Law Council
OF AUSTRALIA
Office of the President

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Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Administrative Review Tribunal Bill 2023 [Provisions] and related bills

1. The Law Council of Australia appreciated the opportunity to appear at the public hearing held on Friday, 3 May 2024 to assist the Senate Legal and Constitutional Affairs Legislation Committee with its inquiry into the Administrative Review Tribunal Bill 2023 (Cth) (the **ART Bill**) and related bills.

2. During the Law Council's appearance, Senator Scarr and Senator Ghosh referred to the Law Council's submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs regarding migration and refugee matters,[1] particularly our argument 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*.[2]

3. Noting the above remarks, Senator Ghosh asked the Law Council to outline the ways that the **Code** of Procedure for migration and refugee matters in the Administrative Appeals Tribunal (**AAT**), set out under the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth), differ from common law principles. As you will recall, our witnesses explained that the Code encourages a focus on compliance with rigid provisions, while the common law allows nuance when addressing the particular case before the AAT.

4. For the benefit of the Committee, and given the significance of this matter, we would like to take this opportunity to expand upon our response. We are grateful to members of the Law Council's Federal Administrative Law Reform Working Group for their assistance in the preparation of this submission.

[1] Law Council of Australia, *Administrative Review Tribunal Bills 2023* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2 February 2024) <https://lawcouncil.au/resources/submissions/administrative-review-tribunal-bills-2023> 52-60.
[2] Ibid 54 [223].

5. In essence, the Law Council considers that a common law approach to natural justice is preferable to the Code because the actions of a decision-maker are reviewed by reference to whether they have acted fairly in the circumstances of a particular case, not by whether the decision-maker has complied with standard rules.

6. In addition, the common law approach is easier to follow, as Tribunal members should be able to understand whether they are conducting a hearing in a fair manner, and to know that adverse information should be put to an applicant if it will be material to the outcome of the decision.

7. In *Kioa v West* [1985] 159 CLR 550 at [15], Brennan J (as he then was) said:

> *The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of statutory power according to the circumstances in which the repository is to exercise the power.*

8. Similarly, in *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [367], Gageler J (as he then was) observed:

> *Procedural fairness … can have a flexible, chameleon-like, content capable of varying according to the exigencies of the exercise of power between nothingness at one extreme and a full-blown trial at the other.*

Close regard should be had to the purpose of the common law natural justice hearing rule, which is to guide decision-makers to act fairly with respect to the process by which they make decisions. This is rooted in the belief that the natural justice hearing rule is an important aspect of affording justice to individuals, and that it leads to better decisions being made. The Code, in contrast, restricts this common law rule, and in doing so it limits procedural fairness.

9. The common law approach to natural justice is also preferable from a consistency standpoint, given that other divisions of the AAT are required to act in accordance with the natural justice hearing rule. Furthermore, the fact that equivalent codes of procedure have not been introduced elsewhere in the AAT indicates that the Code in the Migration and Refugee Division has not been as useful as may have been envisioned upon its introduction.

10. The Law Council is not convinced by the suggestion that the purpose of the Code is to make decision-making easier by avoiding the requirement for Tribunal members to "dive into effectively the nuances of common law natural justice in any given case".[3]

11. The Law Council notes that other Divisions of the AAT currently operate without a code of procedure, and do not have difficulty in applying concepts of natural justice under the common law. An abundance of material exists to describe what natural justice, bias, and procedural fairness are, and is already implemented by judicial officers and tribunal members across Australia.

[3] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 3 May 2024 (Senator Varun Ghosh) 9.

12. In contrast, in the experience of migration law practitioners:

    - the Code has led to complex litigation about its interpretation;
    - additional work for AAT members and applicants has been created, in ensuring that the Code is followed; and
    - the Code is not easy to follow, and members can become fixated on rigidly applying the Code, or may apply the Code incorrectly, during a hearing. This can lead to disjointed hearings and instances where members realise, after the hearing, that the Code was not followed. Members will then seek more information in writing, or conduct further hearings, which prolong the matter.

13. This raises, in turn, significant doubt as to whether the Code has achieved more efficient outcomes, while at the same time diluting procedural fairness.

14. There are at least three perspectives that illustrate the complexity—and disruptive force—of the Code, as it is intended to be retained under the Administrative Review **Tribunal**:

    - the text of the proposed provisions;
    - the design of the Tribunal; and
    - the philosophical complexity of the Code.

