Australian Government
Attorney-General's Department

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

Attorney-General's Department submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs

1. Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) with this submission as part of the Committee's inquiry into the Administrative Review Tribunal Bill 2023 (the ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (the Consequential and Transitional Bill) (together, the Bills).

The Bills would establish a unified, cohesive Tribunal with flexible powers and procedures that best meet the needs of applicants. The new legislation is part of a broader reform to establish a new system of administrative review that is user-focused, efficient, accessible, independent and fair. The reform also includes:

- implementing a transparent and merit-based appointments process
- appointing additional members to address existing backlogs
- implementing sustainable funding arrangements
- implementing a single, updated case management system to address critical business risks
- introducing procedural efficiencies and process improvements
- implementing support services and emphasising early resolution where possible.

This submission is intended to be considered alongside the Explanatory Memoranda to the Bills, as well as the second reading speech[1] accompanying each Bill's introduction to Parliament. It provides additional detail on key elements of reform that depart from current practices and procedures of the Administrative Appeals Tribunal (AAT), including merit-based appointment of Tribunal members; greater cohesion and standardisation of practices and procedures across matter types before the Tribunal; and the establishment of a guidance and appeals panel to promote systemic improvements to government decision-making. This last feature, in particular, is a critical part of the Government's measures to improve administrative decisions and merits review, consistent with the findings within the Report of the Royal Commission into the Robodebt Scheme. Further information on the reform, including an overview of the objective and key features of the Bills, is at **Attachment A**.

Consultation

The Bills are the result of extensive consultation across government, civil society, professional bodies, as well as users, members and staff of the AAT. This included consultation on an Issues Paper seeking stakeholder views on the design of the Administrative Review Tribunal, as well as consultation on an early draft of the legislation, which led to refinements and improvements in response to stakeholder feedback. An overview of

[1] The second reading speech to the ART Bill can be accessed at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F27533%2F0023%22 and to the Consequential and Transitional Bill at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F27533%2F0027%22.

outcomes from stakeholder consultation to date can be found at **Attachment B**. An Expert Advisory Group also provided significant guidance on the Bills. The Advisory Group comprises:

- Former High Court Justice, the Hon Patrick Keane AC KC (chair)
- Ms Rachel Amamoo
- Professor Anna Cody
- Emeritus Professor Robin Creyke AO
- Emeritus Professor Ron McCallum AO
- Former Federal Court Justice, the Hon Alan Robertson SC, and
- Emeritus Professor Cheryl Saunders AO.

The Bills also implement recommendations from, or form part of the government response to, several inquiries that have examined Australia's system of merits review.[2] An overview of how the Bills achieve these outcomes can be found at **Attachment C**.

2. Appointment of Tribunal members

Need for merit-based appointments

An overwhelming majority of participants during consultation emphasised the importance of a merit-based appointment process for the integrity of administrative review. Merit-based appointments are a critical feature of the new Tribunal. They will ensure the Tribunal is able to meet its objective to provide independent, high-quality review of administrative decisions by ensuring Tribunal members have relevant expertise and experience. Merit-based appointments will also safeguard and enhance public trust and confidence in the integrity of the Tribunal.

Previous appointment process

Under the *Administrative Appeals Tribunal Act 1975* (AAT Act), the Governor-General appoints AAT members. The legislation does not specify the process to be followed in identifying or assessing candidates for appointment. Historically, these processes have been set out in non-legislative appointment protocols. Prior to the current guidelines for appointments to the AAT, developed as part of these reforms and published on 15 December 2022 (2022 guidelines), the preceding protocols (of 2015 and 2019) had the following features:

- The President of the AAT provides the Minister with their assessment of the members required
- Expressions of interest are sought publicly to fill available positions
- A recommendation is made to the Minister based on a suitability assessment of candidates from the expression of interest by:
    - 2015 Protocol: a Committee comprising the President (or delegate), the Secretary of the department (or delegate) and a representative of the Attorney-General

[2] Christine Nixon AO APM, *Rapid Review into the Exploitation of Australia's Visa System* (declassified report, October 2023); *Royal Commission into the Robodebt Scheme* (Final Report, July 2023); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Interim Report, March 2022).

    - 2019 Protocol: the President
- The Minister seeks Cabinet's approval of candidates to recommend to the Governor-General. The Minister is not limited to those candidates recommended or preferred by the President or the Committee, and is not limited to those who completed an expression of interest
- Following Cabinet's approval, the Minister recommends the candidate to the Governor-General.

