

Chapter 1

New and ongoing matters

1.1 The committee comments on the following bills.

Bills

Administrative Review Tribunal Bill 2023⁷

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023

Purpose	<p>The Administrative Review Tribunal Bill 2023 seeks to establish the Administrative Review Tribunal, which would replace the Administrative Appeals Tribunal, and re-establish the Administrative Review Council</p> <p>The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 seeks to abolish the Administrative Appeals Tribunal; make consequential amendments to 138 Commonwealth Acts; and provide for transitional rules to facilitate the transition from the Administrative Appeals Tribunal to the Administrative Review Tribunal</p>
Portfolio	Attorney-General
Introduced	House of Representatives, 7 December 2023
Rights	Equality and non-discrimination; prohibition against expulsion of aliens without due process; fair hearing; rights of persons with disability

Litigation guardians

1.2 Clause 67 of the Administrative Review Tribunal Bill 2023 (the ART bill) provides that the Administrative Review Tribunal (the Tribunal) may appoint a person to be a litigation guardian for a party to a proceeding if:

- the Tribunal considers that the party does not understand the nature and possible consequences of the proceeding, or is not capable of adequately

⁷ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Administrative Review Tribunal Bill 2023 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, *Report 1 of 2024*; [2024] AUPJCHR 3.

conducting, or giving adequate instruction for the conduct of, the proceeding; and

- the appointment is necessary, taking into account the availability and suitability of other measures that would allow the party to participate in the proceeding.⁸

1.3 In appointing a litigation guardian, the Tribunal must take into account the party's will and preferences, or likely will and preferences, in relation to whether a guardian should be appointed and who should be appointed.⁹ If the party's will and preferences cannot be ascertained, the Tribunal must take into account the 'personal and social wellbeing of the party'.¹⁰ If appointed, a litigation guardian would act on behalf of the party, meaning the party may only participate in the proceeding through the litigation guardian.¹¹ A litigation guardian must be at least 18 years old, have no conflict of interest, consent to the appointment and be able to perform the duty of a litigation guardian.¹² That is, the guardian must give effect to the party's will and preferences, or likely will and preferences, unless doing so would pose a serious risk to the party's personal and social wellbeing, in which case the guardian must act in a manner that promotes the personal and social wellbeing of the party.¹³

International human rights legal advice

Rights of persons with disability

1.4 By providing for the appointment of a litigation guardian for a party who is considered not to understand the proceeding or not be capable of adequately conducting, or providing instructions for, the proceeding, the measure engages the rights of persons with disabilities, particularly the right to equal recognition before the law, which is protected under article 12 of the Convention on the Rights of Persons with Disabilities. The statement of compatibility does not recognise that this measure engages the right of persons with disability to equal recognition before the law, and so provides no assessment of the compatibility of the ART bill with this right.¹⁴

⁸ Administrative Review Tribunal Bill 2023, subclause 67(1).

⁹ Administrative Review Tribunal Bill 2023, paragraph 67(2)(a).

¹⁰ Administrative Review Tribunal Bill 2023, paragraph 67(2)(b).

¹¹ Administrative Review Tribunal Bill 2023, subclause 67(5).

¹² Administrative Review Tribunal Bill 2023, subclause 67(3).

¹³ Administrative Review Tribunal Bill 2023, subclauses 67(6)–(8).

¹⁴ Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 14-15. The statement of compatibility states that the ART bill promotes the right of access to justice for people with disability by enabling review of decisions that particularly impact people with disability, such as NDIS decisions, and by empowering the Tribunal President to make practice directions in relation to accessibility. The statement of compatibility does not, however, acknowledge the engagement of the right to equal recognition before the law under article 12 of the Convention on the Rights of Persons with Disabilities.

1.5 The explanatory memorandum states that a litigation guardian would be appointed where a party lacks the capacity to understand, conduct or provide adequate instruction for, the proceeding, and this may be due to the person's age or disability.¹⁵

1.6 If a litigation guardian were to be appointed on the basis of a person's age, the rights of the child may also be engaged and limited. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. In particular, children have a right to be heard, which requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The views of the child must be given due weight in accordance with the age and maturity of the child, as set out in article 12 of the Convention on the Rights of the Child. The statement of compatibility does not address this issue. It simply states that the right of a child to express their opinion is promoted by providing for review of decisions affecting children.¹⁶ However, as the provision allows the Tribunal to consider whether the child understands the nature and possible consequences of the proceeding, or is capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding, it appears likely that the views of the child will be taken into account and so this right is not considered in detail in this report.

1.7 In practice an adult party who would be considered to lack capacity would invariably be one with cognitive impairment and thus in effect, the measure would exclusively apply to people with disability.¹⁷ The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life; and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.¹⁸ There can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.¹⁹ This means 'there

¹⁵ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 70.

¹⁶ Statement of compatibility, p. 19.

¹⁷ The Committee on the Rights of Persons with Disabilities has stated that 'persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

¹⁸ Convention on the Rights of Persons with Disabilities, article 12.

¹⁹ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

are no permissible circumstances under international human rights law in which this right may be limited'.²⁰

1.8 The appointment of a litigation guardian to 'stand in the place' of a party who is considered by the Tribunal to lack capacity and 'make all the decisions about the conduct of the proceedings'²¹ would be a form of substitute decision-making and would therefore engage the right to equal recognition before the law.²² The UN Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, are contrary to article 12 and must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others'.²³

1.9 Additionally, States parties are required to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity, such as the provision of advocacy or assistance with communication. The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making and has noted that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.²⁴ It noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.²⁵

1.10 The ART bill provides that a litigation guardian would be appointed if the party is considered to lack the capacity to understand, conduct or provide instruction for, the proceeding, and the appointment is necessary taking into account the availability

²⁰ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

²¹ Administrative Review Tribunal Bill 2023, statement of compatibility, p. 15.

²² The key features of substitute decision-making regimes are set out in Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [27].

