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

1. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.
2. We appreciate the opportunity to provide a submission to the Standing Committee on Social Policy and Legal Affairs Inquiry into the Administrative Review Tribunal Bill 2023 (**ART Bill**) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (**Consequential and Transitional Bill**) (**the Inquiry**). The

focus of our submissions and recommendations reflects our experience and expertise as outlined above. This submission is targeted at the impact of the proposed package of legislation on applicants seeking merits review of decisions made under the *Migration Act 1958* (Cth) (**the Migration Act**) in the migration and general jurisdictional areas of the ART. The submission is particularly focussed on protection visa applicants and applicants seeking review of a visa cancellation decision.

3. According to the Attorney-General, the Hon Mark Dreyfus KC MP, the Bills “represent the most important reform of the federal system of administrative review for decades”¹. Liberty Victoria strongly supports the reform of the merits review system which, due in large part to its politicisation, has slipped far from the pinnacle of accountability it was imagined to be. Liberty Victoria also commends much of the proposed change envisaged by the Bills, however we make recommendations in this submission to ensure the following articulated objectives and features are achieved:
 - a. Fair and just;
 - b. Accessible and responsive to the diverse needs of people;
 - c. Promotes public trust and confidence in the tribunal.²
4. Liberty Victoria’s perspective is that if the following recommendations are not heeded, the potential of this historic moment of reform will not be realised. We anticipate the entrenchment of a subclass of “lesser” review applicants – those seeking review of Home Affairs portfolio decisions – who are afforded fewer protections and rights than what is considered as a minimum for all other review applicants, simply because of visa status. Equality before the law is critical; without it, the new body cannot achieve the integrity and public trust it aspires to.

Fair and just

5. The Bills aim to ensure each party to a proceeding is given a reasonable opportunity to present their case. The Explanatory Memorandum to the Consequential and Transitional Bill refers to the objective of harmonisation, allowing significant benefits to the Tribunal and users (rather than applying particular arrangements), and contains that:

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2023, 9198 (Mark Dreyfus, Attorney-General).

² Explanatory Memorandum, Administrative Appeals Tribunal Bill 2023 (Cth) 8.

Recognising that the majority of Tribunal users are self-represented, increased similarity and predictability in how matters should proceed would better equip them to have a positive experience of review.³

6. In this regard, Liberty Victoria unreservedly welcomes the repeal of Part 7AA of the Migration Act and the abolition of the Immigration Assessment Authority – which has denied a fulsome review process to a specific group of people merely as a consequence of their mode and date of arrival in Australia.
7. Liberty Victoria also considers that the harmonisation of migration and protection visa reviews under Part 5 of the Migration Act is consistent with the objective of designing a review process which is predictable and accessible.
8. However, Liberty Victoria considers that an applicant’s visa status (including a lack thereof) and/or an absence of Australian citizenship should not act to dilute their opportunity to commence or engage in a review process. The reduction of procedural entitlements for people without citizenship fundamentally jeopardises the integrity of administrative decision-making undertaken by the new body. Moreover, it exposes people to harm, and reduces public confidence.
9. The following items would specifically disadvantage an ART applicant based on their migration status:
 - a. New information: Liberty Victoria is troubled by the inclusion of the deeming in s 367A in the Migration Act,⁴ whereby the ART is to draw an unfavourable credibility inference if a claim is raised, or evidence presented, which was not put before the primary decision. The inclusion of this section undermines the merits review process of an independent person stepping into the shoes of the original decision-maker. Instead, the ART member’s ability to make the correct and preferable decision is curtailed by a requirement to respond to new information in a certain and critical manner. It also specifically targets a group of review applicants – protection visa applicants – in relation to whom the consequences of the wrong ART decision (i.e., a failure to accurately assess the risk of harm facing the applicant if returned to their home country) can be life threatening.

There are numerous reasons an applicant may not have been able to comprehensively present their claims prior to the review stage. In Liberty Victoria’s

³ Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 10.

⁴ See Item 170 of the of the Consequential and Transitional Bill.

significant experience, many lack representation or access to information and support; the process at primary stage can be intimidating, complex and lack appropriate procedural fairness protections (for example, a person may not have been interviewed); they may be struggling with disclosure for reasons of health or trauma; they may face intersectional barriers to justice including health issues.

The consequences of decisions are also severe, and include prolonged or indefinite detention, permanent family separation, and refoulement to persecution.