Under these appointment arrangements, there was no requirement to publish details regarding the process through which appointees were selected, including whether they were recommended through the assessment process or whether they completed an expression of interest. When considering these appointment protocols, the Senate Legal and Constitutional Affairs References Committee reported that:

> scope for ministerial discretion was considered by several submitters to lead to adverse outcomes for the AAT and how it is perceived by the public. Concerns were repeatedly put forward in evidence that a lack of transparency and independence in the appointment process was significantly undermining the public credibility of the Tribunal.[3]

Move to a merit-based appointment process

Administrative Review Tribunal Bill 2023

Clauses 205–208 of the ART Bill relating to merit-based appointments are based on sections 8A and 8B of the *Australian Human Rights Commission Act 1986* – updated in 2022 – and corresponding provisions in anti-discrimination laws.

The ART Bill builds on these provisions by requiring all appointments (except for Judicial Deputy Presidents) to be based on a publicly advertised, merit-based appointment process. The ART Bill supports this by:

- providing a definition of 'merit-based'
- requiring the Minister to consult the President in relation to the operational needs and financial position of the Tribunal, as well as the relative number of members at each level
- allowing the Minister to establish assessment panels, and
- ensuring any additional requirements prescribed by the regulations (disallowable) (including those relating to assessment panels) must be followed.

The appointment of Tribunal leadership (the President and the CEO and Principal Registrar) follow the same process, with modifications appropriate to those roles. For example, consultation elements are adapted for the appointment of the President (consultation with the Chief Justice of the Federal Court) and CEO and Principal Registrar (the President must support the appointment).

The Tribunal will comprise hundreds of appointed members who are called upon to review administrative decisions under more than 250 different Commonwealth laws. As well as being transparent and merit-based, the appointment process must be sufficiently practical and flexible – including with respect to the future

[3] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Interim Report, March 2022) 44 [4.35].

needs of and demands on the Tribunal – to support the effective operation of the Tribunal. The process must ensure vacancies are filled efficiently and that any gaps in specialist skills or knowledge can be addressed.

In addition to merit-based appointment requirements, the ART Bill promotes enhanced performance management of Tribunal members to support the integrity of, and community trust and confidence in, the administrative review system. The ART Bill requires the President to establish, and members to follow, a code of conduct (clause 201 refers) and performance standard (clause 202 refers). Together with clause 203 – providing for investigations of possible breaches of these standards – and clauses 221 and 222 relating to termination of members, these provisions respond to feedback expressed during the consultation process about the need to ensure members are properly discharging their functions in a manner which meets public expectations and promotes public trust and confidence in the Tribunal.

Merit-based

The term 'merit-based', in relation to a process for assessment of suitability for appointment, is defined in clause 4 of the ART Bill as:

- including an assessment of the comparative suitability of the candidates for the duties of the office, using a competitive selection process
- being based on the relationship between the candidates' skills, expertise, experience and knowledge and the skills, expertise, experience and knowledge required for the duties of the office, and
- considering the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal.

This definition is drawn from the definition of merit-based appointments of non-executive directors in the *Australian Broadcasting Corporation Act 1983* with some changes to reflect the different nature of the roles.[4] The definition of merit-based in the ART Bill provides a clear legislative framework for merit-based appointments to the Tribunal.

Relevant qualifications outlined in legislation

The relevant qualifications for each level within the Tribunal are set out in the Bill: sub-clause 205(3) sets out the relevant qualifications for the President; sub-clause 206(3) for Judicial Deputy Presidents; sub-clause 207(3) for Non-Judicial Deputy Presidents; and sub-clause 208(3) for senior members and general members. A candidate cannot be assessed as suitable without meeting the qualifications set out in the legislation. The increased specificity and clarity over roles and responsibilities will ensure that only those that are suitably qualified for senior roles in the Tribunal are appointed. This further supports the capacity of the Tribunal to rely on the relevant skills and expertise of persons appointed to the Tribunal, as well as the transparency and integrity of the appointment process.

Compliance with regulations

The Bill provides for requirements to be prescribed in disallowable regulations to allow for the appointments process to be able to meet the changing needs of the Tribunal over time.

[4] *Australian Broadcasting Corporation Act 1983*, sub-section 24B(2).