²³ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

²⁴ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[17], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

²⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

and suitability of other measures. While neither the legislation nor the explanatory materials provide guidance as to how the Tribunal should, in practice, assess whether a party is capable of understanding and conducting the proceeding, the general approach set out in clause 67 appears to be inconsistent with article 12 insofar as a party's legal capacity would be denied where their decision-making skills are considered to be impaired or deficient. The UN Committee on the Rights of Persons with Disabilities has described this as a 'functional approach' to assessing capacity. It has observed:

The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.²⁶

1.11 As to the availability of supports, the explanatory memorandum states that a litigation guardian should only be appointed where a party does not have any other options available to them for participating in the proceeding, including through the provision of other supports.²⁷ However, neither the legislation nor the explanatory materials provide any guidance as to what 'other measures' may be available and suitable to allow a party to effectively participate and at what point these measures would be said to be unavailable or unsuitable. It appears the onus would be on the party rather than the Tribunal to secure other support measures to enable their effective participation. It is noted that international human rights law obliges States parties to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. The UN Committee on the Rights of Persons with Disabilities has emphasised that to comply with this requirement:

States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity.²⁸

²⁶ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15].

²⁷ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 70.

²⁸ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [29(e)].

1.12 Under the ART bill as currently drafted, even if the Tribunal provided a party with access to support measures initially, once a litigation guardian is appointed, the party would not be supported to participate in the proceeding as the role of the guardian would be to fully stand in the shoes of the party. The explanatory memorandum states that this ensures the party has ‘one voice’ in the proceeding.²⁹

1.13 Further, as noted above, States parties must ensure measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse; respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person’s circumstances; apply for the shortest time possible; and are subject to regular review.³⁰ Under the ART bill, a litigation guardian must not have a conflict of interest (and may be removed if one arises) and must give effect to the party’s will and preferences, or likely will and preferences, and where this cannot be ascertained, the guardian must act in a manner that promotes the personal and social wellbeing of the party.³¹ However, where giving effect to the party’s will and preferences would pose a serious risk to their personal and social wellbeing, the litigation guardian must instead act in a manner that promotes the personal and social wellbeing of the party.³² The explanatory memorandum states that the measure seeks to preserve the party’s autonomy to the greatest extent possible while ensuring the litigation guardian is acting in the party’s best interests.³³ While the measure contains some safeguards that would ensure respect for a party’s will and preferences in certain circumstances and may mitigate the risk of conflict of interest or undue influence, the strength of these safeguards would be weakened where the party’s will and preferences are overridden in order to promote their personal and social wellbeing. The concept of ‘personal and social wellbeing’ is not defined in the legislation and the explanatory materials provide no guidance as to how the concept should be interpreted. Further, while the party’s will and preferences are to be taken into account when the Tribunal appoints a litigation guardian, ultimately a guardian may be appointed irrespective of whether the party consents to the appointment.³⁴

1.14 The explanatory memorandum notes that this measure has been drafted with reference to the findings and recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).³⁵ Among other things, the Royal Commission recommended that ‘[s]upported decision-making should be embedded in guardianship and administration

²⁹ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 71.

³⁰ Convention on the Rights of Persons with Disabilities, article 12(4).

³¹ Administrative Review Tribunal Bill 2023, subclauses 67(6) and 67(8).

³² Administrative Review Tribunal Bill 2023, subclause 67(7).

³³ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 71.

³⁴ Administrative Review Tribunal Bill 2023, subclause 67(2).

³⁵ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

law and practice, and other systems over time, to ensure substitute decision-making only happens as a last resort and in the least restrictive manner'.³⁶ The Royal Commission recommended that a representative may only override a person's will and preferences where it is necessary to prevent serious harm and in these circumstances, 'the representative must act to promote and uphold the person's personal and social wellbeing with the least possible restriction on their dignity and autonomy'.³⁷ The Royal Commission noted that what is meant by 'personal and social wellbeing' will depend on each individual's circumstances.³⁸ While there remains some uncertainty as to how this concept would be interpreted in the context of this measure, it is noted that the threshold set out in subclause 67(7) for overriding an individual's will and preferences (applying if giving effect to them would pose a serious risk to the party's 'personal and social wellbeing', rather than where necessary to prevent serious harm) appears to be lower than the threshold recommended by the Royal Commission, although much will depend on how this concept is interpreted in practice.

1.15 While the measure contains some features of supported decision-making, such as requiring a guardian, for the most part, to give effect to the party's will and preferences, these appear to be insufficient to ensure the measure's compatibility with the right to equal recognition before the law. This is because a party would be denied legal capacity on the basis of impaired decision-making ability; they may be appointed a guardian without their consent; they would not be supported to participate in the proceeding once a litigation guardian is appointed; and they may have their will and preferences overridden in certain circumstances. The UN Committee on the Rights of Persons with Disabilities has noted that the 'development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12'.³⁹ As such, the substitute decision-making model set out in clause 67 does not appear to comply with

³⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) p. 67 and pp. 216–221 (recommendations 6.4–612).

³⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) p. 221, recommendation 6.10.

³⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Enabling autonomy and access*, Volume 6 (September 2023) p. 190.

³⁹ Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [28].

all requirements in article 12 of the Convention on the Rights of Persons with Disabilities as set out above.⁴⁰

Right to equality and non-discrimination

1.16 As a litigation guardian would only be appointed to act on behalf of those who are considered to lack capacity, the measure would have a disproportionate impact on people with certain protected attributes, such as disability or age, and thus engage and limit the right to equality and non-discrimination.⁴¹ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.⁴² The Convention on the Rights of Persons with Disabilities further describes the content of these obligations, including the specific elements that States parties are required to take into account to ensure the right to equality before and under the law for people with disabilities, on an equal basis with others.⁴³ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).⁴⁴ Indirect discrimination occurs where 'a rule or measure that is

⁴⁰ It is noted that Australia has made an interpretive declaration in relation to article 12, which most relevantly states, 'Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards'. The Australian Government has stated that it does not propose to withdraw this declaration and it does not purport to exclude or modify the legal effects of the Convention, but clarify Australia's understanding: see Committee on the Rights of Persons with Disabilities, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, CRPD/C/AUS/2-3 (2019) [15]. The Committee on the Rights of Persons with Disabilities has recommended that Australia urgently withdraw this declaration: see Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (2019) [5], [6], [63].

