Senate Legal and Constitutional Affairs Committee Inquiry - Administrative Review Tribunal Bill 2023 and related bills

Introduction

The Refugee and Immigration National Community Law Coalition (RAINCLC) is a national network of not-for-profit immigration and refugee law specialist community legal centres. As an umbrella body, we contribute to national consultative processes and aim to promote cohesive and fair legislation, policy and procedure in Australian refugee, migration and citizenship frameworks. Our organisations provide legal advice and representation to people seeking asylum, refugees and migrants, including those facing particular vulnerabilities such as women on temporary visas experiencing family violence and people in immigration detention.

We welcome the opportunity from the Senate Legal and Constitutional Affairs Legislation Committee to provide a submission regarding the Administrative Review Tribunal Bill 2023 (ART Bill), the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill No. 1), and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024. Our submission draws on our extensive experience representing applicants before the Administrative Appeals Tribunal and witnessing the challenges that refugees and people seeking asylum face in obtaining fair and just merits review outcomes.

The abolition of the Administrative Appeals Tribunal (AAT) is a pivotal opportunity for urgent and critical reform, presenting a chance to remedy long-standing defects that impaired the Tribunal's function and inhibited provision of fair and timely decision-making. Importantly, the Consequential and Transitional Bill No. 1 abolishes the Immigration Assessment Authority (IAA) and Fast Track process, which has subjected thousands of people seeking asylum to an unfair system with dire consequences, including refoulement and permanent family separation.

Whilst the Bills incorporate some measures to restore integrity to administrative review, the new legislation falls short of the reform required. Concerningly, the Bills exclude protection and migration applicants from certain procedural fairness standards, which compound the additional challenges that refugees and people seeking asylum face in accessing justice including language barriers, experiences of trauma and immigration detention. These provisions must be amended to ensure that the ART fulfills its objectives to provide an independent review mechanism that is fair, just and accessible. Further, no solution has been provided by the Government to remedy the injustice faced by thousands of people whose cases were incorrectly decided by the IAA. We urge the Government to provide a clear pathway to permanence for the remaining 9,000 people failed by the Fast Track process.

Recommendations

Fair and just decision making

Recommendation 1: Remove subsections 359A(4)(d), 359A(4)(e) and 359A(4A) from Schedule 2 of the Consequential and Transitional Bill No. 1.

Recommendation 2: Remove section 367A from Schedule 2 of the Consequential and Transitional Bill No. 1.

Recommendation 3: Remove section 357A from the Migration Act and amendments to this section in Schedule 2 of the Consequential and Transitional Bill No. 1.

Recommendation 4: Amend section 91 of the ART Bill to provide the Tribunal with discretion to disclose any information covered by a public interest certificate.

Recommendation 5: Amend section 106 of the ART Bill to limit the ART's power to make a decision without a hearing where the decision is in favour of the applicant.

Recommendation 6: Amend the ART Bill to include maximum timeframes for different types of review matters.

Recommendation 7: Amend the Migration Act to include merits review of deportation decisions and personal decisions of the Minister.

Recommendation 8: Amend the Migration Act to remove the Minister's power to replace a favourable decision of the ART (including sections 133C and 501(3)).

Recommendation 9: Amend ART Bill to include member complaints mechanism.

Accessible and responsive to diverse needs

Recommendation 10: Remove subsections 347(5) and 202(5) in Schedule 2 of the Consequential and Transitional Bill No. 1.

Recommendation 11: Amend subsection 347(3)(a) in Schedule 2 of the Consequential and Transitional Bill No. 1 to provide people in detention with 28 days to seek review.

Recommendation 12: Remove section 368C in Schedule 2 of the Consequential and Transitional Bill.

Recommendation 13: Amend the Migration Act and ART Bill to ensure the process and timeframes for character matters are in line with other migration review matters.

Recommendation 14: Remove subsection 336P(l) in Schedule 2 of the Consequential and Transitional Bill.

Recommendation 15: Amend subsection 66(3) to provide for:

- Procedural fairness prior to a decision by the ART to remove a person's representative;
- A review mechanism for these types of orders; and
- After an order is made, the ART must provide applicants with a reasonable amount of time to find alternate representation.

Recommendation 16: Remove subsection 336P(g) in Schedule 2 of the Consequential and Transitional Bill and section 362A in the Migration Act.

Recommendation 17:

- Amend ART Bill to provide discretion for a complete waiver of the application fee for people facing significant financial hardship and/or other vulnerabilities;
- 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; and
- Where an application to the Tribunal is successful, any application fees paid should be refunded.

Recommendation 18: Amend subsection 36(1)(f) of the ART Bill to maintain in-person hearings as a default position, with the option to make provisions for virtual participation where relevant and consented to by an applicant.

Recommendation 19: Amend section 79 of the ART Bill to provide direction-making powers to order the Minister or Department agency to facilitate an applicant's attendance at a location for their hearing or during the duration of their proceeding.

Recommendation 20: Amend subsections 68(1) and (2) of the ART Bill to require that the ART appoint an interpreter where requested by an applicant.

Recommendation 21: Amend subsection 68(3) of the ART Bill to require the ART to seek the consent of an applicant before appointing an interpreter.

Recommendation 22: Amend sections 81, 99, 106 and 111 of the ART Bill to ensure that notification is provided with translated materials and/or an interpreter where the Tribunal is aware the applicant is not fluent in English.

Recommendation 23: Remove Part 5 of the ART Bill.

Transparency

Recommendation 24: Amend section 209 of the ART Bill to:

- Require the Minister to establish an assessment panel to assess candidates for appointment as a member under relevant appointment provisions;
- Require that assessment panels must consist of independent individuals with appropriate expertise; and
- 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.

Fair and just decision making

Procedural fairness for refugees, people seeking asylum, and migrants

Proposed subsection 359A(4)(d) in the Migration Act removes the obligation for the ART to notify applicants of information that it intends to rely on to affirm the decision under review if that information is contained in the original decision.[1] This is a significant departure from existing procedural fairness requirements where the Tribunal must notify applicants of any adverse information contained in the decision under review which it intends to rely on, including when the Tribunal will consider this material in a different manner to the Department.

