The Senate

Legal and Constitutional Affairs References Committee

The performance and integrity of Australia's administrative review system

March 2022

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ISBN 978-1-76093-388-3

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Printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra

Contents

Abbreviations v

Members vii

List of Recommendations ix

Chapter 1—Introduction and background to the merits review system 1

Referral 1

Conduct of the inquiry 1

Structure of the report 2

The merits review system 2

Background 3

Chapter 2—Operation of the AAT 9

Role and structure of the AAT 9

Performance and transparency 13

Chapter 3—Concerns with the functioning of the AAT 19

AAT finalisation rates and resourcing 19

Member remuneration 24

Performance reporting and outcomes 28

Access to the AAT 31

Case study: the NDIS and AAT applications 35

Chapter 4—The selection of AAT members 37

AAT members 37

Current selection process 39

Concerns with the selection process 44

Legal qualifications of members 52

The need for an open, competitive process 56

Chapter 5—The AAT's Migration & Refugee Division 61

Migration and Refugee Division 61

Applications and case management 63

Insufficient members in the MRD 69

Immigration Assessment Authority 73

Concerns with the IAA 75

Chapter 6—Re-establishment of the Administrative Review Council 79

Role of the ARC 79

Discontinuation of the ARC.. 80

Support for the ARC 82

Chapter 7—Committee views and recommendations.. 89

Merits review and effective public administration 89

Concerns of the committee 91

Re-establishment of the Administrative Review Council 92

Trust in public administration 93

Dissenting report from Coalition Senators 99

Appendix 1—Submissions and additional information received 101

Abbreviations

AAT	Administrative Appeals Tribunal
AAT Act	*Administrative Appeals Tribunal Act 1975*
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
AI	Artificial intelligence
ALA	Australian Lawyers Alliance
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ANU	Australian National University
ARC	Administrative Review Council
ARC Review	Administrative Review Council Report No. 39, Better Decisions: Review of Commonwealth Merits Review Tribunals (September 1995)
ASRC	Asylum Seeker Resource Centre
Callinan Report	2018 Report on the Statutory Review on the *Tribunals Amalgamation Act 2015*
Carina Ford	Carina Ford Immigration Lawyers
COAT	Council of Australian Tribunals
COAT guide	Tribunal Independence in Appointments – A Best Practice Guide
committee	Senate Legal and Constitutional Affairs References Committee
Determination	Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2021
DFWA	Defence Force Welfare Association
EOI	Expression of interest
FOI	Freedom of Information
IAA	Immigration Assessment Authority
IAAS	Immigration Advice and Application Scheme
Kerr Report	1971 Report of the Commonwealth Administrative Review Committee
Law Council	Law Council of Australia
Legislation committee	Legal and Constitutional Affairs Legislation Committee
LIV	Law Institute of Victoria
Migration Act	*Migration Act 1958*
MRD	Migration and Refugee Division (AAT)
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme

NSWBA	New South Wales Bar Association
PGPA Act	*Public Governance, Performance and Accountability Act 2013*
PWDA	People with Disability Australia
RACS	Refugee Advice and Casework Service
RCA	Refugee Council of Australia
Regulations	Migration Regulations 1994
SSCSD	Social Services and Child Support Division
SSRV	Social Security Rights Victoria
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
2019 Protocol	Protocol for Appointments to the Administrative Appeals Tribunal 2019

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Mr Jason See, A/g Research Officer
Ms Michaela Keating, Administrative Officer
Ms Liana Tenace, Administrative Officer

Suite S1.61
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
Email: legcon.sen@aph.gov.au

List of Recommendations

Recommendation 1

7.31 The committee recommends that, as a matter of urgency, the Commonwealth Government re-fund the Administrative Review Council and allow it to fulfil its statutory duties in accordance with Part V of the *Administrative Appeals Tribunal Act 1975*.

Recommendation 2

7.45 The committee recommends that the Attorney-General develop and legislate a process for the appointment of members to the Administrative Appeals Tribunal that:

- **incorporates clear selection criteria;**
- **advertises the selection criteria broadly;**
- **establishes and supports an independent panel to properly consider each applicant's suitability for the role and their qualifications, and recommend appointments against the selection criteria;**
- **limits the discretionary powers of the Attorney-General to make appointments not in accordance with the recommendations of the independent panel;**
- **imposes a uniform approach to the duration of appointments; and**
- **promotes transparency and makes public the outcome of each application and selection round.**

Recommendation 3

7.56 The committee recommends that the Attorney-General disassemble the current Administrative Appeals Tribunal (AAT) and re-establish a new, federal administrative review system, by no later than 1 July 2023. The structure of the new tribunal system should re-align the merits review process with the AAT's legislated objectives of being accessible, proportionate, fair, economic, informal and quick, while promoting public trust and confidence in the decision-making of the review body.

7.57 In restructuring and reforming the merits review system, consideration should be given to the *Administrative Appeals Tribunal Act 1975*, and the Divisional structure, membership, case management practices, practice directions, President's directions, guides and guidelines of the AAT as currently constituted. Appointments to the system should be made in line with Recommendation 2 of this report.

7.58 The re-establishment process should also determine:

- **the relevant stakeholders to consult (including the Law Council of Australia and the Council of Australian Tribunals)**
- **the preferred functions, processes and structures for a fit-for-purpose tribunal system;**
- **ways in which to establish a new system with improved case management and procedural fairness; and**
- **ways to ensure that current matters before the AAT are afforded procedural fairness, and are not impeded or disrupted by the disassembling of the AAT.**

Chapter 1
Introduction and background to the merits review system

Referral

1.1 On 20 October 2021, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 31 March 2022:

> The performance and integrity of Australia's administrative review system, with particular reference to:
>
> (a) the Administrative Appeals Tribunal, including the selection process for members;
> (b) the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;
> (c) whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and
> (d) any related matter.[1]

1.2 This is an interim report. The committee sought an extension of time in which to make a final report, and on 29 March 2022 the Senate agreed to an extension until 30 June 2022.[2]

Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders, inviting submissions by 24 November 2021.

1.4 The committee has to date received 35 public submissions, which are listed at Appendix 1. The committee has at this stage not held a public hearing for the inquiry, and has drawn on the submissions received in order to develop this report and form committee views.

Acknowledgement

1.5 The committee thanks all those who have made submissions. Your contributions provided significant insights into a number of issues and assisted the committee in its deliberations.

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1 *Journals of the Senate*, No. 124, 20 October 2021, p. 4184.

2 *Journals of the Senate*, No. 138, 29 March 2022, pp. 4596-4597.

Structure of the report

1.6 This interim report is comprised of seven chapters.

1.7 This chapter sets out the background to the merits review system in Australia and details the findings of reviews which have been completed into the system over a number of decades.

1.8 Chapter 2 provides information on the operation of the Administrative Appeals Tribunal (AAT), including its structure, and its performance reporting and results.

1.9 Chapter 3 puts forward the general concerns raised in evidence about the functioning of the AAT, such as member remuneration, difficulties in accessing the AAT, and the complaints process.

1.10 Chapter 4 explores evidence received in relation to the selection process for AAT members. It examines the protocol for member appointments and outlines the calls from inquiry participants for a more transparent and independent selection process.

1.11 Chapter 5 turns to matters relating specifically to the AAT's Migration and Refugee Division (MRD), within which sits the Immigration Assessment Authority. It considers the evidence about the MRD's caseload and backlog, whether there are sufficient members in the MRD and other concerns about the operation of that Division.

1.12 Chapter 6 examines the views of submitters in relation to the role and funding of the Administrative Review Council (ARC) and puts forward the calls for its re-establishment and funding.

1.13 Chapter 7 considers the importance of the merits review system. It presents the committee's views on each of the areas examined by the previous chapters and foreshadows further areas of interest for the inquiry. It also puts forward the committee's recommendations.

The merits review system

1.14 There are several arms of Australia's administrative review system, including:

- internal review undertaken within departments and agencies;
- independent merits review by external bodies; and
- judicial review by the federal courts.[3]

1.15 According to the Attorney-General's Department (AGD), merits review is:

> … the process by which a person or body other than the primary decision-maker reconsiders the facts, law and policy aspects of the original decision and determines the correct and preferable decision. The process of review may be described as 'stepping into the shoes' of the primary

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3 Administrative Appeals Tribunal, *Submission 1*, p. 3.

> decision-maker. If the reviewer considers that the decision was not the correct and preferable decision, the reviewer may remake the decision using the same legislative framework as the original decision-maker.[4]

1.16 As part of this system, the AAT plays a vital role in providing merits review of government and agency decisions.

1.17 The Law Council of Australia called the AAT 'the cornerstone of Australia's administrative law system', and detailed the key accountability roles of the administrative law system as:

- protecting individuals against unfair and arbitrary use of public power;
- legitimising and ensuring public confidence in government; and
- enabling informed participation in democratic processes.[5]

1.18 Similarly, the New South Wales Bar Association noted the significance of the AAT to members of the public, saying:

> The AAT conducts a vast amount of work across a range of significant fields, and the decisions its members make can significantly impact upon the rights of those appearing before it. Decisions made in relation to migration and refugee law, citizenship, freedom of information, entitlements under the National Disability Insurance Scheme, and anti-discrimination legislation will almost invariably have serious consequences for the rights of the affected individuals.[6]

1.19 The Australian Lawyers Alliance also observed the importance of the AAT in 'delivering access to justice' for people who may be affected by government decisions, 'by virtue of its relative accessibility and informality'.[7]

Background

1.20 The foundations of the Australian merit review system were laid in the mid-1970s with the formation and establishment of the AAT. Since then, the operation and functioning of the AAT has been reviewed repeatedly. The AAT's founding, and the consequent reviews into it, are detailed below.

Kerr Review

1.21 In 1968, Attorney-General Sir Nigel Brown formed the Commonwealth Administrative Review Committee, led by Sir John Kerr. Known as the Kerr Committee, it was tasked with reviewing the Australian administrative law system.[8]

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[4] Attorney-General's Department, *Submission 5*, p. 1.

[5] Law Council of Australia, *Submission 23*, p. 5.

[6] New South Wales Bar Association, *Submission 26*, p. 2.

[7] Australian Lawyers Alliance, *Submission 2*, p. 6.

[8] Attorney-General's Department, *Submission 5*, p. 1.

1.22 In 1971, the Kerr Committee presented the Report of the Commonwealth Administrative Review Committee (the Kerr Report). The Report outlined the 'inadequacy of parliamentary and judicial action as the primary means of reviewing decisions', and the inadequacy of the processes then in place where numerous bodies reviewed decisions under various pieces of legislation.[9]

1.23 The AGD advised that the Kerr Report:

> … recommended the establishment of a general administrative review tribunal to provide external merits review of government decisions. In part as a result of these recommendations, legislation was passed in 1975 establishing the AAT.[10]

1.24 The AAT commenced operation on 1 July 1976, and was intended to provide a 'direct pathway for individuals and organisations to have administrative decisions of government independently reviewed'.[11]

1.25 Melbourne Law School observed that upon its establishment the AAT was a 'world first experiment in merits review' which 'grew quickly into a national asset'.[12]

ARC review – Federal Merits Review System

1.26 In December 1993, the ARC was tasked with inquiring into the effectiveness of the federal system of external merits review tribunals, given that the operation of the AAT for two decades had provided a 'substantial body of practical experience in the operation of the system', alongside a 'number of significant changes and developments' since the AAT had commenced.[13]

1.27 The ARC delivered its final report in September 1995, titled 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (the ARC Review). It made 102 recommendations for improvement.

1.28 The ARC Review found that while the Australian system of administrative law and its merits review process was 'world leading' at the time, it could 'no longer accurately be described as a coherent system'. Stakeholders told the ARC they were generally supportive of the merits review system and its ability to meet its objectives, with noted improvements to the quality of decision-making since the reforms of the mid-1970s.[14]

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9 Attorney-General's Department, *Submission 5*, pp. 1–2.

10 Attorney-General's Department, *Submission 5*, p. 2.

11 Attorney-General's Department, *Submission 5*, p. 4.

12 Melbourne Law School, *Submission 14*, p. 1.

13 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, p. 7.

14 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, pp. 7; 18–19.

1.29 However, the ARC Review stated that, 'without sacrificing the valued features of the individual tribunals', the challenge was to make improvements in the following areas:

- consistency and speed of review tribunal decision making;
- improving the effect of review tribunal decisions on the quality of government decision making;
- making the system more cost-effective; and
- improving the overall credibility of the system.[15]

1.30 Importantly, the ARC noted 'concerns about perceptions about review tribunals' [lacking] independence from the agency or agencies whose decisions they review'. The ARC further posited that:

> … review tribunals must be (and be seen to be) free of any undue pressure or incentive to favour the position of the agency whose decisions they review.
>
> …
>
> Unless this is achieved, there is a danger that potential applicants will lose confidence in the system's capacity to provide fair and objective merits review of their case, and for this reason might not seek review at all.[16]

1.31 As will be shown in the following chapters, several of the ARC's 1995 recommendations continue to remain relevant. Of particular importance to the current inquiry are the following recommendations:

- Review tribunals should monitor continuously the ways in which their review processes and other characteristics are perceived by applicants, so as to ensure that applicants feel as comfortable in their dealings with tribunals as is consistent with the proper exercise of the review function of tribunals (Recommendation 4).
- Training of review tribunal members should include a component on how to adopt an appropriate active investigative approach in hearings: members should always be aware of how their actions may affect the way their tribunal is perceived by its users (Recommendation 6).
- Review tribunals should cooperate in the development of a minimum set of core skills and abilities required of an effective tribunal member, for use in organising professional development of members and in the process of developing selection criteria (Recommendation 31).
- All prospective review tribunal members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives; and selection criteria for review tribunal member positions

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15 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, p. 20.

16 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, p. 154.

should be made publicly available, as should information about the nature of the selection process to be followed (Recommendations 33 & 34).

- Assessment of applicants for review tribunal membership against selection criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments (Recommendation 35).
- Appointments of members of review tribunals should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment (Recommendation 36).
- Appointments to review tribunals should be staggered so that the terms of a large proportion of a tribunal's members do not expire at the one time; and review tribunal members should be appointed for terms of between three and five years (Recommendations 40 & 41).
- Members of review tribunals seeking reappointment on expiry of their terms should be required to apply for appointment in a competitive selection process and be assessed for suitability for reappointment against the same selection criteria as new applicants (Recommendation 43).
- Review tribunals should continue to develop performance appraisal schemes for their members, covering all aspects of the work of members other than outcomes in particular cases; and all review tribunal members should participate in the setting of appropriate standards against which their performance is to be appraised (Recommendations 46 & 47).
- There should be a statutory entitlement to an interpreter in review tribunal proceedings, where the tribunal considers an interpreter's services are required. Interpreters who participate in these proceedings should be adequately briefed on review tribunal functions and processes (Recommendation 64).[17]

Amalgamation of merits review tribunals

1.32 As part of its recommendations in 1995, the ARC Review called for the establishment of a single tribunal to address migration matters, by merging the Immigration Review Tribunal (later the Migration Review Tribunal) and the Refugee Review Tribunal which were then in operation (but not as part of the AAT).[18] Between 2002 and 2005, the functions of the Migration Review Tribunal and the Refugee Review Tribunal were progressively consolidated into a single agency (but again, this agency was not associated with the AAT).[19]

17 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, pp. 161–172.

18 Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, September 1995, p. 140.

19 Attorney-General's Department, *Submission 5*, p. 4.

1.33 The Abbott Government announced as part of the 2014–15 Budget that the merits review system would be 'streamlined and simplified'. From 1 July 2015, the Migration Review Tribunal, Refugee Review Tribunal and the Social Security Appeals Tribunal were merged and incorporated into the AAT. As a result, decisions which could be reviewed in the former Migration and Refugee Review Tribunals are now considered in the AAT's MRD, and Social Security matters considered by the AAT's Social Services and Child Support Division (SSCSD).[20]

1.34 In announcing the changes, the then Attorney-General, Senator the Hon George Brandis QC argued that:

> The reforms will remove unnecessary layers of bureaucracy and deliver an improved and simplified merits review system for all Australians. This is in line with the Coalition's commitment to streamline government and reduce duplication to deliver efficient, effective government. The measure is expected to save $20.2 million over four years.
>
> …
>
> The merger of merits review agencies will provide an accessible "one stop shop" for external merits review and will ensure that end-users have a review option that is fair, less confusing, just, economical, informal and quick.[21]

1.35 While many processes were to remain as they were prior to the amalgamation, the AAT would 'introduce new practice directions, guides, guidelines and forms as part of implementing the new arrangements' to incorporate legislative and procedural changes.[22]

1.36 The AGD submitted that the consolidation of the tribunals had:

- simplified engagement with the system for AAT users;
- allowed for greater flexibility in the members' availability to hear matters across the AAT; and
- resulted in the standardisation of member entitlements.[23]

Callinan Report

1.37 In 2018, the Hon Ian Callinan AC QC, a former Justice of the High Court, completed a statutory review of the AAT following the amalgamation process of 2015. The resulting report, 'Report on the Statutory Review on the *Tribunals*

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[20] Administrative Appeals Tribunal, *Fact Sheet: Amalgamation of Commonwealth Merits Review Tribunals – What is changing and what is staying the same?*, July 2015 (accessed 10 January 2022).

[21] Senator the Hon George Brandis QC, 'Streamlined arrangements for external merits review', *Media release*, 13 May 2014 (accessed 10 January 2022).

[22] Administrative Appeals Tribunal, *Fact Sheet: Amalgamation of Commonwealth Merits Review Tribunals – What is changing and what is staying the same?*, July 2015 (accessed 10 January 2022).

[23] Attorney-General's Department, *Submission 5*, p. 4.

Amalgamation Act 2015' (the Callinan Report) was tabled in Parliament on 23 July 2019 and put forward 37 recommended measures for further legislative reform to accommodate the amalgamation of the tribunals within the AAT.[24]

1.38 As of May 2020, there had been little progress in implementing the recommendations of the Callinan Report, with the Commonwealth Government advising it was 'carefully reviewing the report' and that it had 'partially responded' by appointing additional members. However, the AGD said that the AAT, as an independent authority, was 'responsible for its own operation and management'.[25]

1.39 The AGD advised that as a 'first step' in responding to the legislative recommendations of the Callinan Report, it introduced the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 on 23 June 2021. The bill passed and took effect from 17 February 2022, making a number of changes to the operations of the SSCSD, and in relation to the AAT allowed for the:

> … updating [of] provisions relating to the appointment and assignment of members on an acting basis, the constitution and reconstitution of the AAT, the appointment and authorisation of officers of the AAT to perform functions in relation to proceedings, the dismissal and reinstatement of proceedings, the correction of errors in the text of a decision, and the taxation of costs.[26]

1.40 A number of submitters considered that the findings and measures recommended by the Callinan Report continued to be relevant and urged for their implementation.[27] Specific recommendations of the Callinan Report are discussed in subsequent chapters of this report.

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[24] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018.

[25] Attorney-General's Department, answer to question on notice, question no. AE20-240, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2019-20, 13 March 2020 (received 8 May 2020).

[26] Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021, *Revised Explanatory Memorandum*, p. 3.

[27] See for example: Law Council of Australia, *Submission 23*, p. 6; Professor Greg Weeks, *Submission 7*, p. 3.

Chapter 2
Operation of the AAT

2.1 This chapter provides background information on the operating framework of the Administrative Appeals Tribunal (AAT), including its staffing, funding and reporting requirements. It also provides information on the AAT's recent performance results.

Role and structure of the AAT

2.2 The AAT is an independent statutory body. The *Administrative Appeals Tribunal Act 1975* (AAT Act) provides the objectives of the AAT, and stipulates that the Tribunal must pursue a mechanism of review that:

(a) is accessible;
(b) is fair, just, economical, informal and quick;
(c) is proportionate to the importance and complexity of the matter; and
(d) promotes public trust and confidence in the decision-making of the Tribunal.[1]

2.3 The Attorney-General's Department (AGD) observed that:

> Merits review through the AAT is an integral part of ensuring good governance, accountability and transparency in public administration and contributes more broadly to better administrative decision making.[2]

Membership and staffing

2.4 The AAT is comprised of a President (who must be a judge of the Federal Court), Deputy Presidents (who may also be judges of the Federal Court or Federal Circuit and Family Court), Senior Members and Members.[3] The AAT members are supported by staff who undertake administrative, corporate and enabling support services.[4]

2.5 The AGD explained that AAT members are either:

> … experienced in legal matters, have skills in decision-making or are experts on particular subject matter. They undertake merits review of a

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[1] *Administrative Appeals Tribunal Act 1975*, s. 2A; see also Administrative Appeals Tribunal, *Submission 1*, p. 5.

[2] Attorney-General's Department, *Submission 5*, p. 2.

[3] Administrative Appeals Tribunal, *Submission 1*, p. 5.

[4] Administrative Appeals Tribunal, *Submission 1*, p. 8. Further information on members, including the selection process and protocols, is set out in Chapter 4.

> broad range of administrative decisions, with a view to reaching the correct or preferable decision in each matter.[5]

2.6 In addition to these members, the Registrar of the AAT assists the President in managing the AAT's administrative affairs and is a statutory office holder appointed by the Governor-General on the nomination of the AAT President. The Registrar is the accountable authority of the AAT for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and is the agency head for the purposes of the *Public Service Act 1999*.[6]

2.7 The AAT detailed the powers of the Registrar, saying that the position has the power to:

> … do all things necessary or convenient to be done for the purpose of assisting the President, particularly in relation to the administrative affairs of the Tribunal. The President may give the Registrar directions about the exercise of the Registrar's powers other than in relation to the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999*. However, the Registrar must consult with the President in relation to the performance of functions or exercise of powers under those Acts.[7]

2.8 As of 24 November 2021, there were 313 members appointed to the AAT, comprising of 112 full-time members and 201 part-time members.[8]

Merits review

2.9 The AAT can undertake reviews of decisions made pursuant to more than 400 Commonwealth Acts and legislative instruments, which confer jurisdiction on the AAT. The AAT advised that its most reviewed decisions relate to:

- Australian citizenship
- child support
- family assistance and social security entitlements
- migration visas, including business, family, skilled, partner, student and visitor visas, and protection (refugee) visas
- the National Disability Insurance Scheme
- taxation
- veterans' entitlements, and
- workers compensation under Commonwealth law.[9]

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5 Attorney-General's Department, *Submission 5*, p. 2.

6 Administrative Appeals Tribunal, *Submission 1*, p. 7.

7 Administrative Appeals Tribunal, *Submission 1*, p. 7.

8 Administrative Appeals Tribunal, *Submission 1*, p. 5; Attorney-General's Department, *Submission 5*, p. 5. A full list of statutorily appointed members is available via the AAT webpage at: https://www.aat.gov.au/AAT/media/AAT/Files/Corporate/StatutoryAppointments.pdf. At the time of writing, that list was last updated on 7 March 2022.

9 Administrative Appeals Tribunal, *Submission 1*, pp. 4, 5.

2.10 The AAT is organised into divisions, in order to best meet its legislative objectives. The current Divisions are:

- Freedom of Information Division
- General Division
- Migration & Refugee Division (MRD) — which includes the Immigration Assessment Authority (IAA)[10]
- National Disability Insurance Scheme (NDIS) Division
- Security Division
- Small Business Taxation Division
- Social Services & Child Support Division
- Taxation & Commercial Division
- Veterans' Appeals Division.[11]

2.11 Each Division applies different caseload management strategies to monitor the allocation of resources, the constitution of cases, and performance. The AAT explained there were three reasons for this, being:

(1) the volume and characteristics of cases across the Divisions varies widely;
(2) the relevant legislation that governs reviews varies; and
(3) at the time of amalgamation, the AAT inherited three different electronic case management systems that provide different levels and types of information.[12]

2.12 The AAT explained that its role is to review a decision on the merits, which involves 'considering afresh the facts, law and policy relating to that decision', including:

> … taking into account additional information that may not have been before the original decision-maker. The AAT must make the legally correct decision or, where there can be more than one correct decision, the preferable decision based on the evidence before it. In doing so, the AAT has the power to affirm a decision that is under review, vary the decision, set it aside and substitute a new decision or remit a decision for reconsideration by the original decision-maker.[13]

2.13 Since 2016–17, the AAT has received approximately 50 000–60 000 applications each year.[14]

2.14 The AAT observed that since amalgamation in 2015, its workload had grown considerably—particularly the volume of applications for review of migration

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10 The MRD and IAA are discussed further in Chapter 5.

