House Standing Committee on Social Policy and Legal Affairs

Attorney-General's Department

Hearing date: 09 February 2024

Question date: 09 February 2024

The Committee asked the following question:

1. Is there a reason why the ART bill does not include a costs provision clarifying that no-costs is the default position with certain exceptions?
a. There is support for the ART to be able to award costs against a government agency where they have acted inappropriately or have not acted as a model litigant. Why should the ART be unable to award costs in these circumstances?
2. Will the ART be able to require information from respondents that was used to make the original decision, such as the Typical Support Package task cards used by the NDIA?
3. How does the ART bill ensure adequate statements of reasons for decisions are provided by agencies to allow those affected to seek review, and for the ART to conduct its review?
4. The time limit for making most types of applications is 28 days, which may be extended in certain circumstances. Do these circumstances include domestic and family violence?
5. Will the practice directions be developed through consultation or codesign with users and their representatives?
a. For example, will people with lived experience of disability have a chance to inform how the NDIS jurisdictional area operates and will there be specific practice directions for this?
6. How does the ART bill ensure that the ART will be fully accessible to people with disability?
7. Will members and staff working with in the NDIS jurisdiction be required to be trained, or have knowledge and experience in working with people with disability?
8. How does the ART bill ensure procedural fairness when a person's representative is removed from proceedings under clause 66?
a. Will legal representatives removed from proceedings under clause 66 be referred to the body responsible for the regulation of legal practitioners in their state or territory?
9. Is there a plan to refer Part 6 and related provisions to the Independent National Security Legislation Monitor for review to ensure that an appropriate balance is struck between national security, fairness, and transparency objectives?
10. Is there a plan to develop principles or guidance for agencies about how broader administrative review objectives may best be achieved in the national security context?
11. Is there a reason why the President will not be required to consult with the tribunal advisory committee before making rules?
12. Is there a reason why the ART bill does not establish a dedicated position, such as a registrar for alternative dispute resolution, to help ensure the ART meets its objective to resolve applications quickly, and with as little formality and expense as possible?
13. Is there a reason why provisions around the composition, membership and staffing arrangements for the Administrative Review Council are not more prescriptive?
14. Application fees may discourage people with reviewable decisions from applying to

the ART and could therefore undermine the bill's objectives. How will the Attorney-General ensure the application fees are affordable for people of low means?
15. The ART will retain the current fee structure for migration and visa matters, which include fees significantly higher than those applicable to other ART matters. Why are the fees for migration and visa matters so much more expensive?
16. Is there any plan to comprehensively review the other key elements of Australia's system of federal administrative law including the Ombudsman Act 1976 and Freedom of Information Act 1982?
17. What is meant by 'adjusting the exhaustive statement of the natural justice hearing rule,' and why is it necessary for migration and protection appeals to the ART?
18. Will migration and protection applicants be entitled to representation, legal or otherwise, in ART hearings?
19. Applicants to the ART are permitted to include evidence that has come to light after an original decision. However, if evidence of this sort is provided by a migration or protection applicant, the ART is to apply an 'unfavourable inference' if the ART is satisfied the applicant does not have a reasonable explanation for not providing the evidence to the original decision maker. Why is this?

The response to the question is as follows:

1. The Tribunal is by default a no-costs jurisdiction, meaning each party bears their own legal costs. This represents a continuation of the status-quo for merits review and is the current default position in the AAT. The reform has maintained existing arrangements for costs across the Tribunal's jurisdiction. In certain types of Tribunal decisions, the Tribunal can order that a party is liable to pay another party's costs. These circumstances are specifically allowed in the relevant legislation, for example:

- subsection 67(8) of the *Safety, Rehabilitation and Compensation Act 1988*
- section 357 of the *Military Rehabilitation and Compensation Act 2004.*

The provisions as to costs are consistent with the approach adopted across the legislation – that is, the Administrative Review Tribunal Bill 2023 (ART Bill) provides the default settings for the Tribunal, with exceptions or specialised provisions contained in other legislation. The note to subclause 115(1) clarifies this.

a. The Government is aware that some stakeholders support introducing an 'asymmetric costs provision', which would allow the Tribunal to award costs against Government parties, but not against non-Government parties. The proposal was considered during the consultation process. This proposal has not been included in the ART Bill because:

- Costs are generally not consistent with the nature of merits review.
- There is a risk that it could make the review process more adversarial and could be difficult to enforce in a tribunal setting.