    These perspectives are outlined in turn below.

<u>The text of the proposed provisions</u>

15. Despite the Codes being in place for approximately three decades in the Migration and Refugee Division of the AAT, there have been many cases addressing the numerous points of complexity with respect to how the Codes operate in practice.[4] Moreover, the ongoing complexity and uncertainty that the Codes have created is demonstrated by the fact that special leave has been consistently granted for points of law that cannot be adequately settled by the Federal Court of Australia.

16. The context in which the new provisions are proposed to operate will be changed by the ART Bills, if passed, and the text of the Codes will also change. It is inevitable that these changes will lead to further confusion that must be decided by the courts, including the High Court of Australia. However, this will be case law that answers separate and discrete questions of statutory interpretation, as opposed to case law that adds to the wisdom of the common law, and assists future decision-makers to apply common law principles to contemporary matters.

[4] Se, for example, overview of caselaw provided in Grant Hooper, 'Three Decades of Tension: From the Codification of Migration Decision Making to an Overarching Framework for Judicial Review'' (2020) *Federal Law Review* 48(3) 401.

17. The Law Council draws the Committee's attention to the amended Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024 (**Consequential No. 1 Bill**). In Schedule 2, at Item 151, subsection 357A(2C) is proposed to be inserted into the Migration Act as follows:

> *(2C) As an exhaustive statement of the requirements of the natural justice hearing rule, the relevant provisions do not require the ART to observe any principle or rule of common law relating to the matters the relevant provisions deal with*.

18. The Law Council queries what "principle or rule of common law" is referred to in new subsection 357A(2C). As this phrase is overly broad, it could refer to various principles or rules, including the duty to act reasonably, the rule against bias, or the natural justice hearing rule.

19. In addition, should the Consequential No. 1 Bill pass, subsection 357A(3) will provide that "in applying this Division, the ART must act in a way that is fair and just". However, this subsection appears to be in direct contradiction with new subsection 357A(2C).

20. In light of the above, it is unclear how a member of the Tribunal is to understand and apply section 357A of the Migration Act as a whole, given that all of the principles of common law are designed to require decision-makers to act in a way that is fair and just.

<u>The design of the Tribunal</u>

21. It is apparent from the Bills and their explanatory materials that the new Tribunal has been designed to:

- provide flexibility to undertake merits review in a manner appropriate to individual matters, their complexity, and the approach of the parties;
- focus on objectives, rather than technicalities; and
- operate as an amalgamated Tribunal.

22. The Law Council considers that the Code is incongruous with the design and functions of the new Tribunal. In particular, the Code is incompatible with the above design features of the Tribunal and it will disrupt its basic operations, as made explicit by, for instance, the disapplication of clauses 27 and 55 of the ART Bill under the proposed changes to the Migration Act by the Consequential No. 1 Bill.[5]

23. The incongruity of the Code with the design of the Tribunal will make it difficult to apply and is likely to undermine the efficient and coherent operation of the Tribunal.

[5] Law Council of Australia, *Administrative Review Tribunal Bills 2023* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2 February 2024) <https://lawcouncil.au/resources/submissions/administrative-review-tribunal-bills-2023> 55-57.

The philosophical complexity of the Code

24. The *Migration and Refugee Division Procedural Law* ***Guide***,[6] released by the AAT in January 2022, demonstrates the existing complexities for members in the Migration and Refugee Division. In explaining the various obligations upon members to follow the law, the Guide consistently oscillates between references to the common law and the Code.

25. The approach in the Guide reflects that the actual dichotomy in question is between common law interrupted by statutory provisions versus the common law, rather than the Code versus the common law, given the reality that Australia is a common law system.

26. The Law Council draws the Committee's attention to an article by Mr Grant Hooper, titled *Three Decades of Tension: From the Codification of Migration Decision-Making to an Overarching Framework for Judicial Review*. Valuable commentary about the development of a functional approach to the Code is extracted below.[7]