11 Administrative Appeals Tribunal, *Submission 1*, p. 5.

12 Administrative Appeals Tribunal, *Submission 1*, p. 12.

13 Administrative Appeals Tribunal, *Submission 1*, p. 5.

14 Attorney-General's Department, *Submission 5*, p. 5.

and refugee decisions. This has resulted in 'challenges in finalising' the caseload in a timely manner. However, the AAT argued that it had:

> … demonstrated the quality of its review processes – from lodgement through early case management and pre-hearing processes to hearing and decision-making – consistently achieving high levels of user satisfaction along with low rates of appeals upheld in the courts.[15]

2.15 The AAT supports its members by providing 'administrative, research and case management assistance as well as a comprehensive professional development program', and reviews and adjusts its case management strategies to 'ensure they are efficient and appropriate to each caseload and its users'.[16]

Role of the Attorney-General's Department

2.16 The AGD explained its role alongside the AAT, as undertaking the following functions in support of the Attorney-General in his or her portfolio responsibility for the AAT:

- facilitating the appointment of AAT members;[17]
- providing advice on the resourcing needs of the AAT;
- progressing policy and legislative reforms to 'ultimately provide users with the best experience possible';
- supporting the development of best practice decision making by reviewing and providing advice on all draft legislation which raises administrative law issues, via the Office of Parliamentary Counsel;
- providing policy advice on administrative law to agencies on an ad hoc basis as part of the policy development process; and
- considering proposed policy and legislative reforms across government which may impact on the AAT's functions, jurisdiction and processes, and progressing—where necessary and appropriate—legislative change to support the AAT in the conduct of its business.[18]

Funding for the AAT

2.17 The AAT (and the associated Immigration Assessment Authority (IAA)) is funded through an annual appropriation, with an adjustable component in response to variations in the number of cases finalised in the MRD. The annual appropriation for the AAT in 2021–22 was $227.12 million.[19]

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15 Administrative Appeals Tribunal, *Submission 1*, p. 3.

16 Administrative Appeals Tribunal, *Submission 1*, p. 4.

17 The selection process for AAT members is considered in Chapter 4 of this report.

18 Attorney-General's Department, *Submission 5*, pp. 2–3.

19 2021–22 Budget, *Portfolio Budget Statements 2021–22: Attorney-General's Portfolio*, p. 54.

2.18 The AAT advised that its funding arrangements are largely based on the funding models in place prior to the 2015 amalgamation process, and that the funding model for cases in the MRD is a 'significant component of the AAT's funding arrangements'.[20]

2.19 Justice Callinan in his 2018 report found that the funding models in place prior to amalgamation, were effectively 'flat' models that were 'demand driven and based on a pre-determined annual appropriation calculated on expected numbers of applications' in Divisions. Because of this, the funding models do not 'provide for adjustment, either by way of increase or decrease to meet actual changes of numbers within the period of the budget'. The Callinan Report drew specific attention to the MRD, saying that:

> The MRD is the Division that is most in need of further funding. It is now funded by a demand-driven model inherited from the former MRT-IRT that varied from year to year depending on the number of applications finalised.
>
> …
>
> There is a real and pressing need for further Members and resources in this Division. Whilst there is such a deficit in it, reviews to be made will multiply, deserving applicants will continue to live in uncertainty, and dishonest or ineligible applicants will be able to remain within the country.[21]

2.20 The AAT noted that how it performs is 'influenced by the legislative and resourcing environment within which it operates', along with other external factors. The AAT submitted that its budget and the appointment of members were 'ultimately a matter for Government'.[22]

Performance and transparency

2.21 The AAT submitted that it must comply with the PGPA Act (including publication of an annual Corporate Plan, and details on performance measurement). The AAT also noted that its operations were subject to scrutiny by government oversight frameworks and bodies, 'including requests made under the *Freedom of Information Act 1982* and complaints to the Commonwealth Ombudsman, as well as through external audits, reviews and parliamentary scrutiny'.[23]

2.22 The AAT continued that regarding transparency and in addition to the general public sector accountability framework, it also has a Service Charter which sets

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[20] Administrative Appeals Tribunal, *Submission 1*, p. 18.

[21] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, pp. 21–22.

[22] Administrative Appeals Tribunal, *Submission 1*, p. 3.

[23] Administrative Appeals Tribunal, *Submission 1*, pp. 8–9.

out the standards of service people can expect when dealing with the AAT (including a complaints and complaint response framework),[24] and further, it has:

> … specific accountability and transparency arrangements that arise from being a tribunal, including the requirement to hold many hearings in public and to give reasons for its decisions, the practice of publishing its decisions and oversight provided by the courts.[25]

2.23 The AAT's submission made the point that 'consistent with a culture of continuous improvement', it regularly reviewed its risk review processes, responded to issues identified in internal and external audit activities and facilitated the implementation of audit recommendations.[26]

Performance results

2.24 The AAT and the IAA have several performance indicators against which they report, as follows:

- the number of AAT applications and IAA referrals finalised;
- the clearance ratio: the ratio of AAT applications and IAA referrals finalised to applications and referrals received;
- the proportion of AAT applications and IAA referrals finalised within 12 months of lodgement;
- the number of AAT and IAA decisions published;
- AAT user experience ratings derived from the results of an annual user feedback survey (the survey asks parties and representatives to rate their experience of different aspects of the review process, including the application process, dealing with staff and perceptions of overall fairness); and
- the proportion of appeals against AAT and IAA decisions allowed by the courts.[27]

2.25 The AAT provided the committee with some information regarding its recent performance and advised that in the period from 1 July 2015 to 30 June 2021, it had 'received more than 300 000 applications and finalised more than 260 000 applications'. In addition, the IAA had 'received and finalised more than 9000 referrals' over the same period. The AAT was of the view that while there have been challenges in meeting its performance targets annually, it has 'performed well against a majority of them over time'.[28]

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24 Information about the extent of the AAT's compliance with the standards is set out in its Annual Report.

25 Administrative Appeals Tribunal, *Submission 1*, pp. 9, 15.

26 Administrative Appeals Tribunal, *Submission 1*, p. 16.

27 Administrative Appeals Tribunal, *Submission 1*, pp. 9, 11.

28 Administrative Appeals Tribunal, *Submission 1*, p. 10.

Caseload report

2.26 Public information on the AAT's caseload shows that for the period 1 July 2021 to 28 February 2022, there were a total of 29 769 applications lodged and 27 269 applications finalised. Additionally, there were 67 909 applications on hand at the end of that time period.[29]

2.27 A breakdown of this caseload information, as published by the AAT, is reproduced in the following table.

Table 2.1 AAT Caseload Report - for the period 1 July 2021 to 28 February 2022

Division/Caseload	Lodgements	Finalisations	On hand at period end
Freedom of Information	**50**	**54**	**106**
General	**2485**	**3231**	**2822**
Australian citizenship	314	495	407
Centrelink (2nd review)	775	1193	673
Visa-related decisions relating to character	232	250	106
Workers' compensation	759	870	1277
Other	405	423	359
Migration & Refugee	**14 242**	**13 446**	**56 845**
Migration	7070	9301	21 745
Refugee	7172	4145	35 100
National Disability Insurance Scheme	**4117**	**1818**	**3925**
Security	**5**	**6**	**26**

[29] Administrative Appeals Tribunal, *Statistics - Caseload reports 2021–2022*, https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2021-22.pdf (accessed 15 March 2022).

Small Business Taxation	**227**	**213**	**463**
Social Services & Child Support	**8069**	**7827**	**2441**
Centrelink (1st review)	6467	6208	1751
Child Support	1490	1502	669
Paid Parental Leave	112	117	21
Taxation & Commercial	**472**	**530**	**1104**
Taxation	408	426	995
Other	64	104	109
Veterans' Appeals	**102**	**144**	**177**
AAT	**29 769**	**27 269**	**67 909**

Source: Administrative Appeals Tribunal, Statistics - Caseload reports 2021–2022, https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2021-22.pdf (accessed 15 March 2022).

The increasing workload

2.28 The AAT remarked that its workload had increased significantly in the period 2015–16 to 2019–20, particularly within the MRD where lodgements in 2017–18 and 2018–19 exceeded 36 000, 'approximately double the number lodged in 2015–16'. The AAT contended that:

> … the number of members and staff available to deal with cases did not keep pace with the higher volume of lodgements, resulting in a growing on-hand caseload over time.[30]

2.29 Despite meeting its finalisation target in 2019–20, the AAT suggested that various factors prevented it reaching the projected number of finalisations in other years, including 'lower than anticipated numbers of applications and referrals in some areas of work and lower membership levels'. In addition, the overall timeliness result had been impacted since 2018–19 by 'the growing and ageing on-hand caseload' in the MRD.[31]

2.30 A decrease of lodgements in 2020–21 occurred largely due to COVID-19, which also allowed the AAT to reach its 100 per cent clearance target 'for the first

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[30] Administrative Appeals Tribunal, *Submission 1*, p. 10.

[31] Administrative Appeals Tribunal, *Submission 1*, p. 11.

time since the amalgamated AAT was established, resulting in a decrease in the on-hand caseload'.[32]

2.31 With regard to the number of published written statements of reasons for decisions, the AAT said that:

> … the AAT and IAA has exceeded the target since this measure was introduced in 2017–18. Initially set as a target of at least 4,000 decisions, this was increased to at least 5,000 decisions from 2018–19. More than 5,860 decisions made in 2020–21 have been published. The AAT is one of the highest volume publishers of decisions amongst all Australian courts and tribunals.[33]

2.32 The AAT also noted that it had exceeded its 70 per cent user experience rating since the measure was introduced in 2018–19, with a 77 per cent result in 2021. Turning to court appeal results, the AAT observed that the number of appeals 'allowed by the courts in a year should be less than 5% of all AAT and IAA decisions that could have been appealed'. The AAT advised that:

> For 2020–21, 2,751 court appeals were finalised with the number of appeals allowed representing 2.3% of all decisions made by the AAT and the IAA in the previous year that could have been appealed: this becomes 1.8% when decisions from the IAA are excluded.[34]

[32] Administrative Appeals Tribunal, *Submission 1*, p. 11.

[33] Administrative Appeals Tribunal, *Submission 1*, p. 11.

[34] Administrative Appeals Tribunal, *Submission 1*, p. 11.

Chapter 3
Concerns with the functioning of the AAT

3.1 This chapter outlines the concerns raised during the inquiry thus far about how the Administrative Appeals Tribunal (AAT) is operating against its legislated aims of providing accessible, fair, informal and quick merits review.

3.2 It details the evidence received by the committee about particular areas of operation within the AAT, including case finalisation rates, levels of resourcing, and how AAT members were remunerated and their performance measured.

3.3 Issues regarding the selection of AAT members, and the operation of the Migration and Refugee Division (MRD) specifically—which considers the majority of AAT cases—are discussed later in this report.

AAT finalisation rates and resourcing

3.4 The previous chapter detailed the significant volume of applications on hand before the AAT for the 2021–22 financial year (as at 28 February 2022)—nearly 68 000.

3.5 In order to assess the productivity of the AAT, it is necessary to consider the rates of finalisation of cases, and the time taken in which to do so. Table 3.1 below shows considerable delays in finalisation in areas such as Freedom of Information; migration and refugee matters, and veterans' appeals.

3.6 Also of note is the proportion of matters in which the AAT determined that the original departmental decision was not the correct or preferable decision, and therefore set aside the decision or remitted it to the decision-maker. For matters concerning the National Disability Insurance Scheme (NDIS), more than half of the decisions under review were changed. A significant number of decisions were also changed for small business taxation, migration, and taxation and commercial matters.

Table 3.1 AAT Caseload Report - for the period 1 July 2021 to 28 February 2022 - further information

Division/Caseload	Proportion of applications finalised within 12 months of lodgement	Median time to finalise (weeks)[1]	Proportion of applications in relation to which decision under review changed[2]
Freedom of Information	**44%**	**61**	**22%**
General	**73%**	**27**	**29%**
Australian citizenship	69%	34	30%
Centrelink (2nd review)	80%	24	26%
Visa-related decisions relating to character	90%	11	36%
Workers' compensation	55%	48	34%
Other	83%	14	22%
Migration & Refugee	**20%**	**108**	**30%**
Migration	18%	107	41%
Refugee	24%	116	5%
National Disability Insurance Scheme	**89%**	**20**	**55%**
Security	**83%**	**50**	**0%**

[1] As stated in the source document: 'Median time to finalise is measured in weeks from lodgement to finalisation.'

[2] As stated in the source document: 'These figures relate to applications for review of decision and do not include other types of applications that may be made under the AAT Act or related legislation. The decision under review is treated as having been changed if the Tribunal varies or sets aside the decision or remits the matter to the decision-maker for reconsideration by way of a decision under section 43 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) or section 349 or 415 of the *Migration Act 1958* or by way of a decision made in accordance with terms of agreement reached by parties under section 34D or 42C of the AAT Act.'

Small Business Taxation	**83%**	**28**	**51%**
Social Services & Child Support	>99%	8	21%
Centrelink (1st review)	>99%	7	18%
Child Support	>99%	11	34%
Paid Parental Leave	100%	7	9%
Taxation & Commercial	63%	36	41%
Taxation	62%	39	42%
Other	66%	30	35%
Veterans' Appeals	55%	47	30%
AAT	55%[3]	34	29%

Source: Administrative Appeals Tribunal, Statistics - Caseload reports 2021–22, https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2021-22.pdf *(accessed 15 March 2022)*

The need for more members

3.7 There were calls from submitters for an increase in the number of AAT members and resources in order to address the significant caseload backlog, with particular attention drawn to the considerable backlogs in the MRD.[4]

3.8 The Law Council of Australia (Law Council) asserted that it was critical that additional members are appointed to the AAT in order to address delays and backlogs. It recommended that:

> … additional members be appointed to the AAT with a focus on qualified decision-makers across the Divisions with the greatest backlogs, so as to maximise the efficiency and effectiveness of the AAT in achieving its statutory aims.[5]

3.9 The Tax Institute called for a greater resourcing of members, particularly in the Small Business Taxation Division, which would help to address the large

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[3] As stated in the source document: 'The Portfolio Budget Statement for the AAT sets out a performance criterion target of 75% of applications finalised within 12 months of lodgement.'

[4] See for example: Faculty of Law, Monash University, *Submission 11*, p. 5; Refugee Council of Australia, *Submission 16*, pp. 3–4; Refugee Legal, *Submission 32*, p. 10; Law Council of Australia; *Submission 23*, p. 6.

[5] Law Council of Australia, *Submission 23*, p. 6.

number of cases on hand. The Institute suggested greater funding and resourcing for members, as well as additional time for members to write decisions—especially given the increasing complexity of cases before the AAT, including tax cases.[6]

3.10 The AAT itself noted in its 2020–21 Annual Report that it was 'not sufficiently resourced to substantially reduce our significant on hand caseload', and that it would 'continue to engage with Government about additional member appointments, commensurate increases to staffing levels to support members and appropriate funding'.[7]

3.11 In evidence to the committee, the AAT again reiterated that a 'challenge linked directly to performance' is the number of members who are available to conduct reviews. It explained:

> Decisions relating to appointments, including the number, level and location, are ultimately a matter for the Government and impact on the AAT's ability to deliver services and meet case finalisation targets.[8]

3.12 In additional to several measures to increase the number of members appointed to the AAT, the 2018 Callinan Report called for amendments to the arrangements for the assignment of members to Divisions, noting that 'some Divisions are not nearly as busy as others', and that 'flexibility in the deployment of members is desirable and likely to enhance harmonisation'.[9]

Case allocations

3.13 The Callinan Report found that case management at the AAT was 'a matter of concern', arguing that:

> Differences in practice and procedure, as well as competencies of Members, complicate the operation of the AAT. There is a clear need for a coordinator and manager of the totality of the AAT's workload in consultation with, and as a delegate of, the President. An appointment of a person to fill that role is, in my view, urgent and necessary.[10]

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[6] The Tax Institute, *Submission 25*, pp. 4-5.

[7] Administrative Appeals Tribunal, *Annual Report 2020-21*, September 2021, p. 9.

[8] Administrative Appeals Tribunal, *Submission 1*, p. 19.

[9] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 10.

[10] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 6.

3.14 Further to this recommendation in the Callinan Report, the AAT's 2020–21 Annual Report advised on the work of case assessment registrars and caseload practice managers, who:

> … undertake early case assessment and triage in various types of applications, particularly in the Migration and Refugee Division, Small Business Taxation Division and the Social Services and Child Support Division. At 30 June 2021, dedicated national teams provided caseload support and legal services to the Migration and Refugee Division, the Social Services and Child Support Division and the National Disability Insurance Scheme Division.[11]

3.15 The AAT further noted that it had worked with the Government during 2020–21 to update its governing legislation, to 'make available a more consistent set of case management powers and procedures across divisions'.[12]

Single case management system

3.16 The AAT described the impact of using several electronic case management systems across Divisions—a legacy of the 2015 amalgamation process. The AAT noted that the systems were ageing and had 'limitations in supporting increasing caseloads, enabling changed work practices or supporting effective modern service design and delivery', while limiting the Tribunal's capacity to leverage data capabilities across the AAT.[13]

3.17 The AAT acknowledged the adverse impact of multiple case management systems, and indicated that the development of a single management system was a 'priority project' for the AAT. It observed that this process would have a direct and positive impact on its public reporting capabilities, saying that:

> In response to increased interest in the AAT's caseload statistics, new reports with more detailed caseload information for all Divisions, are under development with the intention to publish on the AAT's website in future.[14]

3.18 The new case management system is to be implemented in stages over several years across all AAT Divisions, with completion in 2025. According to the AAT, progressing in stages 'reflects the complexity of moving from a number of systems to a single solution' while addressing the needs of a 'broad, complex user base'. It is hoped that the new system will improve interactions for external users, enhance AAT productivity and provide better data for the monitoring and improvement of performance.[15]

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[11] Administrative Appeals Tribunal, *Annual Report 2020–21*, September 2021, p. 20.

[12] Administrative Appeals Tribunal, *Annual Report 2020–21*, September 2021, p. 9.

[13] Administrative Appeals Tribunal, *Submission 1*, p. 17.

[14] Administrative Appeals Tribunal, *Submission 1*, p. 24.

[15] Administrative Appeals Tribunal, *Submission 1*, p. 18.

3.19 The AAT's 2021–22 Annual Report said that the discovery phase for the single case management solution had taken place in 2020–21, with the AAT 'well placed to make milestone design decisions as the project continues into 2021–22'.[16]

Member remuneration

3.20 Remuneration of Tribunal members is currently determined by the Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2021 (the Determination).[17]

3.21 Section 22 of the Determination provides the total yearly remuneration of the following AAT members as:

- Non-judicial Deputy Presidents – $496 560
- Senior Members, level 1 – $391 940
- Senior Members, level 2 – $329 930
- Member, level 1 – $249 420
- Member, level 2 – $221 700
- Member, level 3 – $193 990

3.22 In 2018, the Callinan Report questioned the need for so many levels of membership in the AAT, with 'Deputy Presidents, two levels of Senior Members and three levels of ordinary membership'. In addition, each level was 'attracting a considerable differential in remuneration'.[18]

3.23 As part of his examination, Justice Callinan was told that 'sometimes the most Senior Members…were allocated less demanding work, rather than complex cases which could be expected to be allocated to those Senior Members enjoying their higher grading and better remuneration'. He concluded that:

> The seemingly inexplicable differences in levels of Membership and remuneration are prejudicial to the performance of the AAT and accordingly to the process of amalgamation. Serious consideration ought be given to whether these differentials are unproductive and unjustifiable, and if they are, whether they should be replaced by one or two levels only with a consequential gradual levelling of remuneration.[19]

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[16] Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 12.

[17] The Determination is available at: https://www.legislation.gov.au/Details/F2021C01006 (accessed 15 March 2022).

[18] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 124.

[19] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 125.

3.24 In addition to members receiving varying levels of pay, the Attorney-General's Department (AGD) also noted that AAT members can work part-time and are not precluded from holding outside employment, 'unless, in the President's opinion, it conflicts or may conflict with their duties'. It further advised that:

> … section 14 [of the AAT Act] sets out disclosure requirements for members in relation to a proceeding before the Tribunal, and how identified conflicts may be managed. In this context, the onus is on individual members to declare any potential conflicts of interest. It is then a matter for the President of the AAT to consider and manage disclosures.[20]

Payment of part-time members

3.25 The matter of AAT member remuneration has been the subject of ongoing commentary for some time, particularly the payment of part-time members.

3.26 In early 2021, the AAT advised that part-time members are generally paid a daily fee for undertaking official business of seven hours duration, 'regardless of the day or days on which that work is done', meaning:

> … a member may be paid a daily fee for work that has been undertaken across a number of days: for example, they may have prepared for a hearing on one day, conducted the hearing on a second day and written the reasons for decision on a third day.[21]

3.27 On 21 May 2021, the Shadow Attorney-General, the Hon Mark Dreyfus QC MP, wrote to the Australian National Audit Office (ANAO) expressing concerns about the remuneration of part-time AAT members, in particular in the Social Services and Child Support Division and the MRD. Mr Dreyfus expressed concerns about the AAT providing value for money to taxpayers, and was of the view that, based on evidence before the Senate Legal and Constitutional Affairs Legislation Committee (Legislation committee):

> … it appears that the amounts paid to a number of part-time members could only be justified if those members had completed at least 7 hours of Tribunal work a day for more than five days per week – sometimes for years on end.
>
> I am not suggesting that those members, or any other member of the Tribunal, have been overcharging or over-claiming. Rather, based on the evidence the Tribunal has given to the Committee, it appears that the Tribunal has adopted confused and inconsistent remuneration policies that give rise to the serious possibility that part-time members in the Social Services & Child Support and Migration & Refugee divisions are being paid for more days and hours than they actually work.

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20 Attorney-General's Department, *Submission 5*, pp. 5–6.

21 Administrative Appeals Tribunal, answer to question on notice, question no. LCC-BE20-167 -- 240, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2019-20, 6 November 2020 (received 25 February 2021), p. 15.

> The appropriateness and legal basis of key aspects of those policies are unclear.[22]

3.28 Prior to engaging with the ANAO, Mr Dreyfus sought clarification on these issues from then-President of the AAT, Justice David Thomas. As part of the process, Justice Thomas explained that the applicable remuneration determination 'does not prohibit part-time members from being paid more than the base salary of the equivalent full-time office in respect of any financial year.' Mr Dreyfus was of the view, however, that 'it does not follow that paying some part-time members as much as $70,000 more than full-time equivalents is appropriate or represents value for money'.[23]

3.29 Mr Dreyfus continued and noted that:

> … the President does not identify a legal basis for part-time members being paid for more hours or days than they actually work – and, specifically, more than one daily fee for one day's, or less than one day's, work.
>
> I understand from [a briefing provided by the President] on 10 May 2021 that the Tribunal does not believe that any parttime members are – in fact – being paid for more hours or days than they actually work. I do not share, and nor do I understand the basis of, the Tribunal's confidence.[24]

3.30 In outlining his concerns to Justice Thomas, Mr Dreyfus noted that the AAT had provided the Legislation committee with internal policy documents relating to the payment of members. Mr Dreyfus expressed the view that these policy documents 'raise serious concerns' about:

> … the confused and inconsistent way in which part-time members in different divisions are remunerated. Given that those documents appear to be based on old and long-superseded determinations by the Remuneration Tribunal, I am also concerned that members in some divisions of the Tribunal … are being remunerated in a manner that is inconsistent with the Remuneration Tribunal determinations that are currently in force. That is, I am concerned that, as a matter of policy, members of the Tribunal are being remunerated in a manner that is inconsistent with the law.[25]

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[22] The Hon Mark Dreyfus QC MP, correspondence to the Australian National Audit Office, 21 May 2021, [p. 1].