In response to stakeholder concerns, the Tribunal has been given new powers to manage parties', and their representatives', conduct, including the ability to remove a party's representative (clause 66, ART Bill). The President is also empowered to raise systemic issues with relevant Ministers (paragraph 193(i), ART Bill) – which could include a systemic issue in the conduct of government parties in Tribunal proceedings.

2. Yes.

Clause 23 of the ART Bill requires decision-makers to provide the statement of reasons for the original decision, and a copy of all documents that are relevant to the Tribunal's review of the decision, within 28 days of being notified of an application for Tribunal. Additionally, clause 26 requires the decision-maker to provide any additional documents the Tribunal requests.

These are broad powers, and decision-makers must not withhold any information or documents from the Tribunal, including those that are subject to claims of privilege (clause 30, ART Bill) or those containing information which may be subject to claims for information protection (applications under clause 70, ART Bill), or material which a Minister or the Director-General of ASIO has certified ought not be disclosed (see, for example clauses 91, 158, 159 and 161, ART Bill).

The requirement for decision makers to provide any information or documents to the Tribunal would include any materials used by the NDIA when making a decision, including information and material that was used to develop a participant's individualised plan.

Clause 27 of the ART Bill requires the decision-maker to provide each other party to the proceeding with a copy of any documents provided to the Tribunal.

3. The ART Bill strengthens requirements for statements of reasons. Clause 4 of the ART Bill contains the definition of statement of reasons, which provides that a statement of reasons means a written statement about a decision that:

- sets out the finding on material questions of fact
- refers to the material (including evidence) on which those findings are based, and
- explains the reasons for the decision.

This definition is replicated from subsection 28(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). However, it is altered to require that the decision-maker must 'explain', rather than only 'give', reasons for the decision.

Individuals seeking statement of reasons from decision-makers

Clause 268 of the ART Bill enables a person affected by a decision that can be reviewed by the Tribunal to request a statement of reasons from the decision-maker. A decision-maker is required to give the statement of reasons within 28 days of receiving the request (subclause 269(2), ART Bill), unless certain exclusions apply (see subclauses 269(8)-(10)). If the decision-maker does not provide a statement (which could include a statement that is missing one of the elements included in the definition above), or does not provide a statement that adequately addresses the elements above, the person is entitled to apply to the Tribunal (clauses 270-271, ART Bill). On such an application, if the Tribunal considers that no statement has been provided, or that the statement is inadequate, the decision-maker must provide an additional statement within 28 days.

Tribunal seeking statement of reasons from decision-makers

Clause 23 of the ART Bill provides that the decision-maker must give a statement of reasons to the Tribunal within 28 days after being notified of an application for review

being made in relation to a decision. Clause 24 of the ART Bill provides that, where the statement of reasons has been provided under clause 23, the Tribunal may require the decision-maker to provide further information in relation to any of the components of the statement (listed above) to ensure that the Tribunal and other parties can better understand the basis for the reviewable decision.

4. Yes.

Under clause 19 of the ART Bill, the Tribunal has a broad discretion to grant extensions of time where an application is made outside of the required time limits. The Tribunal may grant an extension if satisfied that it is reasonable in all the circumstances to do so.

The clause recognises that, for some, a 28-day timeframe may not be long enough to secure legal assistance and/or other support services, or personal circumstances might prevent the making of a timely application. The Tribunal may consider circumstances including domestic and family violence in determining whether an extension is warranted.