It is anticipated that the regulations dealing with appointments would be based on the 2022 guidelines (**Attachment D**). That is, they would provide for an assessment panel constituted by the Secretary of the department (or delegate) as Chair, the Tribunal President (or delegate) and a third panel member nominated by the Attorney-General. For non-judicial appointments, the 2022 guidelines require:

- public advertisement of available positions
- all candidates to be assessed against transparent suitability criteria
- candidates for reappointment to have a referee report from a person in seniority at the Tribunal
- panel members to provide reasoning for their assessment of suitability of a candidate
- the Minister to make recommendations to the Governor-General based on the panel report.

Regulations based on these guidelines will provide a basis for transparent, merit-based non-judicial appointments to the Tribunal. These regulations may also include general or specific selection criteria in order to accommodate multiple types of vacancies.

Appointment of Judicial Deputy Presidents would be made by the Governor-General on the recommendation of the Minister, in consultation with the President and the relevant Chief Justice. As outlined in the Explanatory Memorandum to the ART Bill, it is considered not appropriate for the role of Judicial Deputy President to be publicly advertised as all potential candidates are existing sitting Judges (Table 4 – *Appointment process elements, by level*, p. 171 refers).

Outlining additional appointments process requirements within regulations will allow for Parliamentary scrutiny of these requirements through the disallowance process. This will be another critical feature in ensuring the transparency of, and promoting integrity in, the appointments process for the Tribunal.

Term length

The ART Bill provides that member appointments to the Tribunal will be for 5 years, unless a shorter period is specified. Sub-clauses 205(4) and 205(5) of the ART Bill sets out the period of appointment for the President; sub-clauses 206(4) and 206(5) for Judicial Deputy Presidents; sub-clauses 207(4) and 207(5) for Non-Judicial Deputy Presidents; and sub-clauses 208(4) and 208(5) for senior members and general members. Where a shorter period is specified, reasons must be stated in the instrument of appointment. This increases independence, for example by reducing the risk that reappointments are made to coincide with election cycles, and supports the continuity and capability of the Tribunal.

Assignments

Rather than being assigned to specific Divisions through a ministerial instrument, members will be appointed to the Tribunal generally. Clauses 198 and 199 of the ART Bill provide for the President to assign members to jurisdictional areas and to assign certain members to lead lists. The ability of the President to assign and reassign members will enable the Tribunal to rapidly and effectively respond to surges in caseloads and address backlogs in specific matter types by directing resources to where they are needed, as well as where they are most effective. It will also support members' professional development, providing tailored opportunities to build expertise in new areas.

In exceptional circumstances, the Governor-General may assign a member other than the President or a Deputy President to one or more jurisdictional areas through the member's instrument of appointment. This

mechanism will enable assignments to continue to be made where needed to support a broader policy objective, for example if additional appointments are made to deal with a specific caseload issue. This occurred in the AAT in 2023 when additional members were appointed and assigned to the Migration and Refugee Division to assist to address the AAT's significant backlog of protection visa reviews.

3. Structure and design

Systemic reform

Consistent with the Government's integrity reform agenda, the Bill reflects an intention to improve the quality and integrity not only of the federal administrative review body, but of the entire system of administrative decision-making.

This is achieved in the following ways:

- the addition in the objective in clause 9 of providing an independent mechanism of review that maintains public trust and confidence in administrative decision-making more broadly
- enhancing and harmonising, where possible, provisions requiring decision-makers to provide reasons for decision (Division 3 of Part 10 of the ART Bill and throughout the Consequential and Transitional Bill)
- allowing all decisions of the Tribunal to be published, and requiring decisions to be published if they involve a significant conclusion of law or have significant implications for Commonwealth policy or administration
- a guidance and appeals panel (GAP) that can review any matter involving systemic issues or Tribunal decisions that may be affected by error
    - decisions of the GAP must be published, and the President has discretion to refer matters to the GAP, ensuring that patterns of administrative error or injustice are reviewed and addressed
- requiring the President to inform government entities, Ministers and the Administrative Review Council of systemic issues identified in Tribunal decision-making, and to report on actions taken in relation to this function, and
- re-establishing the Administrative Review Council, with refined membership and functions, including to report on systemic issues.

Guidance and appeals panel

A key feature of the Tribunal is the establishment of the GAP by Part 5 of the ART Bill. The GAP would be constituted to hear matters raising systemic issues and to review Tribunal decisions that may be affected by error.

