



Australian Government
Administrative Review Council

Administrative Review Council: Social security inquiry

Issues Paper

Contents

Glossary	5
Legislation.....	5
Other terms.....	5
1. Introduction	7
Scope.....	7
Making a submission	8
List of questions.....	9
2. Background.....	11
Administrative Review Tribunal reforms.....	11
Social security review process	12
Challenges facing social security administrative review	13
3. Key issues	15
Key Issue 1: Internal review processes	15
Robodebt and concerns with ARO review process.....	16
Timeliness and accessibility of decision-making.....	16
Impact on applications for external merits review	17
Council consideration and questions	18
Key Issue 2: ART social security merits review structure.....	19
Current review structure	19
Arguments for and against the two-tier structure	20
Council consideration and questions	23
Key Issue 3: Role of the Department in the ART	24
Current procedures.....	24
Council consideration and questions	28
Key Issue 4: Role of alternative dispute resolution in the ART	28
Should dispute resolution be used in first review?	30
Council consideration and questions	30
Key Issue 5: Role of the Guidance and Appeals Panel.....	31
Overview of the Guidance and Appeals Panel	31
Current role of the GAP in social security matters	32

Previous proposal for the GAP to conduct second review	33
Council consideration and questions	34
Appendix A: History of social security review	35
Social Security Appeals Tribunal.....	35
2015 Tribunal amalgamation	35
Robodebt Royal Commission	36

Glossary

Legislation

Abbreviation	Definition
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
ART Act	<i>Administrative Review Tribunal Act 2024</i>
ART Bill	Administrative Review Tribunal Bill 2024
ART (CTP 1) Bill	Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2024
Legal Services Directions	<i>Legal Services Directions 2017</i>
SSA Act	<i>Social Services (Administration) Act 1999</i>

Other terms

Abbreviation	Definition
AAT	Administrative Appeals Tribunal
AAT1	First stage of social security merits review in the former AAT
AAT2	Second stage of social security merits review in the former AAT
ADR	Alternative Dispute Resolution
AGD	Attorney General's Department
ARO	Authorised Review Officer (Services Australia)
ART	Administrative Review Tribunal
Callinan Report	<i>I D F Callinan AC Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)</i>

Council	Administrative Review Council
First review	First stage of social security merits review in the ART
GAP	Guidance and Appeals Panel
Parliamentary Committee inquiries	House of Representatives Standing Committee on Social Policy and Legal Affairs, <i>Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023</i> and Senate Standing Committee on Legal and Constitutional Affairs, <i>Inquiry into Administrative Review Tribunal Bill 2023 [Provisions] and related bills</i>
Second review	Second stage of social security merits review in the ART
SME	Subject matter expert within Services Australia
SSAT	Social Security Appeals Tribunal
SSCSD	Social Security and Child Support Division of former AAT

1. Introduction

1.1. On 4 March 2025, the former Attorney-General, the Hon Mark Dreyfus KC MP, wrote to the Chair of the Administrative Review Council (“Council”) to request that the Council inquire into the operation of the social security related provisions in the *Administrative Review Tribunal Bill 2024* (Cth) (“ART Bill”) and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2024* (Cth) (“ART (CTP 1) Bill”).

1.2. The Attorney-General’s request followed a recommendation of the Senate Committee for Legal and Constitutional Affairs in its inquiry into the ART Bills:

The committee recommends that, following the establishment of the Administrative Review Council, the Australian Government should also consider referring to the Council the operation of the social security-related provisions as set out in the Administrative Review Tribunal Bill 2024 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024, having regard to the findings of the Robodebt Royal Commission.¹

1.3. On 19 May 2025, the Council decided to inquire and report on this issue.

Scope

1.4. The Council’s inquiry will consider whether the current structures and procedures in place for the review by the Administrative Review Tribunal (“ART”) of social security and family assistance decisions are effectively delivering the objectives of the ART under the *Administrative Review Tribunal Act 2024* (Cth) (“ART Act”). Unlike other jurisdictional areas of the ART, there is a two-tier system for merits review by the ART of “eligible social services decisions”, which includes social security, child support, family assistance decisions and other reviewable social security decisions, as defined.² The inquiry will consider the rationale for, and performance of, the two-tier system of social security merits review in the ART and the desirability of retaining this model. This requires consideration of other elements of the complete scheme for review of social security and family assistance decisions that are inter-related with the ART review. In particular, the inquiry will consider:

- (i) the desirability of retaining the two-tier system of merits review in the ART of social security and family assistance decisions, having regard to the rationale for this model;
- (ii) the role of the Department of Social Services as a non-participating party in existing first review in the ART;

¹ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) Recommendation 3.

² As defined in the *Administrative Review Tribunal Act 2024* (Cth) (“ART Act”) s 131C. The Inquiry will also include consideration of review of “ART social services decisions”, as defined in s 131D(3), which are first tier decisions of the ART of “eligible social services decisions”.

- (iii) the availability of referrals to the Guidance and Appeals Panel (“GAP”);
- (iv) the ability to engage in alternative dispute resolution (“ADR”); and
- (v) the avenue of internal review of social security and family assistance decisions by an authorised review officer (“ARO”).

1.5. As part of its inquiry, the Council will consider:

- The effectiveness of the internal review process conducted by AROs in Services Australia in resolving matters prior to external merits review.
- The effectiveness of first and second review in the ART in finalising matters in accordance with the objectives of the ART Act.
- The experience of parties to social security and family assistance reviews by AROs and by the ART, including any challenges faced by applicants in accessing or exercising their review rights. This will include consideration of prospective applicants and reasons they may not seek to challenge decisions through available review processes, either internally or in the ART.
- The impact of non-participation by the Department of Social Services at the ART first review stage.
- The current use of ADR in social security reviews before the ART and whether there are changes that would facilitate the timely resolution of matters.
- The role of the ART’s GAP and whether the current provisions restricting access to the GAP in social security matters are appropriate.

Making a submission

1.6. The Council invites submissions responding to the questions in this Issues Paper. You do not need to answer every question, and you are welcome to respond only to those questions that are relevant to you or your organisation.

1.7. You can provide a submission via the consultation webpage at <https://consultations.ag.gov.au/>. We encourage you to provide a response to the consultation questions through the online form. Alternatively, you may upload a written submission.

1.8. Submissions received will be handled by the Administrative Review Council Secretariat within the Attorney-General’s Department and shared with the Council.

1.9. Consultation closes on **Friday, 26 September 2025**.

Publication of submissions

1.10. You can submit your response under your name or anonymously. Your submission may be published unless you request that your submission be kept confidential or if the Council considers that the submission should not be made public. The Council may also refer to responses, and the names of submitters (if provided) in its inquiry report.

1.11. The Council reserves the right not to publish submissions which contain personal information, inappropriate or defamatory content, or which may otherwise be unlawful to

publish. The Council may also redact parts of published submissions if appropriate.

- 1.12. Please do not provide detailed information about personal legal matters or cases, or personal information relating to third parties. Please do not provide information that is the subject of legal restriction (for example, under section 204 of the *Social Security (Administration) Act 1999* (Cth)). Where that information is provided, the Council may not be able to consider your submission in its review. If we receive a high volume of identical or template responses we may publish a representative sample. Submissions may be subject to freedom of information requests, or requests from the Parliament.
- 1.13. Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988* (Cth). For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy. A Privacy collection notice, available on the consultation webpage, outlines how we will collect your personal information, how it will be used and who it may be disclosed to. By participating in the consultation, you are indicating you have read and agree to the Privacy collection notice.

List of questions

Internal review processes

1. What is your experience with the Authorised Review Officer (ARO) review process in Services Australia after 7 July 2023 (when the Robodebt Royal Commission reported)?

Provide details particularly in relation to:

- 1.1. access to review;
- 1.2. timeliness of review; and
- 1.3. the communication of reasons for decisions and further review rights?

2. Are there any changes to the process or arrangements for ARO review that could improve this avenue for review in terms of process or outcomes for individuals?

