Introduction

Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey. Our services include legal, casework, housing, medical, education, employment and emergency relief. Based on what we witness through our service delivery, we advocate for change with refugees to ensure their human rights are upheld.

The ASRC welcomes the opportunity from the House of Representatives Standing Committee on Social Policy and Legal Affairs to provide a submission regarding the Administrative Review Tribunal Bill 2023 (**ART Bill**) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (**Consequential and Transitional Bill**).

The abolition of the Administrative Appeals Tribunal is a generational opportunity for critical reform, presenting a chance to remedy long-standing defects that impaired the Tribunal's function and inhibited provision of fair, just and timely outcomes. Whilst the Bills incorporate some measures to restore integrity to administrative review, such as more transparent member appointments and performance management mechanisms, the new legislation falls short of the reform required to fully remedy the dysfunction of the Tribunal.

Non-citizens in Australia face complex and intersectional barristers to access to justice, and their interactions with the justice system can have severe consequences including prolonged and indefinite detention, refoulement to persecution, and permanent family separation. The law is complex, and applicants are often unrepresented. Reform must increase accessibility, clarity and fairness for people in these situations rather than compounding disadvantage.

Equality before the law, which is enshrined in the International Covenant on Civil and Political Rights (ICCPR), is essential for fair decision-making. However, the Bills exclude protection and migration applicants from certain procedural fairness standards and instead impose a different set of rules, causing unfair disadvantage and compounding the additional challenges that refugees and people seeking asylum face in accessing justice including language barriers, experiences of trauma and immigration detention. In particular, the introduction of section 367A in the *Migration Act 1958* (Cth), which requires the ART to draw an unfavourable inference if protection applicants raise new claims and evidence, is a serious incursion on due process. The Government's justification for the different treatment of protection and migration applicants fails to balance timely decision-making with a process that does not jeopardise fairness. The ASRC urges the Committee to adopt its recommendations published in response to the Administrative Review Reform Issues Paper in 2023 to address broad reform issues including accessibility, harmonised timeframes and procedural fairness for protection and migration applicants.

Importantly, the Consequential and Transitional Bill 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. Once the ART is established, people with ongoing IAA matters will have the benefit of their case being assessed by the ART with greater procedural fairness. However, 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. Since 2020, over 30 percent of IAA decisions (i.e. over 300 decisions) reviewed by the courts were found to be unlawful,[1] noting that many people would not have been able to access judicial review or legal representation, meaning the number of unlawful decisions is likely to be considerably higher. The ASRC continues to urge the Government to provide a solution for the remaining 9,000 people failed by the Fast Track process.

Recommendations

Amendments to the Migration Act 1958 (Cth) in the Consequential & Transitional Bill

- **Remove section 367A** - Applicants should not be disadvantaged by raising new claims and evidence before the ART.
- **Remove subsections 202(5) and 347(5)** - ART Bill provisions regarding extending deadlines should apply instead.
- **Remove subsections 347(3)(a) and 500 (6B)** - ART Bill provisions regarding review timeframes should apply instead.
- **Remove subsection 359A(4)(d)** - The ART should notify applicants of adverse information in Department of Home Affairs (Department) decisions that it intends to rely upon to affirm a decision.
- **Remove section 368C** - ART Bill provisions regarding reinstatement should apply instead.
- **Remove section 357A** - Protection and migration applicants should have access to common law natural justice**.**
- **Remove section 336P(2)(l)** - ART Bill provisions regarding financial and legal assistance should apply instead.
- **Amend section 362A** - The Department must provide materials requested under this section within seven days, and the requested materials may include recordings.

Amendments to the ART Bill

- **Amend subsection 36(f)** - Hearings must proceed in person as a default position, and may proceed by use of technology where the applicant consents.
- **Amend section 37** - Notice of constitution must specify the member constituting the Tribunal for a proceeding.

[1] Administrative Appeals Tribunal, Annual Report 2021-22 - Chapter 4 - Immigration Assessment Authority, 2022, https://www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2021-22-44 (see appeals remitted in relation to total appeals finalised).