[23] The Hon Mark Dreyfus QC MP, correspondence to the Australian National Audit Office, 21 May 2021, [p. 2]. Detailed examples of remuneration paid to part-time members are provided in the correspondence from Mr Dreyfus.

[24] The Hon Mark Dreyfus QC MP, correspondence to the Australian National Audit Office, 21 May 2021, [p. 2].

[25] The Hon Mark Dreyfus QC MP, correspondence to the Australian National Audit Office, 21 May 2021, Attachment 1, [p. 8].

3.31 Mr Dreyfus called on the ANAO to conduct a 'tightly scoped performance audit' or assurance audit on how part-time members of the Social Services and Child Support Division and sessional part-time members of the MRD were being renumerated.[26]

Response from the ANAO

3.32 On 17 June 2021, the ANAO confirmed to Mr Dreyfus that during its 2020–21 financial statements audit, it would conduct 'additional measures' in response to the issues raised.[27] On 21 December 2021, the ANAO confirmed to Mr Dreyfus that it had conducted a review of AAT member remuneration, focusing on sessional members in the MRD. Its findings were included in its report on *Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2021*.[28]

3.33 The ANAO found:

- that a small number of members were paid more than the equivalent full-time salary, but these payments were within the AAT's guidelines and procedures, and the payments were consistent with the number of cases finalised by the member;
- in some instances, members' fortnightly paid remuneration was for more than 14 days, but there was limited documentation to evidence compliance with the requirements of the Remuneration Tribunal Determination;
- the amount paid to sessional members on case finalisation, which is based on the case weighting, may not be consistent with actual time spent on the case, with the number of case weighting days paid for the members reviewed being above those of full-time staff days available; and
- as MRD sessional members do not keep time records the ANAO could not readily verify the validity of weightings applied, with the AAT advising that it would move to time spent (timesheets) rather than case finalisation basis for all divisions in December 2021, for all part-time members.[29]

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[26] The Hon Mark Dreyfus QC MP, correspondence to the Australian National Audit Office, 21 May 2021, [p. 1].

[27] Mr Grant Hehir, Auditor-General, Australian National Audit Office, correspondence to the Hon Mark Dreyfus QC MP, 17 June 2021.

[28] Mr Grant Hehir, Auditor-General, Australian National Audit Office, correspondence to the Hon Mark Dreyfus QC MP, 17 December 2021.

[29] Mr Grant Hehir, Auditor-General, Australian National Audit Office, correspondence to the Hon Mark Dreyfus QC MP, 17 December 2021.

3.34 The AAT advised the ANAO at the time that it was seeking legal advice on the 'appropriateness of the guidelines and procedures employed by the AAT to remunerate members'.[30]

Response of the AAT

3.35 Mr Jamie Crew, as Acting Registrar of the AAT, confirmed during Additional Budget Estimates in February 2022 that part-time members were previously paid based on case finalisations, meaning that payments depended on how many finalisations were submitted in the 14-day pay period.

3.36 Mr Crew further noted that, in addition to awaiting the final legal advice about the AAT remuneration (referred to by the ANAO), the AAT was progressing with moving to time-based payments across all divisions. Mr Crew advised that the AAT had commenced a:

> … trial arrangement where part-time members were inputting their daily payment fees on a time related arrangement rather than a case finalisation arrangement. That trial of that system occurred early in the 2021-22 financial year … and was successful, and they began implementation [on] 21 December, so we almost have it completed. … We've almost finalised implementation of the time related arrangements for payment.[31]

Performance reporting and outcomes

3.37 The AAT's 2021–22 Corporate Plan details its performance targets for the reporting year, as follows:

- the number of AAT applications and Immigration Assessment Authority (IAA) referrals finalised: 47 944
- clearance ratio: at least 100 per cent (in each financial year);
- proportion of applications and referrals finalised within 12 months of lodgements or receipt: 75 per cent (in each financial year);
- number of decisions published: at least 5000 (in each financial year);
- AAT user experience rating: at least 70 per cent (in each financial year); and
- proportion of appeals against decisions allowed by the courts: less than five per cent of all AAT and IAA decisions made in the previous year that could have been appealed.[32]

3.38 The MRD is the only division of the AAT which sets yearly benchmarks for members. Yearly benchmarks are not set for:

[30] Mr Grant Hehir, Auditor-General, Australian National Audit Office, correspondence to the Hon Mark Dreyfus QC MP, 17 December 2021.

[31] Mr Jamie Crew, Acting Registrar, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, pp. 80–81.

[32] Administrative Appeals Tribunal, *Corporate Plan 2021–22*, pp. 17–21.

- part-time members who undertake work on a sessional basis as required by the AAT and who are remunerated based on case finalisation; and
- members who may only occasionally undertake work for the division.[33]

3.39 For the MRD, from 2018–19 onwards it developed new benchmarking and case weighting systems within the Division:

> Weightings for all caseloads were reviewed and complexity weightings were established for a broader range of cases, which are now reflected in what is known as 'case days'. The case days represent how many days it is expected a case of a particular category should take to finalise, including pre-hearing work, conducting a hearing and making a decision … The benchmark for each member is expressed as the number of case days the member is available to hear and decide cases with progress measured based on the finalisation of their individual case allocations.
>
> … The maximum possible number of case days for benchmark purposes in a year is 230.[34]

3.40 In effect, depending on the weighting and the time allocated for cases, the benchmarks for members will vary.

3.41 In relation to the benchmarking which only applies to the MRD, the previous Registrar, Ms Sian Leathem, suggested that it was a planning tool and not necessarily a performance mechanism. Further, the benchmarking was 'based on an indicative timeframe for particular types of cases', but that there 'could be cases that are different, unique or particularly complex, in which the benchmarking may need to be adjusted to be able to address that'.[35]

Benchmarking results

3.42 The AAT advised that it expects MRD members to be able to meet, or be within 10 per cent of their benchmark. In 2018–19, full-time and part-time members working in the MRD were given benchmarks—76 members did not meet their benchmark, and 61 met or exceeded their benchmark (due to COVID-19, benchmarking was suspended in March 2020).[36]

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33 Administrative Appeals Tribunal, answer to question on notice, question no. LCC-BE20-167 -- 240, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2019–20, 6 November 2020 (received 25 February 2021), p. 10.

34 Administrative Appeals Tribunal, answer to question on notice, question no. LCC-BE20-167 -- 240, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2019–20, 6 November 2020 (received 25 February 2021), pp. 10-11.

35 Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 26 October 2021, pp. 17.

36 Administrative Appeals Tribunal, answer to question on notice, question no. LCC-AE21-78, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2020–21, 8 April 2021 (revised response received 22 December 2021), p. 7.

3.43 Taking other factors into consideration, of the 76 members who did not meet their benchmarks, 40 failed to meet their expected targets without reasonable explanation. Some members reported progress against their allocated benchmarks as low as 20 per cent, with 11 of the 40 achieving 50 per cent or less.[37]

3.44 The Asylum Seeker Resource Centre (ASRC) called for a performance review of all current sitting members of the AAT using standardised performance criteria, in order to 'bring an end to appointments of underperforming members'.[38]

Performance reporting issues

3.45 Concerns have been expressed that indicators of underperformance of AAT members, may in fact be a result of fundamental issues with the performance data presented about each member—and a lack of context around that data.

3.46 During a recent Senate Estimates hearing, there was discussion of media reports which suggested that several AAT members were underperforming. However, it was put to the AAT that this was instead a result of AAT benchmarking being 'fundamentally flawed', and perhaps the AAT could look at how it could 'better reflect the work performed' by members:

> … For instance, in one case there was a report that a member did no work in a financial year when in fact he was not even sworn in. There have been numerous cases where members have been reflected on, saying that they have been underperforming due to the low number of finalisations of cases in a given year, when in fact in a number of cases they did not even start work until late in that financial year. There is also the failure of the AAT to categorise cases. The migration division, for instance, has a category of complexity of cases [and] the social security division is moving to categorising cases. Other divisions are not, and that means that it is a very unsophisticated way in which you are reflecting on the work performed by your members.[39]

3.47 Mr Crew, Acting Registrar of the AAT, acknowledged these concerns and advised that the AAT was taking steps to address the lack of context and additional information around the case completion statistics for members. Mr Crew noted that information to date reflected only the total number of finalisations of matters by members, and to that end the AAT was looking to 'change what we are doing or review how we might better provide such

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[37] Administrative Appeals Tribunal, answer to question on notice, question no. LCC-AE21-78, Senate Legal and Constitutional Affairs Legislation Committee Additional Budget Estimates 2020–21, 8 April 2021 (revised response received 22 December 2021), pp. 7–9.

[38] Asylum Seeker Resource Centre, *Submission 30*, p. 37.

[39] Senator the Hon Sarah Henderson, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 75.

information so it is clearer in relation to the different types of work' being completed, including the length of time it took to complete each case.[40]

3.48 At the same Estimates hearing, it was suggested that the AAT had—especially recently—displayed some major administrative flaws, including 'not even understanding whether a member has been sworn in'. Mr Crew noted that while the AAT was supportive of major reform, as of February 2022 the AAT had both an acting President and acting Registrar and appointments to both those roles at the earliest opportunity would help to progress reform.[41]

Access to the AAT

3.49 Some submitters remarked on the lack of access to adequate legal representation for applicants before the AAT.

3.50 For instance, Legal Aid NSW explained it was becoming 'increasingly problematic for both lawyers and Tribunal members' that applicants before the AAT may lack capacity to understand the nature of proceedings, or be able to issue competent instructions—especially for matters concerning the National Disability Insurance Scheme (NDIS), visa cancellation cases and protection visa matters. Legal Aid NSW therefore recommended that:

> … urgent consideration should be given to providing the AAT with statutory powers to appoint a litigation guardian … or a tutor for applicants who lack capacity.[42]

3.51 Legal Aid NSW noted that the *Administrative Appeals Tribunal Act 1975* (AAT Act) does not contain specific provisions for the appointment of a litigation guardian or tutor, unlike other comparable jurisdictions like New South Wales. The organisation suggested that the AAT was therefore 'often left not knowing what to do where the applicant is unrepresented and appears to lack capacity'.[43]

3.52 Social Security Rights Victoria (SSRV) said that despite the significant number of people affected by social security and family assistance decisions—many of whom are in vulnerable cohorts—there was no specific funds for social security legal services. SSRV posited that lack of representation caused

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[40] Mr Jamie Crew, Acting Registrar, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 75.

[41] Senator the Hon Sarah Henderson and Mr Jamie Crew, Acting Registrar, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 75.

[42] Legal Aid NSW, *Submission 13*, pp. 3–5. Legal Aid NSW also argued that the NDIA was taking an 'increasingly adversarial approach' to AAT matters, more appropriate to a superior court—resulting in increased costs, distress and 'appeal fatigue to applicants'; see p. 6 of submission.

[43] Legal Aid NSW, *Submission 13*, p. 5.

applicants to feel 'intimidated by the process and unclear about the role of the Tribunal'.[44]

3.53 The SSRV called for substantial increases in government funding, and concluded that the 'gross lack' of legal representation resulted in:

> … an almost complete stifling of the progression of Tribunal precedent to advance the interpretation of social security and family assistance legislation, and ensure it is applied fairly and accurately in all cases.[45]

3.54 The Refugee Council of Australia (RCA) similarly voiced concerns about a lack of government-funded legal representation for visa-related applications having a direct impact on the fairness, accessibility and efficiency of the system. The RCA advised that 'unprecedented demand has meant that there are fewer legal representatives attending hearings of the IAA or AAT, leaving many vulnerable people to navigate these systems without help'.[46] The RCA said that this was:

> … almost certainly having an impact on the efficiency and quality of decision-making within the tribunals, and is making it extremely difficult to identify jurisdictional errors which may lead to a person being wrongly returned to torture or other serious harm.
>
> We therefore recommend that [legal representation] funding be reinstated for all people seeking asylum at all stages of the process.[47]

3.55 The sentiments expressed by the RCA were echoed by the ASRC, which said that publicly funded assistance was negligible, and that it was seeing 'on a daily basis the impact of how the lack of access to quality legal representation prevents underrepresented protection visa applicants from properly articulating their claims'.[48]

3.56 The ASRC called for:

> … free, high quality, independent legal representation available to people seeking asylum or facing visa cancellation or refusal, at all stages of the process.
>
> … Provision of adequate state funded legal assistance could also enable processes to be sped up without compromising fairness or quality of decision making.[49]

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44 Social Security Rights Victoria, *Submission 31*, pp. 5–6.

45 Social Security Rights Victoria, *Submission 31*, pp. 8, 12.

46 Refugee Council of Australia, *Submission 16*, p. 12.

47 Refugee Council of Australia, *Submission 16*, p. 12.

48 Asylum Seeker Resource Centre, *Submission 30*, p. 35.

49 Asylum Seeker Resource Centre, *Submission 30*, p. 36.

3.57 Refugee Legal likewise recommended that the AAT be granted legislative capacity to refer an unrepresented applicant for pro bono legal assistance, as legal assistance and representation was 'critical' for matters before the MRD in order to ensure a fair hearing.[50]

Impact of COVID-19

3.58 Some concerns were raised about the approach of the AAT in adapting to the COVID-19 pandemic and ensuring its ongoing productivity and fair access to all applicants and their representatives.

3.59 For example, the Law Institute of Victoria (LIV) informed the Law Council that in Victoria, there was a 'degree of inconsistency in the productivity of members and the way they have adapted to changes' necessitated by the pandemic. By way of example, the LIV highlighted the following concerns (particular in relation to the MRD):

- members not using video or only choosing to do telephone hearings;
- members not putting their cameras on;
- interpreters not being authorised to view applicants' faces, making interpreting difficult at times;
- inconsistency in how hearings are run;
- inconsistent practices regarding invitations to attend hearings;
- refusing to accommodate the vulnerability of an applicant in a more preferable method of hearing; and
- failing to turn up to allocated hearings.[51]

3.60 Carina Ford Immigration Lawyers made similar points, suggesting applicants were restricted in their rights to access the merits review system during the pandemic. They advised that a 'number of members refused to hold video hearings, despite the AAT having functionality' to do so, and that during COVID-19, the MRD was slow to move to alternative ways of conducting hearings. They also raised concerns over hearings conducted via telephones, saying:

> One of the biggest issues of telephone hearings is the lack of transparency or ability to assess credibility. None of the parties to the proceeding can see each other which we feel is vital in a hearing involving such serious matters but also ensuring the applicant feels they have been heard.[52]

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[50] Refugee Legal, *Submission 32*, p. 8.

[51] Law Council of Australia, *Submission 23*, p. 11.

[52] Carina Ford Immigration Lawyers, *Submission 19*, pp. 3–4.

Complaints process

3.61 The AAT's Service Charter includes information on how to make complaints about the AAT's service (as opposed to an AAT decision), and details how to contact the Ombudsman in the event a complainant is not satisfied with the AAT's investigation of the original complaint.[53]

3.62 The AAT advised that it received a 'relatively low' number of complaints each year, as a proportion of all applications finalised. During 2020–21, the AAT finalised 233 complaints:

> Some complaints involved a finding that the Tribunal could have handled matters differently. They related to issues such as administrative error, how members and staff communicated with users, privacy, procedural issues and timeliness. Where the Tribunal formed a view it could have acted more appropriately, an apology was offered and steps taken to address the issue with the relevant areas and personnel.[54]

3.63 It was suggested to the committee that the AAT's complaints mechanism could be strengthened.

3.64 For example, the Law Council's members noted that concerns raised by practitioners with the AAT were not always addressed, that 'AAT members are seldom removed from cases if a complaint has been made', and that the IAA does not have a formalised complaints process.[55] The Law Council proposed an improved complaints process which would ensure both practitioners and other clients could raise complaints through a Federal Judicial Commission. Such a Commission could provide a:

> … separate, standalone mechanism to deal with any allegation of lack of competency, serious misconduct or corruption amongst the federal judiciary, and has the potential to extend to complaints about AAT members.[56]

3.65 Carina Ford Immigration Lawyers similarly argued that where complaints were made about the conduct of members in the MRD, 'the responses invariably do not address the substance of the complaints or deal meaningfully with complaints to create change'. Further, it appeared to them that the AAT 'is a consequence-free environment for members which is not the fault of those who consider complaints but rather due to the way members are appointed', and called for a complaints process which was transparent.[57]

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[53] Administrative Appeals Tribunal, Service Charter, July 2015, p. 3; Administrative Appeals Tribunal, *Submission 1*, p. 15.

[54] Administrative Appeals Tribunal, *Submission 1*, p. 15.

[55] Law Council of Australia, *Submission 23*, p. 10.

[56] Law Council of Australia, *Submission 23*, pp. 10-11.

[57] Carina Ford Immigration Lawyers, *Submission 19*, p. 5.

3.66 The ASRC also called for a 'revamp' of the complaints process, to ensure that 'appropriate action is taken to discipline members whose conduct is unprofessional, inappropriate, or raises questions of apprehension of bias/actual bias'.[58]

3.67 At the time of making its submission in November 2021, the AAT said it continued to work with the AGD on several matters, including a statutory framework for handling complaints about its members.[59]

Case study: the NDIS and AAT applications

3.68 Evidence was provided to the committee detailing the significant volume of applications and associated lengthy delays in AAT matters involving people with disability, and the negative impacts these processes were having on applicants and their advocates.

National Disability Insurance Scheme applications

3.69 During Additional Budget Estimates 2021–22, the AAT provided an update on the number of applications made to it by participants in the NDIS, as follows:

- 1780 applications from 1 July 2019 to 30 June 2020, with 1527 matters resolved, in a median time of 18 weeks; and
- 2160 applications from 1 July 2020 to 30 June 2021, with 1448 matters resolved and 54 hearings held, in a median time of 23 weeks.[60]

3.70 However, in just the six-month period from 1 July 2021 to 31 December 2021, there were 3140 applications (with 1356 matters resolved). As of February 2022, the median time to finalisation in this period was 19 weeks.[61]

3.71 Evidence from People with Disability Australia (PWDA) detailed the real-world impacts of such high case numbers, and explained that there were 'unprecedented numbers' of people with disability appealing to the AAT. PWDA said that for matters for which its advocates have carriage of, there was a 629 per cent increases in NDIS appeals this financial year in Queensland alone, often arising from decisions made by the National Disability Insurance Agency (NDIA).

3.72 PWDA further argued that while people were appealing to the AAT, 'they shouldn't be there in the first place', with 95 per cent of its Queensland AAT appeals being settled in conciliation. PWDA said this outcome showed

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[58] Asylum Seeker Resource Centre, *Submission 30*, p. 37.

[59] Administrative Appeals Tribunal, *Submission 1*, p. 18.

[60] Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, pp. 65–66; 77.

[61] Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, pp. 65–66.

the 'decisions the NDIA has made internally were wrong', and argued that the 'AAT should not replace a robust NDIA internal review process'.[62]

3.73 PWDA advised that in the experience of its advocates, AAT appeals involving NDIA decisions were taking an average of seven months to resolve, directly impacting on people with disability and their access to NDIS supports. The PWDA made clear its concerns that the AAT was:

> … becoming an unnecessary battleground for people with disability to get the supports we are legally entitled to and are funded to receive through the NDIS.
>
> In the closed chambers of the AAT, what happens to people with disability is being decided with the input of often junior lawyers and tribunal registrars and members.
>
> … Allowing increasing numbers of unfair decisions to be made by the NDIA and then expecting the AAT to reverse them in large-scale numbers is a traumatic waste of public funds, an improper process and not consistent with truly accountable government.[63]

3.74 Speaking to applicants in social security and family assistance matters more broadly—including for people with cognitive or physical disability—Economic Justice Australia suggested that AAT members be appointed to these areas only if regard had been given to the member's 'background and specialist, non-legal expertise'. It explained that:

> Our members' casework experience demonstrates that if AAT members lack the knowledge, expertise and experience to elicit all the relevant information from vulnerable cohorts at a hearing, and appropriately exercise discretion in the application of the relevant law or policy, decisions can be made which cause further harm.[64]

3.75 The AAT's Annual Report for 2020–21 pointed to the appointment of Deputy President Fiona Meagher as the NDIS Division Head on 17 December 2020. Following this, the Division had:

> … developed a caseload strategy which encourages responsiveness, flexibility and timely case management by utilising members and conference registrars nationally and leveraging the Tribunal's recent digital transformation.[65]

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62 People with Disability Australia, *Submission 27*, pp. 2, 7.

63 People with Disability Australia, *Submission 27*, pp. 3–4.

64 Economic Justice Australia, *Submission 21*, [pp. 2, 4].

65 Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 49.

Chapter 4
The selection of AAT members

4.1 Inquiry participants raised serious concerns with the lack of transparency around the appointment of members to the Administrative Appeals Tribunal (AAT). There were repeated claims that the selection of members—particularly in recent years—has been inappropriately influenced by personal connections and political affiliations.

4.2 This chapter first provides background information on the role of AAT members and the current protocol for appointments. It then considers the evidence received from inquiry participants on the AAT member appointment process. Finally, it sets out the various suggestions put forward by submitters to improve the process.

AAT members

4.3 As of 24 November 2021, there were 313 members appointed to the AAT, comprising 112 full-time members and 201 part-time members.[1] The AAT explained that it consists of the following membership:

- a President, who must be a judge of the Federal Court;
- Deputy Presidents, who may also be judges of the Federal Court or Federal Circuit and Family Court;
- Senior Members; and
- Members.[2]

4.4 The President of the AAT must ensure the 'expeditious and efficient discharge of the business of the Tribunal', as well as manage the administrative affairs of the AAT. The AAT advised that, in general, the President directs the allocation of applications for review to Divisions, and while the President and Deputy Presidents can exercise powers in any Division, Senior Members and Members may only exercise power in the Division (or Divisions) to which they have been assigned.[3]

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[1] Administrative Appeals Tribunal, *Submission 1*, p. 5; Attorney-General's Department, *Submission 5*, p. 5. A full list of statutorily appointed members is available via the AAT webpage at: https://www.aat.gov.au/AAT/media/AAT/Files/Corporate/StatutoryAppointments.pdf. At the time of writing, that list was last updated on 7 March 2022.

[2] Administrative Appeals Tribunal, *Submission 1*, p. 5. See also s. 5A of the *Administrative Appeals Tribunal Act 1975*.

[3] Administrative Appeals Tribunal, *Submission 1*, p. 6.