Particularly where many remain unrepresented at merits review, it is entirely inappropriate to legislate this presumption. It entrenches disadvantage and undermines the integrity of decision-making.

- b. Timeframes to seek review: The Explanatory Memorandum to the Consequential and Transitional Bill includes that “[m]ore consistent and standardised timeframes promote clarity, consistency and accessibility of review by simplifying application processes and promoting efficiency within the Tribunal”.⁵ However, a standard timeframe for review is *not* consistently applicable, with shorter timeframes for people in immigration detention.

Liberty Victoria is of the view that the general rule should apply to all, as contained in s 18 of the ART Bill, that a time frame of no less than 28 days from the date of the decision can be prescribed. This general rule is justified because “[t]his is the minimum amount of time that persons affected by government decisions should have to consider the decision, understand the reasons for the decision and their review rights, and decide whether or not to apply for review”,⁶ which is all the more important where an applicant’s liberty is affected where they are in immigration detention and/or the decision relates to their ability to remain in Australia. There is no explanation as to why the seven or nine days allowed for an applicant in immigration detention will be sufficient time for them to understand the decision and review rights, when this period is up to 21 days short of what is considered the minimum amount of time necessary for all other applicants not in immigration detention.⁷

⁵ Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 69.

⁶ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 283.

⁷ We note that the Attorney-General’s Department submission into this Inquiry (Submission 6), refers to these shorter timeframes reflecting “the prioritisation of resolving the immigration status of unlawful non-citizens”, that “[u]nlawful non-citizens must be detained until their immigration status has been resolved” and that the

We note again the particular barriers to access to justice applicants face, including language and security. Liberty Victoria is aware of timeframes being missed and rights being lost for myriad compelling reasons, including due to inadequate communication of decisions and review options to people in detention and in the community, due to health, due to the inaccessibility of advice and support, and due to fleeing family violence.

In Liberty Victoria's submission, proposed new s 347(3)(a) and s 347(4) and the retention of the nine day timeframe to seek review under s 500 of the Migration Act⁸ undermine the ability of an applicant to lodge, let alone have the opportunity to present, their case.

To ensure fairness and accessibility, timeframes should be consistent and, as set out below, capable of extension.

- c. Extensions of time: The ART Bill contains at s 19 that the ART may, if it considers that it is reasonable in all the circumstances to do so, extend the period during which the applicant can apply for review, even if that period has expired. This is included for the following reasons:

*The power to grant such an extension ensures fairness for potential applicants to the Tribunal. For some, a 28-day timeframe may not be long enough to secure legal aid and other necessary support services, or personal circumstances might prevent the making of a timely application. It is appropriate for the Tribunal to have flexibility and discretion to take into account such circumstances and ensure that potential applicants do not lose their right of review.*⁹

However, new s 347(5) of the Migration Act prevents migration and protection review applicants from seeking an extension of time at all. Similarly, s 500(6B) of the Migration Act is retained, such that the nine day time limit to seek review of a migration character decision in the ART cannot be extended.¹⁰

Liberty Victoria considers that the explanation provided for this discrepancy, that a "finite timeframe for lodgement of applications is essential to knowing when an

"expedited review process for character related visa decisions is designed to be as efficient as possible". However these submissions fail to reflect the reality of the impact of these provisions – that many seeking review of life-altering decisions will be unable to do so within this severely truncated timeframe.

⁸ See Items 136 and 267 of the Consequential and Transitional Bill.

⁹ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 287.

¹⁰ See Item 267 of the Consequential and Transitional Bill.

application is ‘finally determined’”,¹¹ is divorced from the grave potential impact on applicants unable to seek review of a decision denying them Australia’s protection leading to the possibility of refoulement, or extending their deprivation of liberty in immigration detention. This is especially problematic where there is an acknowledgment that the 28-day time period may not be sufficient to seek review and this timeframe is not even afforded to those in immigration detention.

It is critical that the provisions for extension of time extend to migration and protection applicants.