3. Should there be statutory time limits on applying for ARO reviews and/or for an ARO to make a decision? Please explain why or why not.

ART social security review structure

4. Have you observed changes to how the review of social security matters is being carried out in the ART, compared with in the former AAT? If so, what are these changes?

5. Do the current structure and procedures for social security review in the ART promote the ART's objectives under the ART Act?³ If not, what do you think are the key impediments hindering this?
6. What aspects of the current first review in the ART are working well?
7. Do you believe a single tier of review in the ART could promote the objectives of the ART?
8. If there were a single tier of review in the ART, would particular measures or safeguards be needed to ensure that review remains accessible and responsive to the diverse needs of parties to proceedings?

Role of the Department of Social Services ("DSS") in the ART

9. How would you describe your experience of DSS's role at first review and second review?
10. What impact does DSS's non-participation during first review have on the ART's ability to resolve matters in accordance with its statutory objectives?
11. Are there any changes you think should be made to DSS's role before the ART to improve or better support the timely and effective resolution of matters at first review?

Role of alternative dispute resolution in the ART

12. What is your experience of alternative dispute resolution (ADR) processes during ART review of social security matters?
13. Are there any changes you would suggest to the ADR process to support the ART's objectives in relation to accessibility, responsiveness and the quick and informal resolution of applications?

Role of the Guidance and Appeals Panel ("GAP")

14. What is your view of the current provisions for access to the GAP in the ART? Do they support the intended role of the GAP in ensuring that significant and emerging issues are quickly dealt with at a higher level and in promoting consistent ART decision-making?
15. If a single-tier system of review were introduced, would any changes be needed to the provisions and criteria for referrals to the GAP?

³ ART Act s 9. The Tribunal must pursue the objective of providing an independent mechanism of review that:

- (a) is fair and just; and
- (b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and
- (c) is accessible and responsive to the diverse needs of parties to proceedings; and
- (d) improves the transparency and quality of government decision-making; and
- (e) promotes public trust and confidence in the Tribunal.

2. Background

Administrative Review Tribunal reforms

2.1. The Council's inquiry has arisen in the context of reforms to Australia's administrative review system in 2024. The ART Act, which came into effect on 14 October 2024, established the ART to replace the former Administrative Appeals Tribunal ("AAT"), and implemented recommendations of the Final Report of the Royal Commission into the Robodebt Scheme. The ART Act requires the ART to pursue the objective of providing an independent mechanism of review that:

- a) is fair and just; and
- b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and
- c) is accessible and responsive to the diverse needs of parties to proceedings; and
- d) improves the transparency and quality of government decision-making; and
- e) promotes public trust and confidence in the Tribunal.⁴

2.2. This differs from the objective of the former AAT in that it emphasises the need to respond to the diverse needs of parties in the ART process and recognises the important role of the ART in promoting transparent and high-quality government decision-making.⁵ The revised objective also places clear limits on the ART's objective of resolving applications quickly and informally, by clarifying that this goal must be balanced by the need to properly consider the issues in each particular case.⁶

2.3. The ART Bill initially proposed significant reforms to the review structure for social security matters, by removing the two-tier review structure that had existed in the AAT and reflected the two levels of merits review which had been in place for social security matters since the late 1980s. The proposed single tier structure was intended to be consistent with the conduct of review in the rest of the ART's caseload, and reflect the aim of the reforms to harmonise processes and procedures. Further detail about the history of social security merits review is at **Appendix A**.

2.4. Despite this proposal, the ART Bill was ultimately amended to retain the two-tier system for social security matters, retaining many of the key features of first and second review that had applied in the AAT.⁷

⁴ ART Act s 9.

⁵ *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") s 2A; Revised Explanatory Memorandum, Administrative Review Tribunal Bill 2024 ("ART Bill") 36-37.

⁶ Revised Explanatory Memorandum, ART Bill 36.

⁷ The rights, requirements and procedures underpinning merits review of social security decisions are primarily set out in the ART Act, as modified by Part 4A of the *Social Security (Administration) Act 1999* (Cth) ("SSA Act"). Part 5A of the ART Act provides for second review for eligible social services decisions. The [Administrative Review](#)

2.5. The ART Bills were the subject of inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs and by the Senate Constitutional and Legal Affairs Legislation Committee.⁸ The Senate Committee recommended the social security-related amendments be referred to the Council, noting:

The committee recognises that, while there was near-universal agreement that the bills represent a significant improvement on the current system of administrative review, some submitters would have liked the committee to recommend further amendments, particularly in the areas of social security and migration.

Importantly, the committee notes that the Administrative Review Council will be tasked with keeping the Commonwealth administrative law system under review, and will be well-placed to consider further improvements to the system after the bills are enacted (and ahead of the five-year statutory review provided for in the bills).⁹

Social security review process

2.6. There are currently three levels of administrative review of social security primary decisions:

1. **Internal review within Services Australia.** An applicant may request an explanation of the original decision by a subject matter expert and/or seek formal review of the decision by an ARO;
2. **First review in the ART.** This is intended to be “informal, accessible, trauma-informed and quick”, with an aim of ensuring that reviews “are as efficient and effective as possible, minimising the burden on applicants”.¹⁰ The applicant will usually be the only participating party;
3. **Second review in the ART.** The Department of Social Services will usually participate in the review as the respondent agency, and there may be some form of dispute resolution process such as case conferencing, mediation or conciliation to seek to resolve the matter. If the matter is not resolved, it will proceed to a hearing.

[Tribunal \(Common Procedures\) Practice Direction 2024](#) provides for directions about the practices and procedures relating to applications for review and the conduct of proceedings.

⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal \(Consequential and Transitional Provisions No. 1\) Bill 2023](#), Australian Parliament website; Senate Constitutional and Legal Affairs Legislation Committee, [Administrative Review Tribunal Bill 2023 \[Provisions\] and related bills](#), Australian Parliament website.

⁹ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 37, Recommendation 3.

¹⁰ Revised Explanatory Memorandum, ART Bill 7.

2.7. In limited circumstances, the GAP in the ART may review a social security matter where the President of the ART believes the application raises an issue of significance to administrative decision-making.

2.8. The Council is seeking views on how each stage of the review process is currently working and whether there are any changes that should be made. To guide consideration, this Issues Paper sets out some of the key issues and debates arising in connection with the various stages of review.

Challenges facing social security administrative review

High volume caseload and finalisation times

2.9. An inherent challenge facing the social security jurisdictional area of the ART is the high volume of decision-making, which can result in a large number of matters proceeding to internal and external review. Annual report data from Services Australia shows that in 2023-24, the agency processed around 3.7 million claims for social security and welfare, and approximately 3.6 million claims in 2022-23.

2.10. Data from the former AAT shows that first review social security (“AAT1”) lodgments typically constituted almost one-third of all matters lodged in the AAT annually, though this proportion fell in 2023/24.

