Law Council
OF AUSTRALIA

Administrative Review Tribunal Bills 2023

House of Representatives Standing Committee on Social Policy and Legal Affairs

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Table of contents

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level. The Law Council speaks on behalf of its Constituent Bodies on federal, national, and international issues. The Law Council promotes and defends the rule of law, and it promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and it maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and it represents its Constituent Bodies, 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors, one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions of the Law Society of New South Wales and the Victorian Bar Incorporated in the preparation of this submission.

The Law Council also acknowledges the guidance and significant contributions of its Federal Administrative Law Reform Working Group, in addition to the following Committees:

- The Federal Dispute Resolution Section's Administrative Appeals Tribunal Liaison Committee;
- The Federal Dispute Resolution Section's Administrative Law Committee;
- The Federal Dispute Resolution Section's Migration Law Committee;
- National Security Working Group; and
- National Criminal Law Committee.

Executive summary

1. The Law Council of Australia welcomes the opportunity to assist the House of Representatives Standing **Committee** on Social Policy and Legal Affairs in its inquiry into the Administrative Review Tribunal Bill 2023 (Cth) (**ART Bill**) and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) (**Consequential Bill**)—together, **the Bills**.

2. Australia's administrative review system provides a critical layer of accountability that protects individuals against the unfair and arbitrary use of public power, ensures public confidence in government, and enables informed and accessible participation in legal processes. For this reason, the Law Council supports the establishment of the Administrative Review **Tribunal** in the place of the Administrative Appeals Tribunal (**AAT**) and welcomes the requirement that the Tribunal must pursue an objective of providing an independent mechanism of review that:[1]

   - is fair and just;
   - 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;
   - is accessible and responsive to the diverse needs of parties to proceedings;
   - improves the transparency and quality of government decision-making; and
   - promotes public trust and confidence in the Tribunal.

3. The Law Council welcomes the key features of the Bills that are directed towards achieving the above objectives of the Tribunal, particularly:

   - a simple membership structure with clear qualification requirements and role descriptions for each level of membership;
   - clear and delineated roles and responsibilities for those who hold leadership positions in the Tribunal;
   - a transparent and merit-based appointment process for members, informed by the operational needs of the Tribunal;
   - the strengthening of the role of the President by:
     - introducing express powers of the President to manage the performance, conduct and professional development of members;
     - clarifying the division between functions of the Principal Registrar and the President; and
     - incorporating a consultative process by establishing a Tribunal Advisory Committee to advise the President.
   - a user-focused design, including simpler and more consistent processes, and an emphasis on non-adversarial approaches to resolving applications, and safeguards to ensure representatives comply with their obligations;
   - a suite of powers and procedures that contemplate harmonisation across the Tribunal to respond flexibly to changing caseloads;
   - mechanisms to identify, escalate and report on systemic issues in administrative decision-making;

[1] Administrative Review Tribunal Bill 2023 (Cth) cl 9.

- a guidance and appeals panel, to improve the quality and consistency of Tribunal decision-making by providing for second tier review, where appropriate, and identification of systemic issues suitable for determination at a second tier;
- the reinstatement of the Administrative Review Council (**ARC**); and
- the abolition of the Immigration Assessment Authority (**IAA**).

4. However, this submission seeks to draw the Committee's attention to a variety of matters where the Bills would benefit from refinement and further justification. Accordingly, the Law Council makes the following recommendations to improve the Bills:

- The Selection of Bills Committee should refer the Bills to the Senate Legal and Constitutional Affairs Legislation Committee for further inquiry, prior to their passage.
- **In relation to the ART Bill generally:**
  - The long title of the ART Bill should be amended to: "A Bill to establish an Administrative Review Tribunal and an Administrative Review Council and provide for merits review of administrative decisions, and for related purposes".
  - Specific reference should be made in the chapeau of clause 9 to "merits review".
  - The Explanatory Memorandum should include an increased emphasis on merits review.
  - The title of clause 54 should be amended to "Tribunal to review decision on the merits".
  - The ART Bill should be amended to provide for an independent review after three to five years.
  - The ART Bill should include an express costs provision which clarifies the standard no costs approach undertaken, and then accounts for all potential circumstances, including any deviations from the standard approach.
  - Consideration should be given to providing for an enhanced ability for the Tribunal to award an applicant costs at its discretion, both at first instance and before any guidance and appeal panel, having regard to listed factors. These could be directed towards exceptional circumstances, such as achieving a salutary effect on Government decision-making or recompensing an applicant where an additional layer of review through the Guidance and Appeals Panel is imposed upon the applicant.
- **In relation to Part 3 of the ART Bill (Starting a review):**
  - The Committee should seek clarification from the AGD regarding the policy rationale for including the "without prejudice" privilege in clause 30 and consider whether that rationale is consistent with the objects of the Bills. If it is not consistent, the "without prejudice privilege" should be removed from clause 30.

- **In relation to Part 4 of the ART Bill (Proceedings):**
  - Clause 39(3) should be redrafted as follows: “The Tribunal, when constituted, must have no more than one member who is a Judge”.
  - The heading of clause 53 should be amended to “Tribunal determines scope of review of decision”.
  - Clause 66(3) should be amended to provide for procedural fairness prior to a decision by the Tribunal to remove a person’s representative.
  - As an alternative to clause 66(3), the Tribunal should be empowered to refer a legal representative to the body responsible for the regulation of legal practitioners in the relevant State or Territory.
  - The President should provide appropriate guidance to Tribunal members to ensure that they are aware of legal practitioners’ professional ethical obligations, particularly for members without legal qualifications.
  - Clause 71(2)(d)(ii) should be redrafted to specify the type of harm to a person that is relevant to the Tribunal’s consideration of whether to hold a hearing in private, or for the non-publication or non-disclosure of certain information.
- **Part 5 of the ART Bill (Guidance and appeals panel)** should provide for the triaging of matters, at an early stage and by a legally qualified member or conference registrar, to identify matters suitable for referral to the guidance and appeals panel.
- **In relation to Part 6 of the ART Bill (Proceedings in Intelligence and Security jurisdictional area):**
  - Part 6 and related provisions should be referred to the Independent National Security Legislation Monitor for review, to ensure that an appropriate balance is struck between national security, fairness and transparency objectives.
  - This review should be complemented by the development of principles or guidance for relevant Commonwealth agencies regarding how broader administrative law objectives may best be achieved in the national security context.
- **In relation to Part 8 of the ART Bill (Members and staff of Tribunal):**
  - The President should be required to consult with the Tribunal Advisory Committee before making rules.
  - Clause 242 should be amended to require that the President’s report must not identify members who remain under investigation, or have been determined to have acted within the code of conduct or performance standard.
  - Following notification of systemic issues by the President or the ARC, the relevant Commonwealth agency and/or Minister should be required to provide a published response addressing any such systemic issue(s) within a specified timeframe.

- All senior members should be required to have been enrolled as a legal practitioner for at least seven years. Clause 208(3)(b) should be deleted from the ART Bill.

- In the alternative, if it is to be retained, clause 208(3)(b) should be redrafted so that a person must not be appointed as a senior member unless the person has such "specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal" as set out in an instrument that has been prepared by the President.

- A baseline quota of legally qualified members should be implemented of at least 75 per cent across the Tribunal.

- Clause 208(4)(b) should be redrafted so that a person must not be appointed as a general member unless the person has such "specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal" as set out in an instrument that has been prepared by the President.

- Clause 217 should be amended to provide that a former member of the Tribunal must not seek to appear in a proceeding before the Tribunal, unless permitted to do so by the Minister (in the case of the President) or the President (in any other case) for their first appearance. Alternatively, clause 217(2)(b)(ii) should be redrafted as "if a different period would apply because of the effect of a law of a State or Territory—that period".

- A subclause should be inserted into clause 208, requiring that the person does not have a disclosable conflict of interest under clause 218.

- Clause 209 should be redrafted to:

  - require the Minister to establish an assessment panel to assess candidates for appointment as a member under relevant appointment provisions; and

  - require that assessment panels must consist of independent individuals with appropriate expertise.

- Where no assessment panel is established, or where a candidate is selected who has not been shortlisted by the assessment panel, the Minister should be required to provide reasons, in writing, why a different approach was adopted.

- Consideration should be given to redrafting clauses 205(5) and 206(5) to provide that the only reason why a shorter appointment period can be specified in the instrument of appointment for the President or a Judicial Deputy President is because that person will reach the compulsory retirement age for a Judge at the end of that period.

- The apostrophes in clause 196(1)(h) should be removed, so that it reads "Veterans and Workers Compensation".

- **In relation to Part 9 of the ART Bill (Administrative Review Council):**
  - To be eligible for appointment to the ARC, Commonwealth officials should be SES Band 3 (Deputy Secretary) level or above.

- Consideration should be given to ensuring that the Secretaries of key agencies responsible for large volumes of decision-making are represented on the ARC.

- "Support education and training" in clause 249(1)(f), relating to the ARC's functions, should be replaced with "inform education and training".

- Consideration should be given to providing the ARC with the function of monitoring the implementation of reports and recommendations relating to the Australian administrative law system.

- Consideration should be given to providing more specificity on the staffing requirements for the ARC in Division 5 of Part 9.

- **In relation to Part 11 of the ART Bill (Miscellaneous):**
  - Clause 294, enabling a person to apply for legal or financial assistance, should apply to all matters, including migration and protection, and social security and child support matters.

  - The ART Bill should facilitate the harmonisation of the review application fee across jurisdictional areas. In the interim, the application fee for migration and protection visa decisions, set by the Migration Regulations, should be reviewed as a matter of priority.

  - Where an application to the Tribunal is successful, any application fees paid should be refunded.

- **In relation to Schedule 2 of the Consequential Bill:**
  - The Department of Home Affairs must provide a stronger justification for the proposed retention in Schedule 2 of a codified natural justice procedure in the *Migration Act 1958* (Cth) (**Migration Act**), with specific regard to the ART Bill's reform objectives of fairness, efficiency and accessibility. In the absence of stronger justification, migration decisions should be subject to the ordinary rules of natural justice.

  - Schedule 2 should be amended to remove the disapplication of clause 55 of the ART Bill by proposed clause 357A(2) of the Migration Act, and the disapplication of clause 27 of the ART Bill by proposed new section 362A of the Migration Act.

  - Alternatively, if proposed section 362A of the Migration Act proceeds, it should be redrafted, or be worded as it currently appears under Part 5 of the Migration Act as an entitlement to the information, rather than an entitlement to request it. Further, there should be an obligation on the Department to respond within a legislated timeframe.

  - Item 160 should be amended to delete proposed section 359A(4)(e) of the Migration Act, to remove the ability for regulations to prescribe further exemptions from the codified obligation to put adverse information to an applicant.

  - Schedule 2 should be amended to remove existing section 423A of the Migration Act, and delete proposed new section 367A.

- The standardised 28-day period for applications should be extended across the board to all applicants under Schedule 2, to make it fairer and easier for persons to seek merits review of reviewable migration and protection decisions.

- The standard approach set out in clause 19 of the ART Bill, enabling the Tribunal to extend the application time if it considers that it is reasonable in all the circumstances to do so, should apply to reviewable migration and protection decisions.

- Schedule 2 should be amended to remove existing Migration Act provisions which disadvantage applicants in the review of character test matters, including with respect to:

  - application time frames;

  - deemed affirmation of the decision if no decision is made; and

  - the prohibition on applicants raising relevant material in a hearing unless provided to the Minister two days in advance.

5. Subject to the above recommendations, the Law Council supports the passage of the Bills.

Introduction

6. If enacted, the Bills—which were introduced into the House of Representatives on 7 December 2023—will constitute historic and highly significant reforms to Australia's administrative law system. The creation of the Tribunal, therefore, presents a unique opportunity to establish a body that meets the expectations of the Australian community by being a cornerstone of Australia's administrative law system for many years to come.

7. The Law Council commends the highly constructive approach adopted by the Attorney-General's Department (**AGD**) and the Attorney-General's Office during the development of the Bills in 2023. The Law Council provided a submission to the AGD in May 2023 in response to its Administrative Review Reform Issues Paper[2] (the **Previous Submission**). The Law Council particularly appreciated the opportunity to review, and engage confidentially with the AGD in respect of, a preliminary draft of the ART Bill in September and October 2023. Nevertheless, a closed consultation process on an early draft of the ART Bill does not lessen the need to provide sufficient opportunity for civil society to meaningfully scrutinise, and provide feedback on, each of the Bills.

8. On 14 December 2023, following a referral from the Commonwealth Attorney-General, the Committee commenced an inquiry into the Bills, calling for written submissions by 18 January 2024. Whilst the Law Council is pleased to have obtained an extension to 2 February 2024 to lodge its submission, it remains very concerned that the Committee's truncated inquiry period will undermine or diminish the democratic and proper scrutiny of the Bills. The Law Council's concerns are

[2] See Law Council of Australia, Administrative Review Reform Issues Paper (Submission to the Attorney-General's Department, 12 May 2023) <https://lawcouncil.au/resources/submissions/administrative-review-reform-issues-paper> (**Previous Submission**).

exacerbated by the sheer level of scrutiny required, given that the Bills comprise more than 550 pages, excluding more than 500 pages of explanatory materials.

9. Additional difficulties have been caused by the inquiry occurring over the summer period, at a time when the legal profession has been, for the most part, unavailable, in addition to the holiday shutdown period for the Law Council Secretariat and each of the Law Council's Constituent Bodies.

10. It is understood that the Commonwealth is seeking to establish the Tribunal as a priority, having first announced its intention to abolish and replace the AAT on 16 December 2022.[3] However, the Law Council is not aware of any public commitment to establish the Tribunal by a specific date.[4] In the circumstances, the Law Council queries why the Attorney-General has caused these significant Bills to be subject to such an expedited inquiry process.

11. In addition, the Law Council notes that, on 7 December 2023, the Senate **Selection of Bills Committee** deferred its consideration of the Bills to its next meeting in early 2024.[5] Whilst the Law Council supports the referral of the Bills to the current Committee, it also recommends that the Selection of Bills Committee refers the Bills to the Senate Legal and Constitutional Affairs Legislation Committee for further inquiry, prior to their passage, given that Committee's usual role in reviewing legislation of this nature.

12. Noting that a third Bill, containing additional consequential amendments, will be introduced this year,[6] the Law Council also considers that, following its introduction, the third Bill must be referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry.

13. Like the Commonwealth, the Law Council is eager to ensure that the Bills, if enacted, are successful. As a membership-based peak organisation, the Law Council has an obligation to consult with its Constituent Bodies, Sections, and advisory committees on matters of policy. The time constraints for this inquiry have impeded the ability of the Law Council, and the bodies it relies upon for expert guidance and input, to engage at a detailed level with the legislative and explanatory materials. This is especially the case for the complex Consequential Bill, on which the Law Council has only received feedback on Schedule 2 (Home Affairs) to date. Should the Law Council receive further comments on the Consequential Bill, it will provide these to the Committee in a supplementary submission.

14. Despite its limited opportunity to engage comprehensively with the Bills, and the consequence that its views in this submission must be considered preliminary and subject to change, the Law Council welcomes their introduction. There remains scope for refinement and greater harmonisation—as evidenced by the recommendations within this submission. Nevertheless, the Bills, overall, represent

[3] The Hon Mark Dreyfus KC MP, Albanese Government to abolish Administrative Appeals Tribunal (Media Release, 16 December 2022) <https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>.
[4] This contrasts with the National Anti-Corruption Commission (**NACC**), where there had been a long-standing public commitment by the Prime Minister and Attorney-General to legislate the NACC by the end of 2022. This deadline necessitated, from the Commonwealth's perspective, a very short timeframe for an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee into the lengthy National Anti-Corruption Commission Legislation Bill 2022 (Cth) and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (Cth).
[5] Senate Selection of Bills Committee, Report No. 16 of 2023 (7 December 2023) <https://www.aph.gov.au/-/media/Senate/committee/selectionbills_ctte/reports/2023/rep1623.pdf> 3.
[6] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 1 [4].

a clear improvement to Australia's current administrative review regime and are likely to promote greater integrity, accessibility, consistency, flexibility and transparency within it. The Law Council generally supports the passage of both Bills, subject to the recommendations below, and any supplementary submissions that it makes.

