Administrative Review Reform - Responses to Issues Paper

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. The ASRC's Human Rights Law Program provides specialised legal representation and advice to people seeking asylum and refugees at all stages of the refugee status determination process, including primary applications, merits review and judicial review, as well as character visa cancellations and refusals.

The ASRC welcomes the establishment of a new administrative review system and the opportunity to provide feedback regarding its reform. There have been long-standing concerns regarding the Administrative Appeals Tribunal, especially in relation to political interference and protracted delays. Also, the poor quality of decision-making of the Immigration Assessment Authority, the limited review body under the unfair Fast Track process, has caused devastating outcomes for people seeking asylum.

It is essential that the new review body upholds the rule of law and restores public confidence in our legal system. For people seeking asylum and refugees, the consequences of a deficient review system are particularly dire, including refoulement, permanent family separation and indefinite detention. It is imperative that the new review body produces lawful and fair decisions in a timely manner.

The following are our responses to the Issues Paper, set out according to topics as per the paper.

Design

1. **What are the most important principles that should guide the approach to a new federal administrative review body?**

The legitimacy of any decision-making body rests upon its ability to make sound and lawful decisions, and to ensure due process. The AAT has not met this standard. A number of factors have diminished the fairness of the AAT's decisions, including political appointments that have undermined the Tribunal's independence and quality of decision-making, arbitrary process, decreased accessibility, and exorbitant delays (currently 2,018 days for a protection matter) as justice delayed is justice denied.

2. **Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?**

The ASRC considers that the existing principles should be expanded to include accessibility to enable applicants to effectively engage with the review process to ensure fair outcomes (such as access to

means-tested pro bono legal representation and culturally appropriate processes), and transparency and independence to promote decision-making that is free from political interference.

The ASRC also agrees with the Refugee Council of Australia's submission that the concept of dignity should be included, which reflects a human rights-based understanding of the term including the right to a fair hearing, as well as an individualised approach to administrative review including the consideration of cultural factors, disability and health concerns.

Also see our response to question 1.

3. **Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?**

The ARC (or a similar body) should be re-established to ensure the quality of decision-making by the new review body and identify measures to improve administrative review.

In order for the ARC to have meaningful impact, it is critical that it is provided with sufficient funding and the ability to make recommendations, which are implemented. These recommendations should involve a mechanism to ensure accountability and meaningful change (unlike the mechanism for the Commonwealth Ombudsman, who can make recommendations, which are often of limited practical benefit as they are not binding).

The body must consider and report on matters in a timely manner to ensure that its work remains relevant and can sufficiently remedy any issues. To promote accountability and transparency, it is recommended that the ARC's reports are tabled in Parliament and made available to the public. Also, it would be prudent for the ARC (or similar body) to be subject to review after a certain period of operation to ensure its effectiveness.

4. **How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?**

Please see our response to question 3.

Structure

5. **What structure would best support an efficient and effective administrative review body?**

The ASRC recommends that the structure of the new administrative review body should be simplified and there should be greater flexibility to adapt to current workload. The Administrative Appeals Tribunal Act

1975 (Cth) currently specifies the divisions of the AAT (under s 17A). However, instead of legislating the structure, the new body should be empowered to make decisions on how to structure its work and develop lists or practice groups which can be adapted to current work demands.

Also, the different levels of members should be streamlined (under section 6 of the AAT Act) and there should be greater clarity regarding the responsibilities for each level and the distinction between levels.

6. **How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?**

The allocation of members to matters should be determined by workload demands and members' expertise. The President (or an appropriate delegate) of the new body should have the discretion to assign members to different types of matters. Consultation with the Minister (as required under ss 17C - 17J of the AAT Act) before a member is allocated to a division should be removed; these powers have impinged on the AAT's independence and permitted political interference with the AAT's work, as well as causing inefficiencies.

7. **How can the legislation best provide for or support the application of different procedures for specific categories of matters?**

Consistent application of review procedures

There should be a minimum framework for review processes (e.g. lodgement of application, conduct of hearings) that applies consistently across all types of matters. Section 24Z of the Administrative Appeals Tribunal Act 1975 (Cth), which explicitly excludes minimum standards under Part IV of the Act for the Migration and Refugee Division, should be abolished as it unfairly disadvantages protection visa and migrant review applicants.

Contradictor representation

The AAT's current approach in the General Division regarding character visa cancellations and refusals involving contradictor representation is neither fair nor efficient, in particular for unrepresented applicants. The legally complex nature of these matters mandates that some form of legal assistance or representation 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.

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 2 business days prior to hearing. Applicants are under the care and control of the contradictor, and generally must participate from held detention controlled by the contradictor.

It is not uncommon for the Minister to file hundreds of pages of material shortly before hearing without particularising what is relied upon, to decline to provide a position on critical matters within their expertise including whether non-refoulement obligations are known, and whether there is any prospect of the Minister intervening to alleviate the risk of indefinite detention. Where applicants suffer additional barriers to access to justice including language and resources, these can be impossible to surmount. In short, there are numerous instances in which the Model Litigant Obligations (contained in Appendix B of the Legal Services Directions 2005) are not complied with, exacerbating disadvantage.

Also, the nature of an adversarial matter is traumatising for applicants, especially those from refugee and humanitarian backgrounds.

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 best process for these types of matters is a non-adversarial process which does not involve cross-examination, and is conducted similar to Part 7 non-character visa cancellation matters.

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 to the most severe forms of harm, indefinite detention in harsh and remote locations, and permanent family separation. Our clients report fearfulness, intimidation, and overwhelm when facing these processes. Please also see our response to question 59.

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.

The ASRC strongly opposes the Department of Home Affairs to appear as a contradictor in migration and refugee division matters for the reasons set out above. It creates an inappropriate power imbalance, impairing the integrity of decisions.

8. **Should the requirement that the President be a Federal Court judge be retained? Should any modifications be made? For example, should the requirement be extended to include former judges or judges of other courts?**

Given the seniority of the position, it is appropriate that the President of the review body has significant legal experience akin to that of a Federal Court judge. In addition, to promote independence, the appointment of a judge to this role will reduce political interference (and the perception of interference) in the management of the review body.