Table 1: AAT Social security lodgments and finalisations

	2020/21	2021/22	2022/23	2023/24
AAT1 lodgments	13,013	12,138	12,260	8,740
% of total AAT lodgments	34.7%	27.4%	29.9%	17.4%¹¹
AAT1 finalisations	13,088	11,996	11,162	10,400
% of total AAT finalisations	29.4%	28.6%	26.1%	23.9%

Source: AAT Caseload Reports [AAT statistics](#) | [Administrative Review Tribunal](#)

2.11. The following table shows the median finalisation time for first review AAT1 and second review (“AAT2”) social security reviews in the AAT. It indicates a recent lengthening

¹¹ This fall in proportion appears to partly be the result of a significant increase in the volume of lodgments in some other Divisions of the AAT, particularly the Migration and Refugee Division which had a 69% increase in lodgments from 2022/23, with migration (non-refugee) lodgments increasing by 114%: AAT *Annual Report 2023-24* (Commonwealth, 24 September 2024).

of resolution times in AAT1 review, despite the number of lodgments falling. The AAT attributed this to increased rates of attrition in experienced members in a division which could be procedurally and technically complex, as well as challenges predicting trends and planning work due to limited data being available through Services Australia.¹²

Table 2: Median finalization times – AAT1 and AAT2

Median finalisation time (weeks)	2020/21	2021/22	2022/23	2023/24
AAT1	9	9	11	15
AAT2	22	24	22	21
AAT average	45	30	34	40

Source: AAT Caseload Reports [AAT statistics | Administrative Review Tribunal](#)

2.12. Having only commenced on 14 October 2024, caseload statistical information from the ART is limited. As with the Social Security and Child Support Division (“SSCSD”) in the AAT, the social security jurisdictional area of the ART reviews a high volume of cases.¹³ Statistics show 3,754 lodgments in the social security jurisdictional area for the period 14 October 2024 to 31 May 2025, with 3,889 finalisations and a median time to finalise of 14 weeks.¹⁴

Vulnerability of applicants

2.13. The nature of the social security jurisdiction means that many seeking assistance will have some form of vulnerability. The Robodebt Royal Commission recognised that vulnerable people may struggle with accessing and navigating the social security system and need extra support.¹⁵ The Commission made a number of recommendations aimed at improving the way that Services Australia designs its policies and processes, with a primary emphasis on the needs of recipients, identifying and engaging with vulnerable recipients, considering documents vulnerabilities in the design of compliance programs, and engaging

¹² AAT *Annual Report 2023-24* (Commonwealth, 2024) “Performance – Social Services and Child Support Division” 39.

¹³ For the jurisdictional area see ART Act s 196(1)(f). The social security jurisdictional area includes Centrelink and Paid Parental Leave lists: “About us: Structure”, *Administrative Review Tribunal* <<https://www.art.gov.au/about-us/structure>>.

¹⁴ “Administrative Review Tribunal Caseload Report for the period 14 October 2024 to 31 May 2025”, *Administrative Review Tribunal* <https://www.art.gov.au/sites/default/files/2024-12/ART_Caseload_2024-25.pdf>. The median time to finalise is measured in weeks from lodgment to finalisation.

¹⁵ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 1, 349.

with advocates.¹⁶

2.14. Applicants with vulnerabilities are likely to face additional challenges when accessing administrative review processes, both internally and externally in the ART. These challenges will be exacerbated when an applicant is unrepresented in review proceedings.

2.15. In the former AAT, a key priority for the SSCSD was to assist people to participate in the review process, including vulnerable cohorts experiencing homelessness, from culturally and linguistically diverse backgrounds, and those with disabilities and other identified vulnerabilities which may have affected their ability to access review services.¹⁷ Despite the AAT's caseload strategy to manage volume¹⁸, resources and case complexity, applicants at AAT1 and AAT2 were the most frequently legally unrepresented.¹⁹

2.16. The Parliamentary Committee inquiries into the draft ART Bills considered the challenges that may be faced by many social security applicants when navigating the administrative review systems and structures, including in relation to exercising their review rights, presenting relevant material and arguments.²⁰ One of the aims of the ART legislation has been to 'significantly improve the experience of those seeking review of government decisions'.²¹

3. Key issues

Key Issue 1: Internal review processes

3.1. Before a social security matter can be appealed to the ART, it must go through an internal agency review process. An individual who receives a decision from Services Australia has the option to:

- Request an explanation for the decision from a Subject Matter Expert ("SME") and/or
- apply for a formal internal review of the decision by an ARO.²²

¹⁶ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 1, xiii-xv, Recommendations 10.1, 11.2-11.4, 12.1, 13.3-13.4.

¹⁷ AAT *Annual Report 2022-2023* (Commonwealth, 2023) 38.

¹⁸ In the AAT, the Social Services and Child Support Division ("SSCSD") was the second largest division.

¹⁹ Social Security Rights Victoria, Submission No 31 to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the performance and integrity of Australia's administrative review system* (12 December 2021) 5.

²⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* Report (February 2024) 27-8.

²¹ Revised Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2024 1.

²² *Social Security Guide*, version 1.329, released 12 May 2025, Part 6.10 <<https://guides.dss.gov.au/social-security-guide/6/10>>.

3.2. The ARO is an officer who was not involved in making the original decision and has the power to vary the decision or set it aside and substitute a new decision.²³

3.3. Services Australia does not publish data in relation to its internal review process, such as application numbers, outcomes and finalisation times.

Robodebt and concerns with ARO review process

3.4. There has been evidence given to the Robodebt Royal Commission and various Parliamentary Committee inquiries of concerns with aspects of the internal review process, particularly in relation to the ability of applicants to understand and access ARO review. These include reports of insufficient reasons being provided for decisions at first instance; of limited or conflicting information being provided about review rights; and of applicants being refused an ARO review or diverted to a less formal reassessment process.²⁴ Evidence was also provided of applicants finding the appeals process intimidating and emotionally harrowing.²⁵

3.5. Services Australia and the Department of Social Services are in the process of implementing a number of recommendations from the Commission, including reforms aimed at improving the systems and supports that impact people experiencing disadvantage. The Department states that these steps should greatly improve the quality and transparency of agency decision-making. These include significant and long-term reform within Services Australia aimed at improving the provision of clear reasons for the primary decision.²⁶ These changes are likely to take time to implement.

Timeliness and accessibility of decision-making

3.6. There is no statutory timeframe within which Services Australia is required to finalise an internal review. Services Australia currently aims to finish at least 70% of formal ARO reviews within 49 days from the date of request.²⁷ The agency's website currently states:

We have a high number of formal review applications in the queue for processing. This means it may take longer than usual before we get to your application.²⁸

3.7. There is the potential for delays at the internal review stage to impact applicants' engagement with the review process and their decisions on whether to seek external merits

²³ SSA Act s 126.

²⁴ Parliament of Australia Senate Standing Committee on Community Affairs *Centrelink's Compliance Program Interim Report* (September 2020) 24; Economic Justice Australia ("EJA") Submission to Robodebt Royal Commission (February 2023) 13-17.

²⁵ Parliament of Australia Senate Standing Committee on Community Affairs *Centrelink's Compliance Program Interim Report* (September 2020) 25.

²⁶ National Legal Aid Submission No 26 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential and Transitional Bill)* (January 2024) 2, 6.

²⁷ Services Australia *Annual Report 2023-24* (Commonwealth, 2024) 40.

²⁸ "Explanations and formal reviews of a Centrelink decision", *Services Australia* <<https://www.servicesaustralia.gov.au/explanations-and-formal-reviews-centrelink-decision?context=64107>>.

review in the ART. The Council is interested in better understanding the accessibility and timeliness of ARO review and the impact that this may have on vulnerable applicants, and their decisions on receipt of an adverse ARO outcome, as to whether it is worthwhile seeking ART review.

Impact on applications for external merits review

3.8. Data from Services Australia highlights the proportion of social security payment decisions changed following merits review in the former AAT.

Table 3: AAT outcomes – social security payments

	AAT1 received	AAT1 changed (%)	AAT2 received*	AAT2 changed*	AAT2 changed as % of AAT1 received
2023-24²⁹	4,741	2,333 (49%)	858	278 (32%)	5.9%
2022-23	7,433	1,954 (26%)	985	304 (31%)	4.1%
2021-22	6,694	1,770 (26%)	1,011	389 (38%)	5.8%
2020-21	8,831	2,028 (23%)	1,418	393 (28%)	4.5%

Source: Services Australia Annual Reports 2021-22 to 2023-24

*Includes both customer-initiated and Secretary applications

Table 4: AAT2 Customer- and Secretary-initiated reviews

	2020-21	2021-22	2022-23	2023-24
No. of Customer- initiated lodgments (No. changed)	1,332 (359)	983 (356)	952 (287)	789 (257)

²⁹ The Services Australia *Annual Report 2023-24* (Commonwealth, 2024) 128 notes that: “In 2023-24 the AAT made a number of decisions relating to the agency’s former practices of income apportionment (used prior to 7 December 2020), which was found to be unlawful”.