The GAP has its genesis in the Administrative Review Council's 1995 report *Better Decisions: review of Commonwealth Merits Review Tribunals* which found that '[t]he current structure for seeking further review of decisions of review tribunals has no effective mechanism for ensuring that particular attention is given to

cases having normative effects'.[5] While the merits review framework has changed since this report (for example, through the 2015 amalgamation of Tribunals – also a recommendation of the report), this fundamental challenge has remained.

The GAP will have a positive normative effect on Tribunal decisions and administrative decisions, promoting consistent decision-making and an effective response to emerging issues through the President's ability to refer novel or representative matters for GAP review. It will simultaneously enhance decision-making at a systemic level, providing clarity and certainty for others seeking review, as well as for the original decision-maker and the Tribunal, on similar issues.

Before an application is made to the Tribunal, a decision will have already been made by an agency decision-maker and many matters will also have been subject an internal review within the agency. Tribunal decisions, including guidance decisions, will provide a feedback mechanism to assist decision-makers to arrive at the correct or preferable decision.

The President may refer an issue to the GAP if satisfied that the decision:

- raises an issue of significance for administrative decision-making (clause 128(2)(a) of the ART Bill), or
- is an earlier Tribunal decision that may contain an error of fact or law materially affecting the decision (clause 128(2)(b) of the ART Bill).

The GAP threshold is modelled on similar panels of review in State and Territory Civil and Administrative Tribunals, with the addition of the ability to consider matters raising systemic issues. The threshold reflects the important role the GAP would play in normatively influencing the decisions of other decision-makers (whether Tribunal members or primary decision-makers) and correcting errors. Clause 40 of the ART Bill provides that for matters referred to the GAP the Tribunal must be constituted by appropriately senior members.

The status quo – two-tier review for social security and child support decisions

Most applicants at the AAT only have access to one tier of AAT review. However, most social security and child support decisions have two-tiers of review within the AAT – a residue of the amalgamation of the former Social Security Appeals Tribunal (SSAT) with the AAT in 2015.

First tier review

The AAT's Social Security and Child Support Division (SSCSD) performs the first review, using procedures retained from the former SSAT. For example, the decision-maker is not required to participate in the hearing and may choose to provide written submissions. During consultation, stakeholders expressed support for the relative informality and efficiency of these procedures.

[5] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report to the Minister for Justice, Report No. 39, 1995) 8.49.

The majority of SSCSD social security and child support matters are conclusively resolved at first review within the SSCSD.

Second tier review

After the first review, both the applicant and decision-maker are entitled to seek a second review at the General Division of the AAT. Second-tier review to the AAT from SSAT decisions was added in 1988 in order to create 'a mechanism of further administrative review for complex and difficult cases'[6] and was preserved through the 2015 amalgamation.

Second tier review is more formal and adversarial, and includes the decision-maker as a party. While stakeholders expressed concern at this difference in procedure, they noted the key benefit is that the participation of the decision-maker unlocks negotiated outcomes through dispute resolution processes or case conferencing, which resolve a significant number of these matters.[7]

Stakeholder views

Some social security stakeholders, advocacy groups and community legal centres noted that the second tier of review currently provides an opportunity to revisit aspects and information that may have been missed on first review. Applicants are more likely to be legally represented on second review.

These stakeholders generally supported retaining informality in the review process and introducing earlier access to negotiated outcomes, as is provided for in the Bills, but preferred to retain access to second review in addition.

During the consultation process, other stakeholders supported removing the second tier of review, noting it protracted proceedings, was inefficient, undermined finality and potentially disincentivised full engagement with the first review.

Better initial review and introduction of the GAP

The ART Bill seeks to improve the external merits review process by combining the best features of first and second tier review, and by making enhancements that will ensure effective outcomes through a single tier of review. The ART Bill expands the Tribunal's ability to determine the complexity of matters, the best options for resolution, and to triage accordingly. It also seeks to enhance the likelihood of a correct or preferable decision at earlier stages of decision-making and review, as discussed above.

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.[8] The ART Bill enables dispute resolution processes and case conferencing

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[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 September 1988, 1288 (Brian Howe, Minister for Social Services).
[7] In the 2022 23 financial year, 7 per cent of Centrelink second review matters were finalised through a decision of the AAT varying or setting aside the first review decision of the SSCSD, and 21 per cent of decisions were varied or set aside by consent. By comparison, in the same period, 48 per cent of Centrelink second review matters were finalised by consent, usually following an ADR hearing or a case conference.
[8] See, for example, National Alternative Dispute Resolution Advisory Council, *Your Guide to Dispute Resolution*, (Attorney-General's Department, 2014).

to be made available at the first review, where appropriate, while preserving informality of review through notices of non-participation in Tribunal proceedings. This approach applies across the whole of the Tribunal's caseload – not just social security matters – improving user-experience for all parties.