As the role requires someone who is currently engaged with the legal and judicial system and aware of relevant updates and developments, the ASRC recommends that only current judges are appointed. Also, in light of the breadth of the types of matters being reviewed, it is recommended that a judge at a federal level who has experience in judicial review of administrative decisions is appointed (as opposed to state courts that focus on other matters such as criminal law).

It is essential that the judge appointed as President has sufficient time allocated to enable them to effectively carry out their responsibilities.

9. **Should the new body have other judicial members and what should their role be?**

The appointment of additional judicial members will change the nature of the review body, which is not a court and is designed to be more informal and accessible. In addition, a critical challenge for the new review body will be to effectively address the large backlog of cases and appoint suitable members for this task. However, the Issues Paper highlights that AAT judicial members did not demonstrate a higher rate of case finalisation (see p. 28). While AAT judicial members presided over sensitive matters, we consider that other senior members could have conducted this task. Therefore, there is no clear rationale in support of the additional appointment of judicial members.

Senior Leadership

10. **What should be the role and functions of the President (or equivalent) of the new body? What qualifications and skills should be required?**

The President should be responsible for the oversight and performance of the review body, including providing guidance on new legal developments and sensitive issues. In light of these functions, it is important that the President has extensive legal experience and an in-depth understanding of administrative decision-making and judicial review. Therefore, the appointment of a Federal Court Judge to this position is recommended (see response to question 8).

However, the President should not be responsible for triaging cases and should be adequately supported in their managerial role by other staff members to avoid excessive delays, in particular for time-sensitive matters. The role of a registrar or similar, who is familiar with certain practice areas, would be suitable to triage cases and allocate them to members.

11. **What should be the role and functions of the administrative head(s) of the new body? For example, should there be a separate Principal Registrar and CEO?**

There should be a senior management role to oversee the review body's administration such as a registrar. The registrar role should be appropriately supported by an administrative team.

A CEO position encompasses broader responsibilities than administrative tasks and is usually the most senior position in an organisation; it is unclear how such a role would work in tandem with the President's position and may cause confusion (internally and externally).

12. **What is the appropriate split of responsibilities and powers between these roles?**

See responses to questions 10 and 11.

13. **Below the President (or equivalent), what should be the most senior level of membership in the new body and what should their primary responsibility be?**

The next most senior staff member in the review body should be a Registrar equivalent who is responsible for the operations and administration of the body. Please see our responses to questions 10 and 11.

14. **What aspects of leadership, management and administration should sit with the most senior levels of membership in the new body, and which should sit with APS leadership of the new body?**

The recruitment, performance management and supervision oversight of members should sit with the President and oversight of the administration of the review body should sit with the Registrar. Other leadership, management and administrative tasks can be allocated to APS leadership.

Members

15. What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?

Given the complexity of decision-making and the extraordinary significance of many outcomes to applicants, all members should be legally qualified, with a minimum of 5 years' post-admission experience in a relevant area of law. This recommendation is in line with the 2018 Callinan Report regarding the statutory review of the AAT, which stated that there is "no necessity to appoint professionals other than lawyers to the AAT (except perhaps for accountants to the Taxation and Commercial Division)".

Ensuring members are legally qualified with appropriate experience protects the ability of the Tribunal to make lawful decisions, which will reduce the burden on courts and public resources. At present, there is an unacceptable proportion of unlawful decision-making, at great cost to applicants and their families and communities, and to the integrity of the AAT itself. Statistics indicate at least 20% of Protection visa decisions appealed are ultimately found to be unlawful. That figure is likely to be significantly higher, given many applicants cannot access review or legal assistance to ensure their case is properly made.

Exceptions to the legal qualifications requirement should not be permitted because this could be exploited to appoint non-legally qualified persons based on political affiliations. It is well-known that the AAT's independence has been marred by political appointments, which has resulted in a significant loss of public confidence. Therefore, the new review body should take all measures to limit avenues where political appointments could be made.

In addition to legal qualifications, all appointments should have relevant industry experience with at least one subject matter expertise regarding the types of decisions reviewed by the new body. Also, experience working with people with vulnerabilities (such as victim-survivors of torture and trauma) and demonstrated cultural competency should be mandatory requirements.

The ASRC supports the simplification of the membership structure, similar to the three-tier example raised in the Issues Paper (at p. 35). Also, as mentioned in our response to question 5, the levels of membership in the new body should be simplified, with clear position descriptions and an explanation for the distinction between each level of membership.

16. Should all members be required to be legally qualified to be eligible for appointment?

Yes - see our response to question 15.

17. **What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?**

Subject-matter expertise is important given the specialised areas of administrative decisions - see our response to question 15.

18. **Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?**

The new review body should not have the ability to appoint experts. The appointment of experts could create a perception of bias and impact on the independence of the review body. For example, in General Division visa cancellation matters, often a forensic expert is briefed by the applicant and/or the respondent. If such an expert was appointed by the review body, it could unfairly disadvantage the applicant, particularly if the process of appointing experts is not consultative or transparent.

In addition, the appointment of additional experts or decision makers (including to a decision-making panel) to assist with a matter is likely to create further delays without any guarantee that the quality or fairness of the decision will be improved.

Critically, the appointment of experts may restrict the agility of the fact-finding task required of members. It may tend, for example, to render static views on particular claims or particular country circumstances, leading to incorrect decisions. In the refugee space, it is critical that each person's claims are considered individually, as there are often cumulative claims.

In the past, the Tribunal has had a research function, which published reports, enhancing transparency and case preparation. We support the reinstitution of a research function within the review body to clarify commonly accepted protection claims with careful controls, including report expiry. However, this research function must not limit the requirement for members to conduct individual research and consider the specific circumstances of each applicant.

19. **Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?**

In general, sessional members have not effectively contributed to reducing the backlog of AAT cases as they work part-time and have limited time available. Given the time and resources required to train sessional members, there is no clear evidence that this investment is beneficial for the review body to achieve its objectives.

Appointments and reappointments

20. Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?

The notion of 'appointments' should be replaced by a fair and equitable recruitment process of suitably qualified candidates. Recruitment for all levels of membership of the new review body should be merit-based and transparent, and reflect the principles of fairness which the review body seeks to administer. Instilling this requirement in legislation would ensure its implementation and limit political influence regarding appointment of members. Both the process for appointment and reappointment should be legislated.