Role of members

4.5 Members of the AAT are independent statutory appointees who hear and decide applications for review of government decisions. Members are required to:

- interpret and apply relevant legislation to factual scenarios;
- conduct hearings and other processes in a procedurally fair manner; and
- make well-reasoned and timely decisions based on relevant criteria and evidence.[4]

4.6 Suitably qualified members may also conduct alternative dispute resolution processes.[5]

4.7 The AAT submitted that non-judicial members come from a range of backgrounds and with diverse areas of expertise, including in 'accountancy, disability law, medicine, migration, military affairs, public administration, science and taxation'.[6]

4.8 Members are appointed on a full-time or part-time basis and may be assigned to one or more AAT Divisions. They are remunerated in accordance with determinations made by the Commonwealth Remuneration Tribunal.[7]

4.9 The AAT stated that it supports members to discharge their statutory responsibilities through the provision of administrative, research and case management assistance, as well as professional development programs.[8]

Professional development

4.10 The AAT advised that all newly appointed members participate in its Induction Program, involving an 'orientation seminar, an induction course and practical training' and the provision of information on the Australian Public Service Code of Conduct. In addition, new members are usually paired with experienced members, as part of a 'peer mentoring strategy to assist new members adjust to their new role quickly and effectively'.[9]

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[4] Attorney-General's Department, *Expressions of Interest for Appointment to the Administrative Appeals Tribunal*, https://www.ag.gov.au/about-us/careers/statutory-appointments/expressions-interest-appointment-administrative-appeals-tribunal (accessed 7 March 2022).

[5] Attorney-General's Department, *Expressions of Interest for Appointment to the Administrative Appeals Tribunal*, https://www.ag.gov.au/about-us/careers/statutory-appointments/expressions-interest-appointment-administrative-appeals-tribunal (accessed 7 March 2022).

[6] Administrative Appeals Tribunal, *Submission 1*, p. 5.

[7] Attorney-General's Department, *Expressions of Interest for Appointment to the Administrative Appeals Tribunal*, https://www.ag.gov.au/about-us/careers/statutory-appointments/expressions-interest-appointment-administrative-appeals-tribunal (accessed 7 March 2022).

[8] Administrative Appeals Tribunal, *Submission 22*, p. 4.

[9] Administrative Appeals Tribunal, *Submission 1*, p. 17.

4.11 In 2021, the AAT also introduced a Periodic Evaluation and Development program, designed to:

> … provide members with feedback early in their term of appointment and identify areas where they may benefit from further support and development. It is based around a detailed curriculum that is aligned with core competencies and promotes opportunities for collaborative learning and professional development sessions.[10]

4.12 An appraisal is then generally completed around 12 months prior to the end of the member's term of appointment, providing 'information the President may take into account in making recommendations relating to reappointment'.[11]

Termination

4.13 Section 13 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) provides for the termination of members, excluding judges. The Governor-General may terminate the appointment of a member, following an address presented by each House of Parliament in the same session, on the grounds of proved misbehaviour, physical or mental incapacity or on other specified grounds (as detailed in section 13(2) of the AAT Act).[12]

4.14 Section 13(3) of the AAT Act allows the Governor-General to terminate the appointment of a member to the Migration and Refugee Division (MRD) if the member has a 'direct or indirect pecuniary interest in an immigration advisory service'.[13]

Current selection process

4.15 The legislative basis for appointment is provided by section 7 of the AAT Act, allowing the Governor-General to appoint members on a full-time or part-time basis for a term of up to seven years. Noting that the President must be a judge of the Federal Court, a person may otherwise be appointed as a Deputy President, Senior Member or Member if:

- they have been enrolled as a legal practitioner of the High Court or the Supreme Court of a State or Territory for at least five years; or
- in the opinion of the Governor-General, have special knowledge or skills relevant to the duties of the position.[14]

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10 Administrative Appeals Tribunal, *Submission 1*, pp. 17, 21.

11 Administrative Appeals Tribunal, *Submission 1*, p. 17.

12 *Administrative Appeals Tribunal Act 1975*, s. 13; see also, Administrative Appeals Tribunal, *Submission 1*, p. 20.

13 *Administrative Appeals Tribunal Act 1975*, s. 13(3).

14 *Administrative Appeals Tribunal Act 1975*, s. 7; Administrative Appeals Tribunal, *Submission 1*, p. 22. A person can also be appointed a Deputy President if they are a judge of the Federal Court, or the Federal Circuit and Family Court (Division 1), see AAT Act, s. 7(2).

Protocol for appointments

4.16 In 2019, the then Attorney-General, the Hon Christian Porter MP and the President of the AAT agreed to the *Protocol for Appointments to the Administrative Appeals Tribunal 2019* (2019 Protocol).[15] This revised document came into effect on 25 March 2019 and superseded the previous 2015 Protocol.[16] The Protocol operates as an exemption to the Australian Public Service Commission's *Merit and Transparency Guidelines*.[17]

4.17 According to the 2019 Protocol, vacancies on the AAT are to be filled in the following manner:

> (1) The President of the AAT will, every year, seek expressions of interest by public advertisement. The AAT will establish a register to receive applications that address selection criteria developed specifically for the AAT.
> (2) Subject to the President otherwise determining, expressions of interest will remain on the register for the calendar year they are received. Each calendar year the register will be repopulated.
> (3) The President of the AAT will establish a process to assess the suitability of applicants who have provided expressions of interest to the register.
> (4) The President of the AAT will supply the Attorney-General with:
>
> > (a) the AAT's assessment of what positions need to be filled and at what level; and
> > (b) advice about which members whose terms are expiring have sought reappointment; and
> > (c) the President's recommendations regarding whether reappointments should be offered and at what level; and
> > (d) the President's recommendations regarding suitable candidates for appointment that should be offered and at what level for positions where the President has recommended that reappointments should not be offered.
>
> (5) The process described in paragraph 4 will be conducted every six months and six months ahead of the vacancies arising, or as otherwise requested by the Attorney-General.

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15 Administrative Appeals Tribunal, *Submission 1*, p. 22.

16 Attorney-General's Department, *Submission 5*, p. 6. Copies of the 2015 and 2019 Protocols can be found in the Attorney-General's Department submission to this inquiry. A copy of the 2015 Protocol is also available here: Attorney-General's Department, answer to question on notice, question no. SBE16/061, Senate Legal and Constitutional Affairs Legislation Committee Supplementary Budget Estimates 2016–17, 18 October 2016 (received 16 February 2017).

17 Attorney-General's Department, *Submission 5*, p. 6.

(6) The President of the AAT's recommendations to the Attorney-General will be made having had regard to the outcomes of the process to assess the suitability of applicants who have provided expressions of interest to the register.
(7) The Attorney-General is not limited to candidates recommended by the President of the AAT and may choose to recommend to Cabinet a candidate for a position that has not been suggested by the President of AAT or is not on the register.
(8) The Attorney-General will consult ministerial colleagues who must be consulted in respect of potential appointments to particular Divisions.
(9) The Attorney-General will then recommend appointments to Cabinet. If the appointment(s) receive Cabinet's approval, the Attorney-General will recommend the appointment(s) to the Governor-General for consideration.[18]

Required competencies

4.18 In relation to point 1 of the 2019 Protocol, individuals seeking to lodge an expression of interest in becoming an AAT member are provided with a list of identified competencies required for the member roles at different levels, compiled by the AAT.[19]

4.19 The competencies are:

- Conducting hearings and other Tribunal proceedings
- Decision-making and reasoning
- Writing and communication skills
- Independence, integrity and collegiality
- Productivity, diligence and resilience.

4.20 Additionally, occupants of the role of Deputy President and Senior Member must also demonstrate an additional competency of leadership.[20]

Assessing the suitability of applicants

4.21 The AAT advised the committee that it consults the register of expressions of interest (EOI) when a need is identified for particular member positions. It explained:

> The processes for assessing expressions of interest differ depending on the seniority of the position(s) and the urgent need for the position(s) to be

[18] Attorney-General's Department, answer to question on notice, question no. 7 (portfolio question number BE19-007), Senate Legal and Constitutional Affairs Legislation Committee Budget Estimates 2019–20, 4 April 2019 (received 24 May 2019).

[19] Administrative Appeals Tribunal, *Submission 1*, p. 30. A full copy of the identified member competencies can be found in the AAT submission to this inquiry.

[20] Administrative Appeals Tribunal, *Submission 1*, p. 22.

> filled. In all instances, candidates are assessed against the competencies listed in the advertisement and any additional criteria relevant to specific roles.[21]

4.22 Additionally, information published online explaining the selection process to applicants advises that:

> Recommendations by the AAT will be made on the basis of merit and the AAT's current and future needs and will include a recommendation as to the appropriate division or divisions to which a potential member should be assigned. The AAT may decide to conduct an interview process to assess the suitability of candidates.[22]

Recommendations to the Attorney-General

4.23 As set out in point 4 of the 2019 Protocol, the AAT President provides the Attorney-General with recommendations on the appointment and reappointment of members.

4.24 The AAT advised that its Heads of Divisions regularly communicate information about the operational needs of the AAT and possible future membership requirements to the President. This in turn informs the President's advice to the Attorney-General.[23]

4.25 The AAT President's recommendations for new appointments are made by reference to the register of EOI, with candidates assessed against the published member competencies outlined above.[24]

4.26 In regard to reappointments, the President's recommendations are informed by a member appraisal process, involving an external reviewer preparing a report 'based on a range of information', which might include:

> … a self-assessment by the member, observation of a hearing or listening to a hearing recording, review of written decisions and statistical information and a meeting with the member.[25]

4.27 The reviewer assesses a member's performance against the member competencies, and, if any issues are raised, the following takes place:

> … the member is invited to an interview before an independent panel, which usually comprises current and former judges and tribunal members and a representative of the Attorney-General's Department.

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[21] Administrative Appeals Tribunal, answers to written questions on notice, 8 December 2021 (received 23 December 2021).

[22] Attorney-General's Department, *Expressions of Interest for Appointment to the Administrative Appeals Tribunal*, https://www.ag.gov.au/about-us/careers/statutory-appointments/expressions-interest-appointment-administrative-appeals-tribunal (accessed 7 March 2022).

[23] Administrative Appeals Tribunal, *Submission 1*, p. 22.

[24] Administrative Appeals Tribunal, *Submission 1*, p. 22.

[25] Administrative Appeals Tribunal, *Submission 1*, p. 23.

The independent panel makes recommendations to the President about suitability for reappointment.[26]

4.28 Under section 17C of the AAT Act, the Minister must consult with the President, prior to assigning a non-presidential member to one or more Divisions of the AAT (some Divisions require additional considerations by the Minister, such as whether the member has relevant training or experience in the subject matter for the Division).[27]

4.29 Section 8 of the AAT Act provides that an appointed member holds office for at most seven years 'but is eligible for reappointment'. The length of appointment is specified in the instrument of appointment; terms and conditions on a member can also be determined by the Minister, in writing.[28]

Role of the Attorney-General's Department

4.30 The Attorney-General's Department (AGD) advised that it does not hold a 'prescribed role' under the 2019 Protocol. It advised that it supports the AAT and the Attorney-General by:

(a) managing public advertising for the EOI register;
(b) hosting the EOI register on the department's IT infrastructure;
(c) providing information to the AAT about the EOIs received;
(d) providing advice to the Attorney-General on the President of the AAT's assessment of the AAT's appointment needs and the candidates that have been recommended for appointment (this does not typically include an analysis of the merits of the candidates appointed)
(e) following the Attorney-General's identification of suitable candidates, supporting the Attorney-General to process candidates through the Government's appointment process, including seeking curricula vitae and Private Interests Declarations from proposed candidates and drafting appointments documentation.[29]

Recent calls for expressions of interest

4.31 The most recent call for EOI was made on 16 April 2021. It will remain open until 29 April 2022, or until a new call is advertised. The AGD stated that as at 3 December 2021, there were 439 applications on the register.[30]

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[26] Administrative Appeals Tribunal, *Submission 1*, p. 23.

[27] *Administrative Appeals Tribunal Act 1975*, s. 17C; Administrative Appeals Tribunal, *Submission 1*, p. 23.

[28] *Administrative Appeals Tribunal Act 1975*, s. 8.

[29] Attorney-General's Department, answers to written questions on notice, 1 December 2021 (received 22 December 2021). See also: Attorney General's Department, *Submission 5*, pp. 7–8.

[30] Attorney-General's Department, answers to written questions on notice, 1 December 2021 (received 22 December 2021).

4.32 Prior to 2021, the last call for EOI was on 8 August 2019, and the register remained open until 8 September 2019.[31] This was the first instance of the EOI register and 800 applications were received. The process informed 30 member appointments announced in 2020.[32] The committee was informed that no EOI process was conducted in 2020, with the AGD advising:

> The reason was largely a practical one. On 23 April 2020, the President of the AAT wrote to the Attorney-General with recommendations to address member needs for the 2020 year, with the 2019 EOI register informing new appointments. These appointments were not finalised until December 2020.[33]

4.33 In response to questions from the committee, the AGD acknowledged that 'the absence of an expression of interest process in 2020 is not consistent with the text of the [2019] Protocol'.[34]

Concerns with the selection process

4.34 As point 7 of the 2019 Protocol makes clear, the Attorney-General is not bound by the recommendations put forward for appointment by the AAT President. The Attorney-General may instead choose to recommend to Cabinet a candidate for a position that has not been suggested by the President, or is not on the EOI register. As the AAT submission emphasised, appointments are 'ultimately a decision for the Government'.[35]

4.35 This scope for ministerial discretion was considered by several submitters to lead to adverse outcomes for the AAT and how it is perceived by the public. Concerns were repeatedly put forward in evidence that a lack of transparency and independence in the appointment process was significantly undermining the public credibility of the Tribunal.

Ministerial discretion and political patronage

4.36 The committee heard that the current process for appointing AAT members carries the risk of appointments based on political patronage, rather than on merit.

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[31] Attorney-General's Department, answers to written questions on notice, 1 December 2021 (received 22 December 2021).

[32] Attorney General's Department, *Submission 5*, p. 7.

[33] Attorney-General's Department, answers to written questions on notice, 1 December 2021 (received 22 December 2021).

[34] Attorney-General's Department, answers to written questions on notice, 18 January 2022 (received 25 January 2022).

[35] Administrative Appeals Tribunal, *Submission 1*, p. 22.

4.37 A number of inquiry participants submitted that the appointment of AAT members—particularly in recent years—has been unduly influenced, or perceived to be unduly influenced, by personal connections and political affiliations. They observed that this trend (or at the very least the perception of this trend) undermined the promotion of public trust and confidence in the decision-making of the AAT.[36]

4.38 For example, the Grattan Institute put to the committee that the current appointment process of the AAT did not adequately protect the independence or quality of the institution. It characterised the process as being 'very opaque' and operating with a high degree of ministerial discretion, arguing that this resulted in insufficient safeguards to uphold the actual and perceived independence of the system.[37]

4.39 The Australian Lawyers Alliance (ALA) asserted that there had been a history of partisan appointments to the AAT. It expressed concern that the AAT's public credibility was at risk of criticism due to the repeated occurrence of partisan appointments.[38]

4.40 Dr Jason Donnelly, an administrative law barrister and senior lecturer at the School of Law at Western Sydney University, set out the dangers stemming from a perception of such undue political influence:

> Members of the public may very well form the view that a person has received a statutory appointment not necessarily because they are the best person for the job but rather because of some political connection. Whether that hypothesis is true, with respect, is beside the point. Critically, what ultimately matters is the perception of the Australian community.[39]

4.41 The Law Council of Australia (Law Council) argued that the current method 'affords the Attorney-General significant discretion in the appointment process'. It drew attention to public comments it had made previously suggesting that the appointment process was 'secretive with the potential to

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[36] See for example: Assistant Professor Narelle Bedford, *Submission 24*, p. 5; Melbourne Law School, *Submission 14*, p. 2; Faculty of Law, Monash University, *Submission 11*, p. 3; Law Council of Australia, *Submission 23*, p. 7–9; Accountability Round Table, *Submission 10*, p. 5; Refugee Legal, *Submission 32*, pp. 10–11; Dr Bruce Baer Arnold, *Submission 6*, p. 2; Refugee Council of Australia, *Submission 16*, p. 5; Carina Ford Immigration Lawyers, *Submission 19*, pp. 6–8; Refugee Advice and Casework Service, *Submission 20*, pp. 3–5; Professor Gabrielle Appleby, Dr Lynsey Blayden, Dr Chantal Bostock and Dr Janina Boughey, *Submission 29*, p. 3; Asylum Seeker Resource Centre, *Submission 30*, p. 7.

[37] Grattan Institute, *Submission 12*, p. 3.

[38] Australian Lawyers Alliance, *Submission 2*, p. 7.

[39] Dr Jason Donnelly, *Submission 4*, p. 6.

undermine public confidence', and that 'any lack of transparency impacts on the reputations of all members of the AAT, which is unfair'.[40]

4.42 The Law Council made strong public statements following a number of appointments to the AAT in the lead-up to the 2019 federal election. The Law Council drew attention to the nature of these appointments:

> The Federal Government's announcement of 34 new appointments to the AAT made without community consultation and 52 reappointments for existing members is concerning, as a number of members have been re-appointed before the expiration of their current terms.
>
> There is a concern that reappointment of members well before the expiry of their current terms, in the context of an upcoming Federal election, may give rise to a reasonable apprehension that decisions are affected by political considerations and therefore compromises the reputation of the Tribunal.
>
> The appearance of a conflict of interest can be just as damaging to the AAT's integrity as an actual conflict.[41]

4.43 The Grattan Institute provided the committee with 2019 analysis suggesting that 69 of the then 336 AAT members (or 29 per cent) had a 'direct political affiliation'.[42] Of those 69 politically affiliated members, 64 were affiliated with the Coalition Government, the same party that appointed them to their positions.[43]

4.44 The Grattan Institute advised that the politically affiliated members were less likely to have had legal training, with approximately 52 per cent having had some legal training, compared to 75 per cent of non-politically affiliated members. Additionally, AAT members with political affiliations were also, on average, appointed for longer terms that those members without political affiliations.[44] As set out earlier in this chapter, the length of appointment and

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[40] Law Council of Australia, *Submission 23*, p. 8; Law Council of Australia, 'AAT appointments must be transparent and merit-based', *Media Release*, 22 February 2019, https://www.lawcouncil.asn.au/media/media-releases/aat-appointments-must-be-transparent-and-merit-based (accessed 12 January 2022).

[41] Law Council of Australia, 'AAT appointments must be transparent and merit-based', *Media Release*, 22 February 2019, https://www.lawcouncil.asn.au/media/media-releases/aat-appointments-must-be-transparent-and-merit-based (accessed 12 January 2022).

[42] The Grattan Institute advised that it took a 'conservative' approach to identifying political affiliations, focusing on appointees with direct political experience,rather than other political or ideological links. Appointees are categorised as having a 'direct political affiliation' if the person has previously worked in politics; for example, as a politician, advisor or employee of a political party.

[43] Grattan Institute, *Submission 12*, p. 4.

[44] Grattan Institute, *Submission 12*, p. 5.

the decision to reappoint a member is at the discretion of government, subject to a maximum term of seven years.

4.45 Based on its analysis, the Grattan Institute argued that the number of AAT members with political affiliations had increased in recent years. In the 12 years before 2015–16, 4 per cent of appointees had political affiliations, compared to 29 per cent in the five years since.[45]

4.46 Based on material obtained through a Freedom of Information (FOI) process, the Grattan Institute set out a case study related to a round of AAT appointments commencing in late 2018 and finishing in early 2019. It argued that the example clearly illustrated that politically affiliated appointments are concentrated among 'captain's picks' by the Minister:

> The documents show the President of the AAT wrote to the Attorney-General's Department in late-2018 with recommendations for appointments, reappointments, and promotions of AAT members.
>
> Email exchanges between the Attorney-General's office and the department, after the department received the President's recommendations, show that the Attorney-General then recommended several additional appointments. Many of these candidates, who were subsequently appointed to the AAT were not known to the department.[46]
>
> Of the 18 additional appointments advanced by the Minister [the Attorney-General] and disclosed in these FOI records, 10 (55 per cent) had a direct political affiliation with the Coalition and three had other connections to the Coalition but do not meet our definition of a direct political affiliation.[47]

4.47 In setting out the case study, the Grattan Institute emphasised that it was not arguing that any specific AAT appointees with political affiliations were not appointed on merit. However, it made clear its position that the high share of member appointments with direct political affiliations, coupled with the fact that these affiliations were almost exclusively from the 'same side' of politics as the appointing Attorney-General, raised concerns that factors other than merit may be influencing choices.[48]

4.48 The Law Council submitted that all appointments and reappointments to the AAT should be, and be seen to be, non-political, in order to ensure public confidence in the institution and the soundness of decision-making.[49] It recommended that AAT appointments be subject to a merit-based protocol

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[45] Grattan Institute, *Submission 12*, p. 6.

[46] The Grattan Institute clarified that in many of these cases, the department had to request the contact details and CVs of the new appointments.

[47] Grattan Institute, *Submission 12*, p. 7. Footnotes from original omitted.

[48] Grattan Institute, *Submission 12*, p. 8.

[49] Law Council of Australia, *Submission 23*, pp. 8–9.

that promotes greater transparency and involves consultation with key stakeholders, including members of the Australian legal profession.[50]

4.49 Specifically, it drew the committee's attention to a policy on the process of judicial appointments (extending to appointments of members and presidents of the AAT) endorsed by its Directors in June 2021:

> The Appointments Policy sets out a process for identifying candidates, consulting with members of the Australian legal profession as part of the assessment of candidates, conducting interviews, considering candidates, making recommendations to the Attorney-General, and preserving accountability and confidentiality. It is submitted that the adoption and adherence to such a process will go a long way to restoring public trust in the appointment process for AAT members, and the Law Council commends the Appointment Policy to the Committee.[51]

Suitability for the role

4.50 As referenced earlier in this chapter, subsection 7(3) of the AAT Act outlines:

> A person must not be appointed as a senior member or other member unless the person:
>
> (f) is enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years; or
>
> (g) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a senior member or member. [52]

4.51 Submitters identified that the 'special knowledge or skills' criterion could be abused through ministerial discretion to make appointments based on political expediency, rather than on merit as the AAT Act intended.

4.52 They also highlighted the minimal transparency surrounding the Attorney-General's decision-making process when recommending candidates to Cabinet, identifying that this was particularly problematic when it came to additional candidates who had not been recommended by the AAT President.[53]

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[50] Law Council of Australia, *Submission 23*, p. 9.

[51] Law Council of Australia, *Submission 23*, pp. 8–9.

[52] *Administrative Appeals Tribunal Act 1975*, ss. 7(3).

[53] See for example: Australian Lawyers Alliance, *Submission 2*, p. 7; Dr Jason Donnelly, *Submission 4*, p. 6l; Grattan Institute, *Submission 12*, pp. 2–4.

4.53 For example, in regard to ministerial 'captain's picks', the Grattan Institute argued that:

> This lack of transparency provides the opportunity for ministers to nominate their political friends and colleagues, without having them tested through a merit selection process.[54]

4.54 The Melbourne Law School likewise commented:

> Not all members are appointed having lodged an expression of interest. The precise process concerning the nomination and appointment of many members remains a mystery.[55]

4.55 The Grattan Institute contended that the inappropriate use of ministerial discretion for appointments carried several risks, namely:

- that appointees will lack the necessary skills and experience to effectively carry out their responsibilities, given they have not been tested through a merits-based process or actively compared to other candidates, and
- that appointees with political affiliations may be less willing to make a decision that might embarrass or upset the government that appointed them, thereby undermining the actual and perceived independence of the AAT.[56]

4.56 In a similar vein, Emeritus Professor Terry Carney AO, an expert on social security law with extensive experience as a member of the AAT, observed that when appointments are made without any proper evaluation of suitability, or against the advice of that process, harm is done to both applicants and to the institution of justice.[57]

4.57 The New South Wales Bar Association (NSWBA) took the view that AAT members should have a sufficient level of competence to make the 'correct or preferable administrative decision'. It detailed the negative impacts that cascaded from members lacking relevant expertise:

> A lack of experience, qualification or skills results in a poor quality of administrative decision making. Poorer quality decision-making can result in the needless expenditure of public money in judicial review proceedings. More importantly, it results in injustice in individual cases, whether that is because the party must then expend further funds and time seeking judicial review, or because the decision made is not the '*correct or preferable*' one.[58]

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[54] Grattan Institute, *Submission 12*, p. 4.