	2020-21	2021-22	2022-23	2023-24
No. of Secretary-initiated lodgments (No. changed)	86 (34)	28 (33)	33 (17)	69 (21)

Council consideration and questions

3.9. In its 1981 report on social security, the Council recognised that an external review system could not be considered in isolation from primary decision-making and internal review processes:

[a] review system is not, except in the simplest situations, merely the addition of a means of independent review at the end of and outside an existing decision-making structure. Where the volume of decisions and appeals is large it should be considered and designed as a total process which may require adjustments within the original decision-making structure itself.³⁰

3.10. The Council seeks views on whether the existing procedures in place for internal ARO review are effectively finalising matters in a timely manner, and whether there are any changes that could help to increase the number of matters resolved at the ARO stage, without needing to progress to external review. The Council also seeks views as to whether there are any aspects of the ARO review process that might deter applicants from pursuing their rights to merits review in the ART.

Questions

1. What is your experience with the Authorised Review Officer (ARO) review process in Services Australia after 7 July 2023 (when the Robodebt Royal Commission reported)?

Provide details particularly in relation to:

1.1. access to review;

1.2. timeliness of review; and

1.3. the communication of reasons for decisions and further review rights?

2. Are there any changes to the process or arrangements for ARO review that could improve this avenue for review in terms of process or outcomes for individuals?

³⁰ Administrative Review Council (ARC) *Social Security Appeals Report* (AGPS, Canberra, 1981) 46.

3. Should there be statutory time limits on applying for ARO reviews and/or for an ARO to make a decision? Please explain why or why not.

Key Issue 2: ART social security merits review structure

Current review structure

- 3.11. The ART provides two stages for review of reviewable social security and family assistance decisions, in its Social Security Jurisdictional Area.³¹
- 3.12. First review is intended to be informal, accessible, trauma-informed and quick, with a view to resolving the matter as efficiently and effectively as possible.³² The Department is taken to be a non-participating party in proceedings, although the ART has the ability to require participation where it would assist in progressing the proceeding or in making the correct or preferable decision, and the Department may also issue a participation notice to request to participate in individual matters or case events.³³ As a result, alternative dispute resolution is not typically used in first review.
- 3.13. Both the applicant and respondent agency may seek second review of an ART social security decision. Second review involves the Department as a participating party, and will often include some form of alternative dispute resolution, such as pre-hearing conferencing. If the parties cannot resolve the matter, it will likely progress to a private hearing before the Tribunal.³⁴

What has changed by comparison with the AAT?

- 3.14. The current ART review structure for social security is intended to maintain most of the features of the two tiers of review that operated in the AAT. However, there have been some changes aimed at promoting greater flexibility in ART procedure, including:
- a social security decision can be appealed directly from ART first review to the Federal Court on a question of law, without the applicant having to obtain a second review decision;
 - the ART has the power to require the agency to participate in first review;
 - under the participation notice framework, the Department may request to participate in first review;
 - there is access to dispute resolution and single party case conferencing at both levels of review; and

³¹ Under the ART Act s 131D(3), second review is available for an “ART social services decision”.

³² Revised Explanatory Memorandum, ART Bill [44]-[45].

³³ ART Act ss 62-64.

³⁴ SSA Act s 168.

- the privacy settings for hearings at first review are maintained at second review.³⁵

3.15. There are also new requirements for the publication of ART decisions, which require the ART to publish its decisions which involve a significant conclusion of law, or with significant implications for Commonwealth policy or administration.³⁶ First review decisions in the AAT were not published, on Austlii or otherwise. The Robodebt Royal Commission found that the publication of reasons in AAT1 matters involving significant points of law or policy would “promote uniformity in decision-making, and allow public scrutiny and wider community understanding of how the AAT was applying law and policy”.³⁷ The Commission recommended that first review social security decisions involving significant conclusions of law or having implications for social security policy, be published.

Arguments for and against the two-tier structure

Previous reports on the issue

3.16. The structure of external social security merits review has long been the subject of debate. The Council has considered the issue in three reports published in 1980, 1984 and 1995. In its 1984 report, *The Structure and Form of Social Security Appeals*, the Council argued that a two-tiered structure of external review was necessary in a mass-volume jurisdiction such as social security.³⁸ However, in its 1995 *Better Decisions* report, the Council concluded that while the availability of a second tier of external merits review was important, it would be less important under the Council’s proposed amalgamated tribunal, given the independence of members and flexibility of procedures.³⁹

3.17. In 2019, the Hon Ian Callinan AC conducted a statutory review of the *Tribunals Amalgamation Act 2015 (Cth)* (“Callinan Report”).⁴⁰ The Callinan Report recommended 37 measures for further legislative reform to accommodate the amalgamation of the tribunals, including the abolition of the right to seek second review of social security decisions.⁴¹ Having considered written submissions from government stakeholders and community organisations, Mr Callinan was unpersuaded by arguments in favour of retaining a two-tier system. He concluded that it was inadvisable to have one AAT member reviewing the decision of another AAT member, and that the existence of a second level of review may discourage careful attention to decision-making by the Department and at the AAT1 stage.

³⁵ Department of Social Services “Answer to Question on Notice IQ24-000026” Senate Legal and Constitutional Affairs Legislation Committee *Administrative Review Tribunal Bill 2023 [Provisions] and related Bills* (May 2024).

³⁶ ART Act s 113.

³⁷ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2, 554, Recommendation 20.4.

³⁸ ARC *The Structure and Form of Social Security Appeals* Report No 21 (AGPS, Canberra, 1984) 185.

³⁹ ARC *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (AGPS, Canberra, 1995) 146.

⁴⁰ I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* Report (23 July 2019).

⁴¹ I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* Report (23 July 2019) 13.

- 3.18. The ART Bill initially proposed the removal of two-tier review. The Attorney-General's Department explained that the Bill sought to combine the best features of first and second review, and make enhancements, to ensure effective outcomes through a single tier of review.⁴² This included making dispute resolution processes and case conferencing available at first review, while preserving informality of review through notices of non-participation by the Department of Social Services in ART proceedings. Complex matters and ART decisions affected by error could be escalated to the Guidance and Appeals Panel.⁴³
- 3.19. The Parliamentary Committee inquiries into the ART Bills reported on the concerns raised by some stakeholders about the proposed abolition of the two-tier review structure. In response to these concerns, the Australian Government amended the Bill to retain the two-tier structure.⁴⁴ The Revised Explanatory Memorandum for the ART Bill noted that retaining an entitlement of applicants to second review "recognis[es] the particular factors and vulnerabilities of social security applicants".⁴⁵

Accessibility

- 3.20. Many submissions to the Parliamentary Committee inquiries into the ART Bills argued that the informality of first review helps to support access to the ART. Legal advocacy and representative bodies gave evidence that the loss of the two-tier structure may deter potential applicants and create particular barriers for unrepresented applicants.⁴⁶
- 3.21. These submissions to the Parliamentary Committee inquiries noted that the two-tier system provides an important protection for vulnerable applicants who may have difficulty presenting relevant material or argument on their own behalf, as it provides a second opportunity to correct a decision.⁴⁷

⁴² Attorney-General's Department (AGD), Submission No 6 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)* (January 2024) 9.

⁴³ AGD Submission No 6 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)* (January 2024) 10.

⁴⁴ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 2.

⁴⁵ Revised Explanatory Memorandum, ART Bill [45].

⁴⁶ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 25.

⁴⁷ Parliament of Australia House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* Report (February 2024) 27-28.

Efficiency and resources

3.22. Efficiency arguments have been made in support of both single and two-tier review structures. Stakeholders in favour of the two-tier review system have argued that it provides a quick and cost-effective means of resolving the majority of applications and reduces the risk of significant backlogs and the administrative burden of all ART applicants having to go through a formal case-management process.⁴⁸ Legal assistance and advocacy organisations have suggested that this also supports them to target their resources more effectively to support applicants through the second review process, in which applicants are more likely to be legally represented.⁴⁹

3.23. Caseload data from the former AAT (**Table 5**) highlights the volume of applications which were lodged in AAT1 compared with those lodged in AAT2. This may suggest that first review plays an important role in efficiently finalising the majority of social security and family assistance matters, with the more resource-intensive second review reserved for those matters which are more difficult to resolve, possibly due to their complexity.