5. a)
In consultations on the reform, stakeholders identified that the AAT Act does not require consultation with civil society or with users of the Tribunal. In practice, consultation occurs on an ad hoc basis. The ART Bill explicitly provides for civil society and user consultation to occur, and requires annual reporting on these consultations.

For example, the President is empowered to make practice directions under clause 36 of the ART Bill. One of the matters in relation to which the President may make practice directions is the 'the accessibility of the Tribunal and the responsiveness of the Tribunal to the diverse needs of parties to proceeding' (paragraph 36(1)(k), ART Bill).

The President must consult the Tribunal Advisory Committee (the Committee) prior to making a practice direction (subclause 36(6), ART Bill). The Committee includes all jurisdictional area leaders, the President, and the CEO and Principal Registrar. In performing its functions – which includes providing advice to the President on practice directions – the Committee is required to have regard to any views expressed by stakeholders (subclause 236(5), ART Bill). Consulting this group will ensure that the President is informed by expertise across the full scope of the Tribunal's operations, including each jurisdictional area and the registry.

It is also a function of the President to engage and consult with civil society in relation to the performance of their functions, which includes the making of practice directions. The President is required to report annually on measures taken to engage with civil society and persons whose interests are affected by reviewable decisions under paragraph 242(2)(k), ART Bill.

Each of these provisions relating to engagement with civil society is a new measure within the ART Bill, with no equivalent provision in the AAT Act, and enshrines the importance of the Tribunal working closely with the communities it serves.

6. The AAT's current objective requires it to 'pursue…providing a mechanism of review that… is accessible' (section 2A, AAT Act). In consultations, many stakeholders

expressed that this did not go far enough to embed the need for an accessible and user-focused tribunal. The ART Bill contains a number of new measures to enhance and clarify the Tribunal's responsibilities in relation to providing an accessible form of review.

Clause 9 of the ART Bill requires that the Tribunal pursue the objective of providing an independent mechanism of review that is 'accessible and responsive to the diverse needs of parties'. The ART Bill defines 'accessible' as 'enabl[ing] persons to apply to the Tribunal and to participate effectively in proceedings in the Tribunal' and lists a number of examples (Clause 4, ART Bill). This definition, which is not in the AAT Act (nor any other piece of legislation identified by the Attorney-General's Department), strengthens references to accessibility throughout the Bill by detailing what is meant by accessibility in this context.

Clause 51 of the ART Bill requires the Tribunal to conduct proceedings in a way that is accessible for the parties, taking into account the needs of the parties (as far as practicable). To meet this obligation, the ART Bill provides the President, and members, with a suite of flexible powers that can be used in proceedings which assist in ensuring accessibility for people with disability. For example, clause 68 empowers the Tribunal to appoint an interpreter. The Bill also takes a technology-neutral approach to how a party may 'appear' before the Tribunal (see, for example subclause 66(2), subclause 68(1) and clause 73 of the ART Bill), which enables the Tribunal to conduct hearings both in-person or virtually. These provisions have no equivalent in the AAT Act.

The ART Bill makes it clear that all senior leaders within the Tribunal are individually and jointly responsible for pursuing the objective, including the accessibility of the Tribunal (See: in the functions of the President (clause 193), Judicial Deputy Presidents (subclause 194(1)), Deputy Presidents (subclause 194(2)), Jurisdictional Area Leaders (clause 197), the CEO (subclause 226(2)) and Principal Registrar (clause 226) and the Tribunal Advisory Committee (subclause 236(4)). This approach, combined with the requirement that the President report annually on the Tribunal's measures to pursue its objective (paragraph 242(2)(a)) will ensure an ongoing, and transparent, approach to the Tribunal's accessibility. This marks a significant improvement upon the AAT Act provisions, which did not explicitly charge Tribunal leadership with pursuit of the Tribunal objective, nor impose specific reporting obligations in relation to its performance.