[55] Melbourne Law School, *Submission 14*, p. 6.

[56] Grattan Institute, *Submission 12*, p. 8.

[57] Emeritus Professor Terry Carney AO, *Submission 8*, p. 2.

[58] New South Wales Bar Association, *Submission 26*, p. 2. Emphasis in original.

Observations from the Callinan Report

4.58 The 2018 statutory review of the AAT, completed by the Hon Ian Callinan AC QC in 2018 and tabled in Parliament in 2019 (the Callinan Report) examined the issue of AAT appointments and the qualifications of members.

4.59 In considering the criticisms of 'political appointments' received by the review, the final report observed that political engagement (either as a politician or an employee of one) is no more a disqualification for office than employment as a public servant, and that service of those kinds may prove useful experience in undertaking merits review. Notwithstanding these views, Justice Callinan concluded:

> But no matter what other qualifications a candidate for appointment to the AAT might have, overwhelmingly submitters favour, as I do, the appointment of people of good character, even temperament, diligence, possessing legal qualifications, and selected as a result of a transparent process.[59]

Conduct and conflicts of interest

4.60 The AAT advised that it promotes and encourages high standards of personal integrity and ethical behaviour by members and staff. The Conduct Guide for AAT Members provides guidance on the appropriate conduct and behaviour of members, both in public duties and in private conduct.[60]

4.61 In regard to managing perceptions of bias and conflicts of interest, the AAT submitted that its members have a 'responsibility to understand and adhere to their professional obligations'. These obligations include the need for impartiality and independence, and 'the need to behave with honesty, integrity, courage and professionalism in all aspects of their duties as a member'.[61]

4.62 Section 14 of the AAT Act requires disclosure of conflicts of interest (pecuniary or otherwise) by members, for the purposes of a proceeding before the Tribunal and where the interest 'could conflict with the proper performance of the member's functions in relation to the proceeding'.[62]

4.63 During the 2021–22 Supplementary Budget Estimates proceedings of the Senate Legal and Constitutional Affairs Legislation Committee, there was

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[59] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, pp. 170–171.

[60] Administrative Appeals Tribunal, *Submission 1*, p. 20. The Conduct Guide can be found at: https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Conduct-Guide-for-AAT-Members.pdf (accessed 11 January 2022).

[61] Administrative Appeals Tribunal, *Submission 22*, p. 21.

[62] Administrative Appeals Tribunal, *Submission 1*, p. 21.

discussion with the AAT about their inadequate processes to identify potential conflicts of interest.[63]

4.64 The then AAT Registrar, Ms Sian Leathem, accepted that there was a 'pressing need' for improvement in that area and advised that 'work was underway' to rectify the situation.[64]

4.65 In its November 2021 submission to the inquiry, the AAT provided the committee with general information on how it handles conflicts of interest; however, it did not provide a specific time frame for the introduction of the new processes as identified by Ms Leathem. It advised:

> In addition to ensuring information is made available to members about their [conflict of interest] obligations, further steps are being taken to raise and reinforce awareness of them. The Attorney-General's Department has recently initiated processes to facilitate providing the AAT with notice of any personal interests declared by a member as part of the appointment process, offering the opportunity for the AAT to raise any potential areas of concern with the member. [65]

4.66 The AAT continued that:

> To facilitate ongoing consideration by members across all Divisions of these matters, the AAT will introduce a declaration process for new members and an annual declaration process for existing members relating to these and other relevant obligations. This will supplement the process already undertaken where new members assigned to the Migration & Refugee Division are asked to complete a potential conflict of interest declaration, which is kept on an internal register to assist with appropriate case allocation.[66]

Duration of appointments

4.67 As previously noted, appointments to the AAT can be made for a period of up to seven years.

4.68 The Law Council expressed concern about a lack of consistency in the duration of appointments, suggesting there was no 'clear basis for the duration of any given appointment'. It was of the view that appointments for a limited time carried the 'potential to damage the perceived independence of the AAT' because:

> … it may be apprehended that members whose reappointment is imminent could be concerned about deciding matters adversely to government agencies. This would tend to undermine the public perception

[63] See: *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 26 October 2021, pp. 19–21.

[64] Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 26 October 2021, p. 21.

[65] Administrative Appeals Tribunal, *Submission 1*, p. 21.

[66] Administrative Appeals Tribunal, *Submission 1*, p. 21.

> in the fair and impartial administration of justice. Conversely, appointing members for a longer term runs the risk of a tribunal having members who underperform or lack the skills, or legal or specialist knowledge, to make objective and effective decisions.[67]

4.69 The Law Council's preferred approach was for long-term appointments to 'go hand in hand' with improvements to the appointments process, to ensure that the 'independence, skills and knowledge of members is appropriate for their role'.[68]

4.70 The Asylum Seeker Resource Centre (ASRC) stated that the duration of regular AAT appointments should be consistent, provided by law, and not at the discretion of the Attorney-General. It argued for this because:

> … the variable length of AAT appointments also makes appointments more vulnerable to politicisation and is done on an unclear basis. For example, appointments in 2019 were for a mix of 3, 5, and 7 years, without explanation for this variation. The issue of the length of appointment can have implications for adjudicative independence, as Tribunal appointees holding shorter terms may be perceived by the public as incentivised to placate the government through upholding its decisions on review and thus earn reappointment.[69]

4.71 The Tax Institute submitted that member tenure should be extended beyond the current standard, as it would better facilitate an increased consistency and organisational memory in AAT decisions.[70]

Legal qualifications of members

4.72 As canvassed earlier in this chapter, under the AAT Act it is a requirement of appointment to the AAT that members have either five years enrolment as a legal practitioner, or have special knowledge or skills relevant to the duties of the position.

4.73 According to the AGD:

> The mechanism for appointing members under section 7 is intended to ensure that the AAT is constituted by individuals who have a wide range of experiences which make them well placed to undertake merits review. These individuals do not necessarily need a legal background, but instead may be appointed for their professional and technical expertise, knowledge or skills. For example, this knowledge could be in relation to accountancy, medicine, taxation, defence or public administration.[71]

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67 Law Council of Australia, *Submission 23*, p. 10.

68 Law Council of Australia, *Submission 23*, p. 10.

69 Asylum Seeker Resource Centre, *Submission 30*, p. 12.

70 Tax Institute, *Submission 25*, p. 4.

71 Attorney-General's Department, *Submission 5*, p. 5.

4.74 Inquiry participants expressed varying views as to whether members should be required to hold legal qualifications.

4.75 In relation to the qualifications of members, the Callinan Report observed that given much of the work of the AAT is 'difficult, factually and legally', it was essential that members had the capacity to undertake forensic analysis and write reasoned judgments.[72]

4.76 It also opined that, with one exception, there was no necessity to appoint professionals other than lawyers to the AAT, given that courts and tribunals are 'well accustomed' to deciding issues in disciplines other than legal ones by analysing differing expert opinions.[73]

4.77 Consequently, Measure 6 of the Callinan Report proposed that:

> All further appointments, re-appointments or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit (a possible exception is appointment to the Taxation and Commercial Division to which competent accountants might be appointed). This may happen without repeal of s 7(3)(b) of the AAT Act, although repeal is, for certainty, desirable.[74]

4.78 Some submitters endorsed the sentiments expressed in the Callinan Report and argued for the need for legal qualifications, citing the increasing complexity of the cases before the AAT.[75]

4.79 For example, Dr Donnelly submitted that legal practitioners and judges are best suited to undertake the 'complex and progressively difficult nature of work' undertaken by the AAT.[76]

4.80 The Law Council commented that while it did not think it necessary that all AAT members have legal qualifications, it acknowledged that the complexity of legislative schemes considered by the AAT should necessitate a 'baseline quota of legally qualified members at any one time'.[77]

[72] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 9.

[73] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 175.

[74] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 9.

[75] See for example: Refugee Advice and Casework Service, *Submission 20*, p. 5.

[76] Dr Jason Donnelly, *Submission 4*, pp. 3–6.

[77] Law Council of Australia, *Submission 23*, pp. 8–9.

4.81 Other submitters also argued that members working in the MRD needed to be legally qualified. For example, the Refugee Council of Australia (RCA) drew attention to the delays in MRD, positing that the delays were in part due:

> … to the politicisation of appointments, especially where members appointed to the MRD do not have legal qualifications or expertise in refugee law. We believe the appointment of independent, qualified and expert decision makers at the MRD will also significantly improve the ongoing backlog.[78]

4.82 The RCA recommended that, given the complexity of refugee and migration law, MRD matters should be heard by qualified members well-trained in those areas to ensure that they possessed the requisite skills to assess protection claims accurately and fairly.[79] On a similar basis, the ASRC recommended that all AAT members have legal qualifications and a minimum of 5 years relevant legal experience.[80]

4.83 Professor Greg Weeks of the Australian National University College of Law (who submitted in a private capacity) echoed the Callinan Report observations. He noted that many AAT decisions are made within a highly complex matrix of legislation and policy, and therefore in such cases, legal qualifications are 'likely to equip members to make better decisions'.[81]

4.84 However, he also observed that AAT members without legal qualifications but who have relevant 'special knowledge and skills' nonetheless have that capacity to contribute enormously to the merits review jurisdiction, saying:

> Their contribution includes serving as a reminder that the AAT was not designed to function as a court, something that might be forgotten if almost all members were legal practitioners. [82]

4.85 He continued:

> There is a view that the increased formality in tribunal decision-making in England and Wales has been caused by the loss of "specialist tribunal members who had accumulated a wealth of knowledge and experience which enabled matters to be dealt with more expeditiously and with greater compassion shown to litigants". Such a state of affairs should not be allowed to befall the AAT.[83]

4.86 Professor Weeks proposed two ways forward on the matter. The first was to constitute the AAT of more than one member, at least one of whom is legally

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78 Refugee Council of Australia, *Submission 16*, pp. 3–4. The operation of the MRD is discussed later in this report.

79 Refugee Council of Australia, *Submission 16*, p. 5.

80 Asylum Seeker Resource Centre, Submission 30, p. 36.

81 Professor Greg Weeks, *Submission 7*, p. 5.

82 Professor Greg Weeks, *Submission 7*, pp. 4–5. Citations in original omitted.

83 Professor Greg Weeks, *Submission 7*, pp. 4–5. Citations in original omitted.

qualified, in a greater number of proceedings.[84] Alternatively, he suggested that an undergraduate law degree from an Australian university be considered to meet the statutory requirement of 'special knowledge or skills' as a qualification for appointment.[85] He explained:

> Expanding this qualification to include legally educated persons, who possess relevant experience but do not necessarily work as legal practitioners, is likely to expand the pool of appropriately qualified potential members. It could also bring the benefits of legal experience to more AAT decisions without necessarily making the AAT more closely resemble a court due to the increased involvement of legal practitioners.[86]

4.87 Professor Carney indicated that he 'flatly rejected' the suggestion originating in the Callinan Report that only legally qualified members be appointed. He elaborated:

> 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.[87]

4.88 The NWSBA recommended the enactment of more detailed suitability criteria for AAT members, to ensure that those selected had relevant legal qualifications (excluding the Taxation and Commercial Division, where the relevant criteria should include being an accredited accountant).[88]

4.89 The Melbourne Law School suggested that, rather than repealing and narrowing section 7(3) of the AAT Act to require all members to be experienced and enrolled legal practitioners, it should be amended to ensure that all AAT members demonstrate specific core competencies, as well as specialist expertise in any of the respective jurisdictions within the AAT (for example, migration, taxation, social security) if they do not possess the legal practice experience currently required by the AAT Act.[89]

4.90 It explained:

> We acknowledge that legal practice skills and experience are vital to a properly functioning tribunal, because lawyers have a deep conceptual and practical understanding of independence and adjudication.

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[84] Professor Greg Weeks, *Submission 7*, pp. 4–5.

[85] Professor Greg Weeks, *Submission 7*, p. 2.

[86] Professor Greg Weeks, *Submission 7*, p. 6.

[87] Professor Terry Carney, *Submission 8*, p. 3.

[88] New South Wales Bar Association, *Submission 26*, pp. 2–3.

[89] Melbourne Law School, *Submission 14*, p. 8.

> Legal skills and experience may be a core competency but other professional skills and expertise in accountancy, aviation, cultural heritage, environmental science, indigenous laws and culture, health and veteran affairs are also core to some of the AAT's jurisdictions.[90]

The need for an open, competitive process

4.91 The majority of inquiry participants strongly argued for a more open, rigorous appointment process to allay integrity and independence concerns and bolster the public credibility and efficiency of the AAT.

4.92 For example, the ALA submitted that there was a pressing need to ensure that the appointment process was open, fair, transparent, and merit-based in order to promote equity and diversity, as well as reduce the potential for appointments made on the basis of political patronage.[91]

4.93 Submissions to the committee outlined various proposals to achieve this goal, with many suggesting the use of an independent panel or body. The following section briefly outlines a selection of these recommended approaches.

4.94 Assistant Professor Narelle Bedford from the Faculty of Law at Bond University (who submitted in a private capacity) highlighted that the selection process for AAT members had been 'a matter of debate' for some time. She pointed out that sound proposals for reform had been recommended by various expert bodies over many years, but that successive governments had failed to implement them. She argued that any reform should draw on past recommendations by experts, rather than be delayed by a process seeking to 'reinvent the wheel'.[92]

4.95 The Council of Australian Tribunals (COAT), drew the committee's attention to its publication *Tribunal Independence in Appointments – A Best Practice Guide* (COAT guide), which was released in 2016 following research and consultation with stakeholders. The guide is designed to assist governments and tribunal heads to develop processes for the appointment of tribunal members. It proposes that the appointment of tribunal members be merit-based and provides guidance for assessing merit.[93]

4.96 According to the best practice model outlined in the COAT guide, an appointment process for tribunal members should have five stages, as follows:

- *Recruitment* is the process of identifying potential candidates for appointment.

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90 Melbourne Law School, *Submission 14*, p. 4.

91 Australian Lawyers Alliance, *Submission 2*, p. 7; Assistant Professor Narelle Bedford, *Submission 24*, p. 4.

92 Assistant Professor Narelle Bedford, *Submission 24*, pp. 4–6.

93 Council of Australian Tribunals, *Submission 18*, [p. 2].

- In the *assessment* stage, applicants are assessed for suitability for the position and those found to be unsuitable are excluded from further consideration.
- The Minister then makes a *selection* among assessed applicants to determine who shall be nominated (or recommended) for appointment.
- The *nomination* stage includes the checks, inquiries, consultations and other steps required to obtain Cabinet approval of the Minister's proposed nomination.
- The process is formally completed when the Executive Council makes an order of *appointment*.[94]

4.97 The COAT guide noted that most tribunals conduct 'open recruitment' for tribunal positions, in which positions are advertised and applications invited. It set out the value of such an approach:

> By conducting open recruitment, the Minister and the tribunal signal to the public that tribunal appointments are made from a wide and inclusive pool of applicants, through a competitive, merit-based and transparent process. The practice enhances public confidence in the independence and the excellence of the tribunal.[95]

4.98 The ALA urged the committee to consider the 1995 review of the Australian federal merits review system conducted by the Administrative Review Council (ARC)[96] which included recommendations (numbers 33 to 42) on the selection process of AAT members and terms of appointments. The ALA advised that it considered the ARC recommendations to be a sensible framework for reform and recommended they be formally adopted by the Government.[97]

Panel assessments of applicants

4.99 The COAT guide stated that when one or more tribunal positions are advertised, best practice requires that a panel is established to assess the applicants against the assessment criteria and report to the Minister. It further explained that where an assessment panel is used, it is best practice for the panel to give the Minister a guided choice from a shortlist of candidates, noting:

> The panel should give the Minister a clear indication of its preferred candidate or candidates, with reasons. The panel may indicate its

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[94] Council of Australian Tribunals, *Tribunal Independence in Appointments – A Best Practice Guide*, August 2016, p. 6. Emphasis in original.

[95] Council of Australian Tribunals, *Tribunal Independence in Appointments – A Best Practice Guide*, August 2016, p. 6.

[96] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals, Report No. 39*, November 1995.

[97] Australian Lawyers Alliance, *Submission 2*, pp. 7–9.

> preference by ranking the suitable applicants or the shortlisted applicants.[98]

4.100 Melbourne Law School recommended that an open, competitive and merits-based appointment process could be achieved by reforms to the AAT Act. In particular, it advocated that the executive should not be involved in the initial recruitment phase. It suggested that an explicit provision be introduced into the AAT Act for the establishment of an appropriately diverse and balanced 'assessment panel'. It detailed its proposal:

> This panel should convene when a recruitment process commences and applications are received. With support from the Attorney-General's department, we submit that this panel should be responsible for shortlisting applicants for initial and further assessment by the panel at interview. Shortlisted candidates must be assessed by this panel against statutory criteria ...The panel should have the power to produce a ranked shortlist of suitable applicants that either exceeds the number of positions to be filled, or fills the number of available positions. In the former instance, responsibility for recommending proposed appointments to the Governor-General would be given to the Attorney-General. In the latter instance, the list of proposed appointees would be given directly to the Governor-General and the Governor-General would then appoint the persons on that list.[99]

4.101 It also suggested that the considerations relevant to the assessment of applicants should be explicitly stated in the AAT Act, and that the AAT Act should be amended to provide that a person may not be appointed as a member unless that person has been recommended to the Attorney-General by the assessment panel.[100]

4.102 A private capacity submission from academics at the Faculty of Law and Justice at the University of New South Wales also recommended that a revised appointment process incorporate an independent panel. Further, the academics argued that any deviation from the recommended shortlist resulting from the process should be publicly explained to ensure transparency. They suggested that the appointment process include the following requirements:

- all positions are advertised;
- the criteria against which a candidate is assessed are publicly available, and include merit-based criteria (including legal and relevant knowledge, skill and expertise, and personal qualities including integrity, independence and good character), and diversity;

[98] Council of Australian Tribunals, *Tribunal Independence in Appointments – A Best Practice Guide*, August 2016, p. 8.

[99] Melbourne Law School, *Submission 14*, pp. 7–8.

[100] Melbourne Law School, *Submission 14*, pp. 8–9.

- the candidates are assessed and shortlisted against these criteria by an independent body, composed of a diverse range of members with relevant expertise, including former judges and tribunal members;
- before shortlisting candidates, the body must consult widely, including with relevant professional bodies and officeholders, and representatives of women and First Nations and other minority stakeholders;
- if the government appoints a member outside of the recommended shortlist, there must be a public explanation of why this has occurred.[101]

4.103 The Grattan Institute put forward recommendations for an improved, merit-based process involving the following key elements:

- All appointments should be advertised with published selection criteria.
- An independent panel should undertake shortlisting.
- The Attorney-General must select from the shortlist of suitable candidates.
- Independent oversight by the Public Service Commissioner of all appointments and reappointments.[102]

4.104 The NSWBA suggested that human rights norms and principles should be used to guide the AAT member selection process, if it was to 'fulfill the promise of an independent and impartial tribunal'. The International Covenant on Civil and Political Rights provides that everyone before a court and tribunal is entitled to a 'fair and public hearing by a competent, independent and impartial tribunal established by law', and the NSWBA noted that this has been considered to apply to decisions made by administrative bodies, and not just judicial forums.[103]

4.105 It called for a 'rigorous and transparent appointment process, preceded by public advertisement, and overseen by an independent appointment body or panel', with similar processes adopted for reappointments to:

> … prevent a perception that an AAT member could be denied reappointment as a result of political dissatisfaction with, or reprisal for, decisions that the member has made.[104]

4.106 In relation to the independent assessment body, the NSWBA said that such a body should be established to conduct shortlisting and interviews, and consist of politically neutral representatives, including legal professionals and the AAT, and publicly publish its shortlist of candidates. It noted that while the

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101 Professor Gabrielle Appleby, Dr Lynsey Blayden, Dr Chantal Bostock and Dr Janina Boughey, *Submission 29*, p. 5.

102 Grattan Institute, *Submission 12*, pp. 10–12.

103 Article 14(1) of the International Covenant on Civil and Political Rights, as cited in New South Wales Bar Association, *Submission 26*, p. 2.

104 New South Wales Bar Association, *Submission 26*, pp. 2–3.

ultimate power of appointment would remain with the Attorney-General, any 'deviations from the short list would require public justification'.[105]

4.107 A submission from the Faculty of Law at Monash University provided evidence around the rigorous appointment processes in place for comparative situations in the United Kingdom (UK) and Canada. Based on these processes, it recommended that an independent judicial appointments commission be set up to select AAT members (and judicial officers), with a statutory duty to attract diverse applicants from a wide field. It proposed that the process should include a public call for expressions of interest and publication of criteria for appointment, which could be modelled on the UK Judicial Appointments Commission.[106]

4.108 Dr Bruce Baer Arnold also referenced the potential of an independent commission. He suggested that the AAT should be 'depoliticised' by transferring the selection of members from a minister to an independent body that would operate on a non-partisan basis. He emphasised that such a proposal was not new or radical, given the similarity to a judicial appointments commission, where merit (rather than an expectation to produce decisions favoured by a minister) was of utmost concern. He proposed that such a selection body could comprise former judges and distinguished members of the community (from outside the legal profession), tasked with assessing applicants on the basis of expertise and publishing a list of recommended individuals. The government would then be expected to fill every vacant position on the AAT on that basis.[107]

4.109 Dr Baer Arnold made clear that this process would require expenditure; however, he argued that such expenditure would be appropriate:

> It is consistent with funding of courts, tribunals and the national legislature: in essence it is one of the legitimate costs of a liberal democracy and a price worth paying for the legitimacy of administrative review.[108]

4.110 Dr Donnelly likewise argued for the establishment of an independent statutory authority which would have the absolute legal power to recommend the statutory appointment of members to the AAT via the Governor-General. He noted:

> Critically, the statutory authority should be entirely independent of government to ensure transparency and legitimacy in the appointment of statutory members to the Tribunal.[109]

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105 New South Wales Bar Association, *Submission 26*, p. 4.

106 Faculty of Law, Monash University, *Submission 11*, pp. 3–4.

107 Dr Bruce Baer-Arnold, *Submission 6*, p. 2.

108 Dr Bruce Baer-Arnold, *Submission 6*, p. 2.

109 Dr Jason Donnelly, *Submission 4*, pp. 8–9.

Chapter 5
The AAT's Migration & Refugee Division

5.1 While the Administrative Appeals Tribunal (AAT) conducts merits reviews on a broad range of matters, the Migration and Refugee Division (MRD) is its largest Division. It is therefore not surprising that the committee received a significant amount of evidence in relation to the MRD, expressing concerns about the functioning of this Division and the impact of its operation on the lives of applicants.

5.2 This chapter considers the evidence put forward regarding the MRD, including its performance outcomes, the adequacy of the number of members, and the legislative constraints on the MRD resulting from the 2015 merger (as detailed in Chapter 1).

5.3 The chapter also considers the operation of the Immigration Assessment Authority (IAA), and the significant concerns raised about its lack of procedural fairness, inefficiencies and limitations on introducing new evidence as part of the IAA process.

Migration and Refugee Division

5.4 The AAT's 2020–21 Annual Report explained the role and function of the MRD, as reviewing decisions made under the *Migration Act 1958* (Migration Act) relating to:

> … a wide range of visas that permit non-citizens to travel to, enter and remain in Australia on a permanent or temporary basis. They include decisions to refuse to grant visas, and to cancel visas, as well as related decisions to refuse to approve business sponsors, nominated positions and business activities. Many of these decisions impact on Australian citizens, permanent residents or businesses. Delegates of the Minister administering the Migration Act generally make the decisions that are reviewable in the Division.[1]

5.5 The MRD is the largest AAT Division, with 'more lodgements and finalisations than the other divisions combined'. The AAT advised that because of this, the head of the MRD is supported by 'both national Practice Leaders and Executive Members in most states and the ACT'.[2] The AAT's 2020–21 Annual Report advises that:

> The vast majority of refugee applications were for review of a decision to refuse to grant a protection visa. This generally requires the Tribunal to consider whether the applicant is a person in respect of whom Australia

1 Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 54.