Recommendation

- **The Selection of Bills Committee should refer the Bills to the Senate Legal and Constitutional Affairs Legislation Committee for further inquiry, prior to their passage.**

Administrative Review Tribunal Bill 2023

General comments

Titles and references to merits review

Long title

15. The ART Bill is given the long title:

> *A Bill to establish the Administrative Review Tribunal and an Administrative Review Council and provide for matters relating to information about administrative decisions, and for related purposes*

16. This description does not accurately identify the key purpose of the Tribunal, which is to provide for merits review of government decisions. Further, the phrase "information about administrative decisions" is unnecessary, given that this is not a core purpose of the Tribunal. The long title should, instead, read as follows:

> *A Bill to establish the Administrative Review Tribunal and an Administrative Review Council and to provide for merits review of administrative decisions, and for related purposes.*

References to merits review

17. The Law Council strongly supports the role of merits review in the Australian administrative law framework and considers that the ART Bill represents an opportunity to assist the public to understand the distinction between judicial review and merits review. However, at present, the only reference in the ART Bill to "review[ing] decisions on their merits" is in the simplified outline in clause 3, while the "correct or preferable" concept is referred to in clauses 56 and 63.

18. Specific reference to the fundamental concept of "merits review" should be made in clause 9 of the ART Bill, which sets out the objectives of the Tribunal. To achieve this, the chapeau of clause 9 should be amended to "The Tribunal must pursue the objective of providing an independent mechanism of merits review". This reference may assist in informing parties, members and the general public about the role and function of the Tribunal, while ensuring that these objectives inform the proper interpretation of any other statutory provisions.

19. In addition, while the phrase "merits review" appears in the Explanatory Memorandum, it is used relatively sparingly and the explanation of the Bill would

benefit from increased emphasis on the concept of merits review, particularly early in the Explanatory Memorandum.

20. In subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), the conferral of the power to "exercise all the powers and discretions" conferred by the relevant enactment on the decision-maker, followed by the specification of remedial orders, is understood as intended to capture the notion of merits review.

21. Clause 54 of the ART Bill is equivalent to subsection 43(1) of the AAT Act, except that the title, "Tribunal's decision on review", is replaced by "Tribunal can exercise powers of decision-maker" and the remedial powers listed in subsection 43(1) have been relocated to clause 105 of the ART Bill. This restructure will allow for the Tribunal's remedial powers on determining an application to be grouped with the Tribunal's other powers, including procedural powers, so this change appears to be appropriate. Nevertheless, the title of clause 54 should be amended to "Tribunal to review decision on the merits".

22. The Law Council does not suggest that the ART Bill should attempt to define merits review, noting that the empowering statutes of the State and Territory civil and administrative tribunals do not attempt to define "review on the merits" in a decision-making context.[7] Clause 54 will be interpreted in accordance with the existing principles set out in *Drake (No 1)*,[8] *Drake (No 2)*,[9] and *Shi v MARA*.[10] The work of explaining what comprises review on the merits is done by the substance of clause 54 as it stands and no changes to its text are required. However, an amendment to the title, as recommended, will send an appropriate signal to users regarding the Tribunal's core function of merits review.

Recommendations

- **The long title of the ART Bill should be amended to: "A Bill to establish an Administrative Review Tribunal and an Administrative Review Council and provide for merits review of administrative decisions, and for related purposes".**
- **Specific reference should be made in the chapeau of clause 9 to "merits review".**
- **The Explanatory Memorandum should include an increased emphasis on merits review.**
- **The title of clause 54 should be amended to "Tribunal to review decision on the merits".**

[7] See *ACT Civil and Administrative Tribunal Act 2008* (ACT); *Civil and Administrative Tribunal Act 2013* (NSW); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT); *Queensland Civil and Administrative Tribunal Act 2009* (Qld); *South Australian Civil and Administrative Tribunal Act 2013* (SA); *State Administrative Tribunal Act 2004* (WA); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas); *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
[8] *Re Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALC 577 (*Drake No 1*).
[9] *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 (*Drake No 2*).
[10] (2008) 235 CLR 286.

Review, oversight and stakeholder engagement

23. The ART Bill does not provide for an independent general review after a set period. This contrasts with most State and Territory civil and administrative tribunals, where a statutory review is required to occur, either at a single time, or on a periodic basis (typically three to five years).[11]

24. The ART Bill should, likewise, include a review requirement. Any such review could occur either on a periodic basis, or at least once, after the Tribunal has been in operation for three to five years. Any such review should simultaneously review whether the ARC is meeting its stated objectives, given that the ART Bill does not currently provide for this.

25. It will likely be a function of the ARC to engage in ongoing reviews targeting particular aspects of the operation of the Tribunal. Nevertheless, a statutory review by an independent reviewer (rather than the ARC) would provide a formal impetus for improvements to be made to the regime on a broader scale, as was achieved by the statutory review of the *Tribunals Amalgamation Act 2015* (Cth) undertaken by the Hon Ian Callinan AC KC (**Callinan Review**) in 2018.[12]

26. The Law Council welcomes the explicit reference in the ART Bill to the President's function of engaging with civil society (and reporting on such engagement).[13]

27. It also welcomes the fact that the ART Bill affords a significant level of flexibility and discretion to the President and the Tribunal. Ultimately, the success of the Tribunal will rest on a variety of matters, including resourcing, the quality of appointments, and the quality of any practice directions and accompanying rules. The role of civil society, including stakeholders such as the Law Council, will be vital to inform such matters on an ongoing basis.

Recommendation

- **The ART Bill should be amended to provide for an independent review after three to five years.**

Jurisdiction

Provisions subject to modification

28. Clause 5 provides that the application of the ART Bill is subject to a contrary intention in other Acts or instruments, with exceptions for Part 2 (establishment of the Tribunal), Part 8 (Members and staff of Tribunal) and Part 9 (ARC).

29. The Law Council acknowledges that the approach in the ART Bill is an improvement to the approach in the AAT Act, which provides that provisions of the AAT Act may be disapplied, or their affect altered, by any amendment.[14] By contrast, clause 5(2) of the ART Bill provides that this can only occur where provided for by another Act.

[11] See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 92; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 240; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 96; *State Administrative Tribunal Act 2004* (WA) s 173.
[12] The Hon Ian Callinan AC KC, Review: Section 4 of the *Tribunals Amalgamation Act 2015* (Cth) (Report, 23 July 2019) <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>.
[13] Administrative Review Tribunal Bill 2023 (Cth) cl 193(k), 242(k)(i).
[14] *Administrative Appeals Tribunal Act 1975* (Cth) s 25(3), (6), (6A).

This does enable Parliament some additional level of scrutiny and is preferable to the current situation.

30. As a matter of principle, however, the Law Council is generally not in favour of provisions that allow a legislative instrument to override a primary Act, as envisaged by clause 5 of the ART Bill. There is a risk that this clause will invite the undermining or fragmenting of the key benefits and achievements of the Tribunal over time, particularly by subordinate legislation which may be passed without adequate scrutiny.

31. Despite the above, this risk must be balanced with the necessity of having some flexibility to modify the standard powers and procedures to respond to the unique features of a particular caseload for particular jurisdictional areas of the Tribunal. Given the existing and extensive legislative framework in place, the Law Council recognises that a provision of this nature is perhaps inevitable in the circumstances, noting that legislative instruments are subject to the safeguard of Parliamentary disallowance being available with respect to them.

Reviewable "decisions"

32. The definition of "decision' in subsection 3(3) of the AAT Act has been retained in clause 4(1) of the ART Bill. This is not affected by the insertion of the additional defined expression, "reviewable decision", in clause 12.

33. It appears that clause 12(2) is intended to enable review of decisions made by an automated process, which are "reviewable decisions" notwithstanding that they are not made by the authorised person. The Law Council considers that these provisions are appropriate. It welcomes that, in its response to the Royal Commission into the Robodebt Scheme report, the Commonwealth committed to increasing the transparency and integrity of automated decision-making processes, including:[15]

- considering opportunities for legislative reform to introduce a consistent legal framework in which automation in government services can operate ethically, without bias and with appropriate safeguards;
- ensuring there is appropriate oversight of the use of automation in service delivery;
- considering establishing a body, or expanding the functions of an existing body, with the power to monitor and audit automated decision-making processes; and
- examining existing regulatory frameworks to ensure a consistent legal, ethical and governance framework in which automation in government services can operate with appropriate safeguards.

[15] Commonwealth, Government Response to the Royal Commission into the Robodebt Scheme (November 2023) <https://www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf> 21-22.

Costs

34. The Explanatory Memorandum for the ART Bill confirms that:

> *The Tribunal is by default a no-costs jurisdiction, meaning each party bears their own legal costs. However, in certain types of Tribunal decisions, specifically allowed in the relevant legislation, the Tribunal can order that a party is liable to pay its own costs.*[16]

35. Whilst the approach adopted reflects the existing default position under the AAT Act and broader legislation, the Law Council suggests that it would be helpful to set out a costs provision in the ART Bill which clarifies the starting point of no-costs, and then accounts for all potential circumstances, including any deviations from the standard approach. This would assist all users of the Tribunal, particularly applicants who are unfamiliar with its operations.

36. More broadly, while recognising the general default position of no-costs being ordered, the Law Council has previously identified that there is currently no general provision in the ART Bill for the Tribunal to order costs in circumstances where a Commonwealth department or agency has departed significantly from conduct consistent with that of a model litigant.[17] The Law Council suggested that providing the Tribunal with a general discretion to award a party costs where appropriate, and with reference to listed considerations, may be worth considering in clearly articulated categories of circumstances. This is further discussed below.

Guidance and appeal panel

37. The Law Council observes that Part 4, Division 4, Subdivision C of the ART Bill creates an additional layer of potential costs, by way of the guidance and appeals panel.

38. Where an applicant applies to the President, pursuant to clause 123, to refer a decision of the Tribunal to the guidance and appeals panel, that applicant has a choice as to whether to initiate such process, and is likely to be cognisant that the Tribunal operates on a no-costs basis by default.

39. By contrast, there are likely to be circumstances where an applicant succeeds at first instance, but the respondent agency applies to the President under clause 123 to refer a decision to the guidance and appeals panel. Should that referral proceed, the applicant will be required to invest time, effort and expense in defending their application for review, with no recourse to costs to compensate the applicant for having done so. This is not consistent with the Tribunal's stated objectives—as provided in clause 9 of the ART Bill—in that:

- it makes the Tribunal less accessible and responsive to the needs of applicants by, potentially, making the defence of some decisions uneconomical;[18]
- it does not improve the transparency and quality of government decision-making, in that it may potentially discourage persons adversely affected by a decision from using the Tribunal as a forum for review; and

[16] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 104 [728].
[17] Previous Submission, 50-51.
[18] For instance, those decisions where the combined cost of running an application at first instance, and defending it on appeal, exceeds the value of what is at stake because of the decision under review.

- it is not fair and just that an ultimately successful applicant, who may be of modest means—particularly when compared with the resources available to Commonwealth agencies—be required to bear the costs of litigation twice.

40. Similar problems may face respondents, including but not limited to private corporations and individuals, where a respondent succeeds at first instance but is then subjected to the additional time, effort and expense of a second-tier review.

Discretionary costs power

41. The Law Council considers it would be appropriate for the Tribunal to have the discretion available to award costs to a successful applicant in particular, both at first instance and in any appeal. Specifically, there are potential benefits to such a costs power, to award costs against the government party, in appropriate circumstances (such as when the party has departed significantly from its model litigant obligations).

42. Such a provision could mirror approaches adopted in certain State-based tribunals,[19] where the default position is also that parties bear their own costs, but there is a discretion to award costs to a party where appropriate, and with reference to listed considerations.

43. A successful applicant in the Tribunal will have shown, typically through legal representatives, that the original administrative decision was incorrect, or incorrectly made. However, the cost of doing so cannot be recovered. This can disadvantage applicants and benefit respondents, contrary to the objectives of the Tribunal, as provided in clause 9 of the ART Bill.

44. This costs power would, therefore, assist the Tribunal in achieving its statutory objectives of operating as a review mechanism that is accessible and responsive to the diverse needs of parties to proceedings, improves the transparency and quality of government decision-making, and is "fair and just".[20] In addition, a power within the Tribunal to award a successful applicant costs could:

- incentivise respondents to resolve, or limit the scope of, disputes;
- incentivise representation in matters with prospects of success where practitioners may work on contingent costs agreement basis, rather than solely relying on the Tribunal administering pro bono representation;
- partly restore applicants to the position they would have been in if the original decision had been made correctly, which would be consistent with principles underlying Appeal Costs Acts in respect of judicial decisions across Australia.[21]

45. A discretion in the Tribunal to order costs could have a salutary effect and is likely to improve the quality of decision-making within Commonwealth agencies, and support compliance of government agencies with their obligations as model litigants. Such a provision would be of benefit in light of the findings of the Royal Commission into the Robodebt Scheme, even if it were expected to be rarely utilised.

46. It is important that the introduction of any discretionary costs power does not add undue complexity to proceedings, and must strive to be a simple, efficient and

[19] See, eg, *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57 and *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.
[20] Administrative Review Tribunal Bill 2023 (Cth) cl 9(a), (c) and (d).
[21] See, eg, *Federal Proceedings (Costs) Act 1981* (Cth); *Appeal Costs Act 1998* (Vic); *Appeal Costs Fund Act 1973* (Qld).

effective process for applicants to pursue. Any such provision must be subject to other relevant legislative schemes that already allow for costs to be recovered.

47. In making the above comments, the Law Council wishes to emphasise that the respondent in the Tribunal's proceedings will usually[22] be the Commonwealth (or an extension of it), which holds significant powers and substantial resources relative to almost all potential applicants. This distinguishes the Law Council's position in the current context from that adopted in its response[23] to the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth), regarding a proposed asymmetric costs model for federal court proceedings in the federal anti-discrimination law context. In the latter context, respondents vary considerably and include individuals and small businesses who are not well-resourced or powerful. It also emphasises that its proposal in the current submission is to award the Tribunal a particular discretion, rather than to limit it.

Recommendation

- **The ART Bill should include an express costs provision which clarifies the standard no costs approach undertaken, and then accounts for all potential circumstances, including any deviations from the standard approach.**
- **Consideration should be given to providing for an enhanced ability for the Tribunal to award an applicant costs at its discretion, both at first instance and before any guidance and appeal panel, having regard to listed factors. These could be directed towards exceptional circumstances, such as achieving a salutary effect on Government decision-making or recompensing an applicant where an additional layer of review through the Guidance and Appeals Panel is imposed upon the applicant.**

Part 3—Starting a review

Time limit for application

48. Division 3 of Part 3 provides that:

- applications for review of a decision must be made within the period prescribed by the rules, but not before 28 days;[24]
- a person can request an extension and the Tribunal may extend this period where satisfied that it is reasonable in all the circumstances to do so;[25] and
- if no prescribed period applies, the Tribunal must dismiss the application if not made in a reasonable time, unless there are special circumstances justifying the Tribunal reviewing the decision.[26]

[22] In some instances, such as under the *Safety, Rehabilitation and Compensation Act 1988* (Cth), a respondent may be a licensed corporation which may not have the same resources as the Commonwealth. As such, the above position focuses on where the respondent is the Commonwealth.
[23] Law Council of Australia, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 12 January 2024) <https://lawcouncil.au/resources/submissions/australian-human-rights-commission-amendment-costs-protection-bill-2023>.
[24] Administrative Review Tribunal Bill 2023 (Cth) cl 18.
[25] Ibid cl 19.
[26] Ibid cl 20.