⁴¹ International Covenant on Civil and Political Rights, articles 2 and 26; Convention on the Rights of Persons with Disabilities, article 5. The focus in this entry is discrimination on the basis of disability as the discrimination on the basis of age appears based on reasonable and objective criteria.

⁴² International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

⁴³ See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1994); Convention on the Rights of Persons with Disabilities, articles 5, 12 and 13.

⁴⁴ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.⁴⁵

1.17 While article 12 of the Convention on the Rights of Persons with Disabilities is absolute, the rights to equality and non-discrimination may be subject to permissible limitations. Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁴⁶ However, as the right to equal recognition before the law is a 'threshold right', were the measure to violate article 12, it is likely that it would impermissibly limit the associated right to equality and non-discrimination. In this regard, the UN Committee on the Rights of Persons with Disabilities has stated:

The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention, including the right to equality and non-discrimination. Articles 5 and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory.⁴⁷

1.18 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged, however, it states that the measure promotes this right as it empowers the Tribunal to adapt its procedure and offer a range of supports to

⁴⁵ *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

⁴⁶ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

⁴⁷ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) [47].

ensure that all persons seeking review can participate in the proceeding.⁴⁸ Were the measure to facilitate supported decision-making, it may promote this right. However, as outlined above, while the measure contains some safeguards to ensure respect for the party's will and preferences, it remains at its core a model of substitute decision-making.

1.19 The stated objective of the measure is to enhance access to the Tribunal so that parties can meaningfully participate in Tribunal proceedings.⁴⁹ The explanatory memorandum states that the measure rectifies a current gap in the *Administrative Appeals Tribunal Act 1975* (AAT Act), which does not provide for the appointment of a litigation guardian, and has been drafted with reference to the recommendations of the Royal Commission.⁵⁰ In general terms, the objective of enhancing access to justice for people with disability would be legitimate for the purposes of international human rights law and, depending on how the measure was implemented in practice, it may be rationally connected to this objective.

1.20 In assessing proportionality, as outlined above (in paragraph [1.13]), the measure contains some safeguards that may ensure respect for the party's will and preferences in certain circumstances and mitigate the risk of undue influence or conflict of interest. Yet while the measure contains elements of supported decision-making, it ultimately remains a model of substitute decision-making as set out above. Further, it is not clear that the measure pursues the least rights restrictive approach. For example, it is unclear why a representative is not only appointed as a measure of last resort and why the role of the representative is not to support and maximise the participation of the party in the proceeding. Such approaches reflect the supported decision-making principles recommended by the Royal Commission.⁵¹ As such, it has not been established that the proposed limitation on the right to equality and non-discrimination would be proportionate such that it would constitute lawful discrimination.

Committee view

1.21 The committee notes that by providing for the appointment of a litigation guardian for those considered to lack capacity, the measure engages the right to equal recognition before the law for people with disability and the right to equality and non-discrimination. The committee notes the clear position under international human rights law that substitute decision-making regimes are contrary to the right to equal

⁴⁸ Administrative Review Tribunal Bill 2023, statement of compatibility, p. 15.

⁴⁹ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

⁵⁰ Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

⁵¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) pp. 216–221 (recommendations 6.4–612).

recognition before the law and that States parties should move towards the abolition of such regimes and instead develop supported decision-making.

1.22 The committee notes the intended purpose of the measure is to enhance access to justice for people with disability and considers this to be an important objective. While the measure contains features of supported decision-making, such as requiring the litigation guardian to give effect to the party's will and preferences (unless to do so would pose a serious risk to the party's personal and social wellbeing), the committee notes that the measure ultimately remains a model of substitute decision-making as legal capacity would be denied on the basis of impaired decision-making ability; a guardian may be appointed without the party's consent; the party would not be supported to participate in the proceeding once a litigation guardian is appointed; and the party's will and preferences may be overridden in certain circumstances. As such, the committee considers that the measure does not appear to be compatible with the right to equal recognition before the law. As this right is considered a 'threshold right' under international human rights law, the committee notes that as the measure appears to violate this right, it is likely that it would also impermissibly limit the associated right to equality and non-discrimination.

1.23 The committee notes that the measure was drafted with reference to the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and indeed the measure has incorporated some key concepts canvassed in the report, such as the concept of 'personal and social wellbeing'. However, many of the findings and recommendations of the Royal Commission are not reflected in the measure. The committee considers that were these recommendations to be more fully implemented, the compatibility of the measure may be significantly assisted.

Suggested action

1.24 The committee considers the compatibility of this measure may be assisted were clause 67 of the bill amended to set out a model of supported, rather than substitute, decision-making; and the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, particularly Recommendations 6.4–6.12, implemented.

1.25 The committee recommends that the statement of compatibility be updated to include an assessment of the compatibility of the measure with the right to equal recognition before the law for people with disability.

1.26 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Restricting disclosure of information relevant to proceedings

1.27 There are several provisions in both the ART bill and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential bill) that effectively seek to restrict the disclosure of information or evidence from the applicant and their representative.⁵² These measures are described below in turn and analysed collectively, as while different in nature, they have a similar effect in withholding information from the applicant and thus raise similar human rights concerns.