Members should be recruited from a pool of appropriately qualified and experienced candidates. The ASRC recommends the establishment of an independent appointments commission. Given the long history of political interference in appointment processes, members of this Commission should be appointed by the judiciary. We note that such appointments should be consistent with the Law Council of Australia's Judicial Appointment Policy dated July 2021.

The Commission should be empowered to make decisions (and not merely recommendations) regarding appointments and reappointments to the review body. The Commission should establish standards performance criteria for re-appointment decisions (see our responses to questions 22-24), and legislation should require that the Commission document its reasons for recruitment decisions.

Also, the ASRC refers to the Transparent and Quality Public Appointments Bill 2023 tabled in Parliament by Dr Scamps in March 2023, which aims to establish a Public Appointments Commissioner (PAC) and departmental Independent Selection Panels (ISP) overseen by a Parliamentary Joint Committee on Appointments (PJCA). Whilst we do not agree with maintaining that the Minister has the final appointment power, we agree with the Bill's efforts to establish an independent authority for the appointment process for important public positions to prevent cronyism and political appointments.

If an independent appointments commission is not established, then the recruitment should be conducted by an assessment panel (rather than the final appointment decision resting with a Minister or the Attorney-General). The review body President should be part of the assessment panel, and should not delegate this responsibility to another member (except in circumstances of bias outlined below). Also, the assessment panel should be comprised of people who are legally qualified.

Should the Government retain the Minister's power to appoint members, the Minister must consult the President before appointing or reappointing members; this requirement should be legislated.

Also, the legislation should require that the President (and Minister if their role in appointments is maintained) must disclose any actual or perceived bias in relation to the recruitment of a member; where such a disclosure occurs, there should be a process for another person to have delegated authority to assess the suitability of the relevant candidate.

The ASRC agrees with the suggested example in the Issues Paper that legislation could also be modelled on the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022 (Cth), which provides for a merit-based and publicly advertised appointment process senior positions (see p. 41). Legislation should also stipulate the minimum qualifications and experience for the role, including legal qualifications and a minimum of 5 years' post-admission experience in a relevant area of law.

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 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 new review body.

Also, please see our response to questions 15.

21. Should the legislation require the Minister to consult the President before appointing or reappointing members?

Yes. Should the Government retain the Minister's power to appoint members, the Minister must consult the President before appointing or reappointing members; this requirement should be legislated. Please see our response to question 20.

22. What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?

In general, the ASRC supports the Guidelines for Appointments to the Administrative Appeals Tribunal (AAT) published in December 2022 as a helpful baseline for implementing a fair and transparent recruitment process.

Guidelines should stipulate required criteria for members, including legal qualifications, education and work experience, and cultural competence (noting that some of these criteria should be legislated - see response to question 21).

23. **What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?**

There should be fixed appointments of up to five years, with regular mechanisms for performance appraisal. Tenure for more senior roles such as President and Registrar may span up to seven years.

Reappointments must be merits based and transparent. Also, the process should consider the number of members being reappointed at any time to ensure a balance between continuity and retention of skills and opportunity for organisational renewal.

There should be a limit on reappointments of one additional term (e.g. appointment of five-year term plus reappointment of another five-year term - ten years in total). After this, the ASRC recommends that members should be required to have a break of at least two years before re-applying for a membership role.

Also, the legislation should provide that reappointments may only occur during a member's final 12 months of their tenure to prevent the politicisation of reappointments prior to an election.

24. **What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?**

Reappointments must be merits-based and transparent, and should not be automatic. Reappointments should occur in a timely manner to ensure minimal disruption for applicants. See our response to question 23.

Past performance indicators that are relevant to reappointment must include quality of decision-making with reference to the number of successfully appealed Federal Circuit and Family Court and Federal Court matters, and number of complaints regarding conduct towards applicants and representatives, including issues of bias.

When conducting reappointments, it is crucial that a re-assessment of conflicts of interests and bias (actual and perceived) are conducted to ensure the member's independence.

The legislative framework should permit brief extensions of tenure (up to 60 days) in circumstances where members have cases that will not conclude by the end of their term in order to finalise those matters.

25. **How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?**

The requirements and processes for managing conflicts of interest (actual and perceived) should be legislated. Where there is a conflict of interest (or perceived conflict of interest), that member should not continue their appointment. The review body must have enforceable powers in relation to members who have conflicts of interest, including termination.

The legislation should stipulate a non-exhaustive list of the types of conflicts of interests that must be disclosed (e.g. political campaigning, political party membership, affiliation with certain groups such as anti-immigration groups). There should also be periods of ineligibility before being able to be appointed as a member (for example, five years since running for office in a political party).

These requirements should also be incorporated in a code of conduct for members, as well as guidelines on expected behaviour regarding members' public engagements (including online conduct).

26. **What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?**

Members should not be permitted to carry on most forms of employment or any political activity while holding office to minimise conflicts of interest. There should be a formal application process for a member to engage in other employment, with final approval from the President.

Other activities, such as speaking engagements or personal websites, must at a minimum be non-political.

Please see our response to question 25.

27. **Should members be prevented from appearing as a representative or an expert witness in matters in the tribunal while they are members or for a period after their term as member concludes?**

While acting in their role as members, members should not be permitted to appear as a representative or an expert witness because this is likely to create a risk of actual or perceived bias. Former members acting as expert witnesses must disclose their previous positions and declare any possible conflicts of interest.

Performance management and removal of members

28. **How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?**

The ASRC strongly supports legislation to manage and respond to member performance and conduct, including a clear termination process.

The ASRC recommends that statistics on individual member decisions are publicly available and we endorse the submission of the Kaldor Centre for International Refugee Law in this regard.

The new review body should also have a code of conduct and other relevant policies regarding member performance and conduct.

29. **What are the appropriate grounds, thresholds and process for suspending or terminating the appointment of a member? Who should be responsible for suspending or terminating the appointments of members?**

There are a range of factors relevant to members' performance, including the rate of successful judicial review applications regarding their decisions, a minimum benchmark of decisions per year (which should be weighted based on the complexity of the matter), and, to ensure that speed is not at the expense of consistency and fairness, the manner in which matters are progressed. In addition, complaints regarding bias and inappropriate conduct towards applicants and their representatives, including successful recusal applications, should be considered. Also, risks of perceived or actual political interference and politicising decision-making should be actively acknowledged and quickly dealt with in an accountable and transparent manner.