> *When other procedures in the code were breached [the High Court] instead took a more functional and practical approach. Practical in the sense that the impact of the breach on the decision-making process was considered. If there was no real impact then the decision would not be set aside.*
>
> *This change in approach benefited decision makers as their decisions were no longer set aside for technical breaches that caused no unfairness. However, it foreshadowed the end of any hole for a Benthamic-like code. It did so because rather than placing an overriding importance on compliance with the legislatively prescribed procedures, it now started from the premise that the Migration Act as a whole is designed to not only ensure that a person who is entitled to a visa receives it but also that a person who is not entitled does not get it. The High Court was now considering a larger range of underlying values, some which favoured the executive and some which did not. While the procedural code in the Migration Act had an important role to play in providing the applicant with natural justice, it also had to be balanced against a need to ensure that decisions could be made efficiently and effectively …*
>
> *… This change in interpretative approach was undoubtably better for decision makers than the strict approach previously taken, but it was a win that came at a cost. The procedural code was not to be treated as a self-contained code and as such the content of and effect of a breach of one of its sections would be interpreted in a similar way to a procedure required of a decision maker by natural justice.*

27. The Law Council notes that an adequate answer is yet to be provided to the legitimate question of what purpose is sought to be achieved by retaining the Code. Hooper's analysis suggests that the Minister for Immigration ceased arguing in favour of a Code several years ago. Nonetheless, the Consequential No. 1 Bill indicates that these provisions are still being advocated for, somewhere within the Commonwealth. The Law Council recommends that the Committee seek clarification from the Attorney-General's

[6] Administrative Appeals Tribunal, *Migration and Refugee Division Procedural Law Guide*, (January 2022) <https://www.aat.gov.au/AAT/media/AAT/Files/Documents/RELEASED-Procedural-Law-Guide_Chapters-1-6.pdf> (Chapters 1-6), <https://www.aat.gov.au/AAT/media/AAT/Files/Documents/RELEASED-Procedural-Law-Guide_Chapters-7-11.pdf> (Chapters 7-11).

[7] Grant Hooper, 'Three Decades of Tension: From the Codification of Migration Decision Making to an Overarching Framework for Judicial Review'' (2020) *Federal Law Review* 48(3) 401 <https://journals.sagepub.com/doi/abs/10.1177/0067205X20927811?journalCode=flra> 424-425.

Department and Department of Home Affairs as to the underlying policy rationale in this instance. As noted, it does not seem arguable that the purpose is procedural fairness, nor greater efficiency. Given the evolving interpretative approach described above, any purported objective of greater simplicity also appears untenable.

Conclusion

28. As recently noted by Ghezelbash, Bridle and Dorostkar,[8] in a joint submission to the 2012 Administrative Review Council review into federal judicial review in Australia, the former Migration Review Tribunal and former Refugee Review Tribunal argued that the Code had been the subject of significant litigation yet had not improved the quality of decision-making, and that:

> *the experience in the migration jurisdiction has been that codification aimed at supplanting the natural justice hearing rule has distinct limitations. Although the codification of procedure may have the advantage of setting out a framework for the parties, experience shows that it leads to unexpected interpretation, uncertainty and extensive litigation ... Statutory codes of procedure, whilst providing a framework for the parties, cannot replicate the adaptiveness of common law procedural fairness.*[9]

29. The Law Council suggests that the passage of time has further underlined these concerns. While it continues to support the ART Bills' passage, it agrees with the conclusions of Ghezelbash, Bridle and Dorostkar that they represent "a missed opportunity for ending migration exceptionalism and creating a unified approach for administrative review".[10]

Contact

30. If the Committee requires further information or clarification, please contact Ms Leonie Campbell, General Manager, Policy on (02) 6246 3754 or at leonie.campbell@lawcouncil.au.

Yours sincerely

Greg McIntyre SC
President

[8] Daniel Ghezelbash, Mia Bridle and Keyvan Dorostkar, 'The Administrative Review Tribunal Bill: A missed opportunity for ending migration exceptionalism and creating a unified approach for administrative review', Australian Public Law online article, 20 March 2024, < https://www.auspublaw.org/blog/2024/3/the-administrative-review-tribunal-bill-a-missed-opportunity-for-ending-migration-exceptionalism-and-creating-a-unified-approach-for-administrative-review?rq=missed%20opportunity>.
[9] Ibid, citing the former Migration Review Tribunal and Refugee Review Tribunal, Submission to the Attorney-General's Department in response to the Administrative Review Council Consultation Paper on Judicial Review in Australia, 5 July 2011, <https://web.archive.org/web/20130418201216/http:/www.arc.ag.gov.au/Documents/MRT-RRT%20-%20Submission%20to%20ARC%20judicial%20review%20inquiry%20pdf.PDF>.
[10] Ibid.