2 Administrative Appeals Tribunal, *Submission 1*, p. 7.

> has protection obligations: whether they are a refugee or, in the alternative, entitled to complementary protection.[3]

5.6 In terms of performance, the AAT submitted that since amalgamation in 2015, the MRD had 'increased its finalisations significantly' through the adoption of 'new senior management structure[s] and innovative case management practices'. The AAT observed that since 2015, the MRD had finalised 'close to 29 000 applications relating to protection visas compared to just under 20 000 in the 6 years prior to amalgamation'.[4]

MRD workload

5.7 Notwithstanding some improvements to case finalisations, the AAT's most recent Annual Report made clear that in the five years prior to 2020–21, the MRD had 'received sustained, high levels of lodgements relating to decisions about protection (refugee) visas, without a commensurate increase in member resources', resulting in a 'gradual but substantial' increase in cases on hand in the MRD.[5]

5.8 This was echoed by the 2021–22 Portfolio Budget Statement for the AAT, where it was observed that:

> The AAT's workload increased significantly from 2016–17, particularly applications for review of migration and refugee decisions. The rate of finalising cases did not keep pace with the higher volume of lodgements, resulting in considerable growth over time in the number of cases on hand. A decrease in the incoming workload as a result of the COVID-19 pandemic has allowed the AAT to achieve a modest reduction in the on-hand caseload, but it remains substantial.[6]

5.9 Ms Sobet Haddad, a Senior Reviewer with the AAT, explained that there were 'complex arrangements for the processing and prioritising of cases' within the MRD. Applicants could make a request for prioritisation, 'which will be considered', and the Division also had an 'early case assessment team that looks at how [the MRD] can prioritise and process and get cases that are suitable to members as quickly as possible'.[7]

5.10 Despite these processes, the AAT drew attention to the impact of insufficient funding and appointments on its performance within the MRD.

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[3] Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 58.

[4] Administrative Appeals Tribunal, *Submission 1*, p. 12.

[5] Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 58.

[6] 2021-22 Budget, *Portfolio Budget Statements 2021–22: Attorney-General's Portfolio*, p. 53.

[7] Ms Sobet Haddad, Senior Reviewer, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 71.

5.11 Since amalgamation in 2015 and as of November 2021, the MRD had received over 172 000 lodgements—exceeding the 18 000 lodgements anticipated by its base funding. This increase in workload was accompanied by a fluctuation in members, with 151 members in the MRD in 2016–17 decreasing to a low of 125 in 2017–18. As of 31 October 2021, there were 151 active members in the MRD.[8]

5.12 The AAT made the point that 'decisions relating to appointments, including the number, level and location, are ultimately a matter for the Government', but noted that these decisions 'impact on the AAT's ability to deliver services and meet case finalisation targets'.[9]

Funding

5.13 During Additional Estimates 2021–22, the Attorney-General's Department advised that some additional funding had been provided in the 2021–22 Budget, with $54.8 million over the forward estimates provided in additional funding to 'address the backlog of migration matters'. As part of that funding, $18.9 million was to 'help support' the MRD with its caseload (with other funding allocated to the Federal Court).[10]

5.14 Despite this allocation, the Law Council of Australia (Law Council) submitted that government policies to address the backlog in MRD have not been successful, and that there was insufficient funding for the likely rise in applications to the MRD following COVID-19. The Law Council called for a significant increase in the resources allocated to the AAT 'on a permanent basis to bolster its ability to efficiently process migration applications'.[11]

Applications and case management

5.15 During the 2020–21 financial year, the MRD finalised 23 246 cases, including finalisations in the refugee caseload and reducing the backlog in business and student visa caseloads, 'by approximately a third and two thirds respectively'.[12]

5.16 The AAT has since published information for the 2021–22 financial year, to date.

5.17 For the period commencing 1 July 2021 and ending on 28 February 2022, the MRD had a total of 56 845 cases on hand (out of 67 909 for the AAT more broadly). As of 28 February 2022, the proportion of MRD applications finalised

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8 Administrative Appeals Tribunal, *Submission 1*, p. 19.

9 Administrative Appeals Tribunal, *Submission 1*, p. 19.

10 Ms Tamsyn Harvey, Acting Deputy Secretary, Attorney-General's Department, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 71.

11 Law Council of Australia, *Submission 23*, p. 14.

12 Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 54.

within 12 months of lodgement was only 20 per cent, with a median finalisation time of 108 weeks (107 weeks for migration matters, and 116 weeks for refugee matters).[13]

5.18 The Law Council provided a detailed breakdown on applications before the MRD during 2020–21 and their progress:

> In 2020-21 alone, migration and refugee matters made up 43 per cent of the AAT's new applications, 52 per cent of finalised applications, and 86 per cent of 'on hand' (or undecided) matters. The backlog of migration and refugee matters in the AAT has increased significantly, from 16,764 at the end of 2015-16 to 63,305 at the end of 2019-20, before dropping to 56,036 in 2020-21.
>
> In each of the years between 2015-16 and 2019-20, the number of applications lodged was greater than the number decided. In 2020-21, the number of applications dropped considerably due to the impact of COVID-19, which enabled the AAT to make some inroads into the backlog. However, there is reason to believe that this progress is temporary.[14]

5.19 While likewise acknowledging the backlog addressed during the pandemic, the United Nations High Commissioner for Refugees (UNHCR) observed that by focusing on the less complex MRD cases which could be finalised without hearings (or through remote hearings), the MRD has now been left with a 'more complex and aged backlog of cases on hand, which is likely to present significant challenges for the years ahead'. The UNHCR submitted that these cases 'tend to become more complicated and time consuming as waiting times are progressively extended'.[15]

Delays in case completion

5.20 The volume of cases has resulted in significant backlogs, a decrease in timeliness and increased processing times, as highlighted by the AAT in the following performance outcomes for the 2020–21 reporting period:

- the percentage of cases finalised within 12 months was 20 per cent in 2020–21 (down from 66 per cent in 2016–17);
- the median processing time from lodgement to decision for cases finalised in 2020–21 was 99 weeks (an increase from 40 weeks in 2016–17); and
- the median time for protection visa cases finalised in 2020–21 was 104 weeks.[16]

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[13] Administrative Appeals Tribunal, *AAT Caseload Report: For the period 1 July 2021 to 28 February 2022* (accessed 15 March 2022).

[14] Law Council of Australia, *Submission 23*, p. 13.

[15] United Nations High Commissioner for Refugees, *Submission 17*, p. 4.

[16] Administrative Appeals Tribunal, *Submission 1*, p. 19.

5.21 The Law Council expressed significant concerns about the rate of finalisation of matters before the MRD, providing the following details:

> According to the AAT website, the average time taken to resolve a protection visa matter between 1 May 2021 and 31 October 2021 was 1,077 days – almost three years.
>
> In 2020-21, the AAT did not meet performance measures set down in its corporate plan regarding the number of AAT applications and IAA referrals finalised and the proportion of such matters finalised within a time standard.[17]

5.22 Based on the 2020–21 and 2021–22 statistics (to date), it is clear that there are significant delays and backlog in the finalisation of cases before the MRD, and the proportion of applications being finalised has stagnated at around 20 per cent.

5.23 Submitters were of the view that the framework for considering matters in the MRD, along with the accumulation of cases and the subsequent case management processes of the MRD, were not effective.

5.24 The Law Council explained that the accumulation of cases in the MRD was causing significant delays for practitioners and clients, with evidence from the Law Institute of Victoria (LIV) to the Law Council suggesting that 'remittals from the court which are usually afforded priority are still taking over a year to be constituted', creating even longer waits for outcomes.[18]

5.25 Legal Aid NSW suggested the lengthy completion times for MRD matters 'impacts on the integrity of the AAT in terms of meeting community expectations of standards of service and accessibility'.[19] It further posited that the large backlog of protection visa applications was problematic, and outlined the impact on applicants:

> Applicants have no indication of when the case will be heard. Circumstances in the countries of origin can frequently change, and the delay can result in difficulties at hearings due to issues such as applicants trying to give evidence of matters which may have occurred many years ago where their memory is affected by torture and trauma.
>
> Similarly, in our experience the delay in determining partner visa cases where there is a claim of domestic violence has the potential to cause extreme hardship to women, especially those who have no right to income support.[20]

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[17] Law Council of Australia, *Submission 23*, p. 13.

[18] Law Council of Australia, *Submission 23*, p. 11.

[19] Legal Aid NSW, *Submission 13*, p. 9.

[20] Legal Aid NSW, *Submission 13*, p. 9.

5.26 The Refugee Council of Australia (RCA) also made the point that the number of cases before the MRD did not consider the 'backlog of protection visas currently on hand with the Department of Home Affairs', and noted that as of October 2021, there were 31 620 applications for onshore protection visas awaiting a decision by the Department.[21]

5.27 A similar point was made by the UNHCR, which noted that the number of applications lodged at the AAT was 'unlikely to significantly decrease in the foreseeable future', because of:

> … the gradual easing of worldwide travel restrictions related to the COVID-19 pandemic and the rise in the number of people forcibly displaced due to persecution, conflict, violence, human rights violations and events seriously disturbing public order.[22]

5.28 The UNHCR further remarked that backlogs, if unaddressed, have implications for the organisational culture for bodies like the AAT who engage with refugee status determinations. The UNHCR said that:

> … with increasing pressure and a seemingly insurmountable backlog, turnover is common, and staff are more likely to be demotivated, contributing to reductions in productivity and quality of decision-making, which is likely to further increase the backlog.[23]

5.29 The delays in finalisation of cases could be significant, with direct impacts on the lives of applicants. The RCA, for instance, suggested that at the current clearance rate of cases it would 'take over five years to get through the existing backlog of applications, not accounting for further applications'. Further, at the rate the Department is processing initial applications for permanent protection visas, it would 'take two years to process these initial permanent protection claims'. The RCA therefore concluded that a person applying for such a protection visa 'may have to wait seven years for an outcome on their protection visa application'.[24] The RCA asserted that:

> This demonstrates a completely dysfunctional review system and contributes to significant distress and uncertainty for applicants. Failure to address these delays leaves these people in a very precarious situation. For many, their visa status will preclude them from access to Medicare and many will have no work rights. …. Delays also mean that those who are not entitled to stay in the country can stay for extended periods while they are waiting for a decision, creating an incentive to lodge weak claims.[25]

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21 Refugee Council of Australia, *Submission 16*, p. 3.

22 United Nations High Commissioner for Refugees, *Submission 17*, p. 2.

23 United Nations High Commissioner for Refugees, *Submission 17*, pp 7–8.

24 Refugee Council of Australia, *Submission 16*, pp. 2, 3.

25 Refugee Council of Australia, *Submission 16*, p. 3.

5.30 In addition to these concerns, the Australian Human Rights Commission (AHRC) stated that it has 'longstanding concerns' about the significant limitations on the review of decisions made under the Migration Act, outlining three key points:

(i) Asylum seekers who are part of the 'legacy caseload' may only seek review of decisions to refuse them protection visas in the IAA (discussed below), which provides them with significantly fewer review rights than ordinary merits review.

(ii) There are broad discretions available to Ministers to make decisions that are not reviewable in the AAT and to overturn decisions of the AAT that they disagree with.

(iii) The administrative law grounds on which migration decisions may be reviewed by a court have long been narrower than the grounds available for ordinary government decision making.[26]

Response of the AAT

5.31 At Additional Budget Estimates 2021–22, Mr Jamie Crew, Acting Registrar of the AAT, responded to questions about the lengthy delays facing applicants before the MRD. Mr Crew explained that the 'amount of time its taking is purely related to the number of matters'. By way of example, Mr Crew advised that:

> … the cases on hand in the division at the end of 2021-22, at 31 December 2021, were 57,201. My understanding is that the work in the division has doubled since the amalgamation of the tribunal back in 2015, and it has remained at consistently high levels from 2017.[27]

5.32 Ms Haddad, Senior Reviewer with the AAT, argued that the caseloads within the Division 'completely depend' on the processing priorities within the Department of Home Affairs. Ms Haddad further pointed out that the 'number of members of the Tribunal has increased over time, but not proportionally in line with the increase in applications', and that funding to the MRD has remained at similar levels for a six-year period.[28]

5.33 In its submission, the AAT also pointed to the finalisation of business, work and student visa reviews within the MRD as being more successful, providing the following statistics:

> In the last 3 years, the Division has finalised over 18,000 applications relating to business/work visas which is more than the combined total of finalisations for these cases in the 9 years prior to amalgamation.

[26] Australian Human Rights Commission, *Submission 3*, pp. 3–4.

[27] Mr Jamie Crew, Acting Registrar, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 70.

[28] Ms Sobet Haddad, Senior Reviewer, Administrative Appeals Tribunal, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Estimates Hansard*, 15 February 2022, p. 71.

> There have been similar successes in the student caseload over the last 3 years, where the Division focussed surge resourcing to meet record-high lodgements, with around 18,000 student visa refusal reviews finalised. This is similar to the number finalised in the 9 years prior to amalgamation. Despite the COVID-19 pandemic, over the last 2 years the Division has been able to reduce the backlog of cancellation cases, which are priority cases and generally more complex, by 65%.[29]

Immigration detention

5.34 The AAT's General Division considers visa refusals and cancellation matters, made on the basis of the character test in section 501 of the Migration Act. The Law Council advised that:

> … other materials which apply to cases dealt with in the MRD of the AAT provide for special hearing arrangements for persons in detention and provide guidance for dealing with vulnerable persons in immigration detention. Notably, none of this material applies to matters in IAA nor to matters in the AAT's General Division.[30]

5.35 Further, the Law Council drew attention to the Migration Regulations 1994 (the Regulations), which require the MRD to undertake its review into migration cases where the applicant is in immigration detention, 'immediately upon receipt of the application'. The MRD must then:

> … give notice of its decision in respect of such an application as soon as practicable. The Migration Regulations do not impose that requirement on the MRD of the AAT in refugee matters.[31]

5.36 The Law Council suggested that the experience of practitioners indicated these prioritisation requirements were not always complied with, and that the AAT's annual reports do not include information about resolution timeframes for immigration detention matters.[32]

5.37 Turning to other issues with immigration detention matters, the Law Council encouraged the IAA and the AAT to implement directions enabling applicants to attend their hearings in person and be entitled to continuity in their detention prior to their hearings, to avoid clients being transferred right before, or in the weeks prior to, their hearings. The Law Council put forward evidence highlighting the negative impact of these practices:

> In the experience of practitioners, these transfers often involve excessive use of force, and are traumatic and unsettling for applicants, and interfere with their ability to calmly prepare for their cases and have contact with

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29 Administrative Appeals Tribunal, *Submission 1*, p. 12.

30 Law Council of Australia, *Submission 23*, p. 15.

31 Law Council of Australia, *Submission 23*, p. 15.

32 Law Council of Australia, *Submission 23*, p. 15.

> their lawyers in those important lead-up weeks when all the evidence and submissions are due.[33]

5.38 The Law Council put forward several arguments for why it was preferable to resolve these merits review matters as promptly as possible. It noted that while the AAT gives the highest priority to constituting and processing matters where applicants are in immigration detention, if the backlog of cases lengthens then 'so does the time taken to resolve matters where the applicant is in detention and this is highly undesirable'—especially when refugee matters become more complex as time passes and the 'conditions in the relevant country evolve'.[34]

5.39 The Law Council continued that prompt resolutions allow applicants to be granted visas and therefore benefit from the rights of that visa. The Law Council said that more broadly, the earliest resolution of matters before the MRD:

> … would also afford earlier immigration status certainty to AAT users, thereby reducing the prospect of those in Australia from having to enter into or remain in exploitative personal and employment arrangements while their immigration status is being resolved.[35]

Insufficient members in the MRD

5.40 In regard to the number of members available to the MRD, the AAT stated:

> … since amalgamation of the AAT in 2015 the Migration & Refugee Division has received over 172,000 lodgments which is well over the 18,000 lodgments per year envisioned in its base funding. While its workload has increased dramatically over this period, its membership has fluctuated from a high of 151 members in 2016–17 to a low of 125 members in 2017–18. As at 31 October 2021, there were 151 active members working in the Migration & Refugee Division.[36]

5.41 The 2018 Callinan Report drew attention to the deficiency of members in the MRD and stated that this should be 'immediately addressed by the appointment of no fewer than 15 to 30 Members, some only of whom should be part-time Members.'[37]

5.42 Many submitters likewise made the point that the MRD was not sufficiently resourced to deal with its significant volume of legacy and new cases.

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[33] Law Council of Australia, *Submission 23*, p. 15.

[34] Law Council of Australia, *Submission 23*, p. 13.

[35] Law Council of Australia, *Submission 23*, p. 13.

[36] Administrative Appeals Tribunal, *Submission 1*, p. 19.

[37] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 5.

5.43 For instance, the Refugee Advice and Casework Service (RACS) said that in its experiences since 2015, it had become 'increasingly common' for applicants before the MRD to be waiting for a hearing for between two and four years.[38]

5.44 Legal Aid NSW also expressed the view that there was inadequate resourcing of the AAT to deal with MRD matters and particularly an insufficient number of members to deal with the caseload. It encouraged the appointment of more members, saying:

> Legal Aid NSW supports the appointment of a greater number of appropriately qualified members to address the issue. The appointment of acting members may also be a viable solution to address the difficulties. The appointment of Tribunal members in any capacity must be accompanied by a rigorous selection process based on merit.[39]

5.45 The Law Council, on behalf of the LIV, observed that in 2016 and 2018 there was a loss of members from the MRD with extensive experience in refugee and protection visa matters. Experienced members who were not re-appointed were replaced with 'members (some of whom had no legal background) with little or no migration and/or refugee law experience'.[40]

5.46 The RCA likewise called for further resources to the MRD in order to address the backlog of cases in a timely manner, 'while also ensuring procedural fairness and accurate decision making'. It echoed the calls of the Callinan Report to appoint no fewer than 15 to 30 members.[41]

5.47 RACS also encouraged more efficiency in decision-making, but said that this should 'never usurp the object of achieving fairness and just outcomes for individuals seeking merits review'.[42]

Productivity of members

5.48 Through a Freedom of Information (FOI) process, the LIV found that between 1 January 2020 and 31 March 2021, the then 173 members of the MRD had a marked variability in productivity. The LIV submitted that the FOI documents showed:

> … the number of cases finalised by members over that period varied between 1 and 1,117, with the average resolved by each member over that 15-month period being 177 matters. The number of matters currently allocated to members varies between 1 and 1,056, and the average allocation is 177 matters. Some members were dealing with fewer than

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[38] Refugee Advice and Casework Service, *Submission 20*, p. 6.

[39] Legal Aid NSW, *Submission 13*, p. 10.

[40] Law Council of Australia, *Submission 23*, p. 6.

[41] Refugee Council of Australia, *Submission 16*, p. 3. See also: Faculty of Law, Monash University, *Submission 11*, p. 5.

[42] Refugee Advice and Casework Service, *Submission 20*, p. 11.

> 50 cases (around 25 members), while others were undertaking over 500 cases.[43]

5.49 Carina Ford Immigration Lawyers (Carina Ford) further observed that some members were taking '12 months to make a decision after a final hearing', which, in their view, was 'unproductive and unacceptable'.[44]

5.50 The Law Council argued that these factors showed a clear need for a review as to why some members 'appear significantly more productive than others in the disposal of cases' and called for a form of 'accountability and oversight in productivity of members'.[45]

5.51 The Law Council suggested that the review should lead to improvements in the quality and timeliness of decisions, as well as an increase in the number of appropriately qualified and experienced members in the MRD and other Divisions. Doing so would help address the backlog and reduce the likelihood of delays 'associated with cases being remitted to the AAT by the federal courts as a result of jurisdictional or other legal error'.[46]

5.52 In addition, the Law Council submitted that given the significant complexity of the legislative framework for migration and refugee law, consideration should be given to a quota, where at least 80 per cent of all MRD members 'must have previously been enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory', at least five years prior to their appointment. The Law Council observed that it had:

> … received strongly expressed views from its members that appointments in the MRD should be legally qualified and capable of presiding over the complexity of migration and refugee matters. The Law Council is supportive of this approach.[47]

Consistency of decision-making

5.53 Submitters also voiced concerns around the consistency of decision-making within the MRD. For example, Carina Ford asserted that there was inconsistency in the conduct of cases, both at an administrative and decision-making level.[48]

5.54 The RCA indicated that there was a 'widely held perception' amongst visa applicants and their legal representatives that 'chances of success of their

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[43] Law Council of Australia, *Submission 23*, p. 7.

[44] Carina Ford Immigration Lawyers, *Submission 19*, p. 4.

[45] Law Council of Australia, *Submission 23*, p. 7.

[46] Law Council of Australia, *Submission 23*, p. 7.

[47] Law Council of Australia, *Submission 23*, p. 10. See Chapter 4 for a detailed discussion on the member selection process.

[48] Carina Ford Immigration Lawyers, *Submission 19*, pp. 4–5.

review at the tribunal largely depend on the decision-maker assigned to the matter, rather than on the merits of the case'.[49]

5.55 In support of this view, the RCA cited the work of researchers at Macquarie University, who found, using FOI data, that:

> The AAT had 88 members who decided more than [MRD] 50 cases. One member did not find in favour of a single asylum seeker applicant, and another 15 had approval rates of less than 5%. At the other end of the spectrum, one member decided in favour of the asylum seeker applicants in 86% of cases while another three members had approval rates of over 40%.[50]

Legislative constraints

5.56 The AAT suggested that the amalgamation process of 2015[51] has resulted in some procedural differences between Divisions, as determined by legislation—limiting the ability of the AAT to 'manage cases in the most efficient, effective and proportionate manner'. In relation to the MRD, the AAT pointed out that members were limited in how they could conduct reviews, 'due to some of the codified procedural requirements set out in the *Migration Act 1958*'. The AAT concluded that:

> The lack of powers under that Act for members to conduct directions hearings, to give enforceable directions, and to dismiss applications for failure to comply with a direction … hampers the ability to efficiently manage cases in that Division.[52]

5.57 The 2018 Callinan Report found that the merger in 2015 of the Migration Review Tribunal and the Refugee Review Tribunal 'was never going to be an easy task', due to 'their very different legislative regimes and practices'. Justice Callinan continued that the difficulties had been 'immensely compounded by the intimidating backlog of cases' in the MRD, and proposed two solutions which could help ameliorate the issue:

(1) 'radical changes to migration law and practice'; and
(2) an immediate increase in the members appointed to the MRD (at least 15 to 30, some of whom should be part time).[53]

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[49] Refugee Council of Australia, *Submission 16*, p. 6.

[50] Refugee Council of Australia, *Submission 16*, p. 6.

[51] The amalgamation is discussed in Chapter 1.

[52] Administrative Appeals Tribunal, *Submission 1*, p. 18.

[53] Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 5. Soon after the report’s completion, 33 part-time members were appointed to the MRD; however, Justice Callinan thought the appointments ‘unlikely to bring the backlog of cases into manageable proportions without further appointments of, preferably, full-time, appropriately legally qualified, Members’ (see p. 6 of the report).