- d. Dismissal and reinstatement: As outlined above in relation to extensions of time, the Bills create a disparity in the treatment of, and opportunities allowed to, applicants based on whether they are seeking review in relation to a migration decision or not. Liberty Victoria considers the dismissal and reinstatement provisions considered appropriate for applicants in the ART should apply indiscriminately, rather than in a more limited fashion as contemplated by the new s 368B and s 368C of the Migration Act. These sections shorten timeframes and apply strictly without the possibility of further time being available where justified by special circumstances, as is available to other review applicants.¹²
- e. Notification: The ART Bill contains a requirement that decision-makers must have regard to rules when giving notice of decisions, per s 267. The rules contemplated by this section are designed to “be used to set out best practice considerations for giving notice, including the content of those notices... [i]t is anticipated that these rules will be based on the Code of Practice”.¹³

However, the Consequential and Transitional Bill disapplies this section in relation to the notification of decisions under the Migration Act, including:

- i. to grant or refuse a visa under s 65 – see Item 23(6);
- ii. to cancel a visa under s 116 – see Item 32; and
- iii. to cancel, not revoke a decision to cancel, or refuse a visa under ss 501(1), 501(2), 501A(2), 501B, 501BA, 501CA or 501F – see Item 296.

¹¹ Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 544.

¹² See Item 171 of the of the Consequential and Transitional Bill.

¹³ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 1540.

The explanation for decision-makers not being required to have regard to rules setting out best practice, which are otherwise deemed necessary for all other decisions being reviewed by the ART, is that this allows the Department of Home Affairs to develop notices “appropriate and tailored” to migration decisions, purportedly justified by factors including: the need for “transparency, certainty and consistency”; the complex visa framework; and that applicants may be in immigration detention.¹⁴ We submit that this will instead allow for a convoluted notification process in relation to a specific cohort. To preclude the notification of migration decisions from best practice is contrary to the implementation of a fair and just review process.

In Liberty Victoria’s view, the carving out of migration decisions from a section introduced to “encourage the widespread adoption of best practices in administrative decision-making, improving the quality and consistency of such notices across the Commonwealth”¹⁵ creates a cohort of applicants disadvantaged by design, based on their migration status.

- f. Provision of reasons and documents: The ART Bill contains at s 27 a requirement for the decision-maker to provide parties with a copy of documents given to the ART, justified as follows:

*This ensures the parties to a proceeding have access to the same information as the Tribunal and decision-maker, which is an important aspect of procedural fairness – parties should have the opportunity to view and respond to any relevant information which may be used to make a decision impacting their rights or entitlements.*¹⁶

In relation to migration reviews, however, the onus of this requirement is essentially reversed – with an applicant instead required to request the Department of Home Affairs provide such documents.¹⁷ The explicitly acknowledged potential for government decisions to have “major and sometimes life-altering consequences”, and thus the critical need for the ART to protect rights and interests of vulnerable members of the community,¹⁸ is exemplified where an applicant seeks Australia’s

¹⁴ See for example, Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 431, 443 and 803.

¹⁵ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 1543.

¹⁶ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 318.

¹⁷ See s 366P(2)(g) of the Consequential and Transitional Bill; and the Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 512, referring to new s 362A(1) of the Migration Act.

¹⁸ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 1.

protection from harm and/or their liberty is directly impacted by the result of the decision if in immigration detention. Liberty Victoria considers that, in this context, applicants should not be required to take additional steps, which many may not be aware of or able to take, in order to realise rights all other review applicants are afforded.

We note that the Attorney-General's Department submission into this Inquiry (Submission 6) contains that "the request-based model provides the appropriate balance between equity, fairness and accessibility, and the efficient and effective use of Government resourcing". In Liberty Victoria's view the appropriate balance has not been struck, and instead a subclass of "lesser" review applicants reinforced, where a standard deemed suitable for non-migration and protection review applicants is disregarded despite the often life-changing impacts of the decisions under review.

10. Liberty Victoria is disappointed to note the retention of s 500 of the Migration Act in relation to the restrictive review procedures for certain migration decisions, including decisions under ss 501, 501CA(4), 36(1C) and 36(2C). The preservation of the following features in relation to the review of decisions under s 501 and s 501CA(4) is particularly troubling, especially given the applicant will primarily be held in immigration detention:
 - a. the preservation of contradictor representation;
 - b. the non-extendable nine day time limit to seek review, as outlined above;¹⁹
 - c. the constraints on the ART receiving documents or oral evidence in support of an applicant's case if provided less than two business days before the ART hearing;²⁰
 - d. the automatic affirmation of the decision under review, unless the ART makes a decision within 84 days after the applicant is notified of the decision;²¹ and
 - e. the ability of the Minister for Home Affairs to set aside the ART's decision.²²
11. Liberty Victoria considers that if these provisions are not amended to allow for a robust and accessible review, funding for free legal representation for applicants is essential.