49. The Law Council considers that 28 days is a suitable minimum period in which 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. That timeframe should be harmonised across all matters. The proposed departures for those in immigration detention (seven days)[27] or seeking review of a "character" test decision (nine days) are of particular concern, given that these persons will typically be deprived of their liberty (in immigration detention and, for character decisions, often in prison or remand) and have limited access to legal assistance and other resources.

50. The Law Council supports the granting of extensions where the Tribunal considers that it is reasonable in all the circumstances to do so. It considers that it is appropriate for the Tribunal to have flexibility to ensure that potential applicants do not lose their right to review in certain circumstances, for instance, where defective notifications are sent or where applicants have particular vulnerabilities. This may include cohorts such as those in prison, immigration detention, people experiencing homelessness, victims and survivors of family violence, people with serious mental or physical illness, and those suffering other unforeseen circumstances (for example, unforeseen illness, or a fraudulent or deceptive migration agent or legal representative).[28]

51. The Law Council observes that clause 28(3), in Division 4 of Part 3, permits the Tribunal to shorten the time for obtaining reasons for a decision from the original decision-maker. This exception will be particularly useful for an applicant, in circumstances of urgency due to personal or financial reasons.

52. See further discussion below outlining the Law Council's concerns regarding the proposed departures from the ART Bill's standard approach to extensions for reviewable migration and protection visa decisions (Consequential Amendments Bill—Schedule 2).

Privilege and public interest

53. Clause 30 provides that documents required to be given by the decision-maker must be given, regardless of legal professional privilege, without prejudice privilege, or public interest immunity in relation to the production of documents.

54. The Law Council observes that clause 30 appears to reflect the current settings in the AAT Act, although it is differently worded.[29]

55. Nevertheless, with respect to the inclusion of the "without prejudice" privilege, the Law Council is concerned that clause 30, as drafted, may have the unintended consequence of limiting the capacity and/or willingness of parties to engage in frank discussions, and, in turn, could minimise the potential for early and cost-efficient resolution of disputes.

56. Noting that the Explanatory Memorandum does not elaborate on the reason that this inclusion is needed, the Law Council recommends that the Committee seek clarification from the AGD regarding the policy rationale for including the "without prejudice" privilege in clause 30, and consider whether that rationale is consistent

[27] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 136 (proposed section 347(3)(a)).
[28] Previous Submission, 32.
[29] *Administrative Appeals Tribunal Act 1975* (Cth) s 37(3), which states that "This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents."

with the objects of the Bills. If it is not consistent, the "without prejudice privilege" should be removed from clause 30.

Recommendation

- **The Committee should seek clarification from the AGD regarding the policy rationale for including the "without prejudice" privilege in clause 30 and consider whether that rationale is consistent with the objects of the Bills. If it is not consistent, the "without prejudice privilege" should be removed from clause 30.**

Part 4—Proceedings

Applications

57. Division 2 of Part 4 broadly prescribes how a person may apply to the Tribunal. The Law Council supports the flexibility provided, particularly in clause 34, and notes that the simplicity and accessibility of the application process will depend significantly on how the practice directions are framed.

Constitution of Tribunal

58. Clause 39 provides that the Tribunal must be constituted by one, two or three members, and provides guidance regarding when it is appropriate for the Tribunal to be constituted by more than one member for a proceeding.

59. Clause 39(3) is currently drafted as "The Tribunal constituted must have no more than one member who is a Judge". The Law Council supports the intention apparently behind clause 39, as avoiding having more than one Judge hear a single matter because it is likely to adversely impact the pool of Judges available to consider other complex or significant matters.[30] However, the Law Council suggests that clause 39(3) be redrafted, for clarity, as follows: "The Tribunal, **when** constituted, must have no more than one member who is a Judge" [emphasis added].

Recommendation

- **Clause 39(3) should be redrafted as follows: "The Tribunal, when constituted, must have no more than one member who is a Judge".**

Procedures

60. Division 5 of Part 4 provides for a set of procedures that are available across all matters. The Law Council considers that consistency in procedures across jurisdictional areas in the Tribunal is desirable, whilst acknowledging that there will be necessary variations to processes and formality, depending on the type of decision under review.[31] The Law Council is broadly supportive of these procedures, subject to the comments below.

61. Clause 50 provides that, in a proceeding, the Tribunal must act with as little formality and technicality as a proper consideration of the matters before the Tribunal permits. This clause is similar to current section 33(1)(b) of the AAT Act, noting the removal of

[30] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 54 [385].
[31] Previous Submission, 5.

the phrase "and with as much expedition".[32] It is also worth noting that clause 50(2) provides that clause 50(1) is subject to the Act and the rules. The Tribunal objectives at clause 9 in turn refer to ensuring "quick", efficient decision-making.

62. Clause 53 gives the Tribunal discretion to determine the scope of the review, including by narrowing the evidence, facts and issues it will consider. This clause would benefit from refinement, as there is an inconsistency between the heading ("Tribunal controls scope of review of decision") and the text ("…the Tribunal may determine the scope of the review…"). Given that the text of clause 53 refers to the Tribunal "determining" the scope of review, as does the Explanatory Memorandum,[33] the Law Council recommends that the heading of clause 53 be amended to "Tribunal determines scope of review of decision".

63. Clause 56(1)(a) provides for the added onus on the decision-maker and their representatives to use their best endeavours to make the 'correct or preferable' decision. This additional emphasis of ensuring that decision-makers and their representatives assist the Tribunal to make the correct or preferable decision is welcome, noting this goes beyond current section 33(1AA) of the AAT Act.

64. Clauses 60 to 63 enable greater participation of decision-makers in proceedings before the Tribunal. Clause 60 provides that a decision-maker may "elect not to participate" in a kind of proceeding in the Tribunal, while clause 63 provides that a non-participating party may give written submissions, or be required to participate. These provisions are intended to recognise that some proceedings benefit from a less formal and less adversarial process of review, and reflects the reality that some decision-makers do not currently participate in matters in the AAT, generally for resources reasons. Whilst the Law Council has previously indicated its support for provisions enabling the decision-maker to make a submitting appearance, save as to costs, it understands that the Bill reflects a different approach.

65. Clause 66 relates to representation before the Tribunal, including that, per clause 66(1), a party to a proceeding may choose another person to represent them in the proceeding. The Law Council welcomes that the ART Bill provides for a right to a representative, particularly a legal representative, in proceedings, without the need to seek leave. This is an improvement on the current position in section 32 of the AAT Act, which allows for representation at a hearing, but not in entire proceedings.

66. Clause 66(3) empowers the Tribunal to remove a person's representative if the Tribunal considers that the representative has a conflict of interest in representing the person;[34] the representative is not acting in the best interests of the person;[35] representation of the person by the representative presents a safety risk or unacceptable privacy risk to any person;[36] or the representative is otherwise impeding the proceeding.[37]

67. The Law Council emphasises the need for procedural fairness when the Tribunal decides to remove a person's representative. Clause 66(3) should provide greater specificity as to how the Tribunal is required to undertake such a process (including, for example, providing the representative with adverse information and an opportunity

[32] It is noted that clause 50(2) provides that clause 50(1) is subject to the Act and the rules. The Tribunal's objective, at clause 9, refers to ensuring "quick", efficient decision-making.
[33] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 62 [441].
[34] Administrative Review Tribunal Bill 2023 (Cth) cl 66(3)(a).
[35] Ibid cl 66(3)(b).
[36] Ibid cl 66(3)(c)-(d).
[37] Ibid cl 66(3)(e).

to respond, prior to a Tribunal decision to remove them). While such a process need not be lengthy or onerous for the Tribunal, it should be fair.

68. The Law Council also suggests that consideration be given to empowering the Tribunal to refer a legal representative to the body responsible for the regulation of legal practitioners in the relevant State or Territory, as an alternative to removal. This will enable regard to be had to various professional ethical obligations which may be engaged in any given situation, including a practitioner's duties to the client, as well as to the Tribunal. It may also be worth ensuring that the President provides appropriate guidance to Tribunal members to ensure that they are aware of legal practitioners' broader professional ethical obligations in appearing before the Tribunal, particularly for members without legal qualifications.

69. Clause 67 enables the Tribunal to appoint a person to be a litigation guardian for a party in certain circumstances, while clause 68 enables the Tribunal to appoint interpreters for the purposes of communication between persons and the Tribunal. These clauses are welcome additions to the ART Bill, noting that sufficient funding will be required to ensure that any subsequent demand can be met. The Law Council has reflected this need in its most recent pre-Budget submission to the Treasury.[38]

Recommendations

- **The heading of clause 53 should be amended to "Tribunal determines scope of review of decision".**
- **Clause 66(3) should be amended to provide for procedural fairness prior to a decision by the Tribunal to remove a person's representative.**
- **As an alternative to clause 66(3), the Tribunal should be empowered to refer a legal representative to the body responsible for the regulation of legal practitioners in the relevant State or Territory.**
- **The President should provide appropriate guidance to Tribunal members to ensure that they are aware of legal practitioners' professional ethical obligations, particularly for members without legal qualifications.**

Powers

70. Division 6 of Part 4 provides for a set of powers that are available across all matters, subject to clause 5, which will allow for different conduct of proceedings in the jurisdictional area of Migration due to the operation of the Migration Act. This is discussed in more detail with respect to the Consequential Bill.

Confidentiality

71. Clause 69 provides that hearings (other than directions hearings) are to be public by default, unless practice directions or a Tribunal order require otherwise. Further, clause 70 provides that the Tribunal may give directions prohibiting or restricting the publication or other disclosure of information tending to reveal the identity of a party to, or witness in, a proceeding (or any person otherwise associated with them).

[38] Law Council of Australia, *2024-25 Pre-Budget Submission* (Submission to the Treasury, 25 January 2024), <https://lawcouncil.au/resources/submissions/2024-25-pre-budget-submission>.

72. Clause 71 sets out the requirements that apply to the Tribunal's consideration of an order for a hearing to be held in private, or for certain information to not be published or disclosed. Whilst the Law Council generally supports these matters as listed for the Tribunal's consideration, it raises concerns with the drafting of clause 71(2)(d)(ii), "in any case—the harm (if any) that is likely to occur to a person if the order is not made". It is insufficiently apparent, from the ART Bill, what is meant by "harm" in this context, or what type of harm is envisaged.

73. Paragraph 534 of the Explanatory Memorandum does assist, to some extent, with the following regarding clause 71(2)(d)(ii):

> *Subclause (2) requires the Tribunal to balance the principles of open justice and procedural fairness with the circumstances of the parties or any persons connected to the proceeding, the harm that could result to a person if an order is not made, the need to keep information confidential and any other relevant considerations. The Tribunal may need to consider factors such as the particular vulnerabilities of parties and persons connected to the proceeding, whether the disclosure of information may cause reputational damage to parties or persons connected to the proceeding, the need to keep sensitive personal information private and whether the safety of a party or person connected to the proceeding may be compromised (such as where there is family domestic violence) if the order is not made.*

74. However, the concept of harm remains somewhat open-ended: for instance, it is uncertain whether it includes harm to an entitlement or right, mental harm or some other form of "harm".

75. The Law Council suggests that clause 71(2)(d)(ii) be redrafted to specify the kinds of harm to be considered so that it is clear and easier to understand for applicants to the Tribunal.

Dispute resolution, dismissal and reinstatement

76. The Law Council particularly supports clause 87, which allows the Tribunal to direct, at any time, that parties undertake dispute resolution in relation to a proceeding, part of a proceeding, or any matter arising out of a proceeding. This is an improvement on section 34AA of the current AAT Act, which requires an application to be made to the Tribunal. The definition of dispute resolution under clause 4 also includes conferencing, which is positive. The Law Council supports conferencing being made widely available within the new Tribunal.

77. The Law Council also welcomes the inclusion of clause 101, which enables the Tribunal to dismiss an application if satisfied that the application:

- is frivolous, vexatious, misconceived or lacking in substance;[39]
- has no reasonable prospects of success;[40] or
- is otherwise an abuse of the Tribunal's process.[41]

[39] Administrative Review Tribunal Bill 2023 (Cth) cl 101(1)(a).
[40] Ibid cl 101(1)(b).
[41] Ibid cl 101(1)(c).

78. The Law Council is also supportive of clause 102, which enables the Tribunal to reinstate an application that it has dismissed (or that is taken to have been dismissed due to the applicant withdrawing it under clause 95) in certain circumstances.

Recommendation

- **Clause 71(2)(d)(ii) should be redrafted to specify the type of harm to a person that is relevant to the Tribunal's consideration of whether to hold a hearing in private, or for the non-publication or non-disclosure of certain information.**

Decision and publication

79. Clause 105 provides that the Tribunal must make a decision affirming a reviewable decision,[42] varying it,[43] or setting it aside (and either substituting a new decision, or remitting the matter to the decision-maker to reconsider).[44]

80. Clause 111 provides that, when the Tribunal has made a decision under clause 105 in a review of a decision, it must provide the parties certain information in writing, specifically:

- the Tribunal's substantive decision;[45]
- a statement of reasons for the decision;[46]
- notice of any right to appeal the decision to the Tribunal's guidance and appeals panel;[47] and
- notice of the parties' appeal rights to the **Federal Court** of Australia or the Federal Circuit and Family Court of Australia (**FCFCOA**).[48]

81. Under clause 111(3), the above information must be given 28 days after the day that the Tribunal's decision is made, unless the practice directions specify otherwise. The Law Council considers that 28 days is a reasonable timeframe.

82. The Law Council is supportive of clause 111, particularly clause 111(2)(b), requiring a statement of reasons to be provided to the parties. Written reasons allow parties to understand why the Tribunal has formed its decision, while also assisting in the identification of trends and systemic issues before the Tribunal.[49] In this respect, it is important that written decisions are clear as to what the reasons are for making the decision, and what information and legislation was relied upon in coming to that decision.

83. The Law Council also welcomes clause 111(4), under which the Tribunal may give a decision (and the reasons for the decision) orally before giving them in writing. The Law Council supports greater standardisation for the delivery of oral decisions in certain matters, given that the preparation of lengthy written reasons can be time-intensive and may not be the most appropriate use of finite Tribunal resources for all matters. Accordingly, the Law Council suggests that, in circumstances where, for

[42] Ibid cl 105(a).
[43] Ibid cl 105(b).
[44] Ibid cl 105(c).
[45] Ibid cl 111(2)(a).
[46] Ibid cl 111(2)(b).
[47] Ibid cl 111(2)(c).
[48] Ibid cl 111(2)(d).
[49] See Previous Submission, 42.

instance, the decision is favourable to the applicant and the case is not complex, only short written reasons could be required, following the delivery of a decision and reasons orally.[50] This streamlined approach may assist to limit the potential for backlogs within the Tribunal.

84. Clause 113(1) provides that the Tribunal may publish its decision and the reasons for them. However, clause 113(2) provides that the Tribunal *must* publish a decision in certain circumstances, subject to an exception in clause 113(4), if:

- the President considers that the decision involves a significant conclusion of law;[51] or
- the President considers that the decision has significant implications for Commonwealth policy or administration;[52] or
- the decision is made by the guidance and appeals panel, is made under clause 105, and is not a decision made by the parties in accordance with clause 103(2).[53]

85. The above provisions are a positive step towards achieving greater consistency in how, and when, written reasons for decisions are issued—and published—by the Tribunal. The Law Council supports their inclusion in the ART Bill.

Part 5—Guidance and appeals panel

86. Part 5 of the ART Bill establishes a guidance and appeals panel within the Tribunal, with the power to:

- hear and determine an application referred to it by the President that raises an issue of significance to administrative decision-making; and
- review and determine Tribunal decisions referred to it by the President that may contain an error of fact or law materially affecting the Tribunal decision or that raise an issue of significance to administrative decision making.