5.58 Legal Aid NSW also suggested that the AAT was 'often constrained in its process by the requirements of enabling legislation', which was particularly problematic in the 'character cancellation/refusal regime' in Part 9, Division 2 of the Migration Act. Legal Aid NSW said these constraints on administrative review were 'undesirable', and identified the following as particular issues:

- the 'prohibitively short' strict nine-day period to seek review of a decision by a Minister's delegate to refusal or cancel a visa on character grounds; and
- the power of the relevant Minister to set aside decisions of the AAT.[54]

Immigration Assessment Authority

5.59 The IAA is a separate office established within the MRD, to conduct limited 'fast track reviews of decisions to refuse to grant certain persons a protection visa'. The Migration Act requires the IAA to do this in a way that is efficient, quick and free of bias, and, in reviewing a decision, the IAA is 'not bound by technicalities, legal forms or rules of evidence'.[55]

5.60 The IAA consists of the AAT President; the head of the MRD; the Senior Reviewer; and Reviewers. The AAT advised that, as per the Migration Act, the Registrar must make officers of the AAT available to assist the IAA in the performance of its administrative functions. In addition:

> The President and the head of the Division are responsible for the overall operation and administration of the IAA. The Senior Reviewer is responsible for managing the IAA, subject to the directions of, and in accordance with policies determined by, the President and the head of the Division of the Migration & Refugee Division.[56]

5.61 The IAA is funded through an agreement based on the projected number of referrals from the Department of Home Affairs.[57]

5.62 The IAA received an average of 75 referrals per month in 2020–21, a 49 per cent decrease compared with the previous year due to the impact of COVID-19. During 2020–21, the IAA finalised 788 cases, with 212 on hand at 30 June 2021. The median time from referral to a decision was five weeks.[58]

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[54] Legal Aid NSW, *Submission 13*, p. 7.

[55] *Migration Act 1958*, Part 7AA, s. 473FA. See also Administrative Appeals Tribunal, *Submission 1*, p. 5.

[56] Administrative Appeals Tribunal, *Submission 1*, p. 8.

[57] Administrative Appeals Tribunal, *Submission 1*, p. 18.

[58] Administrative Appeals Tribunal, *Annual Report 2020–21*, pp. 87–88.

Operation of the IAA

5.63 The IAA is a specialised division of the AAT and deals with migration decisions made in relation to a specific group of asylum seekers—those who arrived in Australia by sea between 13 August 2012 and 1 January 2014 and were not taken to a regional processing country.[59]

5.64 The Law Council explained that decisions to refuse to grant a visa to a fast-track applicant are either excluded from review, or mandatorily sent to the IAA. In addition, fast-track reviewable decisions are subject to an abbreviated review process conducted in accordance with a 'code of procedure which exclusively provides for the hearing procedure (excluding natural justice) under Part 7AA of the *Migration Act 1958*'.[60]

5.65 According to the AHRC, the IAA's 'limited' form of merits review in accordance with a fast-track decision-making process contains fewer rights for those seeking to review government decisions, typically a decision to grant them a protection visa.[61]

5.66 In other words, IAA matters are dealt with pursuant to procedural codes, rather than the principles of common law. As pointed out by the Law Council, the Full Federal Court in 2006 voiced concerns about this approach, saying that 'codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense'. The Court's view was that such matters should be 'dealt with in accordance with the well-developed principles of the common law'.[62]

5.67 The Law Council raised numerous concerns about the operation of the IAA, detailing some of the operational aspects of the IAA as provided by the Migration Act and making a number of observations about the limitations of its operations. For instance, the IAA:

- can make a decision on the papers, and not offer a review applicant an interview or the opportunity to comment on an application except in 'exceptional circumstances' (s. 473DB);
- is generally prohibited from presenting new information or evidence except where 'exceptional circumstances' exist (s. 473CC);
- has reviewers who are public servants, and 'thus are not independent in the same way as members appointed by the Governor-General to the MRD';

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59 Australian Human Rights Commission, *Submission 3*, p. 4.

60 Law Council of Australia, *Submission 23*, pp. 16–17.

61 Australian Human Rights Commission, *Submission 3*, p. 4.

62 *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 as cited in Law Council of Australia, *Submission 23*, pp. 18–19.

- may make decisions without any engagement with unrepresented applicants, and submissions must be made in English and no translating service available; and
- does not reflect the 'inquisitorial merits review process that characterises other statutorily independent merits review bodies'.[63]

Concerns with the IAA

5.68 A number of submitters expressed serious concerns about the operation of the IAA, questioning whether the IAA properly applies the principles of procedural fairness, or provides an adequate merits review to applicants.

5.69 For example, Victoria Legal Aid contended that the diversion of certain asylum seekers through the IAA fast-track process, with its lack of hearings and limited ability for new evidence, had 'resulted in a significant increase in applications for judicial review to the Federal Circuit Court'. The organisation argued that this outcome highlighted the 'negative impacts of a merits review process with diminished procedural protections' and 'reinforces the value of the full merits review model exemplified by the AAT'.[64]

5.70 Similarly, the RCA was of the view that the fast-track process was 'designed to favour expediency over procedural fairness', in contrast to the requirements of the AAT, and it 'could not be relied upon as a fair and accurate review mechanism'. The RCA concluded that:

> This has resulted in significant discrepancies between the IAA and the former review process, with the IAA affirming the Department's original decision to refuse an asylum claim in 91% to 94% of cases. The IAA decisions are also legally questionable, with 37% of appeals succeeded in the federal courts.[65]

5.71 A submission from the Monash University Faculty of Law raised similar concerns with the fast-track process undertaken by the IAA. It noted that various civil society groups and academics had raised concerns over a span of years about the operation of the IAA, and called for either its abolishment or reformation to improve procedural fairness protections.[66]

5.72 The submission also argued that the fast-track process was in contrast to the 'mainstream' merits review system provided to other asylum seekers by the AAT, which conducts a full merits review of the matter and has an obligation

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63 Law Council of Australia, *Submission 23*, p. 17.

64 Victorian Legal Aid, *Submission 15*, p. 3. See also: Carina Ford Immigration Lawyers, *Submission 19*, p. 10.

65 Refugee Council of Australia, *Submission 16*, pp. 1, 11. See also: Ms Heather Marr, *Submission 22*, p. 1.

66 Faculty of Law, Monash University, *Submission 11*, pp. 7, 9.

to hold an oral hearing.[67] It noted that the fast-track system assumes applicants will receive procedural fairness at the first interview stage, and that as such, it is unnecessary for the granting of full procedural fairness (for example, an oral interview) at the review stage.[68]

5.73 Monash University argued that the IAA fast-track process does not adequately provide integrity in the administrative system, and asserted that an oral hearing provides the best opportunity for decision-makers to properly consider an asylum seeker's case.[69]

5.74 It further explained:

> Whilst we recognise that the introduction of efficiency measures is an important way of avoiding delays in decision-making, and from that perspective is beneficial to administrative justice, we believe the IAA Fast Track system increases the propensity of such measures to lead to serious legal errors. This is particularly problematic given the seriousness of the decision-making context at stake (possible return of refugees to harm).[70]

5.75 The UNHCR also asserted that the 'swiftness with which the IAA can finalise cases has come at a cost; for key procedural safeguards are absent from the review process'.[71]

5.76 The Law Council discussed the absence of these safeguards and argued that the lack of a right to a hearing in the IAA—and the inability to introduce new evidence in most circumstances—resulted in the regular failing of cases with merit, 'placing applicants at risk of refoulement'. It was the Law Council's view that all administrative decisions regarding protection visas should have access to a 'robust and independent system of merits review'.[72] The Law Council put forward the experience of practitioners who engage with the IAA, saying that the fast-track scheme:

- does not reduce appeals to court (according to the Law Council, between 2017–18 and 2020–21, 81.8 per cent of IAA decisions were appealed, and 36.5 per cent of decisions were allowed);
- is difficult to navigate for unrepresented applicants; and
- does not allow the introduction of new evidence except in exceptional circumstances, meaning that cases with merit fail.[73]

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67 Faculty of Law, Monash University, *Submission 11*, pp. 6–7.

68 Faculty of Law, Monash University, *Submission 11*, p. 7.

69 Faculty of Law, Monash University, *Submission 11*, p. 8.

70 Faculty of Law, Monash University, *Submission 11*, p. 8.

71 United Nations High Commissioner for Refugees, *Submission 17*, p. 9.

72 Law Council of Australia, *Submission 23*, pp. 14, 17.

73 Law Council of Australia, *Submission 23*, p. 17.

5.77 Similar to the Law Council, the RCA noted that IAA reviewers are engaged under the *Public Service Act 1999* for short initial terms of 18 months, and as public servants the reviewers could not be considered independent decision makers—as they 'serve at the pleasure of the executive and do not need to even have legal qualifications'.[74]

5.78 The Law Council did not support the use of the IAA to address backlogs in the MRD, as doing so did not reduce appeals to court—arguing it in fact produced the opposite result.[75] As an alternative, the Law Council suggested the use of directions hearings as a way to progress matters, as past experience had shown these to work well and benefit clients.[76]

5.79 Overall, the Law Council was of the view that instead of reliance on the IAA, it should be abolished in order to give applicants a full de novo review of their claims, and because:

> … the flaws in its legal framework, which deny procedural fairness and natural justice, cannot be remedied … All cases potentially in the IAA pipeline or on remittal from the IAA should be re-directed to the regular part of the MRD.[77]

5.80 This argument was shared by the RCA, which said there was no justification for maintaining the IAA, especially as its caseload was reducing considerably each year and would have a finite number of applications moving forward—those who arrived by boat in the specified period. The RCA echoed the calls to abolish the IAA and incorporate its functions into the MRD and AAT.[78]

5.81 Refugee Legal shared these views, calling for the abolishment of the IAA and the restoration of full merits review at the AAT. It said that the IAA was a:

> … separate, inferior form of merits review [that] constitutes a radical deviation from longstanding, fundamental procedural and substantive legal protections for vulnerable persons seeking protection from serious human rights abuses in Australia. It has resulted in a serious erosion of essential statutory safeguards, and heightened the risk of Australia wrongly refusing protection for individuals leading to them being returned to persecution or other significant harm.[79]

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74 Refugee Council of Australia, *Submission 16*, p. 8.

75 Law Council of Australia, *Submission 23*, pp. 13–14.

76 Law Council of Australia, *Submission 23*, p. 14.

77 Law Council of Australia, *Submission 23*, pp. 13–14; 17.

78 Refugee Council of Australia, *Submission 16*, pp. 8, 11.

79 Refugee Legal, *Submission 32*, pp. 13–14.

Concerns of the Australian Human Rights Commission

5.82 The AHRC commented on what it saw as the two key problems with the fast-track process at the IAA, which distinguish the process from normal merits review in other AAT Divisions.

5.83 Firstly, by not accepting new information (unless under 'exceptional circumstances), the AHRC argued that this forces an applicant to provide all relevant information at initial interview with departmental officials, at a time when they may not have access to legal advice or assistance. The AHRC concluded that there was an obvious risk of prejudice to an applicant arising from this situation.[80]

5.84 Secondly, the AHRC highlighted that the IAA must not interview the applicant and must conduct a review on the papers, unless there are exceptional circumstances. It stated that this was contrary to procedures recommended by the former Administrative Review Council (ARC), the former Joint Standing Committee on Migration Regulations, and the UNHCR in their advice about processing refugee claims.[81]

5.85 The AHRC stated that it had raised these procedural fairness concerns with the Government in 2014 when the fast-track process was first introduced. It also noted that in 2015 the Australian Law Reform Commission (ALRC) had recommended that the fast-track process be subject to further review to consider whether it unjustifiably excluded the duty to afford procedural fairness.[82]

5.86 In drawing its concerns to the attention of the committee, the AHRC submitted that people affected by migration decisions should have the same substantive and procedural rights as anyone else in Australia who seeks a review of a decision by government.[83]

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80 Australian Human Rights Commission, *Submission 3*, pp. 4–5.

81 Australian Human Rights Commission, *Submission 3*, p. 5.

82 Australian Human Rights Commission, *Submission 3*, p. 5.

83 Australian Human Rights Commission, *Submission 3*, p. 6.

Chapter 6
Re-establishment of the Administrative Review Council

6.1 The majority of submissions to the inquiry were in strong support for the re-establishment and re-funding of the Administrative Review Council (ARC).

6.2 This chapter outlines the previous role of the ARC and the impact of it being defunded. It also presents the views in support of the re-establishment of the ARC as an independent voice in the administration of the merits review system.

Role of the ARC

6.3 The ARC was an independent policy advisory board, established in 1976 under the *Administrative Appeals Tribunal Act 1975* (AAT Act). Its establishment was recommended by the Kerr Report, which said that such a body would be a first step in the evolution of Australia's system of administrative law.[1]

6.4 It consisted of the President, the Commonwealth Ombudsman, the President of the Australian Human Rights Commission (AHRC), the President of the Australian Law Reform Commission (ALRC), the Australian Information Commissioner and at least three, but no more than 11, other members.[2]

6.5 The ARC was tasked with inquiring into and advising on the federal administrative law system, administrative decision-making practices, and tribunal practice and procedure. It also promoted knowledge about the administrative law system and facilitated the training of decision-makers.[3]

6.6 An administrative law policy guide issued by the Attorney-General's Department (AGD) in 2011 provided further detail on the role of the ARC, stating that it was to:

> ... monitor and provide advice to the Government in relation to Commonwealth administrative review. The "monitoring" function arises from the nature of the administrative review system, and the several

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1 Attorney-General's Department, *Submission 5*, p. 8.

2 Moira Coombs, 'Abolition of the Administrative Review Council', *Parliamentary Library Budget Review 2015–16*,May 2015, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/ARC#_ftn6 (accessed 21 December 2021). See also: Attorney-General's Department, *Submission 5*, pp. 8-9.

3 Australian Government Directory, 'Administrative Review Council', 10 June 2021, https://www.directory.gov.au/portfolios/attorney-generals/attorney-generals-department/administrative-review-council (accessed 21 December 2021).

> institutions that perform different but complementary review functions. The Council contributes to maintaining the integrity of the entire system by ensuring that, as laws and government decision making processes change, the various administrative review mechanisms continue to perform appropriate, effective and complementary functions.
>
> As envisaged by the Kerr Committee, the Council examines existing and new administrative decision making powers in Commonwealth legislation, and assesses the availability of review of decisions made under those powers. The Council also conducts larger projects that deal with broader issues of change, such as corporatisation and contracting out of government services.[4]

6.7 According to the AGD, the ARC produced a number of reports including best practice guides on, among other things, 'lawfulness, natural justice and accountability', and reports on topics as broad as 'automated assistance in administrative decision making, administrative accountability, and information-gathering powers of government agencies'.[5]

6.8 While the ARC issued reports and best practice guides on administrative law issues, it did not examine individual claims or hear appeals, nor was it a merits review body with any power to review the decisions of government agencies or tribunals.[6]

6.9 During the course of the inquiry the Administrative Appeals Tribunal (AAT) put forward its support for the reports and guidance which had been issued by the ARC in relation to standards and areas of operation of the Tribunal. However, it noted that any decision about the future operation and activity of the ARC was a matter for the Government.[7]

Discontinuation of the ARC

Defunding the ARC

6.10 As part of the 2015–16 Budget and the Government's Smaller Government Reform Agenda, it was announced that the ARC would be abolished, with any

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4 Attorney-General's Department, *Australian administrative law policy guide*, 2011, p. 18 as cited in Moira Coombs, 'Abolition of the Administrative Review Council', *Parliamentary Library Budget Review 2015–16*,, May 2015, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/ARC#_ftn6 (accessed 21 December 2021).

5 Attorney-General's Department, *Submission 5*, p. 9.

6 Attorney-General's Department, *Administrative law: Administrative Review Council*, https://www.ag.gov.au/legal-system/administrative-law#review (accessed 21 December 2021). A list of ARC publications issued from 1978 to 2012 can be found at: https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications (accessed 21 December 2021); Attorney-General's Department, *Submission 5*, p. 9.

7 Administrative Appeals Tribunal, *Submission 1*, p. 25.

residual functions to be managed by the AGD.[8] The announcement followed the recommendations of the National Commission of Audit in its 2014 report, 'Towards Responsible Government', which suggested that the functions of the ARC could be done by the portfolio department.[9]

6.11 The argument was made by the Minister for Finance at the time, Senator the Hon Mathias Cormann, that this and similar measures were aimed at 'delivering greater value to taxpayers through better services delivered faster and at a lower cost'. Further, the Smaller Government Reform Agenda was to transform the 'public service by improving efficiency, effectiveness and by eliminating waste and duplication'.[10]

6.12 Despite it being announced that the ARC would be 'abolished', provisions remain for the establishment and functioning of the ARC at Part V of the AAT Act.[11] This was made clear by the AGD in its submission to the inquiry:

> Although Part V of the AAT Act (which provides for the ARC's establishment and operation) has not been repealed and remains in force, the ARC has not received any funding or had any new members appointed since its discontinuation.[12]

6.13 As such, rather than being 'abolished', a more accurate characterisation is that the ARC has been defunded and is therefore unable to operate.

6.14 On this matter, Professor Greg Weeks of the Australian National University College of Law (who submitted in a private capacity) observed that the Government's initial characterisation of the ARC as having been 'abolished' was misleading. He clarified that the ARC:

> …continues to exist as a matter of law but has been prevented from exercising its statutory functions in fact.[13]

Consolidation of functions

6.15 After the defunding of the ARC, its functions were consolidated into the AGD. The AGD advised the committee that since consolidation, it continued to 'review the operation of administrative law at the Commonwealth level and guide the development of administrative law policy'. It explained that it did so by:

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8 2015–16 Budget, *Budget Measures: Budget Paper No 2*, p. 65.

9 *Report of the National Commission of Audit*, Phase One, Appendix, Volume 3, March 2014, p. 136.

10 Senator the Hon Mathias Cormann, 'Smaller Government – Transforming the Public Sector', *Media release*, 11 May 2015, https://www.financeminister.gov.au/media-release/2015/05/11/smaller-government-transforming-public-sector (accessed 21 December 2021).

11 Administrative Appeals Tribunal, *Submission 1*, p. 25. The AAT Act is available at: https://www.legislation.gov.au/Details/C2021C00338

12 Attorney-General's Department, *Submission 5*, p. 9.

13 Professor Greg Weeks, *Submission 7*, p. 8.

> … amongst other things, considering the application of administrative law in changing contexts and promoting legislative drafting that is consistent with administrative law policy. The department maintains up-to-date expertise on administrative law issues by reviewing and considering changes in case law and developments across the public sector such as automated decision making. The department facilitates the review and strengthening of the administrative law system by providing advice on proposals affecting administrative law issues, primarily facilitated through providing advice on draft Bills under OPC [Office of Parliamentary Counsel] Drafting Direction 4.2.[14]

Observations from the Callinan Report

6.16 The 2018 statutory review of the AAT, completed by the Hon Ian Callinan AC QC in 2018 and tabled in Parliament in 2019 (the Callinan Report) canvassed the defunding of the ARC. The final report stated that it was the view of many of those consulted that the decision of the Commonwealth to effectively terminate the operation of the former ARC and instead transfer its functions to the AGD was 'an imprudent one'.[15]

6.17 The AHRC pointed to Justice Callinan's observations that it was the duty of the Executive, under section 61 of the Constitution, to 'execute and maintain the laws of the Commonwealth'. To this end, measure 26 of the Callinan Report recommended:

> The ARC should be reinstated and constituted in accordance with Part V of the *AAT Act*.[16]

Support for the ARC

6.18 There was near-universal support in evidence to the inquiry for the urgent re-funding of the ARC. Many submitters highlighted the valuable contributions the body had made in the past and noted the important role it could play in supporting the AAT and its increasingly complex workload into the future.[17]

6.19 For example, the Law Council of Australia (Law Council) recommended that the ARC be re-established as a priority. It noted that the composition of the ARC and the functions it was designed to perform provide an appropriate

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14 Attorney-General's Department, *Submission 5*, p. 9.

15 Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 19.

16 Australian Human Rights Commission, *Submission 3*, p. 12; Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 2018, p. 20.

17 See for example: Faculty of Law, Monash University, *Submission 11*, pp. 12–13; Australian Defence Force Welfare Association, *Submission 5*, p. 4; Accountability Round Table, *Submission 10*, p. 1; Economic Justice Australia, *Submission 21*, p. 1; The Tax Institute, *Submission 25*, p. 7; Asylum Seeker Resource Centre, *Submission 30*, p. 36; Refugee Legal, *Submission 32*, pp. 16–17; Carina Ford Immigration Lawyers, *Submission 19*, p. 9.

mechanism for the facilitation of 'ongoing, objective and apolitical' review of the performance and integrity of the Australian administrative review system.[18]

6.20 Additionally, the Law Council emphasised the valuable contribution the ARC had made in the development of ideas and policy in the field of administrative law, both nationally and internationally. It remarked that the ARC's reports:

> … were intensively researched, balanced by the breadth of perspectives of its members drawn from practice, from senior officials and from academies, and were as a consequence highly respected and influential.[19]

6.21 The AHRC also recommended the re-establishment of the ARC, telling the committee that aside from the continuing statutory requirement for an ARC, there were 'good policy reasons' for this course of action.[20] It explained that the ARC's re-establishment would:

> … assist in remedying the erosion of review rights in relation to government decision making. During its long period of operation, the ARC provided independent and robust advice to government about the kinds of decisions that should be subject to merits review and judicial review, and the way in which such reviews should take place. This kind of scrutiny and expert analysis is vital to ensuring the continued integrity of the system and protecting individual freedoms.[21]

6.22 Professor Gabrielle Appleby, Dr Lynsey Blayden, Dr Chantal Bostock and Dr Janina Boughey, academics at the Faculty of Law and Justice at the University of New South Wales who submitted in their private capacities, called for the immediate re-establishment of the ARC. They asserted that the need for the ARC was 'greater now than it has ever been', and argued that it was necessary that there be an independent body capable of:

- periodically reviewing the various elements of the administrative law system to ensure they are functioning as intended;
- monitoring administrative practices in general to make recommendations as to whether they meet the standards of accountability that are requisite for good administration, administrative justice and the overall health of Australia's democracy; and
- providing guidance to those exercising administrative discretions and making administrative decisions regarding administrative law and accountability standards.[22]

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18 Law Council of Australia, *Submission 23*, pp. 34–35.

19 Law Council of Australia, *Submission 23*, p. 34.

20 Australian Human Rights Commission, *Submission 3*, p. 12.

21 Australian Human Rights Commission, *Submission 3*, p. 2.

22 Professor Gabrielle Appleby, Dr Lynsey Blayden, Dr Chantal Bostock and Dr Janina Boughey, *Submission 29*, pp. 16–17.

6.23 In a similar vein, the New South Wales Bar Association (NSWBA) argued for the re-establishment of the ARC, given that it could assist in identifying:

- cases where systemic issues are arising in the decision-making process of particular or multiple departments, in order to provide advice to the government on improving the quality of decision-making;
- cases where a particular point of law is repeatedly being raised in the AAT, and selecting a test case for judicial review; and
- cases where the AAT has noted systemic problems or injustices in the administration of particular laws and recommend, if necessary, areas for law reform.[23]

6.24 Emeritus Professor John McMillan AO, former head of three statutory agencies[24] with administrative law oversight roles and member of the ARC from 2003 to 2015, commented that he found it 'unfathomable' that the Government had not supported the continuation of the ARC. He observed that, collectively, the ARC membership was unmatched in practical experience in the operation of administrative review, and that Australian law and government was the poorer for the disintegration of the body.[25]

6.25 In reflecting upon his own experience with the ARC, Professor McMillan reported:

> My own experience is that the ARC was an exceptional body that gathered together members from all facets of administrative law — the judiciary, tribunals, ombudsman, information regulation, human rights, government agencies, trade unions, business and consumer advocacy. I was always struck by [how] engaged the members were and how they energetically worked together to improve the functioning of the Australian administrative review system.[26]

Emerging technology

6.26 A number of submitters drew attention to the role the ARC could play in monitoring the use of emerging technology in administrative law.