Complex matters and Tribunal decisions affected by error can be escalated to the GAP on a discretionary basis – by referral or leave. These matters attract a more formal approach, proportionate with their significance, including by a more senior member determining the matter, mandated decision-maker participation, and compulsory publication of these decisions.

Ensuring that the Tribunal is accessible, user-friendly and effective for all applicants, including the most vulnerable, is an important objective of this reform. As the legislation comes into operation, the department will work with affected stakeholders, departments and the Tribunal to ensure that the shift to the GAP review model is effective for social security and child support applicants. This will include, for example, a focus on the capability of members and registrars to support applicants to effectively participate (including through inquisitorial approaches where relevant), timely referral to legal assistance and other support services, and the availability of accessibility supports.

Transitional arrangements

The Consequential and Transitional Bill includes transitional rules that preserve the second review rights of social security and child support applicants who have a current AAT matter and are eligible to undergo, or are undergoing, second review at the time of commencement of the new Tribunal. This ensures that matters commenced under current arrangements are finalised under those arrangements, while new ART applicants will have their matters treated according to the new law.

Election to not participate in Tribunal proceedings

Under current arrangements, decision-makers do not participate in first tier review of social security and child support matters or reviews of migration and refugee matters in the Migration and Refugee Division. In all other matters, the decision-maker appears as a contradictor. Currently, the majority of AAT reviews are conducted in the absence of a decision-maker. During consultation, the more inquisitorial and informal nature of these reviews was noted as being valued by applicants.

Clause 60 of the ART Bill allows decision-makers to elect to not participate in some kinds of proceedings by giving a written notice (an election notice) to the Tribunal. One part of the Tribunal's objective under the ART Bill is to resolve applications as quickly and with as little formality and expense as the proper consideration of the application requires (sub-clause 9(b) of the ART Bill). The flexibility for decision-makers to elect to not participate in proceedings recognises that their non-participation, in some circumstances, can further the objective of the Tribunal.

The Consequential and Transitional Bill provides for the continuation of existing legislative non-participation arrangements by deeming certain decision-makers to have elected not to participate (see, for example, item 24 of Schedule 3 of the Consequential and Transitional Bill).

The Tribunal is empowered to compel a decision-maker to participate in a proceeding where it would assist the Tribunal to arrive at the correct or preferable decision (sub-clause 63(2) of the ART Bill). By granting the Tribunal discretion to compel a decision-making party to participate, decision-maker participation can be

flexibly incorporated into proceedings where that participation will most assist the Tribunal, and assist to resolve a matter. Importantly, social security and child support matters that are identified as amenable to dispute resolution can be resolved through mediation, conferencing or other forms of voluntary dispute resolution on their first review by the Tribunal, rather than needing to be escalated to a second tier of review before this can occur.

4. Migration and protection reviews

Standardisation and harmonisation

Approximately half of all review applications to the Tribunal are related to Home Affairs portfolio decisions. Where possible, the Consequential and Transitional Bill amends the *Migration Act 1958* (the Migration Act) to significantly standardise the review process for migration and protection matters with the other caseloads at the Tribunal. This will enable use of a broader range of powers and procedures for migration and protection matters.

The amendment of the Migration Act is part of a broader harmonisation of Tribunal processes and procedures across Commonwealth Acts. In developing the Consequential and Transitional Bill, the Department has considered (and sought views on) which standard powers and procedures should be able to be applied across the Tribunal's jurisdiction, and where specialised provisions are required to respond to the unique features of particular caseloads.

Where appropriate, harmonised and expanded Tribunal powers and procedures have been applied to migration and protection matters to support the reduction of delays and backlogs by simplifying processes and procedures for Tribunal members, staff and users, and enabling members to be more flexibly allocated across a range of matters to respond to caseload demands.

These amendments are consistent with one of the recommendations (relevant to merits review) proposed by the Rapid Review into the Exploitation of Australia's Visa System by Christine Nixon (the Nixon Review), which was presented to the Government on 31 March 2023. Relevantly, it recommended that improved efficiency be a key focus in the establishment of the new federal administrative review body.