87. The findings of the Royal Commission into the Robodebt Scheme illustrate the potential value of a limited selective review function within Australia's administrative review framework, particularly where this is linked to issues of potential significance for the law or for Commonwealth policy or administration, and publication requirements.

88. The Law Council considers that appeals to the guidance and appeals panel are likely to be small in number, consistent with the experiences of the internal appeal panels of the State and Territory tribunals. This is likely to be the case for the guidance and appeals panel in the Tribunal, not least because applicants will not have an automatic right of review, and the President has discretion to limit reviews to significant cases.

89. The Law Council, therefore, welcomes the fact that the ART Bill provides a new mechanism for escalating significant issues and addressing material errors in Tribunal decisions.[54] Nevertheless, there remains scope to refine Part 5, as outlined below.

[50] Ibid.
[51] Administrative Review Tribunal Bill 2023 (Cth) cl 113(2)(a)(i).
[52] Ibid cl 113(2)(a)(ii).
[53] Ibid cl 113(2)(b).
[54] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 107 [749].

Name and terminology

90. The Law Council has received divergent views from administrative law experts on whether the name of the panel is appropriate and accurately reflects its intended functions. Specifically, the Law Council has received feedback that the name of the panel may be misleading, due to the inclusion of the word "guidance".

- On this view, it appears from the ART Bill and its Explanatory Memorandum that the panel will not provide guidance to either the Tribunal or the parties. Rather, the panel re-exercises the powers and discretions of the original decision-maker, and the panel's decision will generally constitute a "Tribunal guidance decision".[55] As is stated in the Explanatory Memorandum:

> *The guidance and appeals panel will consider matters* de novo. *That is, the guidance and appeals panel will step into the shoes of the original decision-maker and consider the decision afresh*.[56]

- Pursuant to clauses 109 and 110 of the ART Bill, when making a decision in a proceeding, members of the Tribunal "must have regard to"[57] Tribunal guidance decisions that raise similar facts or issues, unless that member is a Judge, or the Tribunal is constituted for the purposes of a proceeding by a member who is a Judge.[58]
- This does not mean that a relevant panel decision is conclusive so as to give the panel decision precedential effect in the ordinary sense. Clause 110(3) confirms this by providing that a failure by the Tribunal to have regard to relevant guidance and appeal panel decisions does not affect the validity of the decision. Further, the Explanatory Memorandum states:

> *…while Tribunal guidance decisions are intended to have a normative effect on the decision-making of the Tribunal, they are not binding precedent … decisions remain final and valid provided they are lawfully made by the Tribunal.*[59]

- Additionally, there may be a subsequent Federal Court decision—whether on appeal from a guidance and appeal panel decision, or by way of judicial review—that has disapproved, or not followed, the relevant Tribunal guidance decision. The doctrine of precedent requires the Tribunal to apply the Federal Court decision, rather than the Tribunal guidance decision.
- In any of these scenarios, the panel's decision should not be described as "guidance". Given this, it would be preferable for the panel to be named "Appeal Panel", and the terminology of "Tribunal guidance decision" throughout the ART Bill be replaced with "Appeal Panel decision".

91. On the other hand, the Law Council has also received feedback that the title of the panel should not be changed.

- According to this view, the word "guidance" does not indicate precedential effect. The words "must have regard to" are indicative of the impact of a panel decision as precedential, but as demonstrated from the jurisprudence in the courts, cases can always be distinguished. This will be particularly the case in the Tribunal, noting that its decisions include factual findings.

[55] Administrative Review Tribunal Bill 2023 (Cth) cl 54, 109.
[56] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 107 [751].
[57] Administrative Review Tribunal Bill 2023 (Cth) cl 110(1).
[58] Ibid cl 110(2).
[59] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 100-101 [700].

- Since the purpose of having a second tier of review is to encourage consistency, the requirement to follow a relevant panel decision—noting that such panel decisions are likely to be quite rare—is in line with that principle.

92. Whilst the Law Council has been unable to resolve these divergent positions in the limited time available, it raises these issues for the Committee's consideration of the ART Bill, noting that the Committee may wish to raise these matters with AGD during the inquiry.

Triage and access

93. Besides the President's function of the "sorting, prioritisation, allocation and treatment of applications for review and related matters",[60] there is no reference to triage in the ART Bill, including Part 5. The role of triaging is essential to identify patterns in applications, such as of the kind identified when the Robodebt scheme occurred.

94. The identification of matters suitable for referral to the guidance and appeals panel should be done by triage. This should be undertaken at an early stage, by a legally qualified member or conference registrars, in a process that enables the prioritisation of matters, as well as identification, including reporting to the President.

95. The Law Council observes that access to the guidance and appeals panel is limited. An appeal to the panel will occur only if the President refers the decision to it under clauses 122 or 128. This "filter" mechanism is likely to be appropriate on efficiency grounds.

96. The Law Council notes that decisions of the President failing to refer, or refusing to refer, a decision may be the subject of judicial review under section 39B(1) of the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, a failure to refer may not be transparent, so any challenge is unlikely.

Recommendation

- **Part 5 of the ART Bill should provide for the triaging of matters, at an early stage and by a legally qualified member or conference registrar, to identify matters suitable for referral to the guidance and appeals panel.**

Part 6—Proceedings in Intelligence and Security jurisdictional area

Overview

97. Part 6 of the ART Bill addresses proceedings in the Intelligence and Security jurisdictional area. It summarises that special rules apply when the Tribunal's powers in relation to a proceeding are exercised in this area.[61] This occurs if the proceeding relates to an intelligence and security decision, or if the President otherwise directs (for example, where the President is satisfied that national security information would be involved).[62]

[60] Administrative Review Tribunal Bill 2023 (Cth) cl 36(j).
[61] Ibid cl 132.
[62] Ibid cl 134.

98. An intelligence and security decision is defined in clause 4 as:[63]

- a criminal intelligence assessment; or
- an exempt security record decision; or
- a foreign acquisitions and takeovers decision; or
- a preventative detention decision; or
- a security assessment; or
- a security clearance decision; or
- a security clearance suitability assessment.

99. National security information has the same meaning[64] as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**).[65]

100. Under Part 6, the standard Tribunal process is adjusted in several respects including as follows.

- Clause 136 provides that Division 3 of Part 10 (decision-makers to give reasons for decisions) of the ART Bill does not apply in relation to intelligence and security decisions. This has the effect that the applicant cannot seek a statement of reasons for the decision from the decision-maker under the ART Bill. The general obligation on decision-makers to provide a statement of reasons also does not apply to intelligence and security decisions.[66]
- Clause 140 provides for a pathway for an applicant to apply to the Tribunal for review of the Tribunal's decision in relation to certain intelligence and security decisions[67] on the basis that further evidence of material significance has become available, which was not available at the time of the initial review.
- Clauses 145 and 146 establish that the Tribunal is differently constituted (in general, by the President, or a Deputy President, or 3 members, at least one of whom is the President or a Deputy President. However, for preventative detention decisions, the Tribunal must be constituted by either the President or a Judicial Deputy President).
- Clause 148 provides that most hearings[68] are held in private.
- Clause 149 sets out the persons entitled to be present at hearings in relation to proceedings for review of intelligence and security decisions, subject to any security certificate issued under clause 158.
    - This includes the right of applicant and their representative to be present when submissions are made by the agency head (or representative) or a relevant body.

[63] These terms are all separately defined: Ibid cl 4.
[64] Ibid.
[65] This means: information (a) that relates to national security; or (b) the disclosure of which may affect national security (under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**), s 7). 'National security' is defined in turn to mean Australia's defence, security, international relations or law enforcement interests (NSI Act s 8).
[66] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 119 [826]-[828], which notes that this clause does not affect any requirements in relation to a statement of grounds, or reasons for the decision, set out in the relevant Act under which the decision is made.
[67] Excluding exempt security record decisions or preventative detention decisions: Administrative Review Tribunal Bill 2023 (Cth) cl 140(1).
[68] With respect to proceedings that relate to an intelligence and security decision, other than an exempt security record decision, and subject to clauses 149 (persons entitled to be present) and 158 (security certificates – responsible Ministers).

- Clause 151 sets out the order in which the Tribunal must initially hear evidence and submissions in a proceeding for review of an intelligence and security decision, unless the Tribunal determines otherwise: first the head of the agency, then the relevant body, then the applicant.
- Clause 152 underlines that the Tribunal must not give the applicant particulars of evidence or a submission in contravention of another provision of the Bill that prohibits or restricts the disclosure of those particulars,
- Clause 155 provides that, with respect to an intelligence and security decision, the Guidance and Appeals Tribunal does not apply in relation to an application for review of the decision, or a decision of the Tribunal on review of the decision.
- Clause 156 provides that the Tribunal has a general duty, even though there may be no relevant certificate under the Bill or any other Act, to ensure, so far as possible, that information is not communicated or made available if it would prejudice: the security, defence or international relations of the Commonwealth; or law enforcement interests.
- Clause 157 provides that the Tribunal, in considering whether to make an order under clause 70 restricting publication or other disclosure of information, must:
  - have regard to the necessity of avoiding national security information; and
  - if the proceeding is for review of an intelligence and security decision - give particular weight to any submission made by, or on behalf of, the agency head.

  Under clause 157, the Tribunal may also prohibit or restrict the publication or disclosure of the whole, or any part, of its findings in the proceeding.
- Clause 158 provides that where a responsible Minister issues a security certificate regarding the disclosure of evidence or the making of submissions, when relevant evidence is adduced or the submission is made: the applicant must not be present; and the applicant's representative must not be present without the Minister's consent. It is an offence for the applicant's representative to disclose the evidence/information.[69]
- Clause 159 provides that where a sensitive information certificate is issued by the Director-General of Security, the information must not be disclosed to the applicant or any person (other than certain listed persons).
- Clause 161 provides that where a public interest certificate is issued by the responsible Minister, the Tribunal may only provide the information to the applicant in limited circumstances.[70]
- Clause 162 provides that, where a non-disclosure certificate is issued under other legislation permitting non-disclosure to the applicant in informing them of the original decision, the Tribunal is obliged not to disclose this information.
- Clauses 162 and 164 provide that, for security clearance and preventative detention decisions, limits are placed on the decisions that may be made by the Tribunal.
- Clause 167 provides that the Tribunal may direct that the whole or a particular part of its findings, as far as they relate to a matter that has not already been

[69] Administrative Review Tribunal Bill 2023 (Cth) cl 158(8).
[70] Ibid under cl 161(6), where the certificate does not specify a reason set out in cl 161(2)(a), (b) or (c).

disclosed to the applicant, is not to be given to the applicant or a relevant body.

Position

101. The Law Council understands that, generally, Part 6 brings together procedures relating to the way in which applications for review of intelligence and security decisions are handled that are currently dealt with separately in various Acts.[71] The Explanatory Memorandum makes multiple references to Part 6 provisions consolidating existing provisions and reflecting modern drafting practices, rather than affecting the operation or effect of relevant provisions.[72]

102. The fourth Independent National Security Legislation Monitor (**INSLM**), Grant Donaldson SC, in his review[73] into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) considered[74] whether the scope of the NSI Act should be extended to administrative decisions of Commonwealth executive government. While he did not recommend[75] the definition of civil proceedings in the NSI Act be changed, his report found the *Australian Security Intelligence Organisation Act 1979* (Cth) and the AAT Act 'co-ordinate to create processes inconsistent with the NSI Act, though similar to the special court order processes in Part 3A, Division 3, Subdivision B (of the NSI Act)'.[76] The fourth INSLM noted that these inconsistencies require further consideration and 'will arise in the same way with a successor tribunal'.[77]

103. The potentially significant impact of a non-disclosure certificate on an affected individual's right to natural justice is illustrated by the case of *SDCV v Director-General of Security*.[78] In that case, the Director-General of the Australian Security Intelligence Organisation certified that SDCV was a risk to security, that adverse assessment underpinned the cancellation of their visa[79] on character grounds. In that case, certain contents of documents pertaining to the adverse security assessment decision were subject[80] to a non-disclosure certificate. This had the effect that the certified matters were not disclosed to the applicant or their legal representatives in review proceedings before the security division of the AAT or in a subsequent appeal before the Federal Court under subsection 46(2) of the AAT Act.

104. Unlike the NSI Act, which establishes[81] a weighted balancing exercise, taking into account countervailing interests in disclosure,[82] clause 159 of the ART Bill and existing section 46(2) of the AAT Act operate as 'blanket proscriptions' in respect of

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[71] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 117 [811], citing the AAT Act, the *Australian Crime Commission Act 2002* (Cth), *Archives Act 1983* (Cth), *Foreign Acquisitions and Takeovers Act 1975* (Cth) and *Freedom of Information Act 1982* (Cth).
[72] See, eg, Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) [817], [835], [837], [847], [850], [879], etc.
[73] Fourth Independent National Security Legislation Monitor, Grant Donaldson SC, Review into the operation and effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Report, October 2023). (***INSLM's NSI Act Review***)
[74] Ibid, 119 [434]-[435].
[75] Ibid 120 [438].
[76] Ibid 119, [436].
[77] Ibid 118 [432].
[78] *SDCV v Director-General of Security* (2022) 405 ALR 209 ('***SDCV***').
[79] *Migration Act 1958* (Cth), s 501(3).
[80] *Australian Security Intelligence Organisation Act 1979* (Cth), s 38(2)(b).
[81] In relation to federal criminal proceedings, NSI Act, s. 31(7) and in relation to federal civil proceedings, ss 38J and 38L.
[82] It is noted that the Law Council considers that this weighted approach in the NSI Act, which emphasises national security over other factors, is unnecessary and may undermine fair outcomes.

certified information (as do certain other provisions in the ART Bill). In this regard, Gageler J, in dissent, in SDCV observed:[83]

> *Depending on the issues in the appeal and on the degree of relevance or perceived relevance of the certified information to the resolution of those issues, the blanket proscription may well be a problem for a party to the appeal who is unaware of the information. By force of the proscription, that party will never know the information despite it being able to be considered by the Federal Court in the determination of the appeal. Typically, that party will be an applicant before the Federal Court. Typically, that party will be an individual. My opinion is that the blanket proscription by s 46(2) of the AAT Act of disclosure of information certified under s 39B(2)(a) of the AAT Act renders the process by which the Federal Court is to hear and determine an appeal under s 44 of the AAT Act procedurally unfair.*

105. Edelman J, also in dissent, noted that this procedural unfairness may have been partly mitigated by a provision requiring the ASIO Minister to provide evidence to the court 'that could justify the certification that a matter falls within a category (in section 39(B(2) of the ASIO Act)'.[84]

106. The Law Council suggests that further consideration be given to enabling[85] a court to mitigate procedural unfairness occasioned by provisions such as clauses 158 and 159 of the ART Bill by disclosing some or all of the material subject to a non-disclosure certificate after balancing the countervailing interests in disclosure. In this regard, consideration should be given to the comments[86] of the fourth INSLM regarding the balancing exercise undertaken by the court under the NSI Act. Under the NSI Act, '(t)he court can accept, reject, or vary what the Attorney-General has proffered in a certificate, both as to redactions, lists or summaries of information and as to the circumstances in which information can be disclosed'.[87]

107. It is notable that the consideration of safeguards limiting procedural unfairness was significant in the High Court's consideration of the constitutional validity of the non-disclosure mechanism contained in section 46(2) of the AAT Act. The constitutional validity of the non-disclosure mechanism[88] was upheld[89] by a bare majority of the High Court. The Court differed[90] on the question of whether the AAT Act authorises the appointment of a special advocate. In dissent, Edelman J expressed concern that:[91]

> *The many policy and functional decisions required to create a scheme for appointment of a special advocate in the context of a final judicial adjudication are not matters that can be resolved by a court. Those*

[83] SDCV [111] (Gageler J).
[84] SDCV [250] (Edelman J).
[85] In this regard, in SDCV, [246], Edelman J observed: 'There is no power for a court to consider disclosure of some or all of the material by balancing that matter against the potential extreme procedural unfairness to an appellant, even where the public interest involved under s 39B(2) might be trivial, such as a minor aspect of the international relations of Australia or something at the low end of the spectrum of matters that could form the basis for a claim of privilege by the Crown in right of the Commonwealth in the documents.'
[86] INSLM's NSI Act Review, Chapter 12—The court's decision.
[87] INSLM's NSI Act Review 184 [686].
[88] In particular, *Administrative Appeals Tribunals Act 1975* (Cth) s 46(2).
[89] SDCV (Kiefel, Keane and Gleeson JJ); [269] (Steward J agreeing).
[90] In SDCV, the plurality opinion doubted that section 46 of the AAT Act could be construed to support the appointment of a special advocate [98] (Kiefel, Keane and Gleeson JJ); Edelman J, in dissent, expressed a similar view: [223]. A contrary view was expressed by Steward J: [295]-[296].
[91] SDCV [259] (Edelman J).