- **Amend section 59**
    - The Attorney-General's ability to become a party to a proceeding should be limited to proceedings before the guidance and appeals panel.
    - Subsection (3) should be mandatory - the Commonwealth must pay the costs of a party that were incurred due to the Attorney-General being a party to the proceeding.
- **Amend section 66**
    - The ART's power to order a person not to be represented by a certain representative should be subject to review (either by the President or the Federal Court).
    - The ART must not make such an order if it would disadvantage an applicant.
    - If such an order is made, the ART must provide the applicant with a reasonable amount of time to find alternate representation.
- **Amend section 67**
    - The decision-maker of the reviewable decision must not be appointed as a litigation guardian.
    - Applicants who have a litigation guardian appointed should be eligible for pro bono legal representation.
- **Amend section 68** - The ART must appoint an interpreter if requested by an applicant.
- **Amend section 79**
    - The ART may give directions to order the Minister or Department agency to facilitate an applicant, who is in prison or immigration detention, to attend a location for their hearing or during the duration of their proceeding.
    - The ART's power under subsection (2)(k) to give directions to limit the ability of a party to give information to the ART within a period before the start of a hearing should not apply to protection decisions. In relation to other decisions, the ART must consider the particular circumstances of applicants before making such a direction.
- **Amend section 81, 99 and 106** - 'Appropriate notice' must include a translated version of the correspondence regarding the case event or hearing where the ART is aware that the applicant requires an interpreter.
- **Amend section 98** - The ART should not have the power to dismiss an application if a fee is not paid where an applicant is in prison or immigration detention.
- **Amend section 100** - Include a non-exhaustive list of what circumstances may determine what is a 'reasonable' timeframe for not complying with an ART order.
- **Amend section 102** - Include a non-exhaustive list of what situations would be considered as 'special circumstances' to reinstate an application after the 28-day deadline.
- **Amend section 106** - The ART's power to make a decision without a hearing should be limited to where the decision is in favour of the applicant.
- **Amend section 110** - Judicial members should be required to have regard to Tribunal guidance decisions in their decision-making.

- **Remove Part 5** regarding establishment of guidance and appeals panel (Panel). In the alternative:
    - Include a maximum timeframe for Panel proceedings to be completed.
    - Applicants of proceedings referred to the Panel should be entitled to pro bono legal representation.
- **Amend section 122**
    - The President's power to refer a matter to the Panel must be qualified by a requirement for the President to consider whether a referral will cause any disadvantage to the applicant, including financial and psychological impact.
- **Amend section 199** - Include an exhaustive list of 'exceptional circumstances' when the Governor-General, upon recommendation by the Minister, can assign a member to a jurisdictional area.
- **Amend sections 208 and 209**
    - Establish an independent appointments commission.
    - In the alternative, the assessment panel under section 209 should be the mechanism to appoint members rather than appointment by the Governor-General, upon recommendation of the Minister, under section 208.
- **Amend subsection 208(3) and (4)**
    - Members allocated to migration and protection jurisdictional areas must have legal qualifications.
    - Gender representation, membership of Aboriginal and Torres Strait Islander people and membership reflective of the social and cultural diversity of the general community should be legislated in relation to membership criteria for the Tribunal.
- **Amend sections 221 and 234**
    - Include a mechanism for the President to raise any performance or conduct issues of judicial members with the Chief Justice of the Federal Court.
    - Subsections 221(1)(a), (b), (c), (f) and (g) should be grounds for mandatory termination of appointment of a member under subsection (3).
    - Subsections 234(1)(a), (b), (c), (d) should be grounds for mandatory termination of appointment of the Principal Registrar under subsection (2).
- **Amend section 242** - The annual ART report should include the number of ART decisions overturned and affirmed by the Federal Court on appeal for each jurisdictional area.
- **Amend section 251** - The Administrative Review Council should have a stipulated minimum number of meetings per year to ensure the Council fulfills its functions.

<u>Matters yet to be addressed in the Bills</u>

- Overhaul of visa character cancellation and refusal regime in the General Division of the Tribunal, including the removal of contradictor representation and provision of legal representation to applicants.

- Legislate maximum timeframes for review proceedings.
- Permit administrative review of ministerial decisions.
- Remove ministerial powers to override Tribunal decisions.
- Establish complaints mechanism for member conduct.

Amendments to the Migration Act in the Consequential & Transitional Bill

Certain proposed amendments to the Migration Act have adverse consequences for refugees and people seeking asylum, and undermine their access to a fair review process.