Applicants must be afforded an opportunity to respond to any adverse information the ART seeks to rely upon in affirming a decision under review. The ART may give different weight or importance to the information in a Departmental decision, and denying an applicant from addressing these concerns is inconsistent with the objective of the ART to provide fair and just decision-making and is an inadequate procedural safeguard for a de novo merits review process.[2] We also echo the concerns raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), including that the disadvantage caused by this section would be compounded as protection applicants often have limited access to legal assistance and language barriers.[3]

Further, applicants will be burdened to address every issue in their Department decision, even if the Tribunal considers these issues are irrelevant to its decision-making. Applicants are likely to provide lengthy submissions and voluminous materials to the Tribunal and incur higher legal fees for the preparation of these materials. Consequently, **this will create an inefficient use of the Tribunal's resources as it will be required to consider these materials, which may be irrelevant to its review.**

Case study

Jibrail, a Hazara man from Afghanistan, sought asylum in Australia. He applied for a Protection visa, which was refused by the Department of Home Affairs. The Department decision held that Jibrail could not safely return to his hometown. The Department considered whether he could relocate to another city, including Mazar-E-Sharif and Kabul. The Department held that he could not return to Mazar-E-Sharif, but could safely return to Kabul and refused his Protection visa application on this basis.

Jibrail sought review of his Department decision. As the Department accepted that he could not return to his hometown or Mazar-E-Sharif, Jibrail focused his submissions to the Tribunal on why he could not return to Kabul.

The Tribunal then notified Jibrail that it considered that he could safely return to Mazar-E-Sharif, and Jibrail had an opportunity to address this matter before the Tribunal.

Had subsection 359A(4)(d) been in place, Jibrail would have been denied the opportunity to respond to the adverse information the Tribunal intended to rely upon regarding relocation to

[1] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 160.

[2] United Nations High Commission for Refugees, Submission No 18 to Standing Committee on Social Policy and Legal Affairs, Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), 25 January 2024, 2-3.

[3] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 2 of 2024, 7 February 2024) [1.68].

Mazar-E-Sharif as this matter was considered in the Department decision (even though the Department reached a different finding).

The Scrutiny of Bills Committee also raised concerns regarding subsection 359A(4A) which replicates an existing measure where information that is about a relevant class of persons could form part of a decision made against an applicant without having been put to the applicant. The Committee stated:

> "information about a class of persons to which the applicant is a member could have relative significance to a protection visa application. For example, this could include relevant country of origin information about the treatment of members of an applicant's ethnic or religious group which could have bearing on the applicant's claim for refugee status…the remaking of this provision provides an opportunity to consider the procedural fairness implications for applicants. It cannot, in the committee's view, be reasonably assumed in all cases that such information would be known to the applicant, and there may therefore be circumstances in which these measures create unfairness.[4]

The Committee also warned that subclause 359A(4)(e), which seeks to allow the regulations to prescribe additional matters that the Tribunal can rely on but does not need to disclose to an applicant, could severely impact the fair hearing rights of applicants.[5] We agree with the Law Council of Australia's recommendation to remove this section.[6]

Recommendation 1: Remove subsections 359A(4)(d), 359A(4)(e) and 359A(4A) from Schedule 2 of the Consequential and Transitional Bill No. 1.

Unfavourable inference against new claims by refugees and people seeking asylum

Proposed section 367A in the *Migration Act 1958* (Cth) (Migration Act) provides that the ART must draw an unfavourable inference as to the credibility of a claim or evidence that was not raised by an applicant seeking review of a protection decision before the primary decision was made.[7] An exception to this requirement is where the ART is satisfied that the applicant has a reasonable explanation for why the claim or evidence was not provided earlier. We have serious concerns regarding the significant and unjust hardship that this provision will continue to cause for protection visa applicants.

People seeking asylum have valid reasons for delay in providing updated evidence and claims, including:

- trauma and related mental health illness. Studies have revealed that trauma, particularly of the kind experienced by people seeking asylum, often leads to memory loss, loss of concentration,

[4] Ibid [1.66].

[5] Ibid [1.69].

[6] Law Council of Australia, Submission No 28 to Standing Committee on Social Policy and Legal Affairs, Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), 25 January 2024 [2.38].

[7] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 170. This clause replicates section 423A in the *Migration Act 1958* (Cth).

impairment in cognitive function and the deterioration of mental health.[8] For some people seeking asylum, the need to cope with past traumas may lead to avoidance, suppressing memories, or dissociation when prompted to recount their past experiences.[9] This can explain why there may be a lack of detail, incoherence or gaps in an applicant's retelling of an event;

- stigma and shame, which can inhibit the disclosure of sensitive information that may form the basis of a protection claim. Stigma attached to the experience of sexual or gender-based violence may leave people seeking asylum afraid or unwilling to share their experience for fear or lack of trust in authorities, fear of rejection, fear of serious harm as a reprisal or concerns about the confidentiality of information shared. People seeking asylum because of their diverse sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC) may have been raised in cultures where their SOGIESC is considered shameful or taboo. This could foster a hesitance to express their SOGIESC verbally or physically, and even limit how readily they identify themselves as being someone with diverse SOGIESC;
- language barriers, which are compounded by limited publicly funded interpreting and translation services, significantly undermine an applicant's ability to understand and articulate their claims for protection; and
- the limited availability of funded legal assistance to comprehensively explain what information should be included in a protection visa application and appropriate forms of supporting evidence.

As the Bill does not provide any guidance regarding what would suffice as a 'reasonable explanation', there is no guarantee that these valid explanations would be accepted by the ART. Consequently, this provision will continue to cause severe hardship and unfair outcomes for protection visa applicants. Further, without adequate guidance regarding what would constitute a 'reasonable explanation', this clause may be the subject of lengthy litigation which could create further delay and exacerbate the existing backlog of Tribunal and judicial review matters.