> *decisions are the province of the legislature, as can be seen by comparison with the statutory regime for the appointment of a special advocate in the (NSI Act) …*

108. The Law Council has long argued,[92] in the context of the NSI Act, that consideration should be given to statutory safeguards to enable a special advocate to be appointed where parties and their legal representatives have been excluded from appearing because of a non-disclosure mechanism. Furthermore, the Law Council maintains its view that fundamental minimum safeguards[93] must be embedded in statute to regulate the role and functions of a special advocate.

109. In the context of the current ART Bill, while acknowledging that its provisions are largely in line with existing approaches under the AAT Act and other legislation, the Law Council suggests that it would be beneficial for the current (fifth) INSLM to review whether Part 6 of the Bill and related provisions concerning the approach adopted in the Tribunal to matters of intelligence and security are likely to operate fairly and appropriately in practice. In this context, the Law Council underlines that certain provisions outlined in Part 6 of the ART Bill limit the applicant's access to information including reasons for adverse decisions, their rights to be present when certain evidence is adduced or submissions made, and impose offences on the applicant's representative in certain circumstances.

110. Over time, the array of decisions which may come under the Tribunal's review when constituted under Part 6 may be seen to have expanded. While acknowledging that many of the ART Bill's provisions may be considered warranted in light of key procedural differences between the ART Bill and the NSI Act, some of the issues identified in that context may also pose legitimate concerns with respect to merits review under the ART Bill.

111. The Law Council further underlines that several decisions which will arise before the Tribunal's Intelligence and Security jurisdictional area for review will have particularly serious consequences for the individual—such as preventative detention decisions and security assessments—and warrant careful scrutiny in this regard.

112. Given this, the Law Council recommends that Part 6 and related provisions, should be referred to the current INSLM for a dedicated review, to ensure that an appropriate balance is struck between national security, fairness and transparency objectives. It understands that this review would need to occur after the passage of the Bill.

113. The Law Council suggests that the INLSM review should have regard to the matters raised above, including the concerns raised by the fourth INSLM and Gageler and Edelman JJ in SDCV. These matters include the potential implications of relevant ART Bill provisions for procedural fairness in court appeals and the potential role of special advocates to ensure greater fairness where individuals and legal representatives are denied access to adverse information.

114. The Law Council also suggests this review should occur in the context of the development of principles or guidance for relevant Commonwealth agencies regarding how broader administrative review objectives may best be achieved in the

[92] Law Council of Australia, Review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (Submission to the INSLM, 26 June 2023) <https://lawcouncil.au/resources/submissions/review-into-the-operation-and-effectiveness-of-the-national-security-information-criminal-and-civil-proceedings-act-2004> 34 [114].
[93] Ibid 34-35 [117].

national security context. Such a review could be done by the ARC, drawing on independent specialist national security expertise including the INSLM.

Recommendation

- **Part 6 and related provisions should be referred to the INSLM for review, to ensure that an appropriate balance is struck between national security, fairness and transparency objectives.**
- **This review should be complemented by the development of principles or guidance for relevant Commonwealth agencies regarding how broader administrative review objectives may best be achieved in the national security context.**

Part 7—Appeals and references of questions of law to Federal Court

115. The Law Council supports Part 7, which makes provision for appeals on questions of law and referrals of questions of law to the Federal Court. The preservation of section 44 of the AAT Act is particularly welcome. However, the Law Council notes that in Schedule 2 to the Consequential Bill, item 237 mirrors section 43C of the AAT Act,[94] which maintains the current settings of precluding certain migration decisions from being appealed on questions of law to the Federal Court.

Part 8—Members and staff of Tribunal

116. The Law Council strongly supports Part 8 of the ART Bill, which clearly sets out the structure, membership levels and staffing of the Tribunal, the functions of those membership levels and staff, and the appointment and termination processes.

Senior Leadership

117. The ART Bill defines the role and functions of the:

- President;[95]
- Deputy Presidents;[96]
- Jurisdictional area leaders;[97] and
- Chief Executive Officer and Principal Registrar.[98]

118. The Law Council welcomes these clearly defined roles and responsibilities, noting the importance of avoiding ambiguity in how the senior leadership of the Tribunal's administration operates.

119. The Law Council also supports the provisions relating to the qualifications and appointment process for each of these roles, particularly the emphasis on a merit-based and transparent process, which is critical to promote public confidence in the Tribunal (consistent with the objective in clause 9(e)) and to ensure its longevity.

[94] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 237 (proposed s 474AA(1) of the *Migration Act 1958* (Cth)).
[95] Administrative Review Tribunal Bill 2023 (Cth) cl 193.
[96] Ibid cl 194, 206-207.
[97] Ibid cl 197.
[98] Ibid cl 225-227.

Tribunal Advisory Committee

120. Clause 236 establishes the **Tribunal Advisory Committee**, which consists of the President, the Principal Registrar, the jurisdictional area leaders, and such other members or staff members as are nominated by the President.

121. The Law Council supports the establishment of the Tribunal Advisory Committee, noting that the President is to be Chair,[99] and that the Tribunal Advisory Committee is to be consulted by the President before making a practice direction,[100] and before establishing or abolishing a list.[101]

122. However, the Law Council observes that the ART Bill does not include a requirement for the President to consult with the Tribunal Advisory Committee before making rules. The ART Bill should include such an obligation.

President

123. The Law Council supports the qualification requirements for the President in clause 205. The retention of the existing requirement that the President of the Tribunal be a Federal Court judge is welcome,[102] as this guarantees a measure of quality and independence of an applicant that a wider selection process, however rigorous, is unlikely to yield. This approach also has the advantage of promoting an understanding and effective dialogue between the two bodies, and perhaps more importantly, will ensure that the Tribunal is led by a judicial officer with constitutionally enshrined independence from the Executive.[103]

124. The Law Council welcomes the emphasis in clause 193 on the President's role in promoting leadership, guidance, performance management, cohesiveness and collaboration in the Tribunal, in addition to engagement with civil society.[104] These functions will ensure that the President's core focus will be ensuring high quality decision-making across the Tribunal, for which the Law Council has previously advocated.[105] It will, therefore, be critical that the appointed individual has the time and capacity to ensure they can carry out these significant overarching duties, which will be material to the culture of the Tribunal and the public's perception of its operation.

125. Clause 242 requires the President to prepare a report on the management of the administrative affairs of the Tribunal for each financial year and give it to the Minister by 15 October of that year. The Law Council is supportive of the matters that must be included in such report, per clause 242(2), including an overview of any actions taken during the year in relation to non-judicial members upholding the code of conduct or meeting the performance standard.[106] However, to promote procedural fairness, the Law Council suggests that clause 242(2)(j) be amended to require that the President's report must not identify members who remain under investigation, or have been determined to have acted within the code of conduct or performance standard.

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[99] Ibid cl 236(3).
[100] Ibid cl 36(3).
[101] Ibid cl 196(3).
[102] Ibid cl 205(3).
[103] Previous Submission, 13-14.
[104] Administrative Review Tribunal Bill 2023 (Cth) cl 193.
[105] Previous Submission, 17.
[106] Administrative Review Tribunal Bill 2023 (Cth) cl 242(j).

Identification of systemic issues by President

126. One of the functions of the President is:

> *to inform relevant Ministers, relevant Commonwealth entities and the [Administrative Review] Council of any systemic issues related to the making of reviewable decisions that have been identified in the caseload of the Tribunal;*[107]

127. The Law Council strongly supports this function and considers that it promotes the facilitation of a "feedback loop" between the Tribunal and relevant agencies regarding systemic issues.

128. Whilst the ART Bill does not contemplate what would constitute a "systemic issue", the Law Council considers that such circumstances that could evolve include:

- repeated instances of an agency making decisions on the basis of an invalid policy, notwithstanding a Tribunal decision holding it invalid, with further affected persons seeking review in the Tribunal;
- a pattern of delay in an area of an agency's decision-making; or
- an agency's failure to implement Tribunal decisions.[108]

129. Clause 242 requires the President to prepare a report at the end of each financial year and give it to the Minister by 15 October, to be tabled in each House of the Parliament thereafter. This report must include, among other matters, a summary of any actions taken by the President or jurisdictional area leaders during that year to identify systemic issues related to the making of reviewable decisions arising in the caseload of the Tribunal, and any actions taken to inform relevant Ministers, Commonwealth entities and the ARC of those issues.[109]

130. Relatedly, clause 264(2) of the ART Bill provides that the ARC's report at the end of each financial year to the Minister *must* include a description of any systemic issues related to the making of reviewable decisions that the President has informed the ARC of during the year. Per clause 264(3), the report *may* include a description of:

- any actions taken by the ARC during that year in response to a systemic issue; and
- any response, that the ARC is aware of, from a Commonwealth entity or a Minister during that year in relation to a systemic issue.

131. Despite the above clauses, it is not apparent from the ART Bill how agencies and Ministers will be required to publicly respond—if at all—upon being informed of a systemic issue by the President or the ARC. This is an important aspect of the Tribunal's feedback loop mechanism and would promote transparency and accountability on the part of agencies. This is essential, in light of the findings from the Royal Commission into the Robodebt Scheme.

[107] Ibid cl 193(i).
[108] Previous Submission, 18.
[109] Administrative Review Tribunal Bill 2023 (Cth) cl 242(i).

132. Potential options to increase the accountability of agencies and Ministers may include:

    (a) an agency being required to publish, in its annual report (or another public-facing document) instances where it has been informed of a systemic issue (by the Tribunal and other integrity bodies, including the Commonwealth Ombudsman), and any action taken to address, or respond to, the issue, or reasons why no action was taken;[110] or

    (b) requiring the responsible Minister to table a response in the Parliament after a specified period (eg, six months from notification), which:

    - provides details of any action taken (or proposed to be taken) as a consequence of notification of the systemic issue; or

    - if no action has been taken (or is proposed to be taken), giving reasons for not doing so.[111]

133. The Law Council does not seek to advocate for any particular option, but makes the overarching recommendation that, to complement the functions of the President under clause 193(i), an agency and/or Minister should be required to provide a published response to any notification of systemic issues related to the making of reviewable decisions within a specified timeframe.

Recommendations

- **The President should be required to consult with the Tribunal Advisory Committee before making rules.**
- **Clause 242 should be amended to require that the President's report must not identify members who remain under investigation, or have been determined to have acted within the code of conduct or performance standard.**
- **Following notification of systemic issues by the President or the ARC, the relevant Commonwealth agency and/or Minister should be required to provide a published response addressing any such systemic issue(s) within a specified timeframe.**

Members

134. The clear and simple membership structure is supported, including provision for senior members and general members. Clauses 195 and 208 set out appropriate distinctions between levels, in terms of their appointment and functions.

Legal qualifications

135. Per clause 208, legal qualifications are not required for appointment as a senior member or general member.

[110] This would be most appropriately achieved by amending legislation pertaining to each individual agency, rather than in the ART Bill itself, given that the ART Bill only relates to agencies whose decisions are reviewable through the Tribunal.
[111] See, eg, *Coroners Act 2003* (SA) s 25(5)(a).

- A person can be appointed as a *senior member* if, in the event they have not been enrolled as a legal practitioner for at least seven years, the Minister is satisfied that the person has at least seven years' specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal.[112]
- A person can be appointed as a *general member* if, in the event they have not been enrolled as a legal practitioner for at least five years, the Minister is satisfied that the person has at least five years' specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal.[113]

Senior members

136. The Law Council understands that the complexity of legislation currently applied by the AAT—and which will be applied in the Tribunal—has grown significantly across all jurisdictional areas since the AAT's establishment. The AGD's submission to the Committee states:

> *The Tribunal will comprise hundreds of appointed members who are called upon to review administrative decisions under more than 250 different Commonwealth laws.*[114]

137. Given this situation, legal qualifications, and the years of enrolment involving experience in statutory interpretation, will be essential to enable the satisfactory performance of the functions of a senior member, as set out in clause 195(1). The Law Council—noting that the Callinan Review found that "there is … no necessity to appoint professionals other than lawyers to the AAT"[115]—recommends that it be a requirement for senior members to have a legal qualification, regardless of whether they are appointed on a salaried or sessional basis.[116]

138. Clause 208(3)(b) (and by extension, clause 208(4)(b), regarding general members) provides the alternative to legal qualification for senior members. It requires that the Minister must be satisfied that the person has at least seven years' "specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal".

139. Clause 208(3)(b) (and by extension, clause 208(4)(b), regarding general members) is unjustifiably broad. It might include, for example a person who has been employed as a policy or program officer for seven or more years, in a Commonwealth agency of relevance to the Tribunal's operations (such as the Department of Home Affairs, or Department of Social Services). While respecting the important role of such professionals, this does not, in the Law Council's view, render this group suitable for appointment as a senior member by the Minister under clause 208(3)(b). It cannot be assumed that this experience is the kind that gives the person sufficient expertise relevant to merits review.

[112] Administrative Review Tribunal Bill 2023 (Cth) cl 208(3).
[113] Ibid cl 208(4).
[114] Commonwealth Attorney-General's Department, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs (January 2024) 4.
[115] The Hon Ian Callinan AC KC, Review: Section 4 of the *Tribunals Amalgamation Act 2015* (Cth) (Report, 23 July 2019) <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf> 175 [10.34].
[116] Administrative Review Tribunal Bill 2023 (Cth) cl 208(7).

140. Clause 208(3)(b) may further extend to former Ministerial adviser roles, where advisers have held responsibility for relevant areas of policy. This raises concerns about politically motivated appointments, particularly when considered alongside:

- clause 208(2), which merely requires the Minister to "be satisfied that the person was assessed as suitable" through a public and merit-based process; and
- clause 209, which provides the Minister with a discretion to establish an assessment panel. As recommended below, this discretion should be removed so that it is not open to the Minister to "side-step" such processes.

141. In the Law Council's view, clause 208(3)(b) should be deleted from the ART Bill. The primary focus when appointing members to the Tribunal, especially senior members, should be the quality of administrative decision-making of which they are capable. Persons with legal qualifications are generally much better-placed to fulfill the role of senior members, given both the increasing complexity of relevant laws and their prior training in administrative law principles, including procedural fairness.

142. In the alternative, however, if clause 208(3)(b) is retained, it should be redrafted so that a person must not be appointed unless the person has such "specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal" as set out in an instrument that has been prepared by the President. This will ensure greater integrity in any appointments made of non-legally qualified persons as senior members, and that the Tribunal's specific skills needs are understood and met.

General members

143. The Law Council does not object to general members not needing to have legal qualifications, per clause 208(4)(b). For some matters involving technical or specialised professional fields such as medicine, defence or social security, having a general member with experience and qualifications in that area can promote better exploration of issues and higher quality decision-making.

144. However, clause 208(4)(b) should be redrafted in line with the alternative recommendation for clause 208(3)(b), for the reasons outlined above.