The ART Bill explicitly empowers the President to make practice directions in relation to accessibility (paragraph 36(k), ART Bill) – where the AAT Act does not make such specific reference (subsection 18(1) AAT Act). This recognises that while legislative provisions are important in setting the objective and overall requirements relating to accessibility, it is through operations and practice that the Tribunal must support people to access its services. The practice direction would spell out in more detail how the Tribunal will be accessible to people with a disability, as well as others who may need support to access its services.

7. Yes.

A key theme from consultation on the reform was that people with disability engage with all aspects of the Tribunal's jurisdiction, and it is important that all Tribunal members are capable of working with people with disability.

Clause 51 of the ART Bill requires the Tribunal to conduct proceedings in a way that is accessible for the parties, taking into account the needs of the parties (as far as practicable). This is a new provision in the ART Bill, without an equivalent in the AAT Act.

Subdivision A of Division 3 of the ART Bill provides for merit-based appointment processes for the President, Non-Judicial Deputy Presidents and members of the Tribunal. Under the definition of 'merit-based' (clause 4, ART Bill), the assessment must take into account the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal.

This definition highlights the importance of lived-experience and diverse experience, while also allowing evolution over time in accordance with community expectations.

Subclause 199(3) of the ART Bill empowers the President to assign members to jurisdictional areas. The President may only assign a member to a jurisdictional area if they are satisfied that the member has appropriate skills, qualifications and experience to hear matters in that area. The President is best placed to understand the specific needs in a caseload, and the particular strengths and skills of an individual member, and is able to assign members who are suitable to hear these matters.

The ART Bill provides that it is a function of the President to 'promote' (paragraph 193(h)), and jurisdictional area leaders to 'provide' (paragraph 197(5)(e)), training, education and professional development opportunities to members. Jurisdictional area leaders will be responsible for upskilling members within their jurisdictional area and providing education and training to support this.

Education and training is a broad category of activities, which could include developing technical skills associated with the roles and responsibilities of a member such as writing decisions and statement of reasons, conducting accessible hearings, dispute resolution skills, and specific legal training. It could also include broader matters such as trauma-informed practice, and cultural and disability competency units.

The President's annual report requires the President to publicly report on actions in relation to the training, education and professional development of members (subparagraph 242(2)(j)(iii), ART Bill).

8. a)

In consultation, stakeholders expressed concerns about the quality and conduct of some parties' representatives. They noted that in extreme situations, representatives were not supporting the applicant's interests (either through a lack of their own ability to understand and advocate on issues, or a conflict in the proceeding), and/or were actively hindering the Tribunal's ability to conduct the review. Stakeholders expressed that the Tribunal required tools to better manage the conduct of parties' representatives, including the ability to remove a party's representative in limited circumstances.

Under the common law, the Tribunal is under a general duty to provide procedural fairness to all parties, whether they are represented or not. This includes ensuring that all parties have a reasonable opportunity to put their case and have access to documents, and ensuring proceedings are free from bias. Additionally, the ART Bill imposes specific

duties on the Tribunal, which reflect particular elements of procedural fairness, including the fair hearing rule reflected in clause 55 of the ART Bill.

Currently, the AAT has an implied ability to remove representatives where they are not assisting the Tribunal. The ART Bill makes this power explicit and ensures that it can only be used in limited circumstances – that is, where the Tribunal considers that:

- the representative has a conflict of interest in representing the person
- the representative is not acting in the best interests of the person
- representation of the person by the representative presents a safety risk to any person
- representation of the person by the representative presents an unacceptable privacy risk to any person, or
- the representative is otherwise impeding the Tribunal (subclause 66(3), ART Bill).

The note to clause 66 clarifies that if the Tribunal orders the removal of a person's representative, that person may choose another representative. Depending on the circumstances of the removal, the person might also elect to have the removed representative as a support person, rather than a representative to proceedings.