1.28 Firstly, clause 70 of the ART bill seeks to empower the Tribunal to prohibit or restrict the publication or other disclosure of information or evidence given to the Tribunal to some or all of the parties.⁵³ In considering whether to make such an order, the Tribunal must have regard to specified matters, including the principles that it is desirable that hearings be held in public, evidence be made available to the public, and all documents and information be given to all parties; the circumstances of the parties; the harm likely to occur if the order is not made; the confidential nature of the information; and any other matters the Tribunal considers relevant.⁵⁴ In addition, clause 157 provides that if an order is being considered in relation to a proceeding in the Intelligence and Security jurisdictional area, the Tribunal must have regard to the necessity of avoiding the disclosure of national security information and, in relation to a review proceeding, give particular weight to any submission made by or on behalf of the agency head.⁵⁵

1.29 Further, the disclosure of information to the applicant and their representative may be restricted where a non-disclosure certificate applies.⁵⁶ In relation to general proceedings before the Tribunal, the Attorney-General may issue a public interest certificate in relation to specified information if disclosure of such information:

- would be contrary to the public interest for reasons that it would prejudice security, defence or international relations;
- would involve disclosure of Cabinet decisions or deliberations; or
- could form the basis of a claim in a judicial proceeding.⁵⁷

⁵² See Administrative Review Tribunal Bill 2023, clauses 70, 71, 91, 143, 144, 156–162; Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, items 43, 160 and 161.

⁵³ Administrative Review Tribunal Bill 2023, subclause 70(2).

⁵⁴ Administrative Review Tribunal Bill 2023, subclause 71(2).

⁵⁵ Administrative Review Tribunal Bill 2023, clause 157. This provisions applies in addition to clauses 70 and 71.

⁵⁶ Administrative Review Tribunal Bill 2023, clauses 91, 158, 159, 161 and 162.

⁵⁷ Administrative Review Tribunal Bill 2023, clauses 91 (regarding information in a proceeding) and 272 (regarding information in a statement of reasons for a decision).

1.30 The effect of a public interest certificate is that the information can only be disclosed to the Tribunal (and not the parties, including the applicant). In limited circumstances the Tribunal may decide to make the information available to any or all of the parties. In exercising this discretion, the Tribunal must take into account the desirability of parties being aware of all matters and the reason specified in the certificate for not disclosing the information.⁵⁸ Similar certificates may be issued by the responsible minister or Director-General of Security with respect to information relating to proceedings in the Intelligence and Security jurisdictional area, including a security certificate (in relation to evidence adduced in a proceeding for review of an intelligence and security decision), sensitive information certificate (in relation to a security clearance decision or security clearance suitability assessment) or a public interest certificate (in relation to a proceeding for review of an intelligence and security decision).⁵⁹

1.31 Additionally, there are a number of other provisions in the ART bill and the Consequential bill that would prohibit or restrict the disclosure of information to parties in relation to proceedings in the Intelligence and Security jurisdictional area. For example, the Tribunal must do all things necessary to ensure that information given to the Tribunal that was used to make a security clearance decision or a security clearance suitability assessment is not disclosed to the applicant or any other person other than the Director-General of Security or their representative or specified Tribunal staff members.⁶⁰ Further, the applicant and their representative must not be present when the Tribunal is hearing submissions made, or evidence adduced, in relation to security clearance standards relating to review of a security clearance decision or a security clearance suitability assessment (unless the applicant already has that information or the Director-General of Security consents to the applicant being present).⁶¹ The Tribunal also has a general duty to ensure, so far as possible, that security and law enforcement information is not communicated or made available to a person if it would prejudice the security, defence or international relations of the Commonwealth or law enforcement interests.⁶²

1.32 The Tribunal may also direct that the whole or a particular part of its findings, so far as they relate to a matter that has not been disclosed to the applicant, not be

⁵⁸ Administrative Review Tribunal Bill 2023, subclauses 91(3)–(7).

⁵⁹ Administrative Review Tribunal Bill 2023, clauses 158 (security certificates), 159 (sensitive information certificates), and 161 (public interest certificates, noting this clause would apply instead of clause 91). Other non-disclosure certificates issued under other Acts, including the *Australian Crime Commission Act 2002* and the *Australian Security Intelligence Organisation Act 1979*, may also apply. See Administrative Review Tribunal Bill 2023, clause 162.

⁶⁰ Administrative Review Tribunal Bill 2023, clauses 143 and 144.

⁶¹ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 4, item 43.

⁶² Administrative Review Tribunal Bill 2023, clause 156.

given to the applicant.⁶³ If the decision is appealed or referred to the Federal Court, the court must do all things necessary to ensure that any information subject to a non-disclosure certificate or other sensitive information is not disclosed to any person other than a member of the court or the Director-General of Security (with respect to security clearance documents).⁶⁴ Limited exceptions would apply.⁶⁵

1.33 Further, the Consequential bill seeks to amend provisions relating to the disclosure of information with respect to decisions made under the *Migration Act 1958* (the Migration Act).⁶⁶ Currently under the Migration Act the Tribunal must give the applicant, in a way that is appropriate in the circumstances, clear particulars of any information that the Tribunal will rely on in affirming the decision under review and must invite the applicant to comment on or respond to that information.⁶⁷ However, the Tribunal does not have to disclose certain types of information to the applicant, including where the information relates to another person (not the applicant), where the applicant gave the information to the Tribunal or where the information is non-disclosable.⁶⁸ The Consequential bill would expand this provision to provide that the Tribunal does not have to disclose information to the applicant that was included in the written statement of the decision that is under review or information that is to be prescribed by regulations.⁶⁹ The Consequential bill seeks to also include a new subsection that clarifies that the Tribunal is not required to give particulars in relation to any of the information that is not required to be disclosed to the applicant before making a decision.⁷⁰

⁶³ Administrative Review Tribunal Bill 2023, subclauses 167(5) and (8).

⁶⁴ Administrative Review Tribunal Bill 2023, clauses 189 and 190.

⁶⁵ Administrative Review Tribunal Bill 2023, subclauses 189(3) and 190(3).

⁶⁶ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, items 160 and 161. See also items 32, 45 and 270 which would disapply certain clauses in the ART bill, having the effect of restricting access to certain information or documents, including a statement of reasons for the decision. Item 32 relates to a decision to cancel a visa and item 45 relates to a decision to not revoke a visa cancellation decision. These items would disapply clauses 267 and 268 of the ART bill, which relate to the rules that must be regarded when giving notice of the decision and would allow a person to request a statement of reasons for the decision. Item 270 relates to review of a decision to not revoke a decision to cancel a visa. It would disapply clause 23 of the ART bill, which would require the decision-maker to give the Tribunal a statement of reasons for the decision and documents relevant to the review.