Table 5: Social security lodgments in AAT1 vs AAT2

Tier	2021/22	2022/23	2023/24
AAT1	9,698	9,896	6,824
AAT2	1,179	1,146	1,121

Source: AAT Annual Reports 2021-22 to 2023-24

3.24. At the same time, arguments in support of single-tier review have claimed that the two-tier system protracts proceedings, requiring applicants to go through internal agency review and then first review in the tribunal before they have the opportunity to negotiate with the respondent agency.⁵⁰ The Attorney-General's Department has stated that during its consultation on the ART reforms, some stakeholders supported the removal of second review on the basis that it was inefficient, undermined finality and potentially disincentivised full engagement with first review.⁵¹

3.25. The Callinan Report stated:

⁴⁸ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 25-26.

⁴⁹ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 25-28.

⁵⁰ Parliament of Australia House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* Report (February 2024) 28-29.

⁵¹ AGD Submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 9.

The provision of a Second Tier of review comes at an expense of time and money. It is discordant with the opportunities for review of decisions in other Divisions. Its existence is a legacy of the absorption of the Social Security Appeals Tribunal (“SSAT”) by the AAT. The existence of a second review may discourage careful attention to the making of decisions within the Department and in the First Tier of the AAT.⁵²

Rationale for distinct approach

- 3.26. Those opposing two-tier review have also questioned the justification for social security matters being treated differently from other jurisdictional areas in the AAT, which may also involve a high-volume caseload and vulnerable applicants. This point was made in the Callinan Report, which rejected policy arguments in favour of the two-tier system and suggested that this structure stood in the way of harmonisation of the then AAT.⁵³

Council consideration and questions

- 3.27. The Explanatory Memorandum for the ART Bill stated that the broader reforms within the legislation, which include enhanced ART powers and procedures and greater flexibility for the ART to resolve matters efficiently and with regard to the needs of the matter, are expected to lead to more social services matters being resolved at first review. However, it noted that second review would continue to ensure that existing systems and safeguards remain in place until the changes are implemented and mature.⁵⁴
- 3.28. The Council seeks views and information about the experience of parties and representatives in the ART since its establishment. In particular, the Council seeks to understand whether there have been changes to the review of social security decisions as a result of the ART’s enhanced flexibility, and whether there are further changes that would support the ART in pursuing its objectives.

Questions

4. Have you observed changes to how the review of social security matters is being carried out in the ART, compared with in the former AAT? If so, what are these changes?

⁵² I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* Report (23 July 2019) 13 (Measure 13).

⁵³ I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* Report (23 July 2019) 159-160.

⁵⁴ Revised Explanatory Memorandum ART Bill 4-5, 7.

5. Do the current structure and procedures for social security review in the ART promote the ART's objectives under the ART Act?⁵⁵ If not, what do you think are the key impediments hindering this?
6. What aspects of the current first review in the ART are working well?
7. Do you believe a single tier of review in the ART could promote the objectives of the ART?
8. If there were a single tier of review in the ART, would particular measures or safeguards be needed to ensure that review remains accessible and responsive to the diverse needs of parties to proceedings?

Key Issue 3: Role of the Department in the ART

- 3.29. This section examines the role of the Department of Social Services in the ART, and the changes that have occurred at first review for social security matters.
- 3.30. Currently, although the Department is a party to social security review proceedings in the ART, it is deemed to have elected not to participate at first review unless the ART orders otherwise. The Department participates in all second review matters.
- 3.31. This non-participation has an impact on the nature of proceedings at first review, including the availability of dispute resolution processes. The Council seeks feedback on the current arrangements for the Department's participation as well as the impact of improved flexibility in procedures of the new ART.

Current procedures

- 3.32. Although social security decisions are made and internally reviewed by Services Australia, the Secretary, Department of Social Services is the decision-maker for the purposes of ART review.⁵⁶
- 3.33. At an operational level, the role of the Department is to manage appeal matters arising from social security decisions.⁵⁷ This includes appearing at hearings and case events, providing information and supporting documents to applicants and the ART, and

⁵⁵ ART Act s 9. The Tribunal must pursue the objective of providing an independent mechanism of review that:

- (a) is fair and just; and
- (b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and
- (c) is accessible and responsive to the diverse needs of parties to proceedings; and
- (d) improves the transparency and quality of government decision-making; and
- (e) promotes public trust and confidence in the Tribunal.

⁵⁶ SSA Act ss 142, 142A.

⁵⁷ SSA Act; *Social Security Act 1991* (Cth).

having regard to ART decisions to monitor and evaluate challenges and issues that may arise affecting government policy, programs and the law.⁵⁸

Background to requirements

- 3.34. Under arrangements prior to April 2010, the Department of Human Services (the former respondent agency in social security matters) was not permitted to be present at hearings of the former SSAT. The purpose was to ensure informality of proceedings and to avoid the creation of an adversarial environment.⁵⁹ To alleviate unnecessary delay and cost, changes were made to provide the Department with an opportunity to request and make oral submissions to the SSAT in complex cases, and to respond to new evidence while maintaining informality in the review.⁶⁰ Following the amalgamation of the SSAT into the AAT in 2015, the majority of AAT1 reviews continued to be conducted in the absence of the Departmental decision-maker.⁶¹
- 3.35. The current arrangements in the ART preserve a similar level of informality, and the Department's non-participation at first review.⁶² Under the ART Act, decision-makers may give an election notice to the ART not to participate in proceedings other than a directions hearing.⁶³ In the case of social security matters, the *Social Security (Administration) Act* 1999 (Cth) provides that the Department is deemed to have elected not to participate in first review.⁶⁴
- 3.36. The ART may order a non-participating party to participate, appear or provide written submissions under section 63(2) of the ART Act.⁶⁵ This means the Department can currently be required to participate at first review on a case by case basis, by order of the ART. The Department may also issue a participation notice to request to participate in individual matters or case events, notwithstanding that it has been deemed to be a non-participating party. This is intended to form part of the improved flexibility provided by the ART Act for the handling of matters.

⁵⁸ SSA Act s 8.

⁵⁹ *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Miscellaneous Measures) Act 2010* (Cth); Explanatory Memorandum, Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Miscellaneous Measures) Bill 2008 (Cth) 2-3.

⁶⁰ Explanatory Memorandum, Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Miscellaneous Measures) Bill 2008 (Cth) 2-3.

⁶¹ AAT Act ss 32; 34(1A)(b), 34J(2), 39(2)(b); AGD Submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No1) Bill 2023* (January 2024) 10.

⁶² ART Act s 60; SSA Act s 142B; *Administrative Review Tribunal Rules 2024* (Cth) rr 7-12.

⁶³ ART Act s 60.

⁶⁴ SSA Act s 142B.

⁶⁵ ART Act s 63(2).