There must be consequences for members' poor performance, including suspension and termination. Partisan or incompetent constitution is extremely damaging to the integrity of any administrative decision-making body.

It is important that adequate training and development initiatives are provided to members to enhance their performance.

Making an application

30. **How can the new body ensure that application methods and processes are accessible to all those seeking review? For example,**

a. **What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?**

The application process should be simple and clear, and applicants should be able to lodge without significant legal advice or representation (as such legal assistance is often not accessible for applicants before their lodgement deadline). The ASRC has extensive experience working with applicants who are people seeking asylum or refugees, and has observed that they often face additional barriers to accessing review, including people in immigration detention or prison, people experiencing homelessness, and people who are not literate or are not fluent in English.

A statement of reasons should not be required by the applicant. This will reduce the accessibility of the review process, particularly for unrepresented applicants and those with increased vulnerabilities and barriers to access legal representation (e.g. people who are illiterate, in immigration detention or prison, victim-survivors of family violence). It increases the risk that applications will be found to be invalid, precluding people from accessing their rights and exposing them to severe consequences. It is plain, in the migration and refugee space, that a decision is being challenged because an applicant does not agree with the outcome.

Also, the application should not require a copy of the decision relevant to the review as this approach has resulted in applicants being denied procedural fairness. The AAT has regularly relied on an applicant providing such a decision as the applicant waiving their right to be notified of any adverse information in the decision that the Tribunal intends to rely upon (which the initial decision-making body did not rely upon), which has resulted in unfair outcomes for applicants. The AAT has sufficient powers to request the decision-maker to provide the relevant decision to the AAT. Also, many applicants do not have access to their decision to provide a copy (such as those in detention or prison).

In the alternative, if the review body requires the decision to be provided with the application, there must be procedural fairness safeguards embedded in legislation that require the review body to put all adverse information in the decision to the applicant, and lodgement should not be deemed invalid if the applicant provides the decision after the lodgement deadline.

b. What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?

The differing time limits and the calculation of these deadlines causes additional anxiety and confusion amongst applicants and their representatives. The ASRC recommends that a consistent time limit of 35 days to make an application is applied across all matters (noting that this will require amendments to the Migration Act 1958 (Cth) as well); this is the same time limit for a review applicant to seek judicial review before the Federal Circuit and Family Court of Australia. This deadline should be calculated in the same manner as court lodgement deadlines and the 35 days should run from the day after the decision (i.e. the date of decision is not included in the 35-day limit). Differing methods of calculating deadlines for merits review and judicial review matters often result in deadlines being incorrectly calculated and applicants losing their review rights.

It is imperative that the new review body has the power to grant extension of time for lodgement in appropriate circumstances, including defective notification or recognising particular vulnerabilities of applicants such as people in prison, immigration detention or psychiatric facilities; people experiencing homelessness; victim-survivors of family violence; people with serious mental or physical illness; and other unforeseen circumstances (e.g. fraudulent migration agent or legal representation).

Case study

The ASRC represented a client 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. The client's Department of Home Affairs decision regarding his Protection visa refusal was clearly affected by error, however he could not seek merits review. We represented him before the High Court of Australia, and his matter was successful and remitted to the Department. Had he 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.

Case study

The ASRC has assisted a person who was never notified of an adverse decision by his previous lawyer, despite having been found to be owed protection, meaning he missed his deadline for review through no fault of his own. His only options are an appeal to the Minister, or a High Court challenge. In the meantime, he remains in detention, and is at risk of indefinite detention or constructive refoulement.

c. Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?

There should be consistent fees across all matters and a harmonisation of rules and process regarding fees and fee refunds. Reviews regarding protection visas and migration are excessive and significantly higher than other types of matters. This unfairly prejudices protection and migration applicants, often from refugee and humanitarian backgrounds, from accessing their review rights. For example, the ASRC has a significant number of clients who have, in our view, been unlawfully refused bridging visas by the Department of Home Affairs, who are unable to submit a review application due to the exorbitant fees.

Also, the option of fee reduction/waiver should be available across all types of matters - currently it is excluded in the Migration and Refugee Division. Often people seeking asylum and refugees do not have work rights or access to mainstream social support, and are unable to pay the relevant fees (either upon lodgement or at the conclusion of their matters). Also, people in prison and immigration detention are not able to work and are often isolated from their support networks, meaning that it is not possible for them to pay any fee, which denies them the opportunity to seek review.

ASRC has significant concerns that large numbers of people have not been able to access review processes due to fee barriers. This means they may face refoulement or detention, despite being refugees. Excessive and inflexible fees impair the integrity of Australia's refugee status determination process.

The ASRC supports the Law Council of Australia's recommendations in its submissions to the the Performance and Integrity of Australia's administrative review system Inquiry that:

- Fees imposed on persons applying for review in non-protection migration matters should be reduced to at least as low as the standard fee (a baseline of $920) and subject to the same

waiver provision as applies in those standard matters (i.e. reducible to $100 with the waiver decision itself being merits reviewable); and

- No fees should be payable by persons in immigration detention or prison or whom the AAT is satisfied is experiencing financial hardship which would be consistent with the Federal Courts (p.25).

Lastly, the ASRC agrees that application fees should be refunded to successful applicants.

31. What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?

Applicants should not automatically lose their review rights due to non-compliance with application requirements. As mentioned in our response to question 30, many applicants face additional barriers to complying with lodgement requirements and accessing legal representation (e.g. people in prison or immigration detention, people experiencing homelessness, victim-survivors of family violence, people with serious mental or physical illness). The review body should notify applicants of any non-compliance with application requirements and provide them with an additional period of time (e.g. one month) to comply.

32. What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?

A variety of lodgement methods will assist the review body to be more accessible to applicants. Whilst the review body can indicate a preference for lodgement method (e.g. online), paper/in-person lodgement and oral lodgement should be possible in certain circumstances (e.g. people in detention or prison, people experiencing homelessness). Also please see our response to question 33.

33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?

Oral applications will increase accessibility in seeking review. The review body should have a discretionary power to permit oral applications in certain circumstances, including (but not limited to) applicants who:

- are in prison or immigration detention;
- are illiterate;
- have a disability;
- are experiencing homelessness; and
- victim-survivors of family violence.