¹⁹ See s 500(6B) of the Migration Act, see Item 267 of the Consequential and Transitional Bill.

²⁰ See s 501(6H) and s 501(6J) of the Migration Act, see Item 277 of the Consequential and Transitional Bill.

²¹ See s 501(6L) of the Migration Act, see Items 278-282 of the Consequential and Transitional Bill.

²² See s 501A and s 501BA of the Migration Act, see Items 285 and 290 of the Consequential and Transitional Bill.

Such funding is justified by the significant curtailing of best practice review procedures as otherwise imagined by the ART Bill and that the Minister for Home Affairs is represented and takes an active, adversarial role in these reviews.

12. The continued denial of merits review in relation to decisions to refuse to grant or cancel protection visas due to security assessments²³ is also a failure to ensure the availability of merits review is fair and just in relation to decisions resulting in the deprivation of liberty and potential refoulement of an individual.
13. We also note with concern that no amendment has been made to the *Australian Security Intelligence Organisation Act 1979* (Cth) which precludes the Tribunal from reviewing a security clearance decision or a prejudicial security clearance suitability assessment where the person “is not an Australian citizen” under s 83(3)(b). This section specifically excludes an applicant from merits review simply on the basis of their lack of Australian citizenship, and is carried into the ART Bill at s 138(2). Here the subclass of “lesser” review applicants is taken to the extreme, with a lack of Australian citizenship precluding review entirely. This is starkly at odds with the objective of accessing fair and just merits review especially given the gravity of the subject matter of the decision and resultant necessity for accountable decision-making.

Recommendations:

- Remove the insertion of the new deeming provision in s 367A of the Migration Act in relation to new information and protection visa applicants, to allow the ART to independently assess the applicant’s case.
- Apply the 28 day time period to seek review to all applicants, regardless of whether they are in immigration detention and/or seeking review of a decision under s 501 or s 501CA(4) of the Migration Act.
- Remove the carve out in relation to migration decisions regarding standard extension of time and dismissal/reinstatement provisions in the ART Bill.
- Apply the best practice contemplated by s 267 of the ART Bill regarding notification to all decisions, by removing the carve out for migration decisions in the Consequential and Transitional Bill.

²³ See ss 338A(1)(c), 338A(1)(d)(ii), 500(4A) and s 36(1B).

- Apply the requirement under s 27 of the ART Bill for decision-makers to provide parties with a copy of documents to migration reviews.
- Apply the same procedures and safeguards considered appropriate for other ART applications to the review of migration decisions under ss 501, 501CA(4), 36(1C) and 36(2C) of the Migration Act and decision to refuse to grant or cancel protection visas due to security assessments.
- Allow non-citizens to seek merits review of security assessments as is available to Australian citizens under Part 6 of the ART Bill.

Accessible and responsive to the diverse needs of people

14. Liberty Victoria commends the reference to a user-focused design; the inclusion at s 49 of the ART Bill to the Tribunal conducting proceedings in an accessible way, taking into account the needs of the parties; and the s 4 definition in the ART Bill including that enabling effective participation may include that adjustments be made to accommodate needs.
15. Liberty Victoria also seeks to highlight the fundamental human rights at stake for many migration review applicants, in particular those seeking review of a protection visa application decision, or a decision to cancel a visa, especially where the applicant is in immigration detention. In Liberty Victoria's view, the following aspects of the Bills require further consideration to ensure the diverse needs of applicants seeking review of decisions in the Home Affairs portfolio are promoted.
 - a. Legal assistance: Liberty Victoria notes that the Nixon review referred to processing times in relation to protection visa applications, including at the Administrative Appeals Tribunal, and recommended that protection visa applications be made with immigration assistance. Liberty Victoria submits that migration review applicants should not be precluded from applying for Commonwealth assistance for legal or financial assistance, per s 294 of the ART Bill. While this is not presently available, it is of grave concern if the ART focusses only on the quick resolution of protection and visa related matters, without ensuring that applicants are able to effectively put their case. A solution and approach that would further assist the ART to efficiently manage the large migration cohort is the provision of free legal assistance to applicants.