⁶⁷ *Migration Act 1958*, subsection 359A(1).

⁶⁸ *Migration Act 1958*, subsection 359A(4).

⁶⁹ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 160.

⁷⁰ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 161.

International human rights legal advice

Right to fair hearing

1.34 By restricting the disclosure of information relevant to proceedings to the applicant and their representative, the measures engage and limit the right to a fair hearing. Article 14(1) of the International Covenant on Civil and Political Rights requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁷¹ The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations and equivalent notions in the area of administrative law, and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.⁷² Proceedings involving the determination of social security benefits or the pension rights of soldiers, for example, have been recognised as creating a 'suit at law' for the purposes of article 14.

1.35 In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case.⁷³ This means the same procedural rights must be guaranteed to all parties and, in the context of civil proceedings, requires that 'each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.⁷⁴ The United Kingdom (UK) courts and the European Court of Human Rights have held that the right to a fair hearing is violated where a person is not provided with sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations, and have an opportunity to challenge the allegations, even in circumstances where full disclosure of information is not possible for reasons of

⁷¹ International Covenant on Civil and Political Rights, article 14

⁷² UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16]. At [17], the UN Human Rights Committee has indicated that the guarantees in article 14 do not generally apply to expulsion or deportation proceedings, although the procedural guarantees of article 13 are applicable to such proceedings.

⁷³ See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

⁷⁴ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [13].

national security.⁷⁵ There can be no fair hearing if a case against a person is based solely or to a decisive degree on closed materials or where open material consists only of general assertions.⁷⁶ As regards these bills, a person's right to a fair hearing may be limited by the measures insofar as they would restrict the disclosure of information relevant to the proceeding from the applicant and their representative, including information that formed the basis of the decision subject to review, evidence adduced by the other party as well as all or part of the Tribunal's findings. In doing so, the applicant would be unable to effectively provide instructions in relation to, and challenge, the information before the Tribunal and contest the evidence adduced by the other party.

Prohibition against expulsion of aliens without due process

1.36 As regards migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, such as visa cancellation decisions, the measures also appear to engage and limit the prohibition against expulsion of aliens without due process.⁷⁷ This right is protected by article 13 of the International Covenant on Civil and Political Rights, which provides that:

⁷⁵ See, *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, especially at [59] where the court ruled that 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations'. See also, *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009), especially [218] where the Court stated that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him'.

⁷⁶ *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28 [59]; *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

⁷⁷ To the extent that the effect of these bills would be to limit a person's ability to challenge a migration or citizenship decision, the consequence of that decision being the person's detention and deportation from Australia or prevention of return to Australia for citizens overseas, the measure may also engage and limit a number of other rights. In particular, the right to liberty (as immigration detention may be a consequence of a decision); right to protection of the family (as family members may be separated); right to non-refoulement (if the consequence of a decision is deportation and removal from Australia); freedom of movement (if cancellation of a visa or cessation of citizenship prevents a person from re-entering and remaining in Australia as their own country); and rights of the child (if the decision relates to a child's nationality). The rights implications of citizenship cessation are discussed in Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2–31; and *Report 6 of 2019* (5 December 2019), pp. 2–19.

An alien lawfully in the territory of a State Party...may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.37 Article 13 incorporates notions of due process also reflected in article 14 of the International Covenant on Civil and Political Rights and should be interpreted in light of that right.⁷⁸ In particular, the United Nations (UN) Human Rights Committee has stated that article 13 encompasses ‘the guarantee of equality of all persons before the courts and tribunals as enshrined in [article 14(1)] and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable’.⁷⁹ The UN Committee has further stated that article 13 requires that ‘an alien...be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one’.⁸⁰

1.38 The measures limit the due process requirements in article 13 to the extent that they may restrict a person’s access to information that informed the decision leading to their expulsion or deportation, as well as their ability to make submissions on the use of that information or the weight to be attributed to the information by the Tribunal. Such restrictions would appear to prevent the person from effectively contesting or correcting potentially erroneous information, thereby hindering their ability to effectively challenge the decision and pursue a remedy against expulsion.⁸¹

⁷⁸ UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

⁷⁹ UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

⁸⁰ UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The Committee has also stated that ‘Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions’.

⁸¹ See Committee on the Elimination of Racial Discrimination, *General Comment No. 30: discrimination against non-citizens* (2004) at [25], where the Committee on the Elimination of Racial Discrimination stressed the importance of the right to challenge expulsion and access an effective remedy, noting that States should ensure that ‘non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies’.

1.39 The due process guarantees in article 13 may be departed from, but only when ‘compelling reasons of national security’ so require.⁸² It is unclear whether this exception would apply to the measures. The reasons in the Consequential bill for not disclosing the information to the applicant include where the information: relates to a person other than the applicant; was provided to the Tribunal by the applicant; is ‘non-disclosable information’; is included in the written statement of the decision under review; or is prescribed by regulations. ‘Non-disclosable information’ means information that would, if disclosed, be contrary to the national interest because it would prejudice the security, defence or international relations of Australia or involve the disclosure of Cabinet deliberations or decisions; would be contrary to the public interest; or would found an action by a person for breach of confidence.⁸³ It is not clear what type of information is to be prescribed by regulations or the basis for non-disclosure of that information to an applicant. While national security is one ground for non-disclosure of information, there are other grounds which are broader than national security reasons, such as Australia’s relations with other countries or the public interest, which would not appear to fall within the exception in article 13. Furthermore, the UN Human Rights Committee appears to have interpreted the exception of ‘compelling reasons of national security’ to be a reasonably high threshold which States parties must meet before departing from their due process

⁸² International Covenant on Civil and Political Rights, article 13; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. Note that if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds, the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality).

⁸³ *Migration Act 1958*, section 5.

obligations.⁸⁴ As such, it appears that article 13 is engaged and limited by the measures.