Case management

34. **What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?**

Case conferencing can be a useful tool to effectively manage a matter by clearly identifying the issues to be addressed and finalising timetabling matters. However, due to the difficulties that self-represented applicants and certain applicants in vulnerable cohorts (e.g. people in prison and detention) face, case conferences should be flexible and informal to assist parties to engage in the matter (rather than mandatory requirements which impose an onerous burden on applicants).

It is critical that applicants are provided with clear notification when their matter is allocated to a member and adequate notice before their hearing (at least 2 months) in order for applicants to prepare and access legal representation, noting that there are wait times to access pro bono services due to high demand. The notification and timetabling process should be consistent. At present, there are instances when our clients receive notification from the Tribunal regarding constitution, however then do not receive any updates for over one year; conversely, at other times no notification regarding constitution is provided to our clients and they only receive a hearing notification within two weeks of the hearing date. The current inconsistent approach with limited notice of hearings creates additional anxiety for applicants and jeopardises their matters as they are often unable to obtain legal representation before their relevant deadlines.

35. **What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?**

Conference registrars should be legally qualified and receive training on how to interact with and manage matters involving applicants facing specific vulnerabilities (e.g. people in prison and detention; victim-survivors of family violence, refugees and people seeking asylum).

36. **What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?**

The new body 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, to attend a certain location for their hearing or during the duration of their matter 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 often involve high levels of force and are very unsettling and upsetting for applicants who feel powerless and disorientated.

In-person attendance at hearing should be standard, unless there is an applicant request or exceptional circumstances.

Case study

In a Migration & Refugee Division matter, our client 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, he 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. He was then placed in the maximum security compound of VIDC. After this ordeal, he was clearly in no condition to provide his best evidence. He 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.

Case study

Our client in detention was attacked 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 him from communicating with his legal team in the critical two weeks prior to his hearing. He 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.

Often members have expressed that they do not have the power to make directions to compel the Department of Home Affairs 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.

In addition, the review body should have the power to compel the production of evidence from government agencies via subpoena.

The ASRC recommends that there is consistency regarding powers across the new review body. Please see our response to question 7.

37. What powers should the new body have to address non-compliance with directions?

The ASRC does not support the dismissal of matters due to an applicant's non-compliance with directions, particularly as non-compliance may be due to applicants facing barriers such as homelessness, being victim-survivors of family violence or being held in incarceration.

However, where a Minister or government agency does not comply with a direction (for example, transferring an applicant to attend an in-person hearing - see our response to question 36), the review body should have powers to sanction the Minister or government agency, including compelling them to provide evidence in relation to their non-compliance.

38. What other interlocutory processes and proceedings should be available in the new body?

The review body should facilitate new parties to be added to proceedings in certain circumstances. For example, it should permit newborn children to be added to their parent's application rather than filing a separate application (which is an inefficient use of resources and reduces accessibility for applicants).

39. What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

Expedited review processes should be consistent across migration, protection and character related matters. Such processes should only be used in relation to decision-making where a positive decision will be made (for example, the review body may dispense with a hearing where it will make a positive

decision on the papers), or where there is an objective reason for refusal which can be easily disproved (for example, a document not being provided that can be provided).

There should also be processes to prioritise matters including where there are compelling and compassionate reasons for prioritisation (e.g. applicant is in detention or prison, applicant has a serious medical condition, prolonged family separation).

Case study

The prioritisation of cases for people in detention is critical; failure to do so has a real human cost. For example, the ASRC represented the family of a young Hazara man who died in July 2019 at the age of 23 while held in Melbourne Immigration Transit Accommodation (MITA). His case had been impacted by the DBB16 decision and had been remitted from the Federal Circuit Court to the AAT on 30 November 2018 (see our response to question 56 regarding this cohort). At the time of his death, some eight months after his case was remitted, the AAT had not progressed or heard his case. This was despite his case meeting the criteria for both of the top two prioritised case types under the relevant Practice Direction. The week before he died, he contacted our service for the first time and told us that he did not have a lawyer and he was totally confused about the status and stage of his case. He said that could not handle his situation anymore and stated that he was stuck in a "circle game". His lack of understanding of his legal situation, his protracted detention and the lack of progression of his case, were all clearly causing him great distress in the period leading up to his death.

Case study

A refugee in detention with a psychiatric disability waited years for a Tribunal hearing because his case was considered difficult due to his health. During COVID, his illness was treated using methods including isolation. He became so unwell that he could no longer participate in the process or provide instructions to lawyers.

Expedited processes should not be at the expense of fair and high-quality decision-making. The ASRC strongly supports the abolition of the Immigration Assessment Authority, which denies procedural fairness to applicants and consistently makes inaccurate and legally erroneous decisions (please see our response to question 67). Sound, fair, consistent process supports efficient dealing with applications.

Information provision and protection

40. What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?

It would greatly assist applicants if all documents relevant to the review are provided to them as a matter of course (rather than having to submit requests for documents). This ensures applicants are able to understand issues in their case, and accords dignity. A similar process already occurs in General Division matters. However, it is important that only relevant documents are released to the applicant - currently in General Division matters, the sheer volume of documents released is often overwhelming for applicants and large sections of the materials are not relevant to the review.

Also, to ensure that applicants have access to all relevant information, Department of Home Affairs Freedom of Information (FOI) processing must be improved. Currently wait times can take over one year and often released material is highly redacted, which prevents applicants from responding to adverse information in their case. In one instance, our client waited 998 days (i.e. 2.7 years) for their FOI documents to be released.

In addition, the AAT regularly transfers applicants' requests for their Department of Home Affairs files to the Department instead of releasing the Department documents available to the AAT; this is inefficient and increases delays for applicants to obtain relevant documents. As stated above, the review body should release all relevant documents directly to the applicant.

41. What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?

The review body should have powers to compel government departments and agencies to provide documents relevant to the review at the applicant's request. Where applicants are regularly unable to access their documents relevant to the review due to protracted Freedom of Information delays (in particular regarding the Department of Home Affairs), the review body's powers to compel this information can assist.

Doing so as a matter of course, however, can delay decision-making and adversely impact the power imbalance against applicants. The preferred approach is for government agencies to release documents directly to applicants in a timely manner.