6.27 For example, a submission from the Faculty of Law at Monash University argued that the need for a body such as the ARC was enhanced due to the 'integrity challenges' and other complexities raised by modern developments, such as the use of technology in government decision-making.[27]

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23 New South Wales Bar Association, *Submission 26*, p. 4.

24 The Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, and the Office of the Australian Information Commissioner

25 Emeritus Professor John McMillan AO, *Submission 33*, [pp. 2–3.]

26 Emeritus Professor John McMillan AO, *Submission 33*, [p. 2].

27 Faulty of Law, Monash University, *Submission 11*, p. 12.

6.28 Emeritus Professor Terry Carney AO, an academic specialising in social security law with extensive experience sitting on social security appeals on the Social Services and Child Support Division of the AAT, made a similar point. He argued that emerging systemic challenges posed by the introduction of new technologies like machine learning and artificial intelligence (AI) made an overwhelming case for the restoration of the ARC as a low cost yet highly effective mechanism to ensure good administration.[28]

6.29 By way of example, Professor Carney observed that the failures of the online compliance initiative (commonly referred to as 'Robodebt') may have been minimised had the ARC been functioning at the time. He noted:

> … 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.[29]

6.30 The Melbourne Law School also emphasised the potential value of a re-established ARC in relation to the digital and automated technologies of contemporary administrative government.[30] It too made mention of the Robodebt scheme, noting that it occurred during the period in which the ARC was 'functionally obsolete' and that the contributing factors were matters squarely within the remit of the ARC's oversight functions. It explained:

> In our submission, it is highly likely that a properly functioning ARC would have kept close watch on the relevant debt recovery processes and would very likely have undertaken inquiries and issued strong letters of advice with respect to it. The Robodebt experience provides among the strongest of arguments for why we need to re-establish the ARC.[31]

A legislative obligation

6.31 Several submitters highlighted that the operation of the ARC remained a legislative obligation under the AAT Act.

6.32 Professor Weeks informed the committee that it was anomalous that the legislation remained operative while the ARC was not. He noted that it was 'far from satisfactory' for a statutory body to exist under a statutory scheme and to have statutory functions which it is unable to perform, merely because the Government decided to no longer fund that body.[32]

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28 Emeritus Professor Terry Carney AO, *Submission 8*, p. 4.

29 Emeritus Professor Terry Carney AO, *Submission 8*, p. 4.

30 Melbourne Law School, *Submission 11*, pp. 17–18.

31 Melbourne Law School, *Submission 14*, p. 19.

32 Professor Greg Weeks, *Submission 7*, p. 8.

6.33 Additionally, he argued that the costs of maintaining the ARC were dwarfed by the costs of the failure of public administration that its advice might prevent.[33]

6.34 Assistant Professor Narelle Bedford of the Faculty of Law at Bond University (who submitted in a private capacity) emphasised to the committee that the ARC remains a 'legislative obligation'. She stated:

> As a matter of urgency the ARC needs to be re-constituted and properly funded to allow it to perform its statutory duties.[34]

6.35 The Law Council also drew attention to this matter, noting that 're-establishing' the ARC would be consistent with the rule of law, given that the terms of the AAT Act require the ARC to exist and operate.[35]

Transfer of functions to AGD

6.36 Evidence to the committee suggested the AGD was not best placed to undertake the functions which had previously been completed by the ARC—nor did it appear that the AGD had completed any work analogous with that of the ARC.

6.37 The Melbourne Law School submitted that owing to the ARC's unique role and composition, the idea that the specific and unique functions of the ARC could be performed by other entities (such as the AGD) was 'completely misplaced'. It detailed:

> To begin, the ARC is the only entity uniquely charged with the function of advising the Attorney-General on the operation and integrity of the administrative law system as a whole. Its statutory functions are not replicated in those assigned to other entities. It was and by statute remains a standing Council dedicated solely to overseeing and ensuring the efficacy and responsiveness of Australia's administrative law system.[36]

6.38 Further, the Melbourne Law School highlighted that there was no publicly available evidence to indicate that the AGD had performed any of the ARC's functions since the council's effective abolition.[37]

6.39 Refugee Legal questioned the appropriateness of the ARC's statutory functions being consolidated within the AGD. It emphasised that independent oversight, as was provided by the ARC, was integral to maintaining public trust and confidence in the decision-making of the AAT, contending:

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33 Professor Greg Weeks, *Submission 7*, p. 8.

34 Assistant Professor Narelle Bedford, *Submission 24*, p. 7.

35 Law Council of Australia, *Submission 23*, p. 35.

36 Melbourne Law School, *Submission 14*, p. 12.

37 Melbourne Law School, *Submission 14*, pp. 11–12.

> … a government department, in this case the AGD, overseeing the adjudication of disputes between the Government and people affected by its administrative decisions erodes such confidence.[38]

6.40 A similar point was made by Dr Bruce Baer Arnold, who stressed the value of the independence of the ARC 'in contrast to officials in a department reviewing a tribunal that on occasion rejects the decision-making and condemns the policy interpretation of their peers'.[39]

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38 Refugee Legal, *Submission 32*, p. 16.

39 Dr Bruce Baer Arnold, *Submission 6*, p. 4.

Chapter 7
Committee views and recommendations

7.1 This report has summarised the evidence of submissions made to this inquiry, while also considering findings from other sources about the shortcomings in the operations and integrity of the Administrative Appeals Tribunal (AAT).

7.2 The evidence received thus far shows that the status quo is not working—this is of serious concern to the committee, and the current operation of the AAT undermines public trust in both the AAT and in effective public administration.

7.3 This chapter puts forward the views of stakeholders on the importance of the merits review system to accountability, transparency and public confidence in government decision-making.

7.4 It then presents the committee's views on the matters raised in this report, followed by the committee's recommendations.

Merits review and effective public administration

7.5 The significance of merits review was reiterated by many stakeholders in their evidence to the committee. For example, Professor Greg Weeks asserted that 'the significance of the interest that the Commonwealth and the nation have in the AAT being a productive and effective body can hardly be overstated'.[1] The Australian Lawyers Alliance likewise noted that the AAT was a 'vital mechanism for ensuring accountability for government decision-making'.[2]

7.6 Similarly, Dr Bruce Baer Arnold drew attention to the importance of transparency in public administration and observed that the 'community at large is more likely to trust Governments if the administrative review system is seen to be fair', rather than politically driven.[3]

7.7 Legal Aid NSW stressed that any system of administrative review must deliver the right balance of:

> … economical, quick, informal review, which is accessible, fair and just. A rigorous system which reviews decisions on the merits of the case and is transparent, is essential to provide administrative justice to individuals and to engender public confidence in decision-making by government departments.[4]

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1 Professor Greg Weeks, *Submission 7*, p. 3.

2 Australian Lawyers Alliance, *Submission 2*, p. 6.

3 Dr Bruce Baer Arnold, *Submission 6*, p. 3.

4 Legal Aid NSW, *Submission 13*, p. 2.

7.8 The Grattan Institute recognised the critical role of the AAT in Australia's democracy and legal framework, as well as its role in facilitating access to justice by members of the public. The Institute observed that the AAT was 'a key mechanism for government accountability' and that the:

> … availability of independent review increases public confidence in government decision-making because it enables transparency. It is important for public trust that the government is seen to be supporting and upholding the independence of the AAT.[5]

7.9 Melbourne Law School also reinforced that merits review is a 'form of executive accountability that enhances openness, good government and public trust in public administration', but made the important point that 'because the AAT is a creature of statute, its functions can be easily degraded structurally and culturally' and further, that the AAT 'is only as effective as its membership'.[6]

7.10 The Defence Force Welfare Association made the point that:

> … transparency in the context of the administrative review system, and more broadly the administrative law system, is of paramount importance to public confidence.
>
> ….
>
> DFWA is of the view that any measures that improved transparency of administrative decisions [of the Commissions], would have consequential improvements to the administrative review system more broadly.[7]

7.11 Despite raising concerns with some elements of the AAT's operation, Carina Ford Immigration Lawyers acknowledged that the AAT and its administrative and support staff:

> … continue to offer a service that is accessible, professional and efficient and [the] majority of members are professional, competent and take their role as being a member very seriously and we fully recognise that members make decisions that can be life changing. It operates a user-friendly website which has useful information for lawyers and unrepresented applicants and it has increasingly improved its publication of decisions.
>
> … The majority of members conduct hearings in a fair, informal and efficient manner and many have a sound knowledge of the area of migration law and the complexities of the caseload.[8]

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5 Grattan Institute, *Submission 12*, p. 3.

6 Melbourne Law School, *Submission 14*, pp. 2, 3.

7 Defence Force Welfare Association, *Submission 9*, pp. 3–4.

8 Carina Ford Immigration Lawyers, *Submission 19*, p. 2.

Concerns of the committee

7.12 It has become clear to the committee throughout this inquiry that the AAT has not been functioning in the 'fair, just, economical, informal and quick'[9] way that the *Administrative Appeals Tribunal Act 1975* (AAT Act) provides it should.

7.13 These views have been reinforced by the evidence received, over several years, by the Legal and Constitutional Affairs Legislation Committee (Legislation committee) through the Senate Estimates process, where the testimony of the AAT has consistently given rise to concerns about its administrative processes, transparency and productivity.

7.14 Some specific issues are discussed below, before turning to concerns with the AAT more broadly.

Migration and Refugee Division

7.15 The Migration and Refugee Division (MRD) is the largest AAT Division by some margin, and it is clear that the AAT cannot address both the significant volume of legacy cases and the continuing number of new applications, without better resourcing and case management.

7.16 It is of considerable concern to the committee that the MRD has such a backlog of cases, and that it is taking years to finalise matters. These delays have a real-world impact on applicants, who have no certainty about the future for them and their families.

7.17 It is also having a negative impact on legal representatives, non-government organisations who advocate for applicants, and on AAT staff who are under increasing pressure to facilitate better and quicker decision-making.

7.18 The piecemeal allocation of funding on a yearly basis does not allow the AAT to make long-terms plan to address the MRD caseload. The committee is concerned that without significant and sustained funding increases, the MRD will not be able to appoint new members to it, and therefore it will not be able to improve its rates of completion.

7.19 The committee echoes the calls of the Callinan Report, that at least 15 to 30 members be appointed to the MRD as soon as possible, with relevant experience in migration and refugee matters as that might allow them to make inroads into the caseload in an expedient yet fair manner.

Caseload

7.20 The AAT itself has noted that several factors are stopping it from achieving its performance targets, including the 'growing and ageing on-hand caseload' in the MRD. It also noted insufficient resources and members, and issues with the legacy case management systems since amalgamation in 2015.

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9 Attorney-General's Department, *Submission 5*, p. 2.

7.21 In addition, the fact that the AAT is setting aside the decisions of departments at consistently high levels indicates problems with the decision-making process in departments themselves. This is exemplified by the National Disability Insurance Scheme (NDIS) Division, where more than half of the relevant agency's decisions have been changed by the Tribunal.

7.22 The caseload at the AAT will not diminish while departments and agencies continue to make decisions which are not the correct or preferred ones.

7.23 The committee will take a keen interest moving forward in the implementation of time-related arrangements for the payment of part-time members, and will be interested to note whether this change has any impact on productivity—for better or worse.

7.24 The committee encourages the AAT to make improvements to its case completion statistics, to ensure that proper context is provided—for example, if a member is sworn in and commences case work only late in the financial year.

Re-establishment of the Administrative Review Council

7.25 The committee is of the strong view that the Administrative Review Council (ARC) should be re-funded and re-constituted as matter of priority. It is wholly unsatisfactory for the ARC to continue to exist as a matter of law, while being prevented from exercising its statutory functions in fact by the deliberate removal of funding by the Government.

7.26 Simply put, Part V of the AAT Act requires the ARC to exist and operate, and this legislative obligation must be upheld.

7.27 It is clear to the committee that the ARC remains the most appropriate mechanism for the facilitation of ongoing, objective and apolitical review of the performance of the federal administrative law system.

7.28 The committee agrees with the Australian Human Rights Commission that the kind of scrutiny and expert analysis provided by the ARC is vital to ensuring the continued integrity of the merits review system and protecting individual freedoms.

7.29 It is the committee's view that the Attorney-General's Department appears unable to replicate the work of the ARC, despite the 'transfer' of functions. The unique role and composition of the ARC makes it best placed to provide the robust, independent, and expert advice required to uphold the integrity of the Australian administrative review system.

7.30 Additionally, it is the committee's view that a properly funded and resourced ARC has an intrinsic role to play in creating and maintaining public trust and confidence in the decision-making of the AAT. To that end, the re-funding of

the ARC will be vital in order for it to provide guidance and instruction in fulsome and wholesale changes to the operations of the AAT.

Recommendation 1

7.31 The committee recommends that, as a matter of urgency, the Commonwealth Government re-fund the Administrative Review Council and allow it to fulfil its statutory duties in accordance with Part V of the *Administrative Appeals Tribunal Act 1975*.

Trust in public administration

7.32 As has been shown throughout this report, the role of the administrative review process in instilling confidence and trust in public administration and the functions of government cannot be minimised. To this end, the AAT should be playing a key role in developing and maintaining this confidence and trust, and in supporting the integrity of the merits review process—but it is not.

7.33 As this and many other inquiries have shown, the AAT is not working, and the merits review system in Australia is being failed by a Tribunal which does not function effectively, efficiently or transparently.

Selection and remuneration of members

7.34 The AAT has become politicised, with the awarding of lucrative, long-term appointments to those who are in favour with the Coalition—regardless of whether these individuals have any relevant qualifications or legal expertise. Nearly a third of appointees to the AAT have been found to have a direct political party affiliation with the Coalition Government, and these appointees are taking the money without any proper accounting of their productivity.

7.35 This politicisation is having a direct impact on the ability of the AAT to perform its legislated functions in a manner that supports proper public administration and effective expenditure of taxpayer funds.

7.36 It also brings into serious doubt whether the AAT can be fully independent, and its decisions trusted by applicants, the legal profession, or the public more broadly. As was noted during the inquiry, whether appointments are made on the basis of political connection or not, what ultimately matters is the perception of the Australian community.

7.37 This politicisation is a danger to those who rely on the merits review system to provide fair and timely decisions on often very personal matters. It also represents a very poor use of public money, given there is a significant proportion of part-time members who are not achieving their required targets, with some members only achieving well under 50 per cent of their benchmark performance indicators—without reasonable explanation.

Ministerial discretion

7.38 Ministerial discretion has been used as a blunt weapon in the politicisation of the AAT.

7.39 It is clear that the Attorney-General holds too much discretionary power in the selection process for members, and this is having a direct and detrimental impact on public trust in the institution. The 2019 protocols allow the Minister to appoint members on the basis of political patronage, rather than on merit. The evidence also suggests that there is no real basis for the duration of any given appointment to the AAT.

7.40 Political appointees may be seen to be making decisions in favour of the government, or upholding the status quo, thus calling into question the independence of the AAT more broadly.

7.41 Ministerial discretion also represents time lost to AAT staff, if the AAT is to go through the expression of interest process, assess applicants and make recommendations—only for the Minister to reject out of hand the recommendations put forward.

7.42 The evidence to the committee reinforced the view that the member selection process was not open, rigorous or fair, with an ever-present risk of political patronage being the basis of appointments. The process as it currently stands is consistently undermining the public credibility of the Tribunal.

7.43 The committee is therefore persuaded by the evidence that a transparent, independent process is needed for the appointment of AAT members, against a clear and well-advertised selection criteria. This should be supported by an independent panel which is able to properly consider each applicant's suitability for the role, and their qualifications.

7.44 This process should be implemented as part of the broader, wholesale changes recommended by the committee around the disassembling and re-establishment of the review system's structures and functions (see below). Doing so will ensure that once re-structured, the system has adequately qualified and experienced members who are ready to perform the duties of the identified roles. Importantly, it will eliminate the politicisation of the appointment process.

Recommendation 2

7.45 The committee recommends that the Attorney-General develop and legislate a process for the appointment of members to the Administrative Appeals Tribunal that:

- **incorporates clear selection criteria;**
- **advertises the selection criteria broadly;**

- **establishes and supports an independent panel to properly consider each applicant's suitability for the role and their qualifications, and recommend appointments against the selection criteria;**
- **limits the discretionary powers of the Attorney-General to make appointments not in accordance with the recommendations of the independent panel;**
- **imposes a uniform approach to the duration of appointments; and**
- **promotes transparency and makes public the outcome of each application and selection round.**

The need to start again

7.46 Over several decades now, the administrative review system has been continually examined and found wanting—with a significant number of recommendations put forward for reform of the merits review system.

7.47 Review after review has outlined how the AAT needs to enact significant reforms to its functions and processes, and importantly to its member selection processes, to no avail. Something is fundamentally broken in the way the AAT currently operates.

7.48 As things currently stand, it is clear that the road to reform of the merits review system would be far too slow—not helped by the significant number of cases which the AAT has on hand, particularly in the MRD. Such slow progress does not help to maintain public confidence in the merits review system.

7.49 For example, the Callinan Report was completed in 2018. In 2020, the government advised it was still 'carefully reviewing the report'. Legislative amendment, apparently taken as a 'first step' in implementing some of Justice Callinan's measures, did not take effect until February of this year.

7.50 It is clear to the committee that wholesale changes are needed to the AAT. These small, piecemeal approaches to change are not working—and even if reforms are progressed, they are taking too long to develop and roll out as applications for review continue to pour in.

7.51 All of the evidence comes together to show only one thing—that the current AAT system is not fit for purpose, is not working as it should, and it impedes the proper consideration of merits review in this country.

7.52 The committee therefore recommends that the AAT be disassembled. In its place, a new federal merits review system should be implemented which re-aligns the merits review process with the AAT's currently legislated obligation to be accessible, proportionate, fair, economic, informal and quick, while promoting public trust and confidence in the decision-making of the review body.

7.53 This new system should be in place no later than 1 July 2023. In progressing with its implementation, the Attorney-General and the AAT should be mindful to not unduly impede or disrupt those matters currently before the AAT, and allow procedural fairness in all cases.

7.54 Further, as part of this wholesale reform, the ARC—once re-funded—should be used to develop policies and provide guidance on best practice approaches to a new administrative review system in Australia.

7.55 In addition, noting the views of the Callinan Report and the evidence before this committee, any restructure of the AAT should ensure that sufficient membership is allocated to consider migration and refugee matters. This area of merits review will continue to have a large caseload—both legacy and new—and there needs to be adequate processes in place to deal with this upfront.

Recommendation 3

7.56 The committee recommends that the Attorney-General disassemble the current Administrative Appeals Tribunal (AAT) and re-establish a new, federal administrative review system, by no later than 1 July 2023. The structure of the new tribunal system should re-align the merits review process with the AAT's legislated objectives of being accessible, proportionate, fair, economic, informal and quick, while promoting public trust and confidence in the decision-making of the review body.

7.57 In restructuring and reforming the merits review system, consideration should be given to the *Administrative Appeals Tribunal Act 1975*, and the Divisional structure, membership, case management practices, practice directions, President's directions, guides and guidelines of the AAT as currently constituted. Appointments to the system should be made in line with Recommendation 2 of this report.

7.58 The re-establishment process should also determine:

- **the relevant stakeholders to consult (including the Law Council of Australia and the Council of Australian Tribunals)**
- **the preferred functions, processes and structures for a fit-for-purpose tribunal system;**
- **ways in which to establish a new system with improved case management and procedural fairness; and**
- **ways to ensure that current matters before the AAT are afforded procedural fairness, and are not impeded or disrupted by the disassembling of the AAT.**

Future work of the committee

7.59 Following on from the recommendations made in this report, the committee will continue its oversight role of the administrative review system as it is revised and reformed.

7.60 To this end, the committee has sought an extension of time in which to make a final report, to 30 June 2022.

Senator the Hon Kim Carr
Chair

Dissenting report from Coalition Senators

1.1 While Coalition senators consider that the Administrative Appeals Tribunal (AAT) needs to make some considerable improvements in its processes and procedures, we strongly reject all recommendations made in the majority report.

1.2 In rejecting the recommendations, our concerns include the following matters as set out below.

(a) We are of the view that the 2019 Protocol for appointments should remain in place as it currently exists and reject the suggestion that this protocol be abandoned.

(b) We reject the majority report's recommendation that the Administrative Review Council should be re-funded (recommendation 1), noting that funding decisions are entirely a matter for Government.

(c) Given that we fully support the continuing operation of the 2019 Protocol for appointments to the AAT, and recommendation 2 of the majority report is predicated on the claim that the 2019 Protocol should be abandoned, we reject recommendation 2.

(d) We reject any suggestion in the majority report that the Attorney-General's Department has been unable to successfully take over the functions and responsibilities of the Administrative Review Council.

(e) We reject the majority report's recommendation that the Administrative Appeals Tribunal should be disassembled, and that a new federal administrative review system be established (recommendation 3).

1.3 Notwithstanding our rejection of all recommendations in the majority report, as has been highlighted in recent Senate Estimates hearings, we are concerned about a number of the AAT's internal processes and procedures which have given rise to inaccurate and incomplete information about a range of matters including the benchmarking of members' work performance, case-loads and completion rates. We also support the implementation of a consistent remuneration framework for all members.

1.4 We are encouraged by the AAT's recent efforts to address these and other matters, and look forward to future improvements.

Senator the Hon Sarah Henderson	**Senator Paul Scarr**
Deputy Chair	**Liberal Senator for Queensland**

Appendix 1
Submissions and additional information received

Submissions

1 Administrative Appeals Tribunal
2 Australian Lawyers Alliance
3 Australian Human Rights Commission
4 Dr Jason Donnelly
5 Attorney-General's Department
6 Dr Bruce Baer Arnold
7 Professor Greg Weeks
8 Emeritus Professor Terry Carney AO
9 Defence Force Welfare Association
10 Accountability Round Table
11 Faculty of Law, Monash University
12 Grattan Institute
13 Legal Aid New South Wales
14 Melbourne Law School
15 Victoria Legal Aid
16 Refugee Council of Australia
17 Office of the United Nations High Commissioner for Refugees (UNHCR)
18 The Council of Australasian Tribunals (COAT)
19 Carina Ford Immigration Lawyers
20 Refugee Advice & Casework Service
21 Economic Justice Australia
22 Ms Heather Marr
23 Law Council of Australia
24 Assistant Professor Narelle Bedford
25 The Tax Institute
26 New South Wales Bar Association
27 People with Disability Australia
28 Jeans Lawyers
29 Professor Gabrielle Appleby, Dr Lynsey Blayden, Dr Chantal Bostock and Dr Janina Boughey
30 Asylum Seeker Resource Centre
31 Social Security Rights Victoria
32 Refugee Legal
33 Emeritus Professor John McMillan AO
34 *Name Withheld*
35 *Name Withheld*

Answers to Questions on Notice

1 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 1 December 2021 (answers received 23 December 2021)

2 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 8 December 2021 (answers received 23 December 2021)

3 Answer to a written question placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 1 December 2021 (answer received 6 January 2022)

4 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 18 January 2022 (answers received 28 January 2022)

5 Answer to a written question placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 18 January 2022 (answer received 28 January 2022)

6 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Administrative Appeals Tribunal, 1 December 2021 (answers received 14 January and 11 February 2022)

7 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Attorney-General's Department, 1 December 2021 (answers received 22 December 2021)

8 Answers to written questions placed on notice by Senator the Hon Kim Carr to the Attorney-General's Department, 1 December 2021 (answers received 27 January 2022)

9 Answer to a written question placed on notice by Senator the Hon Kim Carr to the Attorney-General's Department, 18 January 2022 (answer received 25 January 2022)