In addition, the Department of Home Affairs' (Department) new visa processing model of 'last in, first out'[10] has resulted in our clients being denied a meaningful opportunity to provide details of their protection claims (including denial of Department interviews, no opportunity to comment on adverse information or provide any supporting material). **In one instance, our client had only one month from visa lodgement to refusal decision**. In these circumstances, people seeking asylum cannot be expected to raise all their claims and evidence before the Department makes a decision.

Case study

Mindy[11] came to Australia from Nigeria on a student visa. She applied for a protection visa as she was fearful of domestic violence from her family. Mindy is lesbian, however she was afraid and ashamed to disclose this to the Department, especially as she was worried her family in Nigeria might find out.

[8] Sanjida Khan, Sara Kuhn and Shamsul Haque, '*A Systematic Review of Autobiographical Memory and Mental Health Research on Refugees and Asylum Seekers*' (2021) 12(1) Frontiers in Psychiatry 1, 2; Philippe Charlier et al, '*Memory Recall of Traumatic Events in Refugees*' (2018) 392(1) The Lancet 2170; Altaf Saadi et al, '*Associations Between Memory Loss and Trauma in US Asylum Seekers: A Retrospective Review of Medico-legal Affidavits*' (2021) 16(3) PLoS ONE 1, 5.

[9] United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 65 <https://www.unhcr.org/sites/default/files/legacypdf/51a8a08a9.pdf>.

[10] Minister for Immigration, Citizenship and Multicultural Affairs, '*Restoring integrity to our protection system*' (Media Release, 5 October 2023), https://minister.homeaffairs.gov.au/AndrewGiles/Pages/restoring-integrity-protection-system.aspx.

[11] Names and other personal identifiers have been changed in all case studies in order to protect confidentiality.

Mindy's protection visa was refused by the Department and she sought review before the Tribunal. Mindy was able to access pro bono legal representation for her review matter, and receive legal advice about raising protection claims regarding her sexuality. The Tribunal accepted her protection claims and remitted the matter to the Department, and Mindy was granted a protection visa.

If section 367A had applied, the Tribunal would have been required to draw an unfavourable inference against Mindy when she raised her sexuality claims for the first time, which would have unfairly disadvantaged Mindy and led to an unjust outcome.

The Government has stated that this proposed section is 'intended to ensure that applicants raise all claims relevant to their visa application, and present all evidence to ensure that the decision made by the Department can be as efficient and effective as possible'.[12] However, this provision relies on a similarly flawed logic to that of the IAA, which presumes that applicants for protection are in a position to raise the full extent of their claims in the first instance.

Case study

Balan arrived by boat from Sri Lanka in 2013. He lodged a substantive visa application in 2017. Later that year, the Department notified Balan that his visa application had been refused. The application was referred to the IAA for review.

Balan submitted documents to the IAA with new information about his fears of persecution. This information related to his involvement in the Sri Lankan civil war and his experiences of physical abuse. Balan explained that he had not initially disclosed this information due to fears that he may be detained or deported.

The IAA did not consider Balan's new claims, as the decision-maker was not satisfied that there were exceptional circumstances to justify considering the new information. In 2018, the IAA affirmed the Department's decision to refuse Balan's visa application.

We refer to the submission of the Kaldor Centre Data Lab whose research emphasises that the distinctive treatment of applicants in the Migration and Refugee division for the purpose of efficiency has only created inefficiencies and unjust outcomes.[13] With specific reference to successive pieces of legislation and other measures that have attempted to codify decision-making procedures for decisions made under the Migration Act, the Kaldor Centre Data Lab found that:

> 'the increased codification of migration and refugee procedures has not increased efficiency or fairness, and accordingly it is unlikely to serve the new Tribunal's objectives. Instead, the failure to abolish the separate and rigid migration procedures, including stricter, shorter deadlines and the exclusion of common law natural justice, will perpetuate many of the issues the Migration and Refugee Division is currently facing. It means that many of the benefits of the new more flexible

[12] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth), 89 [621].
[13] Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), 25 January 2024, 7-12.

> and adaptable procedures at the ART, and associated efficiency gains, will not apply to the Migration and Refugee Division, where they are most needed.'[14]

There is no valid justification for this provision, especially as Tribunal members already have discretion to assess any delay as part of an applicant's credibility within their existing powers. Restricting merits review in such a significant manner raises serious concerns regarding procedural fairness, particularly when subsequent forms of judicial review are limited to questions of legal error.

We strongly caution the Government against replicating previous flawed practices that curtailed procedural fairness at the purported expense of efficiency, such as the IAA, which in practice exacerbated delay and caused unjust outcomes.

Recommendation 2: Remove section 367A from Schedule 2 of the Consequential and Transitional Bill No. 1.

Natural justice hearing rule

The Consequential and Transitional Bill No. 1 preserves section 357A of the Migration Act regarding the codification of the natural justice hearing rule for the review of migration and protection decisions, and newly inserted subsection (2C) explicitly states that the ART is not required to observe any principle or rule of common law in its review of these decisions.[15]

It is unjust that protection and migration applicants are deprived of the benefits of common law natural justice, especially when their decisions have grave consequences such as removal from Australia, permanent family separation and refoulement. The Scrutiny of Bills Committee shares our concerns as this provision "removes the requirement for the Tribunal to consider what fairness requires in the circumstances of each case".[16]

The House of Representatives - Standing Committee on Social Policy and Legal Affairs (Committee on Social Policy and Legal Affairs) considered that the separate code for migration and protection applicants will help address the delays in the Migration and Refugee Division of the AAT, which are purportedly motivating bad actors to lodge disingenuous applications for protection.[17] However, **research by the Kaldor Centre Data Lab emphasises that the distinctive treatment of applicants in the Migration and Refugee division for the purpose of efficiency has only created inefficiencies and unjust outcomes** (see above).[18] Also, the Scrutiny of Bills Committee observed that the meaning of the procedural code has been the subject of extensive litigation, which suggests that codification has not resulted in more clarity and certainty and queried whether there is sufficient justification for its use.[19]

Further, the Law Council of Australia considers that there is insufficient justification for retaining a codified natural justice hearing rule, and noted:

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[14] Ibid, 12.