145. The Law Council acknowledges it is possible for a member to acquire statutory interpretation skills, albeit having no formal legal training. However, given that such matters frequently involve legal complexity as well as technical complexity—carrying considerable risk of legal error—consideration should be given to whether there is scope for non-legally qualified members to, at times, sit alongside legally qualified members for the purposes of achieving uniformly higher quality decision-making across the new body.[117]

Quota of legally qualified members

146. The Law Council further recommends, in the alternative, that there be a baseline quota of legally qualified members at any one time in the Tribunal. This quota should be at least 75 per cent overall, and should apply regardless of whether members are appointed on a salaried or sessional basis.

[117] Previous Submission, 21.

147. In practice, any such quota would be enforced by way of the appointments process. Specifically, the Minister would not be permitted to make an appointment of a non-legally qualified general member, under clause 208(4)(b), or senior member, under clause 208(3)(b), if the result of that appointment would be to have fewer than 75 per cent of legally qualified members in the Tribunal.

Conflicts of interest

148. The Law Council considers that conflicts of interest are of particular concern with the appointment of salaried part-time members who hold a portfolio of appointments and work commitments, particularly where their employment involves practice in the private sector.

149. Clause 208 outlines the process for appointment of senior members and general members. A subclause should be inserted into clause 208, requiring that the person does not have a disclosable conflict of interest under clause 218.

Preclusion period

150. Clause 217 places limitations on the ability for members to appear as a representative of a party to a proceeding, or as an expert witness, in the Tribunal. This clause applies to current members,[118] as well as to former members in the first 12 months after they leave the Tribunal,[119] or during any longer period stipulated by a law of a State or Territory.[120] This restriction may be lifted in individual cases by the President or the Minister.[121]

151. The Law Council agrees with the intention of clause 217, as stated in the Explanatory Memorandum, to recognise that members, including former members, of the Tribunal will have special knowledge of its operations and relationships with their colleagues.[122] It is important that the ART Bill limits the potential for any apprehension of bias in proceedings before the Tribunal.[123]

152. The Explanatory Memorandum provides:

> *Various state laws exist restricting the appearance of barristers and solicitors for different time periods (such as clause 95(n) of the '2011 Barristers' Rule, as amended' made under the Legal Profession Act 2007 (Qld)). The intention is not to shorten these periods, but rather to set a minimum restriction of 12 months where it is not otherwise regulated.*[124]

153. The Law Council recognises that the issue of avoiding apprehended bias has traditionally been dealt with by the professional conduct rules for barristers and solicitors that set periods of time—moratorium periods—that must elapse before a former judicial officer can appear before a former court. However, the application of those rules is tempered by the inherent power of a court to determine for itself who may, or may not, appear before it.

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[118] Administrative Review Tribunal Bill 2023 (Cth) cl 217(2)(a).
[119] Ibid cl 217(2)(b)(i).
[120] Ibid cl 217(2)(b)(ii).
[121] Ibid cl 217(3).
[122] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 183 [1267].
[123] See Australian Law Reform Commission, Without Fear or Favour: Judicial Impartiality and the Law on Bias (ALRC Report 138, December 2021) <https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>.
[124] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 183 [1269].

154. The Law Council recommends that clause 217 be reconsidered for the following reasons:

- The professional conduct rules for barristers and solicitors relating to moratorium periods are currently the subject of significant review by the Law Council (for solicitors) and the Australian Bar Association (for barristers).
- A professional conduct rule made under the law of a State or Territory cannot displace the power of a court or tribunal to decide for itself who may, or may not, appear before it.
- It is undesirable for clause 217 to enable inconsistent preclusion periods for former Tribunal members, depending on the jurisdiction they are in.
- There is a risk that, as drafted, clause 217(2)(b)(i) will be perceived as a minimum fixed 12-month statutory prohibition in all cases, disincentivising appropriately qualified and experienced candidates from seeking roles in the Tribunal, particularly on a part time or sessional basis.
- It is inappropriate for clause 217(3) to contemplate that a current member may obtain permission to appear as a representative of a party, or as an expert witness in the Tribunal.

155. The Law Council recommends that clause 217 be amended to provide that:

- a former member of the Tribunal must not seek to appear in a proceeding before the Tribunal, unless permitted to do so by the Minister (in the case of the President) or the President (in any other case) for their first such appearance; and
- a current member must not appear in a proceeding in the Tribunal in any circumstance.

156. Should clause 217 be amended as recommended, it could then, appropriately, operate in conjunction with any rules or guidelines issued by the President regarding appearances by former members. This approach will enable increased flexibility within the ART Bill by ensuring that the onus is on the former member to seek permission to appear in the Tribunal, in accordance with any such guidelines, and justify why their appearance would not lead a reasonably minded lay observer to an apprehension of bias in the matter.

157. In addition, the Law Council envisions that, should clause 217 be amended, one reason for the positive exercise of discretion by the Tribunal would be that the former member is permitted to appear in a jurisdictional area in which they have not previously made decisions (or, at most, have made a minimal number of decisions).

158. Alternatively, clause 217(2)(b)(ii) could be redrafted as “if a different period would apply because of the effect of a law of a State or Territory—that period”.

Recommendations

- **All senior members should be required to have been enrolled as a legal practitioner for at least seven years. Clause 208(3)(b) should be deleted from the ART Bill.**
- **In the alternative, if it is to be retained, clause 208(3)(b) should be redrafted so that a person must not be appointed as a senior member unless the person has such “specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal” as set out in an instrument that has been prepared by the President.**

- **A baseline quota of legally qualified members should be implemented of at least 75 per cent across the Tribunal.**
- **Clause 208(4)(b) should be redrafted so that a person must not be appointed as a general member unless the person has such "specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal" as set out in an instrument that has been prepared by the President.**
- **Clause 217 should be amended to provide that a former member of the Tribunal must not seek to appear in a proceeding before the Tribunal, unless permitted to do so by the Minister (in the case of the President) or the President (in any other case) for their first appearance. Alternatively, clause 217(2)(b)(ii) should be redrafted as "if a different period would apply because of the effect of a law of a State or Territory—that period".**

Appointments and period of appointment

159. As outlined above, the Law Council welcomes the emphasis on merit-based selection processes for members in Part 8 of the ART Bill. Clause 4 provides that an assessment process for an appointment to an office is merit-based only if:

- an assessment is made of the comparative suitability of the candidates for the duties of the office, using a competitive selection process; and
- the assessment is 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
- the assessment takes into account the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal.

160. While the Law Council is supportive of the definition of "merit-based" in clause 4, consideration should be given to strengthening this definition by requiring that the position be publicly advertised in at least two places for a minimum specified period of time.[125]

Assessment panels

161. Clause 209(1) provides that:

> *The Minister may, from time to time, establish one or more panels (**assessment panels**) of persons to assess a candidate or candidates for appointment as a member*.

162. The Explanatory Memorandum states:

> *This is a new feature of the Tribunal, and has been introduced to set an expectation that the assessment process will be undertaken by a separate panel prior to suitable candidates being considered by the Minister.*[126]

[125] See, eg, Commonwealth, Guidelines for appointments to the Administrative Appeals Tribunal (December 2022) <https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat> 1: "Expressions of interest in appointment will be sought via public advertisement. Positions will be advertised at a minimum on the APSjobs website and in the national press".
[126] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 178 [1237].

163. The Explanatory Memorandum does not provide a reason why the ART Bill stops short of requiring the Minister to establish an assessment panel for the purpose of merit-based assessment of candidates. It may be that clause 209(1) is drafted so as to provide the Minister with flexibility when appointing members, particularly during the transitional period, when regulations will have not yet been made under clause 209(2)–(3).

164. Nevertheless, the Law Council is concerned that clause 209(1), as currently drafted, will allow the Minister to bypass the assessment panel process, particularly in circumstances where the candidate may not have the requisite skills and experience. It is essential for the Tribunal's success that all appointments to the Tribunal are—and are perceived to be—merit-based. The Law Council notes that the Commonwealth's interim *Guidelines for appointments to the AAT* require an assessment panel to be established.[127]

165. In the absence of a compelling rationale from the AGD for the current form of clause 209(1), the Law Council suggests that clause be redrafted as follows:

> *The Minister must establish one or more panels (assessment panels) of persons to assess a candidate or candidates for appointment as a member.*

166. If the Committee is persuaded that there may be exceptional circumstances in which establishing an assessment panel may be unpracticable, the Minister should at least be required to set out in writing (such as by tabling a statement of reasons) why a different approach has been adopted. Reasons should also be required to be provided when the Minister selects a candidate who did not appear on the shortlist provided by the assessment panel.

167. Noting that a third Bill, containing additional consequential amendments, will be introduced this year,[128] that Bill could contain a transitional exception for the use of other assessment panels to operate, upon the passage of the ART Bill, until such time that the regulations come into effect.

168. In addition, clause 209 could be strengthened to require that assessment panels must consist of suitably high-level, independent individuals with appropriate expertise. As currently drafted, clause 209 is excessively reliant on the regulations—which are yet to be released—which, in practice, could enable inadequately qualified panels to be established, resulting in poor or inappropriate selections of candidates for the Minister's consideration.

169. Consideration could also be given to linking clause 209(1) directly to the relevant provisions concerning appointments – for instance, by adding the relevant sections at the end of clause 209(1).

170. More broadly, consideration should also be given to increasing the prominence of the role of assessment panels within Part 8 of the ART Bill, given the critical role that assessment panels will play in ensuring that appointments to the Tribunal are merit-based. At present, assessment panels only appear in clause 209 and are not

[127] Commonwealth, Guidelines for appointments to the Administrative Appeals Tribunal (December 2022) <https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat> 2.
[128] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 1 [4].

mentioned in any of the clauses relating to the appointment process for specific positions in the Tribunal.

Terms of appointment

171. The Law Council supports the general approach of five-year terms of appointment for the President,[129] Deputy Presidents,[130] the Principal Registrar,[131] senior members and general members.[132] This will ensure that there is sufficient duration to promote integrity and institutional knowledge. However, the Law Council notes that these provisions also enable a shorter term to be specified in the instrument of appointment. The instrument must state the reasons why the shorter period is specified. This is generally appropriate.

172. However, in the case of the President and Judicial Deputy Presidents, consideration should be given to redrafting clauses 205(5) and 206(5) to provide that the only reason why a shorter appointment period can be specified in the instrument of appointment is due to the Judge reaching compulsory retirement age, noting that, per clause 210(3), "a member who is a Judge ceases to hold office as a member if the member ceases to be a Judge".

Recommendations

- **A subclause should be inserted into clause 208, requiring that the person does not have a disclosable conflict of interest under clause 218.**
- **Clause 209 should be redrafted to:**
  - **require the Minister to establish an assessment panel to assess candidates for appointment as a member under relevant appointment provisions; and**
  - **require that assessment panels must consist of independent individuals with appropriate expertise.**
- **Where no assessment panel is established, or where a candidate is selected who has not been shortlisted by the assessment panel, the Minister should be required to provide reasons, in writing, why a different approach was adopted.**
- **Consideration should be given to redrafting clauses 205(5) and 206(5) to provide that the only reason why a shorter appointment period can be specified in the instrument of appointment for the President or a Judicial Deputy President is because that person will reach the compulsory retirement age for a Judge at the end of that period.**

[129] Administrative Review Tribunal Bill 2023 (Cth) cl 205(4)-(5).
[130] Ibid cl 206(4)-(5), 207(4)-(5).
[131] Ibid cl 227(3).
[132] Ibid cl 208(5)-(6).

Internal structure

173. Clause 196(1) establishes the following jurisdictional areas of the Tribunal:

- General;[133]
- Intelligence and Security;[134]
- Migration;[135]
- National Disability Insurance Scheme (**NDIS**);[136]
- Protection;[137]
- Social Security;[138]
- Taxation and Business;[139] and
- Veterans and Workers Compensation.[140]

174. The Law Council supports the establishment of jurisdictional areas in Division 2, Subdivision B of Part 8 and considers this structure, which includes a leader for each area, will assist to facilitate an efficient and effective Tribunal, while assisting to identify systemic issues arising in the caseload of the jurisdictional area.

175. The Minister is required to assign and vary the jurisdictional area leaders, in consultation with the President.[141] However, the President can establish lists within a jurisdictional area (in consultation with the Advisory Committee),[142] assign senior members to lead lists,[143] assign members to a jurisdictional area,[144] and vary or revoke an assignment,[145] with no requirement for Ministerial approval.

176. There appears to be greater flexibility for the President to manage reassignments of members to jurisdictional areas in need of support, by reference to the changing demands of the Tribunal, than is currently the case and which has created administrative problems in the AAT. The Law Council has previously advocated for increased flexibility in this regard,[146] and considers that the proposed changes achieve an appropriate balance between proscription and flexibility.

177. On a minor grammatical point, the Law Council suggests removing the apostrophes in "Veterans' and Workers' Compensation", as drafted in clause 196(1)(h)—this phrase is descriptive of a practice area, rather than possessive.[147]

Recommendation

- **The apostrophes in clause 196(1)(h) should be removed, so that it reads "Veterans and Workers Compensation".**

[133] Ibid cl 196(1)(a).
[134] Ibid cl 196(1)(b).
[135] Ibid cl 196(1)(c).
[136] Ibid cl 196(1)(d).
[137] Ibid cl 196(1)(e).
[138] Ibid cl 196(1)(f).
[139] Ibid cl 196(1)(g).
[140] Ibid cl 196(1)(h).
[141] Ibid cl 197(1)-(3).
[142] Ibid cl 196(2)-(3).
[143] Ibid cl 198(1).
[144] Ibid cl 199(3).
[145] Ibid cl 198(2), 199(6).
[146] Previous Submission, 10.
[147] See Australian Government Style Manual, Apostrophes (Web Page, 2024) <https://www.stylemanual.gov.au/grammar-punctuation-and-conventions/punctuation/apostrophes>.

Part 9—Administrative Review Council

178. The Law Council has repeatedly advocated for the reinstatement of an adequately funded ARC (or similar body) and welcomes clause 246 of the ART Bill—and Part 9 more broadly—which seek to give effect to this.[148]

179. The Law Council was pleased to note that the Royal Commission into the Robodebt Scheme similarly recommended the reinstatement of the ARC in its July 2023 Report.[149] As governments, and governing, become increasingly complex, and the nature of decision-making evolves, there remains a critical need for an overarching body with a longer-term view, which draws upon a cross-section of experts and leaders, to monitor the operation of the Commonwealth administrative law system.

Membership

Ex-officio members

180. Per clause 247 of the ART Bill, the number of ex-officio members of the ARC has been reduced by two, by removing reference to the President of the Australian Human Rights Commission and the President of the Australian Law Reform Commission.[150]

181. This change leaves three ex-officio members: the President of the Tribunal, the Commonwealth Ombudsman, and the Australian Information Commissioner. The Law Council considers that this membership change is appropriate.