Where a representative is bound by a professional code of conduct, the Tribunal may consider reporting a breach to the relevant professional association or standards body. However, there is also a need for the Tribunal to be able to manage the conduct of proceedings as they are occurring. It is ultimately a matter for the Tribunal to determine its processes and policies for referring representatives to relevant entities.

9. The Independent National Security Legislation Monitor (INSLM) may review the operation, effectiveness and implications of Australia's national security and counter-terrorism laws. Whether to refer particular matters to the INSLM is a matter for the Government.

The functions of the re-established Administrative Review Council include monitoring the integrity of the Commonwealth administrative review system, and inquiring into and reporting on systemic challenges in administrative law. As such, the Council has a role in assessing procedures and arrangements within the Tribunal, including those within the Intelligence and Security jurisdictional area, to ensure they remain adequate and appropriate. It is anticipated that in undertaking such reviews, from time to time and as required, the Council could monitor and inquire into the processes outlined in Part 6 of the ART Bill, and related matters, as a component of Australia's federal administrative review system.

10. Specific principles or guidance for agencies about broader administrative review objectives in a national security context are not within scope of the ART Bill. Developing broader guidance on these issues is a matter for Government.

Under the ART Bill, the Administrative Review Council has a broad range of functions relating to the effectiveness of the overall system of administrative law and review. This includes inquiring into the 'availability, accessibility and effectiveness of review of administrative decisions' as well as providing guidance and supporting training and education for officials of Commonwealth entities on matters relating to administrative decision-making.

Further, as the ART Bill provides that the Council will be an independent body, the Council will have the power to determine how it exercises its these functions. This could include developing specific guidance about conducting reviews in situations that involve sensitive information.

Further, the ART Bill seeks to establish a self-reviewing and self-improving system of administrative decision-making through a number of mechanisms such as the reporting obligations for the President, including more prescriptive annual reporting requirements, Tribunal senior leadership collaboration through the Tribunal Advisory Committee, and referral of system issues to relevant agency heads and the Administrative Review Council (these features of the Tribunal were discussed during the department's appearance before the Committee on Friday 9 February 2024, pp. 15-16 of the relevant Hansard refers). For example, the leader of the Intelligence and Security Jurisdictional Area would be responsible for overseeing the operation of that jurisdictional area, including to ensure it is operating efficiently and effectively and continually pursuing the objective in clause 9 of the Bill, and that any systemic issues are identified and reported to the President. This is a novel and key feature of the reform that is not present in the AAT Act.

11. Rules will be made by the Minister, in accordance with clause 295 of the ART Bill.

Section 17 of the *Legislation Act 2003* requires that the Minister must be satisfied that any consultation that is considered appropriate by the Minister and is reasonably practicable to undertake has been undertaken prior to making the rules.

This would include consultation with the President, as a person who has expertise in the field relevant to the proposed instrument. It would be open to the President to consult with the tribunal advisory committee as part of this process.

12. The Tribunal's objective, as outlined in clause 9 of the ART Bill, requires that the Tribunal pursue providing an independent mechanism for review that ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits.

Part 8 of the Bill provides that the Tribunal's senior leadership, including the President, Deputy Presidents and CEO and Principal Registrar, are responsible for ensuring the Tribunal continually pursues the objective. This is appropriate as it embeds the pursuit of the Tribunal's objective throughout the Tribunal's structure, rather than making it the sole responsibility of a dedicated Tribunal member or employee to ensure the Tribunal meets its objective. It also reflects the obligations of senior staff to collectively and continually ensure the Tribunal is meeting its objective, proportionate to their role and responsibilities in supporting the Tribunal to operate as efficiently and effectively as possible.

The President and Principal Registrar are responsible for the Tribunal's organisational structure. The Bill is not prescriptive as to how the Tribunal organises its business, as this is best left to those required to discharge the Tribunal's objectives, with the best knowledge of its operations, and allowed to evolve in response to changing needs.