Improving efficiency at the Tribunal will reduce opportunities for exploitation of the migration system, as extended timeframes for finalisation of review will not provide an opportunity for unmeritorious or vexatious applications to prolong their stay in Australia. In turn, reduction of the backlog of cases will enable faster resolution of matters for genuine visa applicants.

Harmonisation of Parts 5 and 7 of the Migration Act

The amendments harmonise migration and protection visa review processes and simplify the existing Parts 5 and 7 into the new Part 5 (dealing with reviewable migration decisions and reviewable protection decisions). This reduces the duplication and complexity of provisions in the Migration Act, streamlining review by the Tribunal.

Abolition of the Immigration Assessment Authority

The Consequential and Transitional Bill repeals Part 7AA of the Migration Act which will abolish the Immigration Assessment Authority (IAA). This will harmonise migration and protection visa review processes with other Tribunal caseloads. This ensures that all persons seeking asylum in Australia are provided with a fair, thorough and robust review process at the Tribunal, thereby promoting the right to an effective remedy and a fair hearing.

The IAA will continue to operate until the new Tribunal has commenced. Any person with a review at the IAA, or who would have otherwise been referred to the IAA for review, will be transitioned to the Tribunal upon commencement, as a reviewable protection decision. Where IAA matters are remitted by the Federal Court, those matters will be considered by the ART (as provided in item 37, Part 8 of Schedule 16 of the Consequential and Transitional Bill).

This does not alter the position that persons who do not engage protection obligations, who are not awaiting a merits or judicial review outcome, and who have exhausted all avenues to remain in Australia, are expected to depart Australia voluntarily and may be provided assistance to depart.

Specialised Migration Act features

Certain existing features of review that are specific to migration and protection matters are retained or enhanced in the Tribunal. These features are essential given the volume, distinct nature (including the importance of certainty of a person's visa status) and complexity of visa-related decisions.

Exhaustive statement of the natural justice hearing rule

The codification of the natural justice hearing rule has been adjusted to apply in limited critical areas for migration and protection review matters. This includes the notification framework, what information the Tribunal must provide to an applicant before proceeding to affirm a decision, and the non-disclosure framework.

This provides certainty and clarity to applicants and gives effect to the principle that a person should be given, and invited to comment on, adverse information which is 'credible, relevant and significant' to the decision being reviewed.

Timeframes to apply for review

The timeframe to apply for review to the Tribunal in migration and protection matters will be standardised to the 28-day timeframe generally. Two exceptions will apply: item 136 of Schedule 2 of the Consequential and Transitional Bill provides that persons in immigration detention have seven days to apply for review (increased from two days, as currently outlined in sub-paragraph 4.10(2)(a) of the Migration Regulations 1994), and item 267 of Schedule 2 of the Consequential and Transitional Bill provides for nine days for reviews of character-related visa decision (this retains the existing timeframe, under sub-section 500(6B) of the Migration Act).

The timeframe has been standardised to seven days for all persons in immigration detention. A shorter timeframe has been maintained to reflect the prioritisation of resolving the immigration status of unlawful non-citizens. Unlawful non-citizens must be detained until their immigration status has been resolved, this

includes the resolution of any review applications. The resolution of a person's immigration status may include the granting of a visa or the departure from Australia of a person who is not granted a visa. The seven-day timeframe provides persons in immigration detention the opportunity to consider their review rights and to access review, while minimising the amount of time spent in detention. It also minimises the opportunity for exploitation of the review timeframe to delay departure from Australia.

The nine-day time period for character related visa decisions has been maintained. The expedited review process for character related visa decisions is designed to be as efficient as possible, while also being fair, and reflects the sensitive nature of these matters.

Extensions of time to apply for review

Consistent with the current review framework, migration and protection review applicants cannot seek an extension of time to apply for review. Having a fixed timeframe in which people can seek review is required to facilitate the effective management of a person's bridging visa, and therefore their lawful immigration status in Australia. Once the timeframe for seeking review has passed, certain powers, such as detention and removal powers, may be enlivened.

Similarly, the current pathway for merits review in migration and protection matters – first review undertaken by the Tribunal and subsequent review via judicial review – will be retained. Noting this is a well-established pathway, migration and protection review applicants will not be able to apply for review of an earlier Tribunal decision through the GAP. This will also prevent any unnecessary delay to the finalisation of a person's matter, and ensure certainty regarding the finality of the decision. This does not affect referral to the GAP of an application for review that raises an issue of systemic significance at first instance or the ability to apply for judicial review of a Tribunal decision.