Assessment of limitations on rights

1.40 The right to a fair hearing and the prohibition against expulsion of aliens without due process may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.41 The general objectives underpinning the measures are to promote national security and the public interest, which are capable of constituting legitimate objectives for the purposes of international human rights law.⁸⁵ Insofar as the measures seek to restrict the disclosure of sensitive information in circumstances where disclosure may damage national security or the public interest, the measures would appear to be rationally connected to the stated objectives.

1.42 In assessing proportionality, it is relevant to consider a number of factors, including whether the measures are accompanied by adequate safeguards, including

⁸⁴ See, for example, *Mansour Leghaei and others v Australia*, United Nations Human Rights Committee Communication No. 1937/2010 (2015): the partially dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia (dissenting only because the Committee as a whole did not consider the article 13 arguments) is noteworthy with respect to the national security exception in article 13. The Committee concluded at [10.4] that ‘the author was never formally provided with the reasons for the refusal to grant him the requested visa which resulted in his duty to leave the country, except for the general explanation that he was a threat to national security based on security assessment of which he did not even receive a summary’. In light of this finding, Committee members Cleveland and Rodríguez-Rescia concluded at [5] that the ‘invocation of “compelling reasons of national security” to justify the expulsion of the author...did not exempt the State from the obligation under article 13 to provide the requisite procedural safeguards. The fact that the State failed to provide the author with these procedural safeguards constitutes a breach of the obligation under article 13 to allow the author to submit the reasons against his expulsion...This means that he should have been given the opportunity to comment on the information submitted to them, at least in summary form’. See also, *Mansour Ahani v Canada*, United Nations Human Rights Committee Communication No. 1051/2002 (2004) [10.8]: ‘Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, “compelling reasons of national security” existed to exempt the State party from its obligation under that article to provide the procedural protections in question’. Other jurisprudence of the UN Human Rights Committee indicates that States have previously been afforded ‘wide discretion’ as to whether national security reasons exist but that States should at least demonstrate that there are ‘plausible grounds’ for exercising the national security exception: See *Alzery v Sweden*, United Nations Human Rights Committee Communication No. 1416/2005 (2006).

⁸⁵ Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 10 and 12; Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 11.

access to review, and pursue the least rights restrictive means of achieving the stated objectives.

1.43 The statement of compatibility states that the limitation is proportionate as strict criteria apply for the issuing of public interest certificates; the certificate only applies to information in the proceeding that it would be against the public interest to disclose; and the Tribunal can allow disclosure of information subject to a certificate in limited circumstances.⁸⁶ Proceedings involving public interest certificates or in the Intelligence and Security jurisdictional area must be considered by a tribunal constituted with a Deputy President or the President, which the statement of compatibility says ensures that the most senior levels within the Tribunal will consider these matters.⁸⁷ The statement of compatibility also notes that in relation to the Tribunal's own powers to restrict the publication or disclosure of information, the Tribunal must weigh up the competing interests of open justice and the particular circumstances of the parties and the harm that could occur if the order is not made.⁸⁸ The statement of compatibility further states that parties can seek review of decisions on public interest certificates and non-disclosure orders in the Federal Court.⁸⁹

1.44 The statement of compatibility identifies some useful safeguards that would assist with proportionality. In particular, in deciding whether to make an order under clause 70 restricting the publication or disclosure of information to parties, clause 71 would require the Tribunal to have regard to specified matters, including the desirability that evidence and documents given to the Tribunal are made available to all parties.⁹⁰ In addition to these matters, if an order is being considered in a proceeding in the Intelligence and Security jurisdictional area, the Tribunal must also have regard to the necessity of avoiding the disclosure of national security information and, in relation to a review proceeding, give particular weight to any submission made by or on behalf of the agency head.⁹¹ Clause 71 appears to confer the Tribunal with flexibility to consider the particular circumstances of each individual case and undertake some form of balancing exercise, whereby it may weigh the risk of damage

⁸⁶ Administrative Review Tribunal Bill 2023, statement of compatibility, p. 10.

⁸⁷ Administrative Review Tribunal Bill 2023, statement of compatibility, p. 10.

⁸⁸ Administrative Review Tribunal Bill 2023, clauses 70 and 71; statement of compatibility, p. 12.

⁸⁹ Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 10 and 12.

⁹⁰ Administrative Review Tribunal Bill 2023, clause 71.

⁹¹ Administrative Review Tribunal Bill 2023, clause 157. This provision applies in addition to clauses 70 and 71.

to the public interest against the right to a fair hearing or other matters that it considers appropriate and necessary. This would assist with proportionality.⁹²

1.45 However, the Tribunal is conferred with minimal flexibility with respect to disclosing information subject to a non-disclosure certificate. Such certificates are issued by the Commonwealth, state or territory Attorney-General, the responsible minister or the Director-General of Security on the grounds that disclosure of the specified information would be contrary to the public interest for one or more specified reasons, such as the disclosure would prejudice the security, defence or international relations of the Commonwealth.⁹³ The Tribunal is not involved in the issuing of a certificate and may only disclose information subject to a certificate to parties in very limited circumstances. For example, with respect to a public interest certificate issued under clause 91, the Tribunal may allow disclosure of the restricted information if the certificate was issued on the ground that disclosure would be contrary to the public interest for ‘any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed’.⁹⁴ In deciding whether to make the information available to the parties, the Tribunal must take into account as a primary consideration the principle that it is desirable for the parties to the proceeding to be made aware of all relevant matters; and have regard to any reason specified in the certificate.⁹⁵

1.46 However, in relation to information subject to a public interest certificate on other grounds, such as where disclosure would prejudice Australia’s security, defence or international relations or involve Cabinet deliberations or decisions, the Tribunal is not afforded any discretion to disclose this information to parties. Similarly, there is no flexibility to disclose information subject to other certificates, such as a sensitive information certificate or a security certificate, to parties.⁹⁶ Given the very limited circumstances in which the Tribunal may disclose information subject to a non-

⁹² See *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) at [206] where the Court stated that the right to a fair trial may not be violated in circumstances where, having full knowledge of the issues in the trial, the judge is able to carry out a balancing exercise and take steps to ensure that the defence (whose rights are limited) is kept informed and is permitted to make submissions and participate in the decision-making process so far as is possible without disclosing the confidential material.