Section 367A - The ASRC has grave concerns that the ART must draw an unfavourable inference where a protection applicant raises new claims or evidence before the ART if the ART is satisfied the applicant does not have a reasonable explanation for this delay. Protection visa applicants often have valid reasons for a delay in providing updated evidence and claims, including trauma and related mental health illness, language barriers, fear of authorities and lack of legal representation. As the legislation 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 is likely to cause severe hardship and unfair outcomes for protection applicants. There is no valid justification for including this requirement, especially as Tribunal members already have discretion to assess any delay as part of an applicant's credibility within their existing powers. **The ASRC strongly recommends that this section is removed from the Bill.**

Case study

Mindy 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.

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.

Subsection 347(5) - The ability for the ART to extend deadlines under section 19 of the ART Bill does not apply to reviewable migration decisions or reviewable protection decisions, which unfairly disadvantages migrants and protection applicants. Refugees and people seeking asylum often face additional barriers to seeking review within the standard 28-day timeframe, including immigration

detention, language barriers, insecure housing and employment, serious mental or physical illness, and other unforeseen circumstances (e.g. fraudulent migration agent or legal representation), and should have the ability to request an extension of their deadline to seek review. The ASRC regularly assists 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. 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. **The ASRC recommends that this subsection is removed and the ART Bill's provisions apply.**

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

Case study

The ASRC 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 ASRC 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) by the ASRC, 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.

Section 347(3)(a) - The seven-day deadline for people in detention to submit a review application provides insufficient time for them to obtain legal advice and engage with the review process. The Explanatory Memorandum suggests that shorter lodgement deadlines and review timeframes for people in detention are required to reduce their time spent in detention. However, in practice these short deadlines result in people missing out on their opportunity to seek merits review, and consequently being detained indefinitely while they attempt to access judicial review or Ministerial intervention. **The ASRC recommends that the deadline for people in detention to seek review should be extended to at least 14 days (and preferably 28 days with the ability to extend in accordance with the ART Bill).** This amendment is especially important to ensure accessibility for people in detention given the ART's power to extend deadlines has been excluded for migration and protection review decisions (see above - section 347).

Similarly, retaining the existing nine-day timeframe under **section 500 (6B)** for people to apply for a review of a decision to refuse or cancel a visa on character grounds creates significant disadvantage

for applicants who are either in prison or immigration detention. As recommended above, this deadline should be extended to at least 14 days (and preferably 28 days in accordance with the ART Bill).

> **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.*

Section 359A(4)(d) - This amendment provides that the ART is not required to notify the applicant of information that it intends to rely on to affirm the decision under review if this information is included in the original decision. This is a significant departure from existing procedural fairness requirements where the Tribunal is required to notify applicants of adverse information in the decision under review which it intends to rely on.

This will permit the ART to refuse an application based on material mentioned in the applicant's Department decision, even where this material was not relied on by the Department in making its decision, without providing any notice to the applicant that it intends to rely on this material in a different manner to the Department. This will result in unjust outcomes for applicants who will be denied an opportunity to comment on adverse information before a Tribunal decision is made. 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 not be relevant to its review. Therefore, **the ASRC strongly recommends the removal of this subsection.**

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 39A(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 Mazar-E-Sharif as this matter was considered in the Department decision (even though the Department reached a different finding).

Section 368C - 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. **The ASRC recommends that this subsection is removed and the relevant ART Bill's provisions apply.**

Section 357A - Section 357A maintains the current codification of the natural justice hearing rule regarding the review of migration and protection decisions, and 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. 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 ASRC recommends that this section is removed.**

Subsection 336P(l) - This provision precludes protection and migration applicants from accessing financial and legal assistance under section 294 of ART Bill, which retains the existing exclusion under the AAT Act for applicants in the Migration & Refugee Division. 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.[2] **The ASRC recommends that this subsection is removed and the relevant ART Bill's provisions apply. Applicants should have access to funded legal representation on a means-tested basis.**

Section 362A - This amendment displaces the applicant's ability to seek materials provided to the Tribunal for the purpose of the review, and instead permits applicants to request written materials from the Department which it has provided to the ART. Given the protracted delays in the Department responding to Freedom of Information (FOI) requests regarding protection visa applicants' files, the ASRC is concerned that the Department will not fulfill its obligations 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. **The ASRC recommends that the Department is required to provide materials requested within seven days, and for the requested materials to also include recordings (and not be limited to written materials).**

[2] 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.

Amendments to the ART Bill

The ASRC's recommendations below aim to strengthen the proposed ART framework for a transparent, independent and just review process for all applicants. Also, our recommendations address certain provisions in the ART Bill that have particular adverse consequences for refugees and people seeking asylum.