Providing documents to review applicants

Migration and protection review applicants will be entitled to access documents (on request) that the Department of Home Affairs gives or produces to the Tribunal for the purpose of the review.

There are currently two different processes for the request of documents depending on the type of review. Requests for documents for a Part 5-reviewable decision can be made to the AAT. Requests for documents for a Part 7-reviewable decision must be made through the *Freedom of Information Act 1982*. The coordination and management of freedom of information requests is resource intensive and lengthy, creating delays for applicants seeking their documents, and potential flow on impacts on review timeframes.

Item 164 of the Consequential and Transitional Bill provides a standardised, simplified and expedited system for access to Tribunal files for all review applicants who request a copy. Given the volume of migration and protection matters and the high proportion of people who have copies of their documents, the request-based model provides the appropriate balance between equity, fairness and accessibility, and the efficient and effective use of Government resourcing.

5. Next Steps

The Bills are a key component of the government's commitment to improve the system of administrative decision-making. The implementation phase of the reform will work to ensure effective operation of the

Tribunal from day one of commencement, and equip the Tribunal to realise efficiencies and develop better ways of operating into the future. The Government will ensure funding arrangements for the Tribunal are sufficient and sustainable so that the new body and improved system benefits Australians into the future. The government is providing $21.8 million over two years from 2023-24 to support the interim financial sustainability of the AAT and ensure a smooth transition from the AAT to the Tribunal. The government is also providing $30.1 million over five years from 2022-23 for the development of a new case management solution (CMS) for use by the Tribunal. The multi-year CMS project, in particular, will be one that will allow the Tribunal to realise efficiencies into the future through the better management of cases. It will also facilitate better capturing and sharing of case-related data to inform decision-making and accountability. A governance structure is already in place to progress development of the CMS.

Transition to the ART

The Bills provide for transition of existing AAT matters and staff to the Tribunal on commencement. Importantly, the Bills provide that all APS staff and cases will transition to the new body (items 11 and 24 of Schedule 16, Consequential and Transitional Bill). Where required, transitional policies, practices and procedures will also be developed to ensure the smooth transition of cases, and to support clear advice to applicants and other stakeholders. Transitional provisions will also apply to existing AAT members, with those members being transitioned to the ART where they have been successful in one of the transparent and merit-based recruitment processes currently occurring for recruitment to the AAT (items 28, 29, 30, 31, 32 and 33 of Schedule 16, Consequential and Transitional Bill).

The Bills provide a number of improvements for users of the administrative review system, including the opportunity for less adversarial forms of review and a new requirement that the ART ensure that proceedings are conducted, as far as practicable, in a way that is accessible for the parties to the proceeding taking into account the needs of the parties.[1] The department will work closely with the AAT on the practicalities of these provisions to ensure they are effectively implemented, and will continue to consult stakeholders, including representative organisations, as implementation occurs.

This will include clear communication about the impacts of the changes in the lead up to the commencement of the Tribunal, as well as post-commencement as improved processes are implemented. More generally, it is important that Australians are aware of the existence of an administrative review body, and its purpose and role within Australia's system of administrative review. Ongoing communication with the public about the establishment of the Tribunal will aim to increase broad community understanding of, and trust in, administrative review and in turn lead to better engagement with the new body into the future.

6. Conclusion

The Bills are a critical feature of the proposed reform to Australia's federal system of administrative review. They are the result of considered and extensive consultation with stakeholders across the current system, including staff and users of the AAT, subject matter experts and stakeholder advocates for those who engage with the AAT and form the bulk of its caseload. The Bills' final form also reflects the engagement and guidance provided by the Expert Advisory Group. The Bills set out in legislation a framework for a new body of federal administrative review. The novel features of this framework provide an opportunity for improved practices and procedures, and a cultural shift in how administrative review is conducted. The department will

continue to work with stakeholders, including staff and users of the new Tribunal, to ensure the smooth and successful transition to the Tribunal, and to enable the initial and ongoing success of the new administrative review body. The department looks forward to the findings of the House of Representatives Standing Committee on Social Policy and Legal Affairs' inquiry into the Bills, including engaging with any proposed improvements and enhancements to the legislation.