[15] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 151.

[16] Senate Standing Committee for the Scrutiny of Bills (n 3) [1.59].

[17] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (Report, February 2024) 60 [3.46].

[18] Kaldor Centre Data Lab (n 13).

[19] Senate Standing Committee for the Scrutiny of Bills (n 3) [1.60].

> "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.
>
> 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."[20]

Consequently, there is no valid justification for a separate procedural code which undermines procedural fairness for protection and migration applicants.

Recommendation 3: Remove section 357A from the Migration Act and amendments to this section in Schedule 2 of the Consequential and Transitional Bill No. 1.

Public interest certificates deny procedural fairness

We echo the concerns raised by the Scrutiny of Bills Committee regarding provisions in the ART Bill in relation to public interest certificates that prevent disclosure of certain information to applicants.[21] Although these provisions are modelled on the existing legislation, we do not consider that this is a compelling rationale for maintaining their existence. The ART Bill only provides a very limited discretion for the Tribunal to disclose information covered by a public interest certificate,[22] which prevents applicants from responding to the case put against them, which is an unjustified breach of procedural fairness that is inconsistent with the ART's objectives, particularly transparency and fairness. This approach does not allow the Tribunal to consider the particular sensitivities of each case and determine whether disclosure (or at least partial disclosure) may be warranted, regardless of why the certificate was issued.[23]

The Parliamentary Joint Committee of Human Rights (PJCHR) also observed that the provisions in the ART Bill and the Consequential and Transitional Bill No. 1 that seek to restrict the disclosure of information or evidence limit applicants' right to a fair hearing and the prohibition against expulsion of aliens without due process (regarding migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia), and would not be proportionate in all circumstances.[24] We endorse the Scrutiny of Bills Committee and PJCHR's recommendation that the Bills should provide the Tribunal with discretion to disclose information to the extent that is necessary to ensure procedural fairness.[25]

Recommendation 4: Amend section 91 of the ART Bill to provide the Tribunal with discretion to disclose any information covered by a public interest certificate.

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[20] Law Council of Australia (n 14) 55 [226]-[227].

[21] Administrative Review Tribunal Bill 2023 (Cth) cl 91; Senate Standing Committee for the Scrutiny of Bills (n 3) 2-6.

[22] Ibid.

[23] Senate Standing Committee for the Scrutiny of Bills (n 3) [1.14].

[24] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 1 of 2024, 7 February 2024) [1.51]-[1.53].

[25] Ibid; Senate Standing Committee for the Scrutiny of Bills (n 3) [1.19].

Decisions made without a hearing

We only support dispensing with a hearing where a decision in favour of the applicant can be made. Without this safeguard, applicants may elect to dispense with their hearing under the mistaken assumption that they will receive a positive decision sooner, which will result in unfair outcomes. We have also observed that provisions allowing resolution without a hearing are often used to resolve cases unfairly, perhaps due to decision-making pressures on the Tribunal. The risk of this should be removed.

Case study

A protection visa applicant, Mariam, was 19 minutes late to her hearing including because she found the elevators in the building difficult to navigate. Her application was dismissed under s 426A, despite the interpreter's presence, the applicant's presence, and the scheduling of 6 hours for the hearing. Mariam applied for reinstatement, which was refused on the sole basis that she had been late. An appeal to court took nearly 5 years to resolve in her favour on the basis of unreasonableness, at immense personal and public cost. The Minister refused to concede in the court matter until the last minute: had specialist lawyers not been involved, Mariam would likely not have succeeded, and lost her right to a meaningful hearing exposing her to detention and forcible return to persecution.

Recommendation 5: Amend section 106 of the ART Bill to limit the ART's power to make a decision without a hearing where the decision is in favour of the applicant.

Timeframes for decision-making

To prevent the recurrence of exorbitant review delays, maximum timeframes for different types of review matters should be legislated (up to a maximum of 12 months), with accountability mechanisms for the President of the review body (such as reporting to Parliament). However, if a timeframe is passed, this should not automatically result in an adverse decision for the applicant.

Recommendation 6: Amend the ART Bill to include maximum timeframes for different types of review matters.

Accountability for ministerial decisions

The scope of migration decisions that are reviewable under the Migration Act should be expanded to include deportation decisions and personal decisions of the Minister. Given the God-like ministerial powers under the Migration Act, it is appropriate that such decisions are subject to accountability under a review process.

We also recommend that the Minister's power to replace a favourable decision of a review body (e.g. sections 133C and s 501(3) of the Migration Act) should be abolished to ensure that administrative decision-making remains free from political interference and applicants retain the benefit of a Tribunal decision in their favour. The current legislative regime provides that the Minister has the power to overrule the Tribunal or to remove a person's right to merits review. This is a concerning departure from the rule of

law and an overreach by the Executive aimed at avoiding proper and necessary accountability for government decision making.

Recommendation 7: Amend the Migration Act to include merits review of deportation decisions and personal decisions of the Minister.

Recommendation 8: Amend the Migration Act to remove the Minister's power to replace a favourable decision of the ART (including sections 133C and 501(3)).

Complaints mechanism

In order to ensure accountability and independence of the ART, the establishment of an accessible and transparent complaints mechanism in relation to member conduct is important. This mechanism should involve complainants being provided with a meaningful response regarding what action has been taken in relation to their complaints.

Recommendation 9: Amend ART Bill to include member complaints mechanism.