⁹³ Administrative Review Tribunal Bill 2023, clauses 91, 158, 159, 161 and 162.

⁹⁴ Administrative Review Tribunal Bill 2023, paragraphs 91(1)(c) and 91(2)(b). Subclause 91(6) provides that the Tribunal may decide to make the information or document available to any or all of the parties to the proceeding if the reason for the certificate being given by the Attorney-General is a reason other than the reason set out in paragraphs 91(1)(a) or (b) or 91(2)(a). In effect, this means the information may only be disclosed if the reason for the public interest certificate is that set out in paragraphs 91(1)(c) and 91(2)(b). See also subclause 161(6).

⁹⁵ Administrative Review Tribunal Bill 2023, subclause 91(7).

⁹⁶ Administrative Review Tribunal Bill 2023, clauses 158 and 159.

disclosure certificate to the applicant in practice, it appears that, with respect to these measures, there is insufficient flexibility for the Tribunal to consider the individual circumstances of each case, including the sensitivity of the information and likely harm if it were to be disclosed and the right of the applicant to a fair hearing. Without this flexibility, it is not clear that the non-disclosure of information to the applicant would necessarily be proportionate in each case.

1.47 While the availability of review in relation to non-disclosure decisions would theoretically serve as an important safeguard, its value in practice is uncertain. This is because the applicant is unable to access critical information on which the decision was based, making it very difficult for the applicant to understand the reasons for the decision and thus effectively challenge the decision. Concerns therefore arise that the right of review is not, in all the circumstances, an effective one.

1.48 As to whether there are less rights restrictive alternatives available, the jurisprudence of the European Court of Human Rights offers some guidance in this regard. In the context of domestic laws that restrict disclosure of information to parties for reasons of national security, the European Court of Human Rights has identified special advocates as an important safeguard to ‘counterbalance procedural unfairness’ through ‘questioning the State’s witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure’.⁹⁷ The European Court of Human Rights has stated:

the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.⁹⁸

1.49 It is noted that in other Commonwealth legislation where information is withheld from the affected person on national security grounds, there is a process by which the affected person is provided with a summary of the information and a special advocate is appointed to represent the person's interests in closed hearings.⁹⁹ However, neither the ART bill nor the Consequential bill provide for special advocates or even for a process by which the applicant and their representative may be provided

⁹⁷ *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [209] and [219].

⁹⁸ *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

⁹⁹ See *National Security Information (Criminal and Civil Proceedings) Act 2004*. Although note the human rights concerns regarding the adequacy of these measures to safeguard the right to a fair hearing, see Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 54–61.

with a summary of the restricted information. Indeed, the amendments to the Migration Act in the Consequential bill clarify that the Tribunal is not required to give particulars in relation to any of the information that is not required to be disclosed to the applicant before making a decision.¹⁰⁰

1.50 A less rights restrictive way of achieving the stated objectives would appear to be to confer the Tribunal with sufficient discretion so as to allow them to disclose as much information as possible without compromising the public interest or national security, or, following an independent assessment of the information and the risk of disclosure, to provide the applicant and their representative with a summary of the information. This would provide the Tribunal with greater flexibility to treat different cases differently.¹⁰¹

Committee view

1.51 The committee notes that those provisions in the ART bill and the Consequential bill that seek to restrict the disclosure of information or evidence engage and limit the right to a fair hearing and, with respect to migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, the prohibition against expulsion of aliens without due process. With respect to the latter right, while the due process guarantees in article 13 may be departed from when compelling reasons of national security so require, the current measures go further and allow restrictions based on Australia's relations with other countries or the public interest. The committee notes that the UN Human Rights Committee appears to have interpreted the exception of 'compelling reasons of national security' to be a reasonably high threshold which States parties must meet before departing from their due process obligations. The committee notes that the right to a fair hearing and the prohibition against expulsion of aliens without due process may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.52 While the committee considers that the measures pursue the legitimate objectives of seeking to protect national security and the public interest, it is concerned that the proposed limitations may not be proportionate in all circumstances. The safeguards identified in the statement of compatibility do not appear to be sufficient, noting the Tribunal has minimal flexibility to disclose information subject to a non-disclosure certificate to the applicant and there appear to be less rights restrictive ways of achieving the stated objectives. Depending on the

¹⁰⁰ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 161.

¹⁰¹ The Parliamentary Joint Committee on Human Rights raised similar human rights concerns regarding the restricted disclosure of information to the applicant in the context of migration decisions. See Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, *Report 1 of 2021* (3 February 2021) and *Report 3 of 2021* (17 March 2021).

scope and nature of information withheld from the applicant and the consequent interference with their ability to effectively participate in proceedings, there appears to be a risk that the measures would not be proportionate in all circumstances and thus may impermissibly limit the right to a fair hearing and the prohibition against expulsion of aliens without due process.

Suggested action

1.53 The committee considers the proportionality of these measures may be assisted were the bills amended to provide:

- (a) the Tribunal with the discretion to disclose the relevant information (or a summary of it) to the extent that is necessary to ensure procedural fairness in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest or national security; and
- (b) a process by which a special advocate scheme (that complies with human rights) or equivalent safeguard be created to allow the Tribunal to appoint someone in a particular case to represent the applicant's interests if it is determined that the relevant information cannot be disclosed to the applicant.

1.54 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Termination of employment of AAT members

1.55 The Consequential bill seeks to abolish the Administrative Appeals Tribunal (the AAT)¹⁰² and transition AAT staff and some AAT members to the new Tribunal.¹⁰³ In particular, staff members of the AAT who were engaged immediately before the transition time (that is, the time the ART bill would commence) are to be engaged as staff members of the new Tribunal on the same terms and conditions.¹⁰⁴ Regarding AAT members, the President, Deputy Presidents who are judges, and members who were appointed on or after 1 January 2023 to the AAT (as a result of a selection process conducted in accordance with the Guidelines for appointments to the AAT) are to be transitioned as members to the new Tribunal on the same terms and conditions of employment for the remainder of the term for which they were originally

¹⁰² Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 17, item 1 (which repeals the *Administrative Appeals Tribunal Act 1975*).