13. The provisions of the ART Bill are intended to provide certainty about key requirements for the composition, membership and staffing of the Administrative Review Council (the Council) and enable an appropriate degree of flexibility in how the Council organises itself and performs its functions. They are closely based on the existing provisions of the AAT Act relating to the Administrative Review Council, which were broadly supported

by stakeholders in the department's consultation process.

In relation to composition and membership, the provisions in the ART Bill would enable the composition of the Council to respond to changes in workload over time, and to incorporate expertise as required. For example, a particular inquiry may be assisted by appointment of a member with deep expertise in a specialist field of regulation, such as particular aspects of social policy, or artificial intelligence.

In relation to staffing, the ART Bill provides for the Council to be assisted in performing their functions by staff of the Attorney-General's Department (the department). The Secretary of the department would be required to consult with the Chair of the Council before making staff available to the Council. Staff performing services for the Council would be subject to the direction of the Council in undertaking tasks for the Council.

The Government has committed $5.3 million over four years from 2023–24 (and $1.8 million per year ongoing) to re-establish the Administrative Review Council and support its ongoing operation.

14. As is the case with the AAT, a fee may be payable for some applications before the Tribunal. Application requirements and any fees payable will be set out in the Tribunal Rules, in accordance with clause 296 of the ART Bill.

The Government is considering what fee arrangements, including concessions, waivers and refunds, should be in place for the Tribunal. As is the case with fees for applications to the AAT, the government expects that a number of cohorts will continue to be exempt from being required to pay an application fee or will be eligible to pay a reduced fee.

15. As is the case with the AAT, fees for review of migration and protection decisions at the Tribunal will be contained in the Migration Regulations as provided for in section 504 of the *Migration Act 1958*.

The Government is considering what fee arrangements, including concessions, waivers and refunds, should be in place for the Tribunal.

16. Under the ART Bill, the functions of the Administrative Review Council would include monitoring the integrity of the Commonwealth administrative review system, inquiring into and reporting on systemic challenges in administrative law, and supporting education and training for Commonwealth officials in relation to administrative decision making and the administrative law system. As the Council would be an independent body, the Council would have the power to determine matters for inquiry relating to the Council's functions.

Additional reviews directed at particular elements of Australia's system of federal administrative law are a matter for Government.

17. The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential and Transitional Bill 1) proposes to retain the codification of the natural justice hearing rule for certain critical matters within a migration and protection visa review: what 'adverse information' must be put to applicants, and how; notifications (including the 'deemed receipt' framework), and non-disclosure certificates issued by the

relevant Minister. The common law natural justice hearing rule would apply to the aspects of proceedings not covered by the revised exhaustive statement.

Other matters currently covered by the exhaustive statement of the natural justice hearing rule will be repealed. This includes provisions that are no longer necessary because they duplicate provisions in the ART Bill or unnecessarily constrain the Tribunal's ability to conduct efficient and fair reviews.

These amendments would significantly reduce the matters that are covered by the exhaustive statement, but retain it for critical matters. These matters provide certainty and clarity to applicants. They promote consistent decision making by the Tribunal and Courts, while ensuring applicants are given a fair opportunity to present their case.

Adverse information

The 'adverse information' provision is contained in section 359A of the *Migration Act 1958* (Migration Act) (as amended by items 154-162, Consequential and Transitional Bill 1). Section 359A requires the Tribunal to give particulars of adverse material that would be the reason, or part of the reason, for affirming the decision under review, except for certain categories of 'adverse information' (see subsection 359A(4) and subsection 359A(4A)). Those categories include information:

- that is not specifically about the applicant,
- that the applicant has provided themselves, or
- that was included or referred to in the written statement provided to the applicant of the decision under review.

In the Department of Home Affairs' experience, section 359A supports the efficient operation of the system of migration and protection reviews. For example, section 359A supports an efficient review in circumstances where factual information has already been exhaustively considered in the review application or tribunal hearings. Due to the high volume of matters, it is necessary to have certainty about what information can and must be put to an applicant before a decision may be made, to support the efficient resolution of matters.