Accessible and responsive to diverse needs

Extensions of deadlines for refugees, people seeking asylum and migrants

Proposed subsection 347(5) in the Migration Act excludes the ART's power to extend deadlines under section 19 of the ART Bill to migration and protection decisions, which unfairly disadvantages migrants and protection applicants.[26] Rigid timeframes undermine the ART's attempt to provide an accessible review process. Also, refugees and people seeking asylum often face additional barriers to seeking review within the standard 28-day timeframe, including:

- Correspondence being sent to an abusive visa sponsor that did not inform the visa applicant about the refusal;
- The applicant is homeless and has not been able to effectively receive the correspondence;
- They do not understand the Department refusal notification due to language barriers and are unable to access affordable legal assistance in time, especially for people in immigration detention;
- They do not have the funds to pay for merits review (even with a fee reduction);
- They are experiencing serious mental or physical illness; and
- Fraudulent migration agent or legal representation.

We regularly assist protection visa applicants who have missed their AAT deadline to seek review for very legitimate and unforeseen circumstances, and suffer the unjust consequences of losing the right to seek merits review including indefinite detention, refoulement and permanent family separation. Their only recourse is to seek judicial review before the High Court of Australia, which is costly and not available for the majority of people, and has limited chances of success.

[26] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 136.

Case study

A RAINCLC member represented Kamal who missed his deadline to seek review before the AAT by one day due to a miscalculation of the timeframe because of how the 28-day deadline is calculated (by including the date of notification). Kamal's Department decision regarding his Protection visa refusal was clearly affected by error, however he could not seek merits review.

The RAINCLC member represented Kamal before the High Court of Australia, and his matter was successful and remitted to the Department. Had Kamal not been able to access legal representation (including payment of the High Court fees), he would have been returned to his home country and faced persecution. A remedy came at significant public cost and after delay, causing harm and distress.

The Attorney-General's Department's submission states that the reason for not affording extended timeframes for review to migrant and protection visa applicants is to "facilitate the effective management of a person's bridging visa".[27] However, people can apply for a bridging visa when they have unlawful status, including where they have applied for judicial review before the Courts of an AAT no-jurisdiction decision regarding late lodgement. Therefore, this justification is not a compelling rationale to exclude protection and migration applicants from seeking an extension of their deadlines.

For the same reasons, proposed subsection 202(5) in the Migration Act should be removed as it precludes section 19 of the ART Bill applying to a person seeking review of an adverse security assessment.

Recommendation 10: Remove subsections 347(5) and 202(5) in Schedule 2 of the Consequential and Transitional Bill No. 1.

Short timeframes for people in detention

The ART Bill sets out a general rule that provides for 28 days to lodge a review application.[28] However, people in immigration detention must lodge their review application within seven days.[29] In our experience, this is a wholly insufficient timeframe for an applicant to:

- read a complex legal decision that is often in a language they are not fluent in;
- understand the contents of the decision;
- recognise the timeframe to lodge an appeal; and
- contact a legal service provider for advice or assistance.

In addition, time is required for the legal service provider to respond to queries for assistance, obtain the necessary information to provide legal advice, and offer substantive assistance with lodging an appeal.

The Explanatory Memorandum suggests that shorter lodgement deadlines and review timeframes for people in detention are required to reduce their time spent in detention.[30] However, in practice these short

[27] Attorney-General's Department, Submission No 6 to Standing Committee on Social Policy and Legal Affairs, *Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)*, January 2024, 13.

[28] Administrative Review Tribunal Bill 2023 (Cth) cl 18(3).

[29] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 136.

[30] Explanatory Memorandum (n 12) 12 [70].

deadlines result in people missing out on their opportunity to seek merits review, and consequently being detained indefinitely for years while they attempt to access judicial review or Ministerial intervention.

Case study

After living in Australia for 20 years, Majok's refugee visa was mandatorily cancelled under section 501 of the Migration Act. At the time, Majok was serving a 12-month imprisonment sentence. When he received notice of his visa cancellation, he was not able to access a lawyer to help him to request revocation of the cancellation.

10 months later, the Department decided not to revoke Majok's visa cancellation. At this time, Majok was in immigration detention and had severe depression due to being isolated from his family. He did not know how to find a lawyer to help him. Majok missed the nine-day deadline to seek review of his Department non-revocation decision before the Tribunal.

Without access to merits review, Majok had limited options available and has been held in detention for years as he cannot be removed to his home country.

Extending the deadline for people in immigration detention to seek merits review is especially important to ensure accessibility given the ART's power to extend deadlines has been excluded for migration and protection review decisions (see above).

Recommendation 11: Amend subsection 347(3)(a) in Schedule 2 of the Consequential and Transitional Bill No. 1 to provide people in detention with 28 days to seek review.

Limited reinstatement for refugees, people seeking asylum, and migrants

The ART's powers for reinstatement are more limited for migration and protection decisions, and exclude certain safeguards provided in section 102 of the ART Bill, including the ability for the ART to reinstate an application on its own initiative if the matter was dismissed in error and for an applicant to seek reinstatement on the grounds of error. Also, the power for the ART to extend the deadline for a reinstatement application is completely excluded for protection applicants, which unfairly disadvantages them and compounds the additional barriers they face in seeking review which are mentioned above.

Recommendation 12: Remove section 368C in Schedule 2 of the Consequential and Transitional Bill.

Unfair character visa cancellation and refusal proceedings

Concerningly, there are no significant changes to the review of character matters by the ART. Section 500 of the Migration Act, which provides for the conduct of review of decisions of a delegate of the Minister under s 501 and s 36(1C) of the Migration Act, still applies to the ART. In light of this, there are considerable hurdles and accessibility issues that have not been addressed, including:

- nine-day timeframe under section 500 (6B) of the Migration Act to apply for a review of a decision to refuse or cancel a visa on character grounds;

- the prohibition on applicants raising relevant material during a hearing unless this has been provided to the Minister in writing two business days in advance; and
- deemed affirmation of the decision if no decision is made within 84 days.[31]

The onerous timeframes coupled with the adversarial nature of character hearings means that applicants will continue to find the new merits review body inaccessible. Failure to remedy this in the legislation is a missed opportunity to ensure procedural fairness across all sections of the ART.