Subsection 36(f) - While the President may make practice directions that allow a person to participate in a proceeding without being physically present, **the ASRC recommends this section be amended to require hearings to proceed in person as a default position, and the hearing may proceed by use of technology where the applicant consents.**

The ASRC's experience is that applicants prefer to attend their hearing in person with their representative and have the opportunity to fully express their claims. 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 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).

Section 37 - This provision states that the notice of constitution does not need to specify the member(s) constituting the Tribunal for a proceeding. This could disadvantage applicants who may require a member of the same gender based on their protection claims (for example, victim-survivors of sexual violence), however they will not be aware of whether they need to make such a request to the ART before their matter is listed for hearing. The ASRC recommends that the notice of constitution must specify the member constituting the Tribunal for a proceeding.

Section 59 - The Attorney-General's ability to become a party to a proceeding is likely to increase costs to applicants and delay in obtaining a final outcome, which are not in line with the ART's objectives including accessibility and fairness. In these circumstances, the ASRC recommends that

the Attorney-General's ability to become a party should be limited to proceedings before the guidance and appeals panel given that these proceedings are likely to be of more legal significance. Also, subsection (3) should be mandatory instead of discretionary (i.e. where the Attorney-General becomes a party to a matter, the Commonwealth must pay the costs of a party that were incurred due to the Attorney-General being a party to the proceeding).

Section 66 - The ART's new discretionary power to order a person not to be represented by a certain representative in specific situations raises concerns. 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. The ASRC recommends 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). Also, the provision should be amended as follows:

- the ART must not make such an order if it would disadvantage an applicant; and
- if such an order is made, the ART must provide the applicant with a reasonable amount of time to find alternate representation.

Section 67 - The ability for the ART to appoint litigation guardians is a positive amendment to assist certain applicants to have greater accessibility to participate in a review process and obtain a fairer outcome. **The ASRC recommends that this provision is amended to include that the decision-maker of the reviewable decision (e.g. Minister for Home Affairs) must not be appointed as a litigation guardian.** This will minimise a conflict of interest existing when a guardian is appointed.

Also, given that people who require a litigation guardian often have complex circumstances and face substantial barriers in access to justice, the ASRC recommends that applicants, who have a litigation guardian appointed, are eligible for pro bono legal representation. This legal assistance could be provided via the Attorney-General's Department under section 294 of the ART Bill.

Section 68 - The ART should be required to appoint an interpreter if requested by an applicant. The current wording permits the ART not to appoint an interpreter if the Tribunal considers that the person does not require an interpreter. This permits a paternalistic approach that undermines the agency of people who are not fluent in English to engage in the review process. The Tribunal is not best placed to know whether a person requires an interpreter; rather, the person who made the request for an interpreter will know whether they can understand communications and require an interpreter.

Section 79 - 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. The ASRC has 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.

Case study

In a Migration & Refugee Division matter, the ASRC's client, Mohammad, was detained at a low security Alternative Place of Detention in Brisbane (indicating he was considered a low security risk) and arrangements had already been made for him to attend his AAT hearing in Brisbane. Days prior to his hearing, Mohammad was told he was being moved to another detention centre and given ten minutes to pack his belongings. He was not told where he was being moved to and was placed in the back of a car handcuffed and body cuffed and driven 12 hours to Villawood immigration detention centre (VIDC), restrained the entire way except during two toilet breaks at police stations en route. Mohammad was then placed in the maximum security compound of VIDC. After this ordeal, he was clearly in no condition to provide his best evidence. Mohammad continued to seek answers for why he was treated this way, and never received satisfactory responses as to the chosen timing and mode of his transfer, even after complaining to the Commonwealth Ombudsman.

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 ASRC 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.

Subsection 79(2)(k) - The ART's power to give directions includes orders to limit the ability of a party to give information to the ART within a period before the start of a hearing. This will unfairly disadvantage protection visa applicants who are often unable to obtain legal representation until shortly before their hearing and may only be able to provide evidence closer to the date of their hearing. It will also place additional pressure on pro bono legal services providers who have limited resources and are sometimes only able to provide evidence shortly before a hearing. The ASRC recommends that this section does not apply to protection decisions. In relation to other decisions, the ASRC recommends an amendment that the ART must consider the particular circumstances of applicants before making such a direction.

Section 81, 99 and 106 - To ensure accessibility, the ASRC recommends that 'appropriate notice' to applicants regarding ART case events and hearings includes a translated version of the correspondence where the ART is aware that the applicant requires an interpreter. 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. Often protection applicants are unable to understand the Tribunal's correspondence because it is in English, which results in them being unaware of important information regarding their review application and missing case events and hearings.