Appointed members

182. The Law Council is supportive of the requirement that, in addition to the three ex-officio members, the ARC is to have at least three, but not more than 10, other members.[151] It also appears to be appropriate that the ARC is to have a quorum of five members.[152]

183. Clause 254 provides the qualifications for appointment as a member of the ARC. The Law Council broadly supports the required qualifications, particularly the inclusion of persons with direct experience and direct knowledge of the needs of people (or groups of people) significantly affected by government decisions.[153]

184. However, the Law Council has concerns about qualifying an official of a Commonwealth entity who "is an SES [Senior Executive Service] employee".[154] An SES Band 1 typically holds the position of Assistant Secretary or Branch Head. The Law Council considers that an official at this level will hold insufficient influence and seniority for a representative of a Commonwealth entity on the ARC, especially for

[148] See Law Council of Australia, Statutory Review of the *Tribunals Amalgamation Act 2015* (Submission to the Callinan Review, 27 August 2018) <https://lawcouncil.au/resources/submissions/statutory-review-of-the-tribunals-amalgamation-act-2015>; Performance and integrity of Australia's administrative review system (Submission to the Senate Legal and Constitutional Affairs References Committee, 7 December 2021) <https://lawcouncil.au/resources/submissions/performance-and-integrity-of-australias-administrative-review-system>.
[149] Royal Commission into the Robodebt Scheme (Report, July 2023) <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF> [Recommendation 20.5].
[150] *Administrative Appeals Tribunal Act 1975* (Cth) s 49(1).
[151] Administrative Review Tribunal Bill 2023 (Cth) cl 247(d).
[152] Ibid cl 251(5).
[153] Ibid cl 254(1)(c).
[154] Ibid cl 254(1)(d)(ii).

agencies of a very large size, such as Services Australia and the Department of Home Affairs.[155]

185. The Law Council suggests that clause 254 require Commonwealth officials to be at the level of SES Band 3 (Deputy Secretary) or above. In practice, this change will mean that—appropriately—only the Secretary, or a Deputy Secretary, of an agency will be eligible to be a member of the ARC, to perform the high-level monitoring and policy direction function of the ARC, and for agencies to achieve the necessary buy-in of ARC recommendations.

186. In addition, consideration should be given to ensuring that the Secretaries of key agencies responsible for large volumes of decision-making are represented on the ARC, such as the Department of Social Services and the Department of Home Affairs, to ensure whole of government commitment to the reformed administrative review system.

187. More broadly, the Law Council considers that, across the membership of the ARC, there should be expertise on key subject areas, including refugee and migration matters, social security, the NDIS, and the use of machine technology in administrative decision-making.

Recommendations

- **To be eligible for appointment to the ARC, Commonwealth officials should be SES Band 3 (Deputy Secretary) level or above.**
- **Consideration should be given to ensuring that the Secretaries of key agencies responsible for large volumes of decision-making are represented on the ARC.**

Functions

188. The functions of the ARC in clause 249 are welcomed, particularly:

- monitoring the integrity and operation of the Commonwealth administrative law system;[156]
- inquiring into systemic issues related to the making of administrative decisions and the exercise of administrative discretions;[157] and
- developing and publishing guidance in relation to the making of administrative decisions and the exercise of administrative discretions.[158]

189. Clause 249 also provides that one of the functions of the ARC is "to support education and training for officials of Commonwealth entities"[159] in relation to administrative decision-making and the administrative law system. The Law Council agrees that such education and training is essential for Commonwealth officials and strongly supports the underlying intent.

190. However, on one view, this educative function may detract from the higher-level functions of the ARC and should instead be undertaken by the Australian Public Service (**APS**). The Law Council acknowledges that the Royal Commission into the

[155] Australian Public Service Commission, APS Agencies – size and function (Web Page, February 2023) <https://www.apsc.gov.au/aps-agencies-size-and-function>.
[156] Administrative Review Tribunal Bill 2023 (Cth) cl 249(1)(a).
[157] Ibid cl 249(1)(c).
[158] Ibid cl 249(1)(e).
[159] Ibid cl 249(1)(f).

Robodebt Scheme Report recommended that the reinstated ARC "should provide training and develop resources to inform APS members about the Commonwealth administrative law system".[160]

191. On balance, the Law Council supports the inclusion of the broad educative function in clause 249(1)(f). However, to improve clarity, the Law Council recommends replacing "support" with "inform", to better reflect the intention for the ARC to assist the APS by publishing guidance materials and other educational resources, as the ARC has previously done,[161] and monitor whether Commonwealth agencies are providing sufficient training to employees who are administrative decision-makers. This would better align with the higher-level ARC role.

192. Consideration should be given to providing the ARC with the additional function of monitoring the implementation of reports and recommendations relating to the Australian administrative law system. This deficiency in the current system would be remedied by providing the re-established ARC with this specific function.

Oversight and staffing

193. Part 9 of the ART Bill does not contemplate circumstances where there may be a conflict of interest: for instance, where the ARC has been asked by the Minister to inquire into a matter under clause 249(2)(a) involving a Commonwealth agency, but the head of that agency is a member of the ARC.

194. While the reporting requirements for the ARC are welcomed,[162] the ART Bill does not provide for a review to be conducted after a period of the ARC's operation, to ensure it is meeting its stated objectives. Should an independent statutory review of the ART Bill be implemented (as recommended earlier in this submission), such review would encompass a review of Part 9, relating to the ARC and its operations.

195. In relation to the provision of staff to assist the ARC at clause 263, the Law Council is pleased that the staff will be subject to the directions of the ARC when performing services for the ARC.[163] However, there are currently no requirements in the ART Bill for staff made available to the ARC to be of a minimum number, or to have a particular level of seniority or expertise. Consideration should be given to including such provision within Division 5 of Part 9, given that sufficient numbers of adequately qualified staff to resource the ARC will be critical.

Recommendations

- **"Support education and training" in clause 249(1)(f), relating to the ARC's functions, should be replaced with "inform education and training".**
- **Consideration should be given to providing the ARC with the function of monitoring the implementation of reports and recommendations relating to the Australian administrative law system.**
- **Consideration should be given to providing more specificity on the staffing requirements for the ARC in Division 5 of Part 9.**

[160] Royal Commission into the Robodebt Scheme (Report, July 2023) <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF> 642 [Recommendation 23.4].
[161] See Attorney-General's Department, Administrative Review Council publications (Web Page, 2023) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications>.
[162] Administrative Review Tribunal Bill 2023 (Cth) cl 250, 264.
[163] Ibid cl 263(3).

Part 11—Miscellaneous

Applications for legal or financial assistance

196. Clause 294 of the ART Bill provides that certain people can apply for legal or financial assistance in relation to Tribunal proceedings, which may be granted if the Attorney-General considers that refusing the assistance application would cause the person hardship, and that providing assistance is reasonable in all the circumstances.

197. As noted in the Explanatory Memorandum, the decision to grant financial or legal assistance—including the amount granted—is at the discretion of the Attorney-General.[164] The funding scheme can be considered one of last resort, with applicants generally required to be ineligible for assistance from a Legal Aid Commission or Community Legal Centre.

198. The Law Council is supportive of clause 294, noting that a similar arrangement exists at section 69 of the AAT Act. However, it notes with concern that the Consequential Bill provides that clause 294 does not apply for some matters, including for:

- social security and child support matters, unless the application is in relation to a matter that is before the guidance and appeals panel for review;[165] and
- for reviewable migration decisions and reviewable protection decisions.[166]

199. While existing section 69(3) of the AAT Act precludes legal assistance applications where relevant matters are exercisable in the Migration Act and Refugee Division or the Social Services and Child Support Division of the AAT, the Law Council does not consider that this provides a compelling rationale.

200. The approach adopted is particularly unclear, given recent recognition of the importance of legal assistance in both social security and migration proceedings, given:

(a) The explicit recommendation by the Royal Commission into Robodebt regarding the need to recognise the public interest role played by those services, as exemplified in their work during the Robodebt scheme.[167] This recommendation was accepted by the Commonwealth.

(b) The Commonwealth's recent announcements that over $48 million would be provided to boost essential legal assistance services to support applicants through the application process. This announcement formed part of a broader, $160 million package of reforms to restore integrity to Australia's refugee protection system, provide support to vulnerable visa applicants and ensure a

[164] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 253 [1715].
[165] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 3, pt 1, item 25 (proposed section 112C), 47 (proposed section 138B), 75 (proposed section 95AC), 121 (proposed section 225C), 169 (proposed section 147C) and 201 (proposed section 313C).
[166] Ibid sch 2, pt 5, item 119 (cl 336P(l)).
[167] Royal Commission into the Robodebt Scheme (Report, July 2023) <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF> 642 [Recommendation 12.4].

faster, fairer and more efficient protection system for those genuinely in need of Australia's protection.[168]

201. In the absence of a rationale for the disapplication of clause 294 in the above matters, the Law Council recommends that clause 294 apply to all matters to ensure that the Tribunal is accessible and can ensure an applicant's right to representation, especially for vulnerable applicants in social security and migration matters.

202. It is noted that as presently drafted, clauses 294(5) and (6) allow for rules to be developed to exclude certain proceedings from the legal assistance scheme.

203. The Law Council recognises that further consideration should be given to the role of the last resort scheme vis-à-vis the broader availability of legal assistance schemes in the development of these rules. It would be pleased to contribute to their development as part of a broader consultation. However, it queries the blanket preclusion of migration and social security matters as a starting point.

204. The Law Council adds that if the concern underpinning the exclusion of social security and migration matters from the legal assistance framework is one of potential volume, the Law Council again reiterates the need for an adequately funded legal assistance sector to meet the demand for legal support amongst these types of applicants, noting that it is likely that section 294 will only apply to applicants unable to access support from a Legal Aid Commission or Community Legal Centre.

205. Finally, the Law Council highlights the importance of ensuring that the legal assistance framework proposed by clause 294 is accessible and supported by guidance materials to assist applicants. The Law Council understands the current application process to be difficult to navigate, and emphasises the need to provide applicants with the necessary clarity and support required to be able to identify and access the scheme.

Recommendation

- **Clause 294, enabling a person to apply for legal or financial assistance, should apply to all matters, including migration and protection, and social security and child support matters.**

Application fees

206. Clause 296(1) provides that the Tribunal may charge fees in accordance with the rules, which may provide for fees to be paid in respect of:

- applications to the Tribunal;[169]
- applications to the President;[170]
- taxation of costs by the Tribunal;[171]
- proceedings in the Tribunal;[172] and

[168] The Hon Andrew Giles MP, Restoring integrity to our protection system (Joint media release with the Hon Mark Dreyfus KC MP and the Hon Clare O'Neil MP, 5 October 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/restoring-integrity-protection-system.aspx>.
[169] Administrative Review Tribunal Bill 2023 (Cth) cl 296(2)(a).
[170] Ibid cl 296(2)(b).
[171] Ibid cl 296(2)(c).
[172] Ibid cl 296(2)(d).

- services provided by the Tribunal.[173]

207. In relation to application fees, the Law Council reiterates the following comments from its June 2023 submission to the AGD.[174]

- Given that a central principle of the administrative law system is to protect individuals against unfair or arbitrary use of public power, there is a need to ensure application fees are not excessive and incorporate meaningful hardship waiver options for applicants.
- Unjustified increases to fees could dissuade a potential applicant from seeking review of a decision or from obtaining advice about a possible review when the costs of obtaining legal advice are added to the application fee.
- Non-payment of fees should not be used to determine the jurisdiction of the Tribunal to dispose of a matter. Where a fee has not been paid, whether due to the fault of a representative or applicant, the new administrative review body should provide a period for the applicants to rectify the fault, rather than automatically determining an application to be invalid.

208. There does not appear to be any reassurance in the ART Bill, the Consequential Bill or the explanatory materials regarding implementing a more equitable and proportionate approach to application fees in the Tribunal, including in the Migration jurisdictional area. This is a significant missed opportunity.

209. Of particular note, the Law Council considers that current fees in the AAT's Migration and Refugee Division—set by the *Migration Regulations 1994* (Cth)[175]—are disproportionately high (more than $3,300 as at January 2024) and pose a severe restriction on access to justice for migrants and individuals seeking protection visas. Increasing fees is not an appropriate or effective way to address the backlog of administrative appeals, and it will likely result in an increase in unrepresented applicants, as people will be even less able to afford access to legal assistance after paying the application fee. If the ART Bill inherits this approach, the workload and efficiency of the Tribunal, upon its establishment, will be adversely impacted.[176]

210. To ensure that the Tribunal is as accessible as possible, the ART Bill should facilitate the harmonisation of the review application fee across jurisdictional areas. In addition, application fees should not be payable by persons in immigration detention or prison, or by persons whom the Tribunal is satisfied are experiencing financial hardship, consistent with arrangements in the Federal Courts.[177] In the interim, the application fee for migration decisions, as set by the Migration Regulations, should be reviewed as a matter of priority.

211. Any application fees paid should also be refunded, where an application is successful.

[173] Ibid cl 296(2)(e).
[174] Previous Submission, 32-33.
[175] *Migration Regulations 1994* (Cth) regs 4.31B, 4.31BA, 4.31BB.
[176] Previous Submission, 32.
[177] Ibid.

Recommendations

- **The ART Bill should facilitate the harmonisation of the review application fee across jurisdictional areas. In the interim, the application fee for migration and protection visa decisions, set by the Migration Regulations, should be reviewed as a matter of priority.**
- **Where an application to the Tribunal is successful, any application fees paid should be refunded.**

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

General comments

212. As noted at the outset of this submission, the Law Council only received feedback on Schedule 2 to the Consequential Bill, relating to the Home Affairs portfolio. Accordingly, remarks on the Consequential Bill have been limited to Schedule 2.

213. The Law Council notes that a further Bill, containing additional consequential amendments, will be introduced this year.[178] Noting that the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) has not been included in the first Consequential Bill, the second Consequential Bill must address this omission, given that the SRC Act currently allows for applications to the AAT.

Schedule 2—Home Affairs

Overview

214. The Explanatory Memorandum summarises Schedule 2 as follows:

> *Schedule 2 of the Consequential Bill would amend the Migration Act to significantly standardise the review process for migration and protection visa applicants with other Tribunal caseloads. Broadly, the amendments would enable the Tribunal to exercise a range of functions and powers in the ART Bill in proceedings for review of reviewable migration and protection decisions, and harmonise and combine Parts 5 and 7 of the Migration Act into one single Part dealing with the conduct of a review. It would also abolish the IAA and provide for those matters to transition into the Tribunal to be dealt with as a reviewable protection decision.*
>
> *The codification of the natural justice hearing rule would apply for certain critical aspects of migration and protection visa review: notification (that is, providing 'deemed receipt'), non-disclosure certificates issued by the relevant Minister, and the information that must be, and must not be, put to the applicant before exercising certain powers. The common law natural justice hearing rule would apply to other aspects of proceedings.*
>
> *Certain provisions that apply currently in the AAT would be retained for the Tribunal to ensure the workability of Tribunal review for migration and protection visa matters. These arrangements would include: specific timeframes to apply for review if people are in immigration detention,*

[178] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 1 [4].

> *disapplying extensions of time to apply for review for reviewable migration and protection decisions, a request-based model for provision of client files to the applicant for reviewable migration and protection decisions, clear requirements for application validity and fee payment, disapplying remittals, providing that the Minister is taken to be a non-participating party, and provisions relating to non-disclosure requirements. These arrangements ensure (among other things) that timeframes are clear, finite and compatible with the bridging visa system, and that it is clear when a matter is finally determined.*[179]

Immigration Assessment Authority

215. Item 228 repeals existing Part 7AA of the Migration Act, effectively abolishing the IAA (which conducts review of fast track reviewable decisions). Fast track reviewable decisions will now be reviewable in the Tribunal under Part 5 as reviewable protection decisions. That is, relevant applicants will now have their matters reviewed in the same way as any other protection visa applicant.[180]

216. The Law Council strongly endorses the abolition of the IAA. It has made consistent calls to abolish the IAA given the flaws in its legal framework and its inherent unfairness to applicants, which denies procedural fairness and natural justice.[181]

Codes of Procedure—approach to reform

217. In its Previous Submission, the Law Council argued that greater simplification and efficiency would be achieved across the new Tribunal's functions if the Codes of Procedure for migration and refugee matters, set out in the Migration Act (Parts 5 and 7[182]) and the *Migration Regulations 1994* (Cth), were removed altogether.[183]

218. The Callinan Review considered the Migration Act's Codes of Procedure,[184] and recommended their removal, stating:

> *The Codes of Procedure are too prescriptive. They are a distraction from effective and fair decision making. Many to whom I spoke, or who made relevant submissions, criticised the Codes. They have not in practice promoted consistency or efficiency. They have instead encouraged a formulaic approach rather than a reflective consideration of all relevant factors, that is the case as a whole.*[185]

219. The Law Council reiterates its view that such removal would: improve the quality of decision-making and the fairness of the review process for applicants, as decisions would be made subject to common law principles; ameliorate the large caseload of migration and refugee litigation, which is directed at the construction of, and compliance with, provisions forming part of the code of procedure; improve

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[179] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 7-8 [41]-[43].
[180] Ibid 100 [709].
[181] Regarding the Law Council's concerns about the IAA, see Law Council of Australia, 'Performance and integrity of Australia's administrative review system – submission to Legal and Constitutional Affairs References Committee (07 December 2021) at 13-14, 16-18.
[182] And Part 7AA, discussed above.
[183] Previous Submission, 1, 13.
[184] The Hon Ian Callinan AC KC, Review: Section 4 of the *Tribunals Amalgamation Act 2015* (Cth) (Report, 23 July 2019) <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>.
[185] Ibid [6.82].

efficiency and make handling matters easier for relevant members; and make the new body easier for unrepresented applicants to navigate.