Importantly, section 359A does not prevent the Tribunal member from putting any information to the applicant, if they consider it necessary and conducive to the review process.

Notifications

Consequential and Transitional Bill 1 maintains current policy settings in relation to the giving of documents by the Tribunal to applicants in migration and protection reviews. The legislative frameworks for giving documents by the Tribunal are contained in new Division 7 of Part 5 (which retains the contents of former Division 8A of Part 5 of the Migration Act – amended by items 189-227, Consequential and Transitional Bill 1. The equivalent framework for protection matters, formerly contained in Division 7A of Part 7, will be repealed along with all of Part 7 and all of Part 7AA).

In the Department of Home Affairs' experience, the notifications regime gives certainty in relation to precisely when certain documents are lawfully given by the Tribunal to applicants. This supports the efficient conduct of reviews, for example, by minimising avenues for the applicant to debate when they received correspondence and therefore

when the timeframe for response began and ended. Having certainty regarding the date the decision is taken to have been made also allows the applicant to easily calculate when a judicial review application needs to be lodged (if they wish to do so).

Non-disclosure certificates

The non-disclosure certificate regime (contained in sections 375-376 of the Migration Act, as amended by items 175-187 of the Consequential and Transitional Bill 1) allows the Minister to certify that certain information must not be disclosed to the applicant where its disclosure would be contrary to the public interest, including because:

- it would prejudice the security, defence or international relations of Australia, or
- because it would involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet.

Section 376 gives the Tribunal a discretion to provide the relevant material to a review applicant in limited circumstances. This is consistent with other forms of Public Interest Certificates that are issued in the Tribunal, for example, under section 91 of the ART Bill.

The ministerial certificate regime is necessary to protect the public interest, including by promoting the legitimate objectives of national security and protecting the confidentiality of Cabinet deliberations. Including the provisions within the exhaustive statement of the natural justice hearing rule avoids uncertainty about whether the Tribunal is required to put to a review applicant information covered by a non-disclosure certificate to comply with procedural fairness obligations.

18. Yes.

The standard provisions in Subdivision B of Division 5 of the ART Bill will apply to ensure that parties in migration and protection matters may appear with representation.

Existing provisions in the Migration Act relating to whether applicants may be represented are being repealed by Consequential and Transitional Bill 1. They are current section 366A (Applicant may be assisted by another person while appearing before Tribunal) and current section 366B (Other persons not to be assisted or represented while appearing before Tribunal).

19. The new section 367A of the Migration Act replicates the effect of existing section 423A of the Migration Act in relation to how the Tribunal is to deal with new claims or evidence in reviews of a reviewable protection decision. The provision does not apply to reviewable migration decisions.

Like existing section 423A (which would be repealed), new section 367A is connected to the operation of section 5AAA of the Migration Act, which requires non-citizens to provide and substantiate claims on which they are seeking protection. New section 367A complements this responsibility, and requires the Tribunal to draw an inference unfavourable to the credibility of new claims or evidence provided to the Tribunal if the applicant does not have a reasonable explanation to justify why the claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application.

Section 367A is intended to ensure that applicants raise all claims relevant to their visa application, and present all available evidence, upfront, to ensure that the decision made

by the Department of Home Affairs can be as accurate and efficient as possible.

These provisions (section 5AAA and new section 367A) contribute to the integrity of the onshore protection status determination process. They are further supported by the criteria for the grant of a Protection (Subclass 866) visa which relevantly requires, at the time they apply for a visa, that the applicant makes *specific claims* about why Australia's protection obligations are satisfied in their case.

The provision does not prevent an applicant providing new material to the Tribunal. The provision does not operate to require any inference to be drawn in circumstances where the applicant has a reasonable explanation for not making the claim or presenting the evidence before the primary decision was made. 'Reasonable explanation' is not defined, which provides Tribunal members flexibility to determine what constitutes a reasonable explanation.