of automation and public law in Australia, which has been cited by the Australian Law Reform Commission, NSW Parliament, NSW Ombudsman, Australian Human Rights Commission, and a former Chief Justice of the High Court.

Dr Katie O'Bryan is a Lecturer in the Faculty of Law at Monash University. Prior to entering academia, she practised as a solicitor in native title, acting for native title claim groups in both Western Australia and Victoria. She holds a Master of Laws in Environmental Law from Macquarie University and a PhD from Monash focussing on the legal recognition of Indigenous water rights. Katie's research and teaching interests include Indigenous Legal Rights, Native Title, Water Law, Rights of Nature laws, Human Rights, Constitutional Law, Administrative Law and Public Law and Statutory Interpretation.

Dr Maria O'Sullivan is an Associate Professor in the Faculty of Law at Monash University, a Deputy Director of the Castan Centre for Human Rights Law, and an affiliate of the Monash Data Futures Institute. Maria is the author of international and national publications on subjects including refugee law, human rights, public law and technology. Maria's work has influenced case law, law reform and public debate. Her research has been cited in the High Court of Australia, by the Advocate General of the Court of Justice of the European Union and in reports of parliamentary inquiries and law reform commissions in Australia.

Emily Singh is a community lawyer and lecturer (practice) at Monash Law Clinics. She has practiced exclusively in the community legal sector in Australia and the United Kingdom, primarily in administrative law, since entering the legal profession in 2013. She was previously Principal Lawyer at Social Security Rights Victoria, a legal officer at the Helen Bamber Foundation in London and a solicitor specialising in gender based refugee claims at the Asylum Seeker Resource Centre. Most recently, Emily worked at Economic Justice Australia, the national peak body for social security legal centres, prior to commencing at Monash Law Clinics.

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