Section 98 - The ASRC recommends that the ART should not have the power to dismiss an application if a fee is not paid where an applicant is in prison or immigration detention in light of the significant barriers they face in accessing review processes.

Section 100 - The ASRC recommends including a non-exhaustive list of what circumstances may determine what is a 'reasonable' timeframe for not complying with an ART order such as whether the person is in prison or immigration detention, or is experiencing homelessness.

Section 102 - The ART has the power to reinstate an application after the 28-day deadline in 'special circumstances', however this term is not defined which creates ambiguity and the possibility for inconsistent interpretation. The ASRC recommends including a non-exhaustive list of reasons that would be considered as 'special circumstances' such as the person is in prison or immigration detention, is experiencing homelessness, or is a victim-survivor of family violence.

Section 106 - The ASRC only supports 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. The ASRC has 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. **The ASRC recommends that the ART's power to make a decision without a hearing must be limited to where the decision is in favour of the applicant.**

Case study

A protection visa applicant, Farhad, became trapped offshore during COVID, despite having secured Department permission to travel to see his severely ill mother. The Tribunal proceeded to a decision without inviting Farhad to a hearing, in breach of s 425. Again, litigation was needed to correct what is plainly an unlawful decision. Had Farhad not been able to contact lawyers, he would not have had any remedy.

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 ASRC 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.

Section 110 - Judicial members should be required to have regard to Tribunal guidance decisions in their capacity as a Tribunal member to ensure consistency in the Tribunal's decision-making. A judicial member's qualifications as a Judge should not exempt them from following Tribunal guidance decisions because this would undermine the usefulness of guidance decisions.

Part 5 - **The ASRC 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, the ASRC recommends 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, the ASRC recommends 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.

Section 122 - In light of the matters raised regarding Part 5, the ASRC recommends that the President's power to refer a matter to the Panel must be qualified by a requirement for the President to consider whether a referral will cause any disadvantage to the applicant, including financial and psychological impact.

Section 199 - The Governor-General, upon recommendation by the Minister, retains the power to assign a member to a jurisdictional area in 'exceptional circumstances', however this term is not defined which creates the possibility for political interference. The ASRC recommends including an exhaustive list of 'exceptional circumstances' when this section would be relied upon to assign members to jurisdictional areas.

Section 208 & 209 - It is concerning that the Governor-General, upon recommendation of the Minister, retains the power to appoint members given the long history of political interference with appointments to the Tribunal. **The ASRC recommends the establishment of an independent appointments commission with members of this Commission appointed by the judiciary.** The Commission should be empowered to make decisions (and not merely recommendations) regarding appointments and reappointments to the review body.

If an independent appointments commission is not established, then the recruitment must be conducted by an assessment panel (rather than the final appointment decision resting with the Governor-General). Although section 209 provides the Minister with a discretionary power to establish a panel to assess candidates for appointment, it is not a mandatory process, which erodes transparency in the appointment process. The assessment panel under section 209 should be the mechanism to appoint members rather than appointment by the Governor-General, upon recommendation of the Minister, under section 208.

Subsections 208(3) & (4) - Whilst legal qualifications are not required for the appointment of senior and general members, **the ASRC recommends that members allocated to migration and protection jurisdictional areas must have legal qualifications** given the complexity of the law and the serious consequences for applicants, including being permanently excluded from Australia and separated from family.

In addition, the ASRC considers that proactive measures should be taken to diversify the membership of the review body to improve the quality of decision making and reflect the diversity of our society. It is recommended that provisions similar to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) regarding gender representation, membership of Aboriginal and Torres Strait Islander people and membership reflective of the social and cultural diversity of the general community are legislated in relation to membership criteria for the Tribunal.

Sections 221 and 234 - These provisions relate to the termination of member appointments, however exclude judicial members given that their supervision is monitored by the Federal Court. It

is recommended that a mechanism is included for the ART President to raise any performance or conduct issues of judicial members with the Chief Justice of the Federal Court of Australia to ensure that their conduct regarding their Tribunal role is adequately managed.