Implications of non-participation

- 3.37. Under the single-tier review structure initially proposed by the ART Bills, the Department would have been required to participate in social security proceedings as a default position.⁶⁶ Feedback from legal assistance groups during the Parliamentary Committee stages indicated that the absence of the Department during first review was a key advantage of the process and promoted the accessibility of review for applicants who were unrepresented and/or had negative experiences in engaging with Centrelink.⁶⁷
- 3.38. This evidence suggests that the Department's non-participation at first review may assist to further the objectives of the Tribunal, and particularly ensure "...that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits."⁶⁸

Obligation to assist Tribunal

- 3.39. Current arrangements relating to a non-participating party's obligation to assist the AAT have narrowed with the commencement of the ART Act.⁶⁹ Generally, the obligations of a Commonwealth Department at first review have operated under a framework involving the AAT Act and the *Legal Services Directions 2017* (Cth).⁷⁰ Appendix B to the *Legal Services Directions 2017* sets out the model litigant obligations that apply to the Commonwealth, including as parties to proceedings in the ART.⁷¹
- 3.40. Under the ART Act, decision-makers and their representatives must use their best endeavours to assist the ART.⁷² Under Paragraph 4 of Appendix B of the *Legal Services Directions* a Commonwealth agency "should use its best endeavours to assist the tribunal to make its decision."⁷³
- 3.41. Section 56(3) of the ART Act limits this obligation for non-participating parties so that it applies only in relation to action the party is required to take by the ART Act or by the

⁶⁶ AGD noted that the reforms would be complemented by a focus on capability of members and registrars to support applicants to effectively participate; timely referral to legal assistance and other support services, and the availability of accessibility supports: AGD Submission No 6 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)* (January 2024) 10.

⁶⁷ For example, see EJA Submission No 7 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)* (January 2024) 2; Department of Human Services ("DHS") Submission to I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (24 August 2018) 7.

⁶⁸ ART Act s 9(b).

⁶⁹ ART Act s 56(3), 61(1A) Note.

⁷⁰ *Legal Services Directions 2017* (Cth).

⁷¹ *Legal Services Directions 2017* (Cth) App B cl 3.

⁷² ART Act s 56(1).

⁷³ *Legal Services Directions 2017* (Cth) App B cl 4.

ART in relation to the proceeding. According to the explanatory material for the ART Bill, the obligation:

only applies to the extent that the party is participating in the proceeding. This is because a non-participating party is necessarily hampered in its ability to assist the Tribunal... Rather, the obligation to assist ... would apply to steps of the proceeding that all decision-makers are required to take, such as provision of documents under Division 4 of Part 3.⁷⁴

3.42. The role of the former Department of Human Services in AAT proceedings was examined by the Robodebt Royal Commission, which noted that the conduct of a Commonwealth agency should align with the model litigant obligations in the *Legal Services Directions* when engaging in litigation, including tribunal reviews.⁷⁵

3.43. The Commission also stated that the Department of Human Services should be cognisant of its overarching obligation to act as a model litigant in proceedings⁷⁶ and use its best endeavours to assist the AAT to make its decision in relation to a proceeding.⁷⁷ The Royal Commission noted this obligation includes “ensuring that the AAT has all relevant information and bringing the AAT’s attention to arguments of the other side where it appears the AAT has overlooked them.”⁷⁸ This includes the Department’s knowledge of a previous first review decision questioning the legality of the Department’s Robodebt program.⁷⁹

3.44. This finding is consistent with the principles of administration under s 8 of the *Social Security (Administration) Act* 1999 (Cth) and the duty of the Department to have regard to ART decisions to monitor and evaluate issues that may arise affecting government policy, programs and the law.⁸⁰

3.45. In light of the default non-participation of the Department in social security first-review, there are questions as to the impact of s 56(3) of the ART Act on the ART’s ability to conduct social security reviews in line with the ART’s objectives under the ART Act, particularly in relation to promoting public trust and confidence, ensuring accessibility and responsiveness to the diverse needs of parties, and improving the transparency and quality of government decision-making.

⁷⁴ ART Act s 56(3); Revised Explanatory Memorandum ART Bill 68, 483.

⁷⁵ AAT Act s 33(1AA); *Legal Services Directions* 2017 (Cth) App B.

⁷⁶ *Legal Services Directions* 2017 (Cth) Sch 1 cl 4.

⁷⁷ AAT Act s 33(1AA); *Legal Services Directions* 2017 (Cth) App B cl 3-4.

⁷⁸ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 559; *Legal Services Directions* 2017 (Cth) App B cl 2(f); “Guidance Note 1”, Office of Legal Services Coordination (Web Page, 29 June 2019) [8], citing *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1608; *SZLPO v Minister for Immigration and Citizenship* [No 2] (2009) 177 FCR 29, 29 [4]; *Laing v Central Authority* [1999] FamCA 100; See discussion in Eugene Wheelahan, “Model Litigant Obligations: What are they and how are they enforced?” (Seminar Paper, Federal Court Ethics Seminar Series, 15 March 2016) [22]-[23].

⁷⁹ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 559.

⁸⁰ SSA Act s 8.

Council consideration and questions

- 3.46. The Council seeks views on how current procedures for the Department's participation in ART review of social services matters are working, and whether there have been any changes as a result of the ART reforms. This includes any views on the impact of the Department's non-participation at first review on its obligation to assist the Tribunal.

Questions

9. How would you describe your experience of DSS's role at first review and second review?
10. What impact does DSS's non-participation during first review have on the ART's ability to resolve matters in accordance with its statutory objectives?
11. Are there any changes you think should be made to DSS's role before the ART to improve or better support the timely and effective resolution of matters at first review?

Key Issue 4: Role of alternative dispute resolution in the ART

- 3.47. Alternative dispute resolution ("ADR") has traditionally been used for AAT2 reviews where the Department is a party to the review. Dispute resolution processes have included conferences, conciliation, mediation, case appraisal or neutral evaluation, and were aimed at facilitating the settlement of an application for review.
- 3.48. Current arrangements applying in the ART allow for the availability of dispute resolution processes at first review for social security matters.⁸¹ This means that it is possible for agency decision-makers to be required to participate in both first review and second review, including single-party case conferencing at both levels, if the Tribunal considers it appropriate.⁸² The changes were made with the intention of increasing the chances of finalising a matter at earlier stages of decision-making and review.⁸³
- 3.49. There is no data publicly available yet to indicate whether ADR is being used at first review in the ART. Statistics for the AAT indicate that approximately 50% of AAT2 reviews

⁸¹ ART Act s 87 provides that at any time during a proceeding, the Tribunal may by order direct that the proceeding (or any part) be referred to a dispute resolution process. Subsection 87(2) specifies that parties to the dispute resolution process must act in good faith.

⁸² Department of Social Services "Answer to Question on Notice IQ24-000026" Senate Legal and Constitutional Affairs Legislation Committee *Administrative Review Tribunal Bill 2023 [Provisions] and related Bills* (May 2024).

⁸³ Parliament of Australia House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* Report (February 2024) 28.

were settled between parties and approximately 80% of matters were finalised prior to the AAT issuing a decision following a hearing (including by the applicant withdrawing the application) (see **Table 6**). Most AAT2 cases tended to be more complex, with 28% of decisions varied either during pre-hearing conferences and ADR or after a hearing.⁸⁴

Table 6: Dispute resolution outcomes (%) –AAT2

	2020/21	2021/22	2022/23	2023/24
% finalised without AAT decision	78%	77%	81%	81%
% finalised in FY in which at least one ADR process was held	73%	69%	63%	66%
Median calendar days from lodgment to final ADR process	104	114	116	112
Median no of total minutes spent in ADR per case	60	60	60	60

Source: AAT Annual Reports 2021-22 to 2023-24

Table 7: AAT2 outcomes

	2020/21	2021/22	2022/23	2023/24
By consent⁸⁵ – set aside/vary	281 (15%)	280 (18%)	259 (21%)	209 (20%)
By consent – affirm	5 (<1%)	9 (1%)	7 (1%)	22 (2%)

⁸⁴ Professor Emeritus Terry Carney Submission No 6 to Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into Administrative Review Tribunal Bill 2023 [Provisions] and related bills* (6 March 2024) 2.

⁸⁵ “By consent” refers to applications finalised by the AAT in accordance with terms of agreement reached by the parties either in course of ADR or at any stage of review proceedings.

	2020/21	2021/22	2022/23	2023/24
Dismissed – settlement⁸⁶	505 (26%)	397 (26%)	334 (27%)	316 (30%)

Source: AAT Annual Reports 2021-22 to 2023-24

Should dispute resolution be used in first review?