220. With this primary position in mind, the Law Council welcomes those provisions in the Consequential Bill that repeal Part 7 of the Migration Act, and aim to provide a single, more harmonised process for the review of migration and protection visa decisions in Part 5 of the Migration Act. These amendments would remove existing special procedures for reviews of migration and protection matters, and would significantly standardise the availability of Tribunal powers and procedures for migration and protection matters, supporting consistency and collaboration across the Tribunal in several important respects. These include the ability to hold directions hearings and case conferences, and to use broader dismissal powers, directions powers, and summons powers. These are important, and welcome changes.

221. However, the Consequential Bill also represents a missed opportunity, in that it includes certain provisions which disapply, or apply instead of / in addition to provisions of the ART Bill. These include the codification of the natural justice hearing rule, the scope of which would be adjusted but nevertheless retained for particular aspects of migration and protection visa review, as well as certain procedural provisions as summarised above.

222. The Law Council retains its general concern that the Tribunal may continue to operate in a more inefficient and less fair manner as a result. In this context, the Law Council is conscious that the AAT has itself indicated that a codified natural justice hearing rule for migration and refugee matters, compared to the common law approach, has substantial resource implications for its members and staff, including training and a vast additional manual.[186]

223. Whilst acknowledging that such provisions are ostensibly directed toward workability, certainty and finality,[187] the Law Council considers that the justification for retaining a codified natural justice hearing rule in key areas is insufficient, and that it can be overly complex for the end user of the Tribunal to understand. That is, it is unclear why the Commonwealth would wish to deviate from the common law on natural justice. The principles of natural justice are primarily designed to ensure fair outcomes in the individual circumstances, but they also improve the quality of administrative decisions by providing for a fair hearing and the ability for a person to be heard.[188] That is because a person whose interests would be affected by a decision is likely to possess information relevant to that decision. Conversely, where a decision is made without offering an affected person an adequate opportunity to be heard, the decision is likely to be based on incomplete or incorrect information.

224. To the extent that the codification of the natural justice hearing rule was originally intended to avoid litigation, the Law Council considers that this can no longer be justified having regard to the subsequent development of court jurisprudence. For example, Migration Act privative clauses[189] effectively restrict judicial review to the

[186] Presentation by AAT Deputy President Jan Redfern PSM at the 2022 Immigration Law Conference (30 March 2022) and the 2023 Immigration Law Conference (17 March 2023).
[187] Ibid.
[188] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [143] (Heydon J); *Condon v Pompano* (2013) 252 CLR 38, [177] (Gageler J); *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, [51] (Gageler J). See also *R v Alexandridis* [2008] VSCA 126, [17] (Redlich JA, Buchanan and Nettle JJA agreeing).
[189] *Migration Act 1958* (Cth) ss 476, 476A.

grounds of jurisdictional error. These grounds may include a breach of procedural fairness or the unreasonable exercise of power.

225. However, in recent years, the High Court of Australia has emphasised that even if a breach is established, it will not constitute jurisdictional error unless it was material to the decision being made.[190] This means that a technical error even if significant (e.g., by the Tribunal or the Department of Home Affairs, that has no impact on the decision) will not entitle a person to relief.

226. To the extent that there are concerns that the approach to procedure that is adopted in the ART Bill (and rests on the common law of natural justice/procedural fairness) will enable potential litigation based on the Tribunal or Department's omissions or breaches, this is unfounded where the error was immaterial.

227. To the extent that there was a breach or error which was material to the decision made and has led to unfairness, the Law Council queries why this should not be amenable to challenge in the courts.

Recommendation

- **The Department of Home Affairs must provide a stronger justification for the proposed retention in Schedule 2 of a codified natural justice procedure in the Migration Act, with specific regard to the ART Bill's reform objectives of fairness, efficiency and accessibility. In the absence of stronger justification, migration decisions should be subject to the ordinary rules of natural justice.**

Access to documents or information

Requesting information from the Department

228. New section 357A(2B)[191] of the Migration Act provides that paragraph 55(1)(b) of the ART Bill (which says the Tribunal must give each party a reasonable opportunity to access information or documents to which the Tribunal proposes to have regard) does not apply in relation to a review of a reviewable migration decision or reviewable protection decision.

229. This is of particular concern to the Law Council, especially when combined with the fact that the Consequential Bill would also repeal existing section 362A of the Migration Act which provides that an applicant is entitled to have access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review.[192]

230. Instead, new subsection 362A(1)[193] provides that the applicant is entitled to *request* that the Department of Home Affairs provide access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review.

[190] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; *Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737.
[191] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 151.
[192] Ibid sch 2, item 164.
[193] Ibid.

231. Currently, existing section 362A sits under Part 5 of the Migration Act, which generally provides for AAT review of migration decisions, and is distinguished from Part 7, which provides for AAT review of protection visa decisions.

232. The Law Council acknowledges that, under the Consequential Bill, protection visa applicants that the intended change is meant to benefit from proposed new subsection 362A as, currently, there is no equivalent to existing section 362A under Part 7 of the Migration Act. That is, protection visa applicants must now have recourse to the cumbersome processes under the *Freedom of Information Act 1982* (Cth) to seek relevant information for the purposes of merits review.

233. However, it remains uncertain as to why the proposed new subsection 362A needed to be re-worded if it is meant that it should operate as it currently stands under Part 5 of the Migration Act.

234. The amendments under the Consequential Bill will enable applicants in proceedings relating to a protection review decision to request that the Department provide a copy of the written material it gave or produced to the Tribunal for the purposes of the review, because it is not limited to proceedings related to migration review decisions.[194]

235. However, for migration visa applicants, this is clearly a backward step. Under the Consequential Bill, there is no apparent obligation on the Department, following a request by an applicant, to provide the information at all, let alone within a specified timeframe. As well as undermining fairness and access to justice, it is unclear how this will work practically. For instance, if the Department fails to provide the information sought, it is uncertain how the Tribunal can provide a fair hearing, as it is required to do.

236. The Law Council recommends that, instead of new clause 362A, clause 27 (which requires decision-makers to provide documents) and clause 55 of the ART Bill should simply apply to migration and protection visa applicants alike. Clauses 27 and 55 are fundamental to the basic principles of merits review, and it should not be disapplied. In the alternate, if this is not supported then either the current section 362A of the Migration Act should be retained or, if the preference is that access be granted by the Department rather than the Tribunal, the new clause 362A should retain the current language of entitlement to *access* rather than entitlement to *request*. The Department should also be obliged to provide the access within a legislated timeframe.

Adverse information

237. Item 160 of the Consequential Bill amends section 359A(4) of the Migration Act, including by allowing regulations to prescribe further exemptions from the codified obligation on the Tribunal to put adverse information to an applicant.

238. The Law Council is concerned about the proposed addition of section 359A(4)(e) of the Migration Act, given that it goes beyond what is currently permitted, and risks abrogating procedural fairness. It is not appropriate that the Consequential Bill seeks to give the Minister the ability to increase the exemptions, via regulations, to what is excluded from the important obligation on the Tribunal to put adverse information to an applicant.

[194] As set out in the Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 87 [604].

239. The Law Council is opposed to the inclusion of proposed section 359A(4)(e) of the Migration Act. It should be deleted from item 160 of the Consequential Bill.

Recommendations

- **Schedule 2 should be amended to remove the disapplication of clause 55 of the ART Bill by proposed clause 357A(2) of the Migration Act, and the disapplication of clause 27 of the ART Bill by proposed new section 362A of the Migration Act.**
- **Alternatively, if proposed section 362A of the Migration Act proceeds, it should be redrafted, or worded as it currently appears under Part 5 of the Migration Act as an entitlement to the information, rather than an entitlement to request it. Further, there should be an obligation on the Department to respond within a legislated timeframe.**
- **Item 160 should be amended to delete proposed section 359A(4)(e) of the Migration Act, to remove the ability for regulations to prescribe further exemptions from the codified obligation to put adverse information to an applicant.**

Drawing unfavourable inferences

240. Under item 170, new section 367A replaces existing section 423A of the Migration Act. New 367A requires the Tribunal to draw an interference 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 claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application. The intention of this provision is to ensure all evidence is raised upfront.[195]

241. Notwithstanding this intention, the Law Council considers that this provision is overly prescriptive. It is neither necessary nor desirable in circumstances where:

- the provision has given rise to some complexities/difficulties in its application;[196] and
- absent the provision, the Tribunal retains the power to draw an adverse inference from the late raising of a claim (and, from practitioners' experience in other spheres, such adverse inferences are regularly drawn if there is no reasonable explanation for the late claim).

242. The Law Council recommends amendments to Schedule 2 to the Consequential Bill to remove existing section 423A of the Migration Act, and delete proposed new section 367A.

Recommendation

- **Schedule 2 should be amended to remove existing section 423A of the Migration Act, and delete proposed new section 367A.**

[195] Ibid 89 [621].
[196] See, eg, *EQU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1182.

Application timeframes

243. The Consequential Bill provides for new standardised general timeframes of 28 days for migration and protection visa applications.[197] This includes standardising the current 70-day lodgement timeframe for people outside Australia to 28 days, reflecting that electronic communication renders the longer timeframe unnecessary.[198]

244. However, shorter timeframes will apply for people in immigration detention (seven days).[199] The existing nine-day timeframe is retained for a review of a decision to refuse or cancel a visa on character grounds.[200] Reviews of certain bridging visa decisions[201] must also be completed within a prescribed period[202], which is currently seven working days.[203]

245. The Law Council supports the general standardisation of applications to 28 days. However, it recommends that the 28-day period be streamlined across the board for reviewable migration and protection matters under Schedule 2, including 'character' review applications under section 500 of the Migration Act (currently nine days, and proposed to be retained) to make it fairer and easier for all applicants to access justice.

246. The Law Council acknowledges with respect to immigration detention that seven days would constitute an increase in time from the current requirement (in some cases) to apply for review of a decision within two days from being notified of the decision.[204] However, it underlines that there are particularly extensive barriers for persons in immigration detention in terms of accessing legal advice and information about the law. As such, it would be fair to further extend the period for applications for this vulnerable cohort to 28 days, to ensure that they can make fully informed decisions to apply for review. This is equally critical for applicants seeking review regarding character test or bridging visa decisions, who are also in precarious situations and require advice and information.

247. In a different context, Schedule 3 proposes that a 28-day deadline apply for social security applicants, having regard to their particular vulnerabilities.[205] It is difficult to reconcile the Consequential Bill's approach to this cohort of applicants, compared to persons in immigration detention, character test or bridging visa applicants under Schedule 2.

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[197] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 136, (proposed sections 347(3) and (4) of the Migration Act).
[198] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 228; Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 79 [542].
[199] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 136 (proposed section 347(3)(a)).
[200] Ibid sch 2, item 169, which slightly amends but retains existing section 367 of the *Migration Act 1958* (Cth).
[201] Being a refusal to grant or cancellation of, a visa that requires a person to be detained.
[202] Retaining existing 367 of the *Migration Act 1958* (Cth).
[203] Under the *Migration Regulations 1994* (Cth).
[204] Section 500(6B) of the *Migration Act 1958* (Cth), as amended by item 267 in Schedule 2 of the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth).
[205] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) 16 [93].

Recommendation

- **The standardised 28-day period for applications should be extended across the board to all applicants under Schedule 2, to make it fairer and easier for persons to seek merits review of reviewable migration and protection decisions.**

Application form and extensions

248. Under item 136 of the Consequential Bill, applications to the Tribunal are no longer required to be in an approved form,[206] providing greater flexibility for applicants and enabling substantial compliance with the requirements outlined in proposed new section 347(2). The Law Council supports this greater flexibility.

249. However, the Consequential Bill also disapplies clause 19 of the ART Bill, providing that the Tribunal is precluded from extending the period during which a person may apply to the Tribunal for review of a reviewable migration or protection decision.[207] The Law Council considers that the standard approach under clause 19 of the ART Bill should be adopted, which enables the Tribunal to extend the application time if it considers that it is reasonable in all the circumstances to do so.

250. The Law Council agrees with the rationale for clause 19 set out in the ART Bill Explanatory Memorandum, which states that:[208]

> *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.*

251. This is no less true with respect to applicants seeking review of migration and protection decisions. To the extent that there are concerns that the system can be 'gamed', the Law Council considers that clause 19 is an appropriately worded discretion which enables the Tribunal to respond effectively.

252. Currently, a sizeable proportion of all outcomes (11 per cent) in the AAT Migration and Refugee Division are characterised as 'no jurisdiction', which includes applications having been made outside the time limit.[209] Lodgements made out of time are nevertheless accepted by the AAT processing system, requiring a member to determine that there is no jurisdiction. It has been suggested to the Law Council that such lodgements currently clog up the system, and that there may be little real administrative difference in enabling extension applications to be made.

[206] From existing ss 347(1)(a) and 412 of the *Migration Act 1958* (Cth).
[207] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2, item 136, proposed new section 347(3) and (4).
[208] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 41 [287].
[209] Administrative Appeals Tribunal, 2022-23 Annual Report (September 2023) <https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2022-23-annual-report> 34.

253. The Law Council further submits that providing a standardised approach to extensions in the Tribunal may have a positive impact in that, currently, vulnerable persons whose applications miss uncompromising AAT deadlines will progress these applications to the courts. A fairer approach at the Tribunal level may have a moderating effect at the more expensive end of the system.

Recommendation

- **The standard approach set out in clause 19 of the ART Bill, enabling the Tribunal to extend the application time if it considers that it is reasonable in all the circumstances to do so, should apply to reviewable migration and protection decisions.**

Character test

254. The Law Council notes that there is no significant change proposed by the Consequential Bill to review of character matters. Section 500 of the Migration Act, which provides for the conduct of review of decisions of a delegate of the Minister under section 501 and section 36(1C) of the Migration Act, still applies to the new ART.

255. Consequently, some of the provisions that disadvantage the applicant still apply, including (but not limited to) the following:

- (as above) nine days to make an application;[210]
- deemed affirmation of the decision if no decision is made within 84 days;[211]
- the prohibition on applicants raising relevant material during a hearing (whether orally or in writing) unless this has been provided to the Minister in writing two days in advance.[212]

256. This is significant missed opportunity to improve procedural fairness and reduce the apparently arbitrary disparities between migration and other types of decisions. The retention of the above provisions will continue to provide a disproportionate advantage to the respondent in these matters, noting that many matters currently before the AAT involve unrepresented applicants.

Recommendation

- **Schedule 2 should be amended to remove existing Migration Act provisions which disadvantage applicants in the review of character test matters, including with respect to:**
  - **application timeframes;**
  - **deemed affirmation of the decision if no decision is made; and**
  - **the prohibition on applicants raising relevant material in a hearing unless provided to the Minister two days in advance.**

[210] *Migration Act 1958* (Cth) s 500(6B).
[211] Ibid s 500(6L)(c).
[212] Ibid ss 500(6H) and 500(6J).