Please also see our responses to questions 36 and 40.

42. **What documents and information should the Tribunal share or not share with applicants?**

It is crucial that applicants have access to all materials relevant to the review, including any adverse information, in order to have procedural fairness and be able to wholly advance their case. The certificate provisions under the Migration Act 1958 (Cth), for example s 375 and s 375A, have resulted in unfair and unjust decisions being made as applicants were not provided with an opportunity to respond to adverse information. The ASRC recommends that such provisions are repealed.

However, if the new review body has similar certificate provisions, it is essential that there are clear and objective factors regarding which types of information should not be disclosed to the applicant and discretion for members to disclose this information to the applicant and their representative for the purposes of the review.

43. **By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?**

Proceedings involving applicants with particular vulnerabilities and/or who are at risk of harm (e.g. refugee/protection visa matters, victim-survivors of family violence or trauma) should be heard in private and non-disclosure and non-publication orders should be made. Guidelines regarding applicants with vulnerabilities should be issued to ensure this cohort is treated fairly and consistently.

44. **Should all matters involving sensitive national security information have a common set of protections and processes? What should those protections be?**

Yes. People subject to national security assessments are some of the most disenfranchised people in our society - they are often held in immigration detention for protracted periods, isolated from their support network, have difficulties accessing legal representation and suffer from mental health conditions due to their detention. It is critical that matters involving national security information ensure that applicants have access to their basic human rights, including the right to a fair hearing. These protections should involve the applicant (or at the very least, their legal representative) having access to any adverse information relied upon in the review process.

Resolving a matter

45. **What types of dispute resolution should be available in the new body?**

Any dispute resolution process should be available early in the review application process. Also, if dispute resolution involves an applicant in prison or detention, they must be provided with free legal representation to ensure that they obtain a fair outcome.

46. **Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?**

It is difficult to envisage when dispute resolution would be appropriate for protection visa and visa cancellation/refusal matters as the Department of Home Affairs is unlikely to change its visa decision.

47. **What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be able to refer a matter to dispute resolution?**

To improve accessibility, information about dispute resolution processes should be translated into key community languages. Also, many applicants may not be familiar with this type of informal process and care should be taken to ensure applicants are aware when dispute resolution is an optional process (as opposed to a mandatory condition).

48. **What powers should the new body have to resolve a matter before hearing? Which of these powers should be conferred on non-members? Should these powers be standardised across all matters?**

The new body should have powers to resolve matters on an expedited basis (including without a hearing) when a decision will be made in favour of the applicant; these powers should be standardised across all matters. Such decisions should only be made by members, who have the requisite legal skills and experience to adjudicate matters. Administrative staff should assist with triaging matters that can be expedited and referring them to members for final assessment.

Please see our response to question 39.

49. **What powers should the new body have to manage applications that are frivolous or vexatious?**

The new body should have powers to dismiss applications that are frivolous or vexatious. Subsections 42B(1)(a) and (c) of the Administrative Appeals Tribunal Act 1975 (Cth) provide guidance regarding such powers. However, the ASRC recommends that s 42B(1)(b) of the Act is not included under these powers because the assessment of reasonable prospects of success involves an evaluative judgement that should be conducted in the review decision-making process (e.g. whether someone is owed protection obligations and should be granted a protection visa).

50. In what circumstances should the new body be able to dispense with a hearing?

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 observed that provisions allowing resolution without hearing are often used to resolve cases unfairly, perhaps due to decision-making pressures on the Tribunal. The risk of this should be removed. Please see our responses to question 39 and 48.

Case study

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

Case study

A protection visa applicant 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 him to a hearing, in breach of s 425. Again, litigation was needed to correct what is plainly an unlawful decision. Had he not been able to contact lawyers, he would not have had any remedy.

51. How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

Whilst we agree that hearings need to be conducted in a manner that is accessible, informal, economical, proportionate, just and quick, this must not be done at the expense of fair, lawful, consistent, and high-quality decision-making.

In-person hearings

It is of critical importance that hearings proceed in person as a default position, and may proceed by videolink where the applicant consents. No hearings should be conducted by telephone unless at the request of the applicant due to accessibility reasons. 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) - please see our response to question 39.

The ASRC does not agree with the assertion in the Paper that telephone or videolink hearings can be less stressful for review applicants (p. 75). On the contrary, 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.

Applicants with vulnerabilities

There should be Guidelines to assist the review body staff and members to adequately support applicants with vulnerabilities, including, victim-survivors of family violence, members of the LGBTIQ community, and people with mental health conditions. Also, there should be Guidelines to support members to engage with people who have protection claims and/or past experiences of trauma. These Guidelines should be clear. For example, where a person fleeing gender-based violence requests a member of a particular gender, that request should be facilitated.

Contradictor representation

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 migration and refugee matters, including character cancellations and refusals. Contradictor representation in migration and refugee

matters will create a process that is not fair or informal, especially for self-represented applicants. The ASRC has represented many applicants in the General Division 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). Please see our response to question 7.

Statement of Facts, Issues and Contentions

The ASRC does not support the introduction of a Statement of Facts, Issues and Contentions (SOFIC) for migration and protection related matters and considers that this requirement should be removed for General Division character visa cancellations and refusals. The language of a SOFIC is formal and legally complex, which is contrary to the review body's informal and accessible approach. Also, there is no legal requirement to demonstrate that the primary decision maker was incorrect to require a SOFIC given that the review body is undertaking a de novo review. The decision under review should make clear to the Tribunal what the matters for determination are.

Decisions and appeals

52. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?

Written decisions are essential to ensure transparency and fairness. No oral decisions should be made which are unfavourable to applicants. In these circumstances, applicants require clearly articulated and thorough reasons. This is essential for them to understand why their application was unsuccessful and to exercise their right to seek judicial review (which is impossible without published reasons for their decision).

In circumstances where a decision favourable to the applicant is made, a short written decision may be appropriate depending on the complexity and circumstances of the matter.

Decisions must be issued in a timely manner (i.e within one month) and before any applicable deadline for judicial review before the courts.

53. How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?

Members should be provided with training in decision writing, including how to explain legal concepts in an accessible manner. Decisions are often inaccessible to applicants, including because of length and language barriers. A key metric for decision writing must be accessibility and empowerment. Whilst template documents can be of assistance in structuring decisions, it is important that members are not

over-reliant on such documents as they can prevent thorough analysis and evaluation of each case on its merits and result in legal error.

54. Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?

Streamlined processes often create a risk of unfair decision making. Please refer to our response to question 39 regarding expedited processes.

The Tribunal may appropriately decide to fast-track plainly meritorious claims based on published country information decisions.

55. What should be the timeframes for lodging an appeal from a decision of the new body? Should this date from the receipt of a decision, or the receipt of written reasons for decision?

Given that there can be a delay from the date of decision to the receipt of published reasons, the ASRC recommends that timeframes for lodging an appeal run from the date of published reasons. It is recommended that there are consistent timeframes for lodging a review application and appeal - please see our response to question 30(b).

56. When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?

It is important that the new review body follows the current jurisprudence in respect of legal developments as delays or inconsistent application of the law will impact on the body's independence, transparency and fairness. For example, the AAT's handling of review applications impacted by *DBB16 v Minister for Immigration and Border Protection* [2018] FCAFC 178 (also known as the Ashmore Reef cohort) was inconsistent, and many proceedings were stayed instead of the Tribunal reviewing the decisions based on the current law. Also, the Tribunal did not clearly communicate to applicants regarding how these matters would be processed and the timeframes involved.

In this circumstance where a question of law impacted a cohort of applicants, it would have been beneficial for the review body to have the power to refer the question of law to the Federal Court of Australia to ensure a legally correct approach was taken in a timely manner and to prevent an inefficient use of resources by each applicant filing a judicial review application (this occurred for many of the Ashmore Reef cohort).

As noted in our response to question 39, a young man in the Ashmore reef cohort died in the context of waiting for a protracted period of time for a decision. He was not the only detained person impacted by the DBB16 decision who waited far too long for the Tribunal to decide their case. Several other people held in immigration detention waited more than a year for their cases to be heard, including another of our clients whose case was remitted to the Tribunal from the Court in September 2018, yet he did not receive a hearing date until November 2019. He finally received a decision in February 2020, in total taking more than 17 months for a supposedly high priority case. If the AAT had the power to refer the DBB16 question of law to the Federal Court in a timely manner, it could have resolved the cases for this cohort more quickly and prevented undue suffering and distress for applicants.

A further example of a cohort that was impacted by a question of law and would have benefitted from such a referral power concerned visa cancellations under s 109 of the Migration Act decided by a delegate in 2017, who was retrospectively found not to have been validly appointed to make these decisions. These applicants applied to the AAT in around 2017. The Federal Circuit Court made its decision in November 2018, finding that the AAT did have jurisdiction to decide the cases, however its powers were limited to setting those decisions aside. The Minister then appealed this decision, and it was not until May 2019 that the Full Federal Court ruled in the Minister's favour, finding that despite the invalid delegation, the applications for review of the visa cancellation decisions made to the AAT were valid and the AAT had its full suite of regular powers to dispose of these cases. The confusion, anxiety and delay for this cohort could have been avoided if the AAT had the power to refer the question of law to the Federal Court in 2017.

The ASRC does not support the new body having an appeal panel or second tier of decision making (see our response to question 58).

57. What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?

An effective triaging process that can quickly identify systemic issues for cohorts of applicants would assist the review body to refer questions of law in a timely manner. Also, it is important that senior members of the review body are abreast relevant jurisprudence developments before the Federal Courts as they may have broader ramifications for review cohorts (for example, see our response to question 56 in relation to the Ashmore Reef cohort).

58. **Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an appeals mechanism within the new body for complex matters or matters raising systemic issues?**

a. **If available, how should the second tier of review operate and how should it be accessed? For example, should the President be able to refer a matter of their own motion? Should leave be required to appeal?**

b. **Should some matters be referred to a second tier of review from the outset and in what circumstances should this occur?**

The ASRC does not support the new body having an appeal panel or second tier of decision making as it is likely to create further backlogs, increase the formality of the review process and reduce accessibility.

Supporting parties with their matter

59. **Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?**

The ASRC strongly recommends that the right to legal representation is enshrined in legislation. Leave to appear with representation should not be required; such a requirement will hinder the review body's objectives, particularly fairness and accessibility, and result in unjust outcomes. 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 submission and Data Lab evidence which demonstrates the importance of legal representation on success rates at the AAT - applicants with legal representation are on average six times more likely to succeed than self-represented applicants.

The new review body should have an effective means-tested scheme for pro bono legal representation for applicants. Section 69 of the AAT Act provides that applicants may apply to the Attorney-General for the provision of legal assistance in circumstances of hardship. However, access to this scheme is virtually impossible. The ASRC is not aware of a single General Division applicant in relation to character visa cancellation or refusal who has been able to access legal assistance via this scheme. Also, given that General Division character matters are subject to an 84-day time period in which a decision must be made (see s 500(6L) of the Migration Act), an applicant is not able to access the legal assistance in time due to delays in legal assistance applications being processed. Lastly, this scheme explicitly excludes applicants in the Migration and Refugee and Social Services and Child Support Divisions, which denies these applicants the right to legal representation.

Therefore, the new legal assistance scheme should completely replace the existing AAT Act scheme and ensure that pro bono legal representation is available for all types of matters based on applicants' means.

Since 2014, successive governments have whittled down legal funding and since August 2022 there has been no government-funded legal assistance for protection visa applicants. 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. Without legal assistance, people seeking asylum cannot effectively engage in the refugee status determination process, which increases unfair outcomes and inefficient visa processing. It also exposes people seeking asylum to defective advice and covert representation, at great expense to their futures.

Assuring legal assistance for people engaging with these processes is one of the key measures that would enhance the integrity of decision-making, accessibility, and dignity.

60. Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?

The ASRC has observed that many applicants have had their visa applications and review matters mismanaged by unscrupulous actors, and applicants seek our assistance after their former representatives have incurred irreparable damage to their cases. The ASRC supports a code of conduct for representatives to minimise negligent and fraudulent behaviour. However, enforceable sanctions against representatives who breach this code are required to create meaningful change.

It is important for the new body to consult with representatives via their stakeholder organisations to seek input before finalising a code of conduct.