- 3.50. The high settlement rates at second review raise the question of whether greater use of ADR at first review would enable more matters to be settled at an earlier stage. The Attorney-General's Department made this point during the Parliamentary Committee consideration of the ART Bills, stating:

Resolving matters through dispute resolution processes is often more efficient and cost effective for parties, provides applicants with greater opportunity to engage in their matter, and leads to a higher rate of compliance with the final outcome.⁸⁷

- 3.51. However, the former Department of Human Services, when it had responsibility for Centrelink, opposed the proposed use of pre-hearing case management processes in first review cases. The Department of Human Services suggested this would have significant resourcing implications for the Department and unnecessarily prolong the review process in what is intended to be a quick and economical review.⁸⁸

- 3.52. During the Parliamentary Committee inquiries into the ART Bills⁸⁹ Emeritus Professor Terry Carney AO suggested that the use of ADR would need to be “judiciously exercised” to avoid it being used by the Department to avoid adverse rulings being made public.⁹⁰

Council consideration and questions

- 3.53. A key challenge for use of ADR earlier in the review process is the limit on the Department's participation in first review proceedings, as discussed under Key Issue 3.⁹¹

⁸⁶ “Dismissed – settlement” refers to where an application relates to recovery of a debt, parties may agree in writing to settle the proceedings. The application is taken to have been dismissed.

⁸⁷ AGD Submission No 6 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential and Transitional Bill)* (January 2024).

⁸⁸ DHS Submission to I D F Callinan AC *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (24 August 2018) 8.

⁸⁹ For example, see EJA Submission No 7 to House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential and Transitional Bill)* (January 2024); DHS, Submission to *Statutory Review of the Tribunals Amalgamation Act 2015* 7.

⁹⁰ Professor Emeritus Terry Carney Submission No 6 to Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into Administrative Review Tribunal Bill 2023 [Provisions] and related bills* 9.

⁹¹ ART Act ss 63(2) 87.

- 3.54. The Council is interested to hear from the community and from stakeholders about experiences using ADR in social security matters in the ART, and whether there are any changes that could assist with the quick and informal resolution of matters.

Questions

12. What is your experience of alternative dispute resolution (ADR) processes during ART review of social security matters?
13. Are there any changes you would suggest to the ADR process to support the ART's objectives in relation to accessibility, responsiveness and the quick and informal resolution of applications?

Key Issue 5: Role of the Guidance and Appeals Panel

Overview of the Guidance and Appeals Panel

- 3.55. Established by Part 5 of the ART Act, the GAP provides a mechanism for escalating significant issues and addressing material errors in ART decisions.⁹² The objective of the GAP is to promote consistent decision-making, make rapid responses to emerging issues and increase confidence in ART decisions.⁹³ ART applicants do not have an automatic right of review by the GAP, and not all ART decisions can be referred to the GAP.⁹⁴ The President of the ART has a discretion to refer a matter to the GAP, either on application or on the President's own motion, and this power mirrors the authority of an appellate court to grant leave to appeal.⁹⁵ This discretion is intended to focus the GAP on matters that raise an error of fact or law materially affecting an ART decision or that raise an issue of significance to administrative decision-making.⁹⁶
- 3.56. A decision of the GAP on an issue of significance to administrative decision-making is intended to provide clarity for others seeking review to enhance the quality of future administrative decisions, both by the primary decision-maker and by the ART on similar issues. The ART Act requires ART members to treat decisions by GAP as "Tribunal guidance decisions", and have regard to them when making a decision in a proceeding that

⁹² Revised Explanatory Memorandum ART Bill 113.

⁹³ House of Representatives, Administrative Review Tribunal Bill 2023, Second Reading Speech, The Hon Mark Dreyfus, 7/12/23, 9202.

⁹⁴ Particular decisions including some decisions made under the *Freedom of Information Act 1982*, Veterans' Review Board and the Intelligence and Security jurisdictional area of the ART.

⁹⁵ ART Act ss 122, 123; The Hon Justice Emilios Kyrou "Key Features of the New Administrative Review Tribunal", Council of Australian Tribunals seminar (Adelaide, 16 April 2024).

⁹⁶ These circumstances are: first instance referral - s 122(1); or second instance referral relating to an issue of administrative significance - s 128(2)(a); or second instance referral based on possible error or fact of law - s 128(2)(b).

raises similar facts or issues.⁹⁷ The ART is not bound to follow a Tribunal guidance decision, as it is not binding precedent.⁹⁸ Tribunal guidance decisions are also intended to influence primary decision-making in agencies.⁹⁹

Current role of the GAP in social security matters

President's own-initiative referral

3.57. The ART Act specifies that parties cannot apply to the GAP for review of either first review or second review social security decisions.¹⁰⁰ The ART President has the discretion to refer an application for review by the GAP if the President is satisfied:

- the application raises an issue of significance to administrative decision-making; and
- it is appropriate in the interests of justice that the ART be constituted by the GAP for the purposes of the proceeding in relation to the application.¹⁰¹

3.58. The [Administrative Review Tribunal \(Guidance and Appeals Panel\) Practice Direction 2024](#) sets out the practices and procedures for referral of matters to the GAP. It states that ART members and staff will inform the President of any application for review that may warrant consideration of whether it is appropriate for referral to the GAP.¹⁰² In considering whether to make a referral on the President's own initiative, the President will consider:

- the circumstances of the parties to the proceeding, including whether a referral is likely to disadvantage a party unfairly or cause an unacceptable delay in reaching an outcome;
- whether the proceeding is likely to have a broader impact on persons beyond the parties to the proceeding or is likely to improve administrative decision-making; and
- other relevant discretionary factors, such as whether a referral would hinder the ART's ability effectively to pursue its statutory objectives.

3.59. The Practice Direction clarifies that proceedings that raise an issue of significance to administrative decision-making may include matters that are novel, complex, could potentially affect a large number of individuals, or involve significant systemic issues that require guidance.¹⁰³

⁹⁷ ART Act ss 109, 110.

⁹⁸ ART Act s 110(3). See also Addendum to the Revised Explanatory Memorandum ART Bill 2024 [739A] 1.

⁹⁹ Addendum to the Revised Explanatory Memorandum, ART Bill 2024 [739B] 1.

¹⁰⁰ ART Act s 131W.

¹⁰¹ ART Act s 122.

¹⁰² Administrative Review Tribunal (Guidance and Appeals Panel) Practice Direction 2024 s 2.2.

¹⁰³ Administrative Review Tribunal (Guidance and Appeals Panel) Practice Direction 2024 ss 5.2-5.5.

Previous proposal for the GAP to conduct second review

3.60. Under the draft ART legislation as initially introduced, social security applicants would have had access to a single level of review in the ART, with complex or significant matters capable of being referred to the GAP. Parties would have also had the ability to apply for decisions of the ART to be referred to the GAP.¹⁰⁴ The Attorney-General's Department described this proposed structure as combining the "best features" of first and second review.¹⁰⁵ The Department pointed to the existing two-tier model as contributing to the structural challenge in escalating Robodebt-related legal issues, and described the GAP as providing a different two-tier model which allowed issues of significance to be escalated as needed.¹⁰⁶

3.61. This proposed structure broadly aligned with the merits review structure recommended by the Council in its 1995 report, *Better Decisions: Review of Commonwealth Administrative Review Tribunals*. In the report, the Council recommended that existing review tribunals including the SSAT be replaced with a single new tribunal, the Administrative Review Tribunal. As part of this, the Council noted that it still regarded the availability of a second tier of merits review important, to enable the review of cases of particular significance for government or agency policy.¹⁰⁷ The Council therefore recommended the establishment of Review Panels to undertake second reviews of cases raising issues of general application, to promote improved government decision-making.¹⁰⁸

3.62. The Parliamentary Committee inquiries into the ART Bills received some submissions that the GAP would not be an effective replacement for the two-tier review system that existed within the AAT. Some stakeholders raised concerns that under the Bill as drafted, the GAP was unlikely to consider cases that had substantial impacts on individuals unless they also raised issues of significance to administrative decision-making, and that criteria for accessing the GAP may not be adapted to the circumstances of disadvantaged applicants.¹⁰⁹ National Legal Aid submitted that the two-tier review process should be retained until the range of federal government reforms were in place and there had been sufficient time to see how the ART structure, including the GAP, was

¹⁰⁴ Supplementary Explanatory Memorandum relating to sheet SE106, ART Bill 2 at 3-4.