In addition, we do not support contradictor representation (i.e. a representative who appears on behalf of the Minister or government agency) being part of proceedings for character visa cancellations and refusals. It creates an inappropriate power imbalance, impairing the integrity of decisions, in particular for unrepresented applicants. We have represented many applicants in relation to character visa cancellations and refusals and have witnessed the unfairness of this process, and strongly recommend that it be changed (and not introduced to any other types of matters). The best process for these types of matters is a non-adversarial process which does not involve cross-examination, and is conducted similar to the current Part 7 non-character visa cancellation matters under the Migration Act.

Recommendation 13: Amend the Migration Act and ART Bill to ensure the process and timeframes for character matters are in line with other migration review matters.

Access to legal representation

Proposed subsection 336P(l) in the Migration Act precludes protection and migration applicants from accessing financial and legal assistance under section 294 of ART Bill.[32] Although this provision retains the existing exclusion under the AAT Act for applicants in the Migration & Refugee Division, as noted by the Scrutiny of Bills Committee, this is not an appropriate justification to preserve limitations to people's access to a fair hearing.[33]

The lack of free legal assistance to people seeking asylum and refugees has had a devastating impact on their ability to engage with the review process due to barriers including literacy and language skills, poor mental health, and isolation from community support, especially for people in immigration detention. Protection visa applicants, including people in detention and prison, often experience greater barriers with access to justice and should be eligible to apply for legal and financial assistance regarding their review applications.

Legal representation is vital for applicants to navigate legally complex matters and effectively engage with the merits review process, particularly given the serious consequences of review such as deportation or indefinite detention. We refer to the Kaldor Centre's Data Lab evidence which demonstrates the importance of legal representation on success rates at the AAT - applicants with legal representation are on average five times more likely to succeed than self-represented applicants.[34] We echo the Law Council of Australia's

[31] *Migration Act 1958* (Cth), s 500(6H)-(6J), (6L). These concerns were also raised by the Law Council of Australia, see n14 [255].

[32] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 120.

[33] Senate Standing Committee for the Scrutiny of Bills (n 11) [1.50]-[1.55].

[34] University of NSW, Kaldor Centre, '*Breaking down the data: What the numbers tell us about asylum claims at the AAT*', 28 August 2023, https://www.unsw.edu.au/kaldor-centre/our-resources/kaldor-centre-data-lab/breaking-down-the-data--what-the-numbers-tell-us-about-asylum-cl.

recommendation that clause 294 of the ART Bill should apply to all applicants to ensure the ART is accessible and enables applicants' right to representation.

The Attorney-General Department noted that the legal and financial assistance available under s 294 is a small, discretionary program, and that migration applicants are already an existing priority in legal assistance through the National Legal Assistance Partnership (NLAP).[35] However, the vast majority of community legal services providers funded under NLAP do not provide legal advice regarding protection and migration related matters, and there are very limited avenues for people seeking asylum, refugees and migrants to obtain pro bono legal assistance - the demand for legal representation for this cohort far exceeds the assistance available. Therefore, NLAP does not justify excluding protection and migration applications from the AGD's scheme under s 294.

We reiterate the Standing Committee on Social Policy and Legal Affairs' strong support for additional funding to be provided through NLAP,[36] and the Law Council of Australia's call for an adequately funded legal assistance sector to meet the demand for legal support, noting that it is likely that s 294 will only apply to applicants unable to access support from a Legal Aid Commission or Community Legal Centre.[37]

Recommendation 14: Remove subsection 336P(l) in Schedule 2 of the Consequential and Transitional Bill.

The ART's new discretionary power to order a person not to be represented by a certain representative in specific situations raises concerns.[38] Whilst the provision may provide greater protection to applicants from being subjected to fraudulent or negligent representation, there is a risk that this power could jeopardise an applicant's interests and be paternalistic by impinging on an applicant's right to choose their own representative. We endorse the Law Council of Australia's recommendation that clause 66(3) should be amended to provide for procedural fairness prior to a decision by the Tribunal to remove a person's representative.[39]

We also consider that if the ART retains the power to make such an order, this order should be subject to review (either by the President or the Federal Court), and if such an order is made, the ART must provide the applicant with a reasonable amount of time to find alternate representation.

Recommendation 15: Amend subsection 66(3) to provide for:

- **Procedural fairness prior to a decision by the ART to remove a person's representative;**
- **A review mechanism for these types of orders; and**
- **After an order is made, the ART must provide applicants with a reasonable amount of time to find alternate representation.**

[35] House of Representatives Standing Committee on Social Policy and Legal Affairs (n 17) [2.175].

[36] Ibid [2.188].

[37] Law Council of Australia (n 6) 50 [204].

[38] Administrative Review Tribunal Bill 2023 (Cth) cl 66.

[39] Law Council of Australia (n 6) 22 [67].

Access to documents

The amendments to s 362A of the Migration Act dispose of an applicant's entitlement to have access to information given to the ART by the Department.[40] This entitlement has been replaced with a mere ability for an applicant to request information from the Department. There is no obligation for the Department to provide that information, nor is there any time limit prescribed. We are concerned that without an obligation and timeframe to provide this material, applicants will be prevented from accessing relevant documents within a reasonable amount of time or at all.

Our experience with protracted delays in the Department responding to Freedom of Information (FOI) requests regarding protection visa applicants' files indicates that the Department will not furnish the requested documents under section 362A in a timely manner, which will prevent applicants from effectively engaging in the review process and obtaining a fair outcome. Currently FOI wait times can take over one year, and in one instance, our client waited 998 days (i.e. 2.7 years) for their FOI documents to be released.

As noted by the Law Council of Australia, it is unclear how this amended provision will work practically because 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.[41]

Instead, we echo the call of the Law Council of Australia and UNHCR that s 27 of the ART Act should apply to protection and migration applicants, which requires decision-makers to provide a copy of all documents it has provided to the ART to each party to a proceeding. Currently this provision is excluded for protection and migration applicants under the Consequential and Transitional Bill.

Alternatively, if proposed section 362A of the Migration Act proceeds, it should be amended as it currently appears under the Migration Act as an entitlement to the requested information, and there should be an obligation on the Department to respond within a legislated timeframe.[42]

Recommendation 16: Remove subsection 336P(g) in Schedule 2 of the Consequential and Transitional Bill and s 362A in the Migration Act.