Section 221 - Subsections (1)(a) (conviction of an indictable offence), (b) (inability to perform duties due to physical or mental incapacity), (c) (serious misconduct), (f) (Serious breach of code of conduct) and (g) (Serious breach of the performance standard) should be grounds for mandatory termination of appointment of a member under subsection (3), rather than discretionary grounds for termination. The Tribunal has a history of not adequately responding to misconduct and performance issues of members, including termination of appointment, which has undermined the integrity of the Tribunal. These amendments are required to ensure that there are appropriate consequences for members due to serious conduct and performance issues. Also, these amendments will instill public trust and confidence in the Tribunal, which is an objective of the ART under section 9 of the ART Bill.

Section 234 - For similar reasons above, subsections (1)(a) (conviction of an indictable offence), (b) (inability to perform duties due to physical or mental incapacity), (c) (serious misconduct), (d) (performance has been unsatisfactory for a significant period) should be grounds for mandatory termination of appointment of the Principal Registrar under subsection (2), rather than discretionary grounds for termination.

Section 242 - The annual ART report should include the number of ART decisions overturned and affirmed by the Federal Court on appeal for each jurisdictional area to ensure transparency regarding the quality of the Tribunal's decision-making and provide helpful data for the Tribunal to improve its performance.

Section 251 - It is recommended that the Administrative Review Council has a stipulated minimum number of meetings per year (e.g. four per annum) to ensure the Council fulfills its functions.

Matters not addressed in the Bills

Critical matters in relation to administrative review are currently not addressed in the Bills. The ASRC urges the Committee to recommend that the Bills address the following matters.

General Division - character visa cancellation and refusal proceedings

The ASRC does 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 in the General Division of the Tribunal. It creates an inappropriate power imbalance, impairing the integrity of decisions, in particular for unrepresented applicants. The ASRC has represented many applicants in relation to character visa cancellations and refusals and has

witnessed the unfairness of this process, and strongly recommends 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.

The legally complex nature of these matters mandates that some form of legal assistance is required for applicants to appropriately make their case. However, many applicants appear unrepresented due to a lack of funds for legal support or the ability to find pro bono services, which is exacerbated by applicants' inability to work (generally character visa cancellation and refusal applicants are incarcerated in prison or immigration detention). It is also difficult for applicants to obtain legal representation as merits review is a no-costs jurisdiction, meaning that applicant representatives must work without payment in extremely complex and challenging spaces with no prospect of receiving costs for a successful matter. Even if applicants are represented, the sheer resources required to run these matters cannot be matched with the resources of the Commonwealth, which results in unfair outcomes and additional expenses for all parties.

The legislation, policy and practices entrench power imbalance that jeopardise lawful decision-making. For example, s 500(6H) of the Migration Act prevents the Tribunal having regard to any information provided by an applicant if not in writing and provided at least two business days prior to hearing. Also, applicants are under the care and control of the contradictor, and generally must participate from held detention controlled by the contradictor. Further, the nature of an adversarial matter is traumatising for applicants, especially those from refugee and humanitarian backgrounds.

All applicants in character visa cancellation and refusal matters must be provided with free legal representation due to the significant access to justice barriers, including that applicants are in detention in remote locations and often isolated from their support networks, and they generally have poor mental health. The consequences are also particularly severe, including refoulement, indefinite detention, and permanent family separation. The ASRC's clients report fearfulness, intimidation, and overwhelm when facing these processes.

There should also be funding for applicants to obtain forensic psychological assessments, which are essential to determine risk of recidivism and for the Tribunal to make accurate and fair decisions.

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 result in an adverse decision for the applicant (such as in subsection 500(6L) of the Migration Act 1958 (Cth); this legislation should be repealed.

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.

The ASRC also strongly recommends that the Minister's power to replace a decision of a review body (e.g. s 133C and s 501(3) of the Migration Act) should be abolished to ensure that administrative decision-making remains free from political interference. 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.

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.

Conclusion

Over the years the framework for migration and refugee administrative review has been stripped of many procedural safeguards for applicants. The establishment of a new review body provides an opportunity for migration and refugee review to be once again included under a consistent framework across all administrative review, with appropriate benchmarks for procedural fairness.

Sadly, 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. The ASRC strongly urges the Committee to adopt the recommendations in these submissions to address these issues, as well as its response to the Administrative Review Reform Issues Paper in 2023 to address broader reform.

The ASRC welcomes the long overdue abolition of the IAA and Fast Track process, which will enable people who have been seeking asylum for over a decade to finally access a just review process. However, this change comes too late for people who were failed by the Fast Track process. The ASRC continues to call on the Government to provide a solution for this cohort of people seeking asylum who have been part of our communities for over 10 years.