¹⁰⁵ Parliament of Australia House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* Report (February 2024) [2.82].

¹⁰⁶ Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 9 February 2024, 14 (Sara Samios, AGD).

¹⁰⁷ ARC *Better Decisions: Review of Commonwealth Administrative Review Tribunals* Report No 39 (AGPS, Canberra, 1995) 146.

¹⁰⁸ ARC *Better Decisions: Review of Commonwealth Administrative Review Tribunals* Report No 39 (AGPS, Canberra, 1995) 146-151.

¹⁰⁹ Parliament of Australia House of Representatives Standing Committee of Social Policy and Legal Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* Report (February 2024) 30; Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 29.

implemented.¹¹⁰

- 3.63. The subsequent amendments to the ART Bills, in response to stakeholder concerns, re-established the two-tier review structure and narrowed the availability of GAP review for social services matters. The Senate Legal and Constitutional Affairs Legislation Committee described this amendment as creating “a coherent pathway through the appeals process that intersects appropriately with the Guidance and Appeals Panel”.¹¹¹

Council consideration and questions

- 3.64. The Council is seeking feedback from the public and stakeholders about the current mechanisms for review by the GAP and the role it should play in respect of social security reviews.

Questions

14. What is your view of the current provisions for access to the GAP in the ART? Do they support the intended role of the GAP in ensuring that significant and emerging issues are quickly dealt with at a higher level and in promoting consistent ART decision-making?

15. If a single-tier system of review were introduced, would any changes be needed to the provisions and criteria for referrals to the GAP?

¹¹⁰ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 25.

¹¹¹ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) 36.

Appendix A: History of social security review

Social Security Appeals Tribunal

Independent merits review of social security decisions first began in 1975, with the establishment of SSATs in each State and Territory, which provided an avenue of appeal from a decision of an officer of the Department of Social Services. The establishment of the SSATs, separate from the AAT, recognised the need for a high-volume decision-making tribunal in social security.¹¹²

The SSATs were originally non-statutory and were constituted by two part-time members: a lawyer and a welfare/community representative, as well as a full-time officer of the Department of Social Services on secondment. Initially, the SSAT only had the power to make recommendations to the Department. In 1988, in response to recommendations of the Council, the SSAT was established by statute, and acquired determinative powers as well as independence of its membership.¹¹³

From 1988, the AAT was given jurisdiction to review decisions of the SSAT, to provide a “mechanism of further administrative review for complex and difficult cases”.¹¹⁴

The differences between the review procedures in the SSAT and AAT broadly (though not completely) remained in place despite the tribunal structures changing over time. The SSAT’s statutory objective was to provide a mechanism of review that was fair, just, economical, informal and quick.¹¹⁵ SSAT hearings were conducted without formality, through a discussion between the SSAT and the applicant (or their representative). The Department did not appear at hearings.¹¹⁶ In the AAT the review generally involved a lengthier process, with preliminary conferences between the parties (including the Department, which participated in proceedings) and then a full hearing if the matter had not resolved earlier.¹¹⁷

2015 Tribunal amalgamation

In 2015, the SSAT and a number of other federal tribunals were merged into the AAT. The objective of the amalgamation was to streamline and simplify the Commonwealth merits review system and improve access to justice by promoting greater awareness of the AAT’s function.¹¹⁸ This restructure

¹¹² Terry Carney “Welfare appeals and the ARC report to SSAT or not to SSAT: Is that the question?” (1996) 4(1) *Australian Journal of Administrative Law* 30. < <https://ses.library.usyd.edu.au/handle/2123/33435>>.

¹¹³ Terry Carney “Welfare appeals and the ARC report to SSAT or not to SSAT: Is that the question?” (1996) 4(1) *Australian Journal of Administrative Law* 30. < <https://ses.library.usyd.edu.au/handle/2123/33435>>; ARC *The Structure and Form of Social Security Appeals* Report No 21 (AGPS, Canberra, 1984).

¹¹⁴ [Commonwealth Parliament Parliamentary Debates](#), House of Representatives, 29 September 1988, 1288 (Brian Howe, Minister for Social Services).

¹¹⁵ Social Security Appeals Tribunal Submission No 86 to Productivity Commission, *Access to Justice Arrangements* Issues Paper (4 November 2013).

¹¹⁶ T Brennan “The ART as a response to the Robodebt scandal” (2024) 31 *Australian Journal of Administrative Law* 18.

¹¹⁷ ARC *The Structure and Form of Social Security Appeals* Report No 21, (AGPS, Canberra, 1984) 15-16.

¹¹⁸ Revised Explanatory Memorandum, Tribunals Amalgamation Bill 2014 2.

was intended to balance maintaining specialisation in certain jurisdictional areas with harmonising and simplifying procedures where appropriate, without making “significant changes”.¹¹⁹

The amalgamated AAT preserved the distinct procedural features from the former SSAT and AAT in relation to social security matters.¹²⁰ Social security decisions were reviewed at first instance by the Social Services and Child Support Division with a right of appeal to the General Division. AAT1 review was intended to be quick and informal, and the agency decision-maker was not a party to proceedings. Second review in the General Division was more comprehensive, involving the decision-maker as a party and the use of pre-hearing case-management, including dispute resolution.

The preservation of these distinct procedural features of the amalgamated bodies was described as “crucial to managing the workload of their respective jurisdictions [within the AAT]”.¹²¹

Robodebt Royal Commission

The terms of reference for the Royal Commission into the Robodebt Scheme included the requirement to inquire into how the federal government responded to adverse decisions made by the AAT. The Commission noted that:

Effective merits review is an essential part of the legal framework that protects the rights and interests of individuals; it also promotes government accountability and plays a broader important role in improving the quality and consistency of government decisions.¹²²

Scrutiny by the Commission of the system of social security appeals highlighted the deficiencies in the Department of Social Services and Department of Human Services policies and systems in relation to their ability to monitor and systemically review and implement AAT decisions in an effective manner.¹²³ The Commission’s report revealed inadequacies with certain features of the merits review system, notably at the AAT1 level where social security decisions were not published.

The Commission found that there was no discernible reason why AAT1 decisions involving significant points of law or policy in social security matters should not have been published.¹²⁴ Publishing reasons would have promoted uniformity in decision-making, and allowed public scrutiny and wider community understanding as to how the AAT was applying law and policy.¹²⁵ The Commission noted that government and community stakeholders supported publication of significant decisions in an accessible form.¹²⁶

The Commission made a number of key recommendations relevant to the review of social security decisions including:

¹¹⁹ Revised Explanatory Memorandum, Tribunals Amalgamation Bill 2014 3.

¹²⁰ AGD *Administrative Review Reform* Issues Paper (April 2023) 81.

¹²¹ Explanatory Memorandum, Tribunals Amalgamation Bill 2014 13.

¹²² Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 553.

¹²³ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 555.

¹²⁴ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 554.

¹²⁵ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2.

¹²⁶ Royal Commission into the Robodebt Scheme *Report* (July 2023) Vol 2 563.

- Training of Departmental legal officers in relation to the preparation of advices in relation to AAT decisions, to ensure they deliver services in line with the Commonwealth model litigant obligations (Recommendation 20.2)
- Establishment of a system within the Department of Social Services for identifying all significant AAT decisions and bringing them to the attention of its Secretary (Recommendation 20.3)
- The development of a system for publication of first instance tribunal decisions on social security which involve significant conclusions of law or have implications for social security policy (Recommendation 20.4)
- Powers for the Ombudsman to refer or recommend referral of matters to the Tribunal (Recommendation 21.5)

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All information in this publication is correct as at August 2025