Exorbitant and inconsistent fees

The cost of Tribunal application fees undermines the objectives of the ART. The current fee for lodging a review in the Migration and Refugee Division is $3,374. We reiterate the Law Council of Australia's concerns that these fees are disproportionately high and pose a severe restriction on access to justice for people seeking asylum and migrants.

The Bills do not consider any arrangements to alleviate the financial burden on applicants seeking review. Applicants can only request a fee reduction of 50% (not a complete waiver) where paying the fee would cause them severe financial hardship. We have witnessed clients struggle to pay the reduced fee and place themselves in extremely vulnerable situations, including people who are victim-survivors of domestic, family and sexual violence use their emergency funds from the Australian Red Cross, sell their motor vehicle

[40] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 164.
[41] Law Council of Australia (n 14) 56 [235].
[42] Ibid [236].

(which they were also using for a home), pawn family heirlooms and other personal items and enter payday loans, in order to access merits review.

Exorbitant fees mean that seeking review remains inaccessible for many refugees, people seeking asylum and migrants. Whilst this matter may be dealt with by associated regulations, we consider that this issue warrants immediate attention and reform.

As observed by the Law Council of Australia, 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 less able to afford legal assistance after paying the application fee.[43]

Recommendation 17:

- **Amend ART Act to provide discretion for a complete waiver of the application fee for people facing significant financial hardship and/or other vulnerabilities;**
- **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; and**
- **Where an application to the Tribunal is successful, any application fees paid should be refunded.[44]**

Mode of hearing

The ART Bill stipulates that the President of the ART may make practice directions concerning the use of technology that allows a person to participate in a proceeding without being physically present. This is intended to allow for virtual participation in proceedings where an applicant may not be able to travel to the ART or attending a hearing may be unsafe for them.[45]

Our clients have consistently expressed a desire to attend hearings in person to ensure that they are able to express the full range of their verbal and nonverbal communication. Applicants have previously cited greater comfort at being able to speak face to face with a Member of the AAT, which has had a positive impact on their ability to speak in detail about their claims. The use of technology as a precondition to participation in a hearing may be prohibitive for some applicants who do not have access to a safe and quiet space to attend a hearing, technology literacy, a computer or mobile phone, and stable internet connection. Disposing of in-person hearings has resulted in a loss of humanity and is disempowering for applicants.

Given the serious consequences of review matters, including refoulement and deportation, applicants should be given the best possible opportunity to share their evidence. It is well-established that non-verbal cues (such as demeanour and facial expressions) are critical to establishing credibility; applicants are denied the opportunity to share this type of evidence with decision makers via videolink and telephone hearings. These procedural fairness issues often result in successful judicial review appeals and matters

[43] Ibid 51 [209].
[44] Ibid 52.
[45] Administrative Review Tribunal Bill 2023 (Cth) cl 36(1)(f).

are remitted to the AAT, resulting in additional trauma and delay for applicants and an inefficient use of resources.

Telephone and videolink interviews also create additional barriers to effective communication including interactions with interpreters, and internet and connectivity issues can stifle dialogue and prevent applicants and their representatives from effectively engaging during the hearing.

For applicants who are in prison or detention, the relevant Minister or government agency should facilitate their attendance at an in-person hearing at the office of the review body where their representative is located (or for unrepresented applications, at the nearest review body office).

Recommendation 18: Amend subsection 36(1)(f) of the ART Bill to maintain in-person hearings as a default position, with the option to make provisions for virtual participation where relevant and consented to by an applicant.

The ART should have direction-making powers to order the relevant Minister or Department agency (e.g. Department of Home Affairs) to facilitate an applicant, who is incarcerated in prison or immigration detention, to attend a location for their hearing or during the duration of their proceeding in order for them to effectively exercise their right to review. We have witnessed numerous applicants in prison or immigration detention being held at remote locations (including Christmas Island) during their review process, which jeopardises the fairness and accessibility of the review by preventing applicants from communicating with their representatives and attending their hearing in person.

Concerningly, often the Australian Border Force decides to transfer a person to a different detention centre within a short period prior to their scheduled hearing date. These transfers involve high levels of force and are very unsettling and upsetting for applicants who feel powerless and disorientated. Often members have expressed that they do not have the power to make directions to compel the Department or Minister of Home Affairs regarding the location of an applicant. Legislating these direction-making powers will ensure the review body is equipped to ensure applicants who are incarcerated can access their review rights.

Case study

Mohan was attacked in detention by other detainees and then while still injured, placed in COVID-19 related quarantine in a cell for five days. Aside from facing appalling physical conditions in his cell, he was only able to receive limited internet or telephone reception while standing on the toilet seat and holding his phone up to the window bars. In addition to the impact of his trauma and injuries from the attack, being held in this isolation cell in this restrictive manner also prevented Mohan from communicating with his lawyers in the critical two weeks prior to his hearing. Mohan was then transferred without any notice to a different detention centre, just one week prior to his hearing, causing further disruption to his ability to be in a settled state of mind in order to prepare for and give evidence at his hearing.

Recommendation 19: Amend section 79 of the ART Bill to provide direction-making powers to order the Minister or Department agency to facilitate an applicant's attendance at a location for their hearing or during the duration of their proceeding.

Accessibility for people from diverse cultural backgrounds

The ART Bill requires the ART to appoint an interpreter at an applicant's request, except where it considers that the applicant does not require an interpreter to communicate or understand evidence and submissions. An applicant's request for an interpreter should be honoured by the ART as they are in the best position to advise on their needs to properly participate in a hearing. Denying access to an interpreter when requested not only maintains an asymmetry of power between the ART and the applicant, but also contravenes the ART's objective of being responsive to the diverse needs of parties to a hearing.

Recommendation 20: Amend subsections 68(1) and (2) of the ART Bill to require that the ART appoint an interpreter where requested by an applicant.