¹⁰³ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, item 11.

¹⁰⁴ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, items 11, 28–32.

appointed.¹⁰⁵ All other current members of the AAT would need to apply for membership of the Tribunal, to be appointed to the ART through a merit-based process. For those AAT members who are not appointed as members of the new Tribunal, they are to be compensated an amount equivalent to four months remuneration or, for members with less than four months remaining of their term, an amount the person would have received as remuneration for the remainder of that term.¹⁰⁶

International human rights legal advice

Right to fair hearing

1.56 By abolishing the AAT, certain AAT members would have their employment terminated insofar as they would not be automatically transitioned to the new Tribunal. Terminating the appointments of some Tribunal members prior to the end of their term by way of government legislation appears to constitute executive interference with the independence of the judiciary, which has implications for the right to a fair hearing. This right requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁰⁷ The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.¹⁰⁸ The requirement of independence demands:

...actual independence of the judiciary from political interference by the executive branch and legislature...A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of independent tribunal.¹⁰⁹

1.57 In order to guarantee judicial independence, States parties must protect members of the judiciary from any form of political interference in their decision-making through the adoption of laws that establish clear procedures and objective

¹⁰⁵ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, items 28–30. Other AAT members who are to be appointed as members of the new Tribunal commencing at, or immediately after, the transition time are to be remunerated at the same rate for the first four months as a member of the new Tribunal (or for less than four months if the remainder of the term for which the person was appointed as a member of the AAT is less than four months), see schedule 16, item 31.

¹⁰⁶ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, item 32.

¹⁰⁷ International Covenant on Civil and Political Rights, article 14.

¹⁰⁸ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

¹⁰⁹ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

criteria for the appointment, remuneration, tenure and dismissal of members.¹¹⁰ Regarding the dismissal of judicial members, the UN Human Rights Committee has stated that:

Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.¹¹¹

1.58 Terminating AAT members prior to the end of the original term for which they were appointed therefore risks violating the requirement of an independent judiciary with respect to the right to a fair hearing.¹¹² The statement of compatibility does not address the engagement of the right to a fair hearing and so no assessment is provided as to its compatibility with this right.

1.59 The statement of compatibility generally notes that the Consequential bill forms part of a package of legislation that would abolish the AAT and establish the new Tribunal, which is intended to be a new federal administrative review body that is user-focused, efficient, accessible, independent and fair.¹¹³ While the statement of compatibility acknowledges that abolishing the AAT would cease the employment of existing AAT members, it does not explain why all members cannot transition to the new Tribunal, at least for the duration of their term. The statement of compatibility states that all current members of the AAT have had the opportunity to apply for membership of the Tribunal through a merit-based process consistent with the Guidelines of Appointments to the AAT. It states that members of the AAT who are not appointed to the new Tribunal but whose terms as AAT members would have continued beyond the abolition of the AAT will receive compensation for the termination of their appointment.¹¹⁴ While providing members with compensation

¹¹⁰ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

¹¹¹ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [20].

¹¹² The termination of certain AAT members would also engage the right to work. The statement of compatibility has sufficiently justified the potential limitation on the right to work insofar as those AAT members who are to be terminated will receive up to four months compensation. As such, the right to work is not discussed in detail in this report. See Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 23.

¹¹³ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 4.

¹¹⁴ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 23.

and the option to re-apply for membership of the new Tribunal would appear to safeguard the right to work, it does not satisfy the requirement of independence in the context of the right to a fair hearing, which protects judicial members against dismissal.

1.60 In the absence of any specific reasons set out in the explanatory materials as to why it is necessary to dismiss certain AAT members (such as on the grounds of serious misconduct or incompetence) and without effective judicial protection being available to members to contest their dismissal, there appears to be a risk that the measure is incompatible with the notion of an independent tribunal.¹¹⁵

Committee view

1.61 The committee notes that abolishing the AAT and consequently terminating the appointment of certain AAT members before the end of the term for which they were originally appointed engages the right to a fair hearing, particularly the requirement for a competent, independent and impartial tribunal. The committee notes that the requirement of judicial independence demands freedom from political interference by the executive or legislature and is an absolute right that is not subject to any exception.¹¹⁶ The statement of compatibility does not address the engagement of this and so provides no assessment as to its compatibility.

1.62 The committee notes that all AAT members were provided with an opportunity to apply for appointment to the new Tribunal through a merit-based process and those who are not to be appointed to the new Tribunal will be adequately compensated. The committee considers a merit-based process for appointment of members to the new

¹¹⁵ Jurisprudence of the European Court of Human Rights suggests that the political context in which judicial reforms take place may be relevant in assessing whether dismissal of judicial members is compatible with human rights. See, e.g. *Grzęda v. Poland*, European Court of Human Rights (Grand Chamber), Application no. 43572/18 (2022). In this case, the applicant, a judge at the Polish Supreme Court, was removed from the National Council of the Judiciary before the end of his term and he was unable to get a judicial review of that decision. The Court found a violation of the applicant's right to access a court. At [348], the Court observed that 'the whole sequence of events in Poland...vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the [National Council of the Judiciary] and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline...As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant's case is one exemplification of this general trend'. The current measures were clearly introduced in a very different context. However, in the absence of reasons justifying why these measures were necessary, questions remain as to whether the measures are compatible with the notion of an independent tribunal.

¹¹⁶ UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

Tribunal is important for ensuring the new Tribunal is independent and fair. However, noting the position under international human rights law that members of the judiciary should only be dismissed on serious grounds of misconduct or incompetence, and in such cases, they should have access to judicial protection to contest their dismissal, the committee considers there to be a risk that the measure may not be compatible with the notion of an independent tribunal.

1.63 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.