- b. Procedural fairness: The extension of the codification of natural justice in the new s 359A(4) of the Migration Act²⁴ (to include that the ART need not provide information that was included or referred to in the statement of decision under review, or is prescribed) will curtail the ability of vulnerable protection visa applicants to engage with the ART and will undermine the robust review process the Bills are intending to produce. The explanation for this change – that applicants are provided with written statements of decisions such that “it is reasonable that they are aware of its contents without requiring the Tribunal to proactively draw matters to their attention”²⁵ – fails to appreciate what is the inescapable reality: a large portion of applicants in these spaces may be unable to read decisions only provided in English; may be self-represented, and may face other complex and intersectional barriers to access to justice.
- c. Directions: The inclusion at s 79(2)(k) of the ART Bill that the Tribunal may limit an applicant’s ability to give information or documents within a period before the start of the hearing concerns Liberty Victoria, particularly in relation to protection visa applicants. Given the limited resources of the pro bono migration law sector, applicants may not have secured legal assistance well in advance of a hearing and, in any event, may not be able to pre-empt the aspects of the review the member is concerned with. Given the breadth of potential factual and legal issues at play in a protection or visa cancellation matter, we consider that this subsection should not apply to review applicants under the Home Affairs portfolio.
- d. Dismissal for failure to pay fee: Liberty Victoria considers where applicants are in prison, immigration detention or otherwise destitute, the failure to pay a fee should not preclude their ability to access merits review as is contemplated by s 98 of the ART Bill. We submit that the objective of responding to the diverse needs of people demands consideration of their financial circumstances.
- e. Dismissal for failure to comply with an order: As with dismissal for failure to pay a fee, Liberty Victoria is of the view that consideration of the circumstances of an applicant must be factored into a decision under s 100 of the ART Bill to dismiss the review for non-compliance with an order. The objective of accessibility may

²⁴ See Item 160 of the Consequential and Transitional Bill.

²⁵ Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) 597.

require adjustment to orders made, should the applicant be unable to comply, rather than dismissal.

Recommendations:

- Allow access to free legal representation for applicants, especially in relation to protection visa applications and where applicants are in immigration detention, including by removing the carve out for migration applicants in relation s 294 of the ART Bill.
- Ensure migration and protection review applicants are allowed procedural fairness by removing new s 359A(4)(d) of the Migration Act.
- Disapply s 79(2)(k) of the ART Bill in respect of review applicants under the Home Affairs portfolio.
- Amend s 98 of the ART Bill to exempt applicants in prison, immigration detention or facing destitution.
- Amend s 100 of the ART Bill to ensure consideration of whether adjustment can be made to the order to allow for compliance, prior to dismissal.

Promotes public trust and confidence in the tribunal

16. Liberty Victoria is encouraged by the attention to transparency and accountability in relation to merits-based member appointments in the package of reforms.
17. We note the inclusion at s 208(3) and s 208(4) of the ART Bill, requiring members to have a minimum number of years of experience as legal practitioners or specialised training or experience in a subject matter relevant to the jurisdiction. The Explanatory Memorandum to the ART Bill refers to the importance of having a “diverse range of skills and experience on the Tribunal” to justify members not being required to have legal qualifications. However, in relation to decisions under review made under the Migration Act, the complexity, length and regular amendment of the legislation, coupled with the pace at which common law precedent evolves in the migration law jurisdiction, require members making decisions under the Home Affairs portfolio to have legal qualifications. A legal qualification *is* the “specialised training or experience in a subject matter” relevant and essential for this jurisdiction.

18. Given that “[a]pproximately half of all review applications to the Tribunal are related to Home Affairs portfolio decisions”,²⁶ and restoring trust and confidence in Australia’s merits review is a core goal of the Bills, Liberty Victoria is of the view that the ART’s annual report should include the number of Tribunal decisions quashed on judicial review. We commend the inclusion of the result of reviews in the ART’s yearly report at s 242(2)(e) of the ART Bill, and consider this should be expanded to ensure the reported “result” captures data on the legal accuracy of decisions as determined on judicial review, which data should be made publicly available.

Recommendations:

- Require members making decisions under the Home Affairs portfolio to have legal qualifications.
- Include in s 242(2)(e) of the ART Bill a requirement to report on the number of Tribunal decisions quashed on judicial review.

Conclusion

19. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Michelle Bennett, President of Liberty Victoria or the Liberty Victoria office on (03) 9670 6422 at info@libertyvictoria.org.au.

Michelle Bennett
President

Liberty Victoria
1 February 2024

²⁶ Attorney-General’s Department submission into this Inquiry (Submission 6).