Subclause 68(3) mandates that the ART must, on its own initiative, appoint an interpreter for an applicant even where they have not requested one if it believes that an interpreter will be required for the purposes of communication at a hearing. We recommend that an applicant's consent must be obtained before an interpreter is appointed. There are many reasons why an applicant may seek to not request an interpreter. This may include privacy concerns where the applicant had previously experienced discomfort or judgement from members of their own community, or where the prospect of revealing intimate information regarding their claims for protection to someone from their community may limit their ability to comfortably discuss their situation. This clause is especially concerning in the context of reviewable protection decisions, where the appointment of an interpreter without consent can significantly hinder how forthcoming an applicant may feel to discuss sensitive aspects of their claims.

The ART must respect and facilitate the agency of applicants with respect to the decision to request or not request an interpreter. Doing so would give effect to the ART's objectives of increasing accessibility and responding to the diverse needs of applicants in a trauma-informed manner.[46]

Recommendation 21: Amend subsection 68(3) of the ART Bill to require the ART to seek the consent of an applicant before appointing an interpreter.

Applicants are notified of critical information about their review applications entirely in English. The majority of applicants we assist do not speak English fluently, and many do not comprehend correspondence from the Tribunal, including the outcome of their review application, until it is explained to them with an interpreter. This can have dire consequences on some applicants who do not contact a legal service provider expeditiously and may subsequently miss their opportunity to engage in the merits review process or seek judicial review.

A user-focused accessible design of the ART would see applicants be able to meaningfully participate in all aspects of ART processes. One way to do so would be to communicate critical notifications, including ART case events, hearings and the outcome of an ART review application in the language of the applicant, especially where the ART is aware that the applicant requires an interpreter. If an interpreter was required for an applicant to adequately participate at a hearing, it reasonably follows that the applicant would require translated information to genuinely understand the outcome of their review application.

[46] Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth), 61 [435].

Given the ART may proceed with a case event in the absence of a party (section 81), may dismiss a matter (section 99) or make a decision without a hearing (section 106) where it is satisfied that the applicant received 'appropriate notice' of the case event or hearing, it is critical that the notice is accessible to applicants.

Letters notifying applicants of the outcome of their application usually include standard information about the review of decisions, timeframes they may be subject to, the payment of fees and the publication of decisions. This information could easily be translated as it is general and not specific to an applicant. Where an applicant's language is only spoken (for example, Rohingya) the ART should endeavour to notify the outcome of the application verbally with an interpreter of the relevant language – particularly in circumstances where such applicants are unrepresented.

Recommendation 22: Amend sections 81, 99, 106 and 111 of the ART Bill to ensure that notification is provided with translated materials and/or an interpreter where the Tribunal is aware the applicant is not fluent in English.

Second tier of review creates additional barriers

RAINCLC does not support the introduction of a guidance and appeals panel (Panel) because it is likely to create further backlogs, increase the formality of the review process and reduce accessibility. The ART's power to refer a question of law to the Federal Court under section 185 provides a sufficient mechanism for the ART to determine complex legal issues of significance, and a Panel is not required.

If the Government intends to retain the Panel in the ART Bill, we recommend that there is a maximum timeframe for Panel proceedings to be completed (e.g. 4 months) to reduce wait times and ensure applicants have timely access to judicial review.

Also, as a referral to the Panel is likely to result in the applicant incurring additional expenses, we recommend that applicants of proceedings referred to the Panel should be entitled to pro bono legal representation. This legal assistance could be provided via the Attorney-General's Department under section 294 of the ART Bill.

Recommendation 23: Remove Part 5 of the ART Bill.

Transparency

Member appointment

Given the long history of political interference with appointments to the Tribunal, it is concerning that section 209 of the ART Bill only provides the Minister with a discretionary power to establish a panel to assess candidates for appointment. An optional assessment panel process erodes transparency in the

appointment process. We note that the Commonwealth's interim Guidelines for appointments to the AAT require an assessment panel to be established.[47]

These issues were acknowledged by the Standing Committee on Social Policy and Legal Affairs Report, and the Committee encouraged the Government to adopt the suggestion of a mandatory selection panel in the appointments process.[48]

We endorse the Law Council of Australia's recommendations, and support the amendments by Kate Chaney MP, included as additional comments to the Standing Committee's Report:

- (**cooling-off period for former parliamentarians**) for integrity reasons and to prevent the politicisation of the ART, a former member of the Commonwealth parliament should not be eligible to be appointed as a member until completion of a two year cooling-off period from the end of their term;
- (**publication of details of members**) requiring publication of details of the qualifications and prior work experience of all members of the ART; and
- (**post-appointment obligations**) requiring all appointees to the ART to resign political party memberships, and to resign from the ART before standing for political party pre-selection.[49]

Recommendation 24: Amend section 209 of the ART Bill to:

- **Require the Minister to establish an assessment panel to assess candidates for appointment as a member under relevant appointment provisions;**
- **Require that assessment panels must consist of independent individuals with appropriate expertise; and**
- **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.[50]**

Conclusion

RAINCLC welcomes the establishment of the ART as an opportunity for migration and refugee review to be included under a consistent framework across all administrative review, with appropriate benchmarks for procedural fairness. The long overdue abolition of the IAA and Fast Track process will enable people who have been seeking asylum for over a decade to finally access a just review process.

However, we are concerned that the new legislation continues to exclude protection and migration applicants from procedural fairness standards, which unfairly disadvantages them and hinders the Tribunal from fulfilling its objectives to provide a just and accessible review process. We caution the Government against this approach and replicating past mistakes where purported efficiency was prioritised over just outcomes, which led to protracted delays and devastating consequences for refugees and people seeking asylum including refoulement and permanent family separation.

[47] Attorney-General's Department, '*Guidelines for appointments to the Administrative Appeals Tribunal (AAT)*', 15 December 2022, https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat.
[48] House of Representatives Standing Committee on Social Policy and Legal Affairs (n 17) [2.185].
[49] Ibid 76.
[50] Law Council of Australia (n 6) 44.