61. What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided:

a. by departments and agencies

b. by the new body

c. by other organisations

Onus on Department to ensure fair hearing opportunity

There is a concerning pattern of the AAT failing to take appropriate steps to ensure a person is apprised of their hearing, leading to decisions being made where a person never received their hearing invitation. For example, where a person is taken into custody during an AAT process, they may not be able to

update their contact details. The Department of Home Affairs, however, is aware of their updated contact details.

The ASRC supports a requirement that the Department provide the new body with any updated contact details for applicants.

Interpreting and translations

High-quality interpreters who have relevant experience are essential to ensuring accessibility for applicants who are not fluent in English. These services should be provided by the review body. Similar to the representative code of conduct, such a code should also exist for interpreters engaged for review hearings.

Also, to improve accessibility, the review body's website, practice directions and other resources should be translated into key applicant languages. In addition, resources such as infographics should be utilised to convey information about the review process, which will be more accessible to people with lower literacy levels.

Practice Directions

There has been an observable reduction in accessibility through Practice Direction reform. We refer to our submissions in respect of ensuring fair process for applicants.

62. **How can the new body (or ancillary services) enhance access for vulnerable applicants?**

The ASRC strongly supports means-tested funding for legal representation for all refugee, protection and humanitarian related matters to increase accessibility and ensure fair outcomes for applicants who face grave consequences of an adverse decision, including refoulement, deportation and permanent family separation. This cohort of applicants face additional vulnerabilities including incarceration in prison or immigration detention in remote locations with no support network, serious mental or physical illness, homelessness, being victim-survivors of torture and trauma, and literacy and language barriers.

Please also see our responses to questions 43, 59 and 61.

63. **How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?**

Please see our response to question 43 regarding private hearings, pseudonyms and other processes. In addition, there should be specific procedures regarding how the review body communicates with

victim-survivors of family violence (who are often included in the same review application as the perpetrator) to ensure they are not placed at risk of harm.

Also, the review body should automatically constitute all matters with female applicants who have experienced gender-based violence to female members. Also, where a female applicant raises sexual and gender-based claims after her matter has been constituted to a male member, the review body should reconstitute the matter to a female member. The onus should not be placed on applicants within this cohort to request the reallocation of a matter to a person of a certain gender because there are many factors which create a power imbalance that may prevent them from making such a request, including the nature of sexual and gender-based violence, experiences of persecution and cultural expectations, in particular for unrepresented applicants. Similar consideration should also be applied to applicants with transgender and sexual identity-related claims who have a preference for a male or female member.

Unfortunately, in the ASRC's experience we have faced difficulties in making requests for reconstitution to a member of a certain gender and these requests have not always been accommodated by the AAT, which made the review process more traumatic for our clients and hindered their ability to effectively engage in the review process.

64. Should the legislation place an obligation on the new body to promote accessibility for all users?

Yes. By including accessibility as an obligation (as opposed to merely an objective), the new review body is much more likely to proactively implement measures to improve accessibility.

65. How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?

The ASRC recommends that the new body seeks specialist advice from disability advocacy organisations and the Office of the Public Advocate to implement measures to support and empower people with disabilities to participate in their proceedings.

66. Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?

In certain circumstances it would be beneficial for the new body to appoint a litigation guardian for a party (similar to court proceedings). Currently the process to appoint a guardian is external to the AAT, which creates additional challenges for a timely appointment before a Tribunal matter is heard. For protection and character related matters, litigation guardians should be available for applicants who are minors or who do not have capacity to provide instructions.

Case study

A lack of clear process regarding guardianship caused delay of over three years in a proceeding relating to a person with severe disability. The matter needed to be resolved by permitting lawyers to appear as amicus or contradictors. Ultimately, the process was extremely damaging for the applicant, and resulted in his detention in appalling conditions for years of his life.

Other matters

67. Do you have any other suggestions for the design and function of a new administrative review body?

Amendments to the Migration Act

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. This harmonisation will involve the repeal of Part 5, Part 7, Part 7AA and s 500 of the Migration Act 1958 (Cth) and section 24Z of the Administrative Appeals Tribunal Act 1975 (Cth), which explicitly excludes minimum standards under Part IV of the Act for the Migration and Refugee Division.

In addition, the scope of migration decisions that are reviewable under the Migration Act should be expanded to include deportation decisions, personal decisions of the Minister and the exclusion of some Fast Track applicants from any merits review by the Immigration Assessment Authority (IAA). 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 AAT or to remove a person's right to merits review. We consider this to be 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.

Abolition of IAA

The ASRC strongly recommends that the IAA be abolished immediately, and Part 7AA review applications be heard and determined within the AAT until the new federal administrative review body is established. The 2023/2024 Federal Budget indicated that the IAA has received an additional $4 million in funding. The IAA has a notorious track record of producing erroneous decisions, with over 30% of court appeals of IAA decisions being successful per year from 2020 to 2022. Further funding of the IAA will lead to more unjust outcomes and an inefficient use of court resources to process appeals. The ASRC strongly urges the government to redirect the IAA's funding to the AAT in order to determine existing IAA matters and for the IAA to be abolished as a matter of urgency.

It is unlikely that the thousands of Fast Track cases presently before Federal courts will be resolved within a year. Urgent redress is needed so that people are not exposed to a recklessly defective process that has failed to deliver lawful, correct outcomes.

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 as noted above).

Complaints mechanism

In order to ensure accountability and independence of the new review body, 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.

Review of immigration detention conditions

There is currently no mechanism available for the review of immigration detention conditions, which has created an opaque and unjust system with many people languishing in detention for protracted periods (noting the average time spent in detention is 732 days). The ASRC strongly recommends that an independent review body is established to review a person's detention and make enforceable recommendations. Although the Commonwealth Ombudsman has reporting powers under the Migration Act for anyone held in detention for over two years, its powers are not binding and rarely result in the release of people from detention.

Referral service for applicants

The ASRC supports the establishment and funding of a pro bono or limited assistance referral service for refugee and humanitarian matters, including visa cancellations. For example, the Limited Assistance Scheme established by the Visa Cancellation Working Group could be a suitable conduit.

Holistic review

Without holistic reform, the new body will be impaired in its ability to achieve its objectives.

For example, the quality and timeliness of decisions being made at the primary stage requires dramatic improvement. The AAT is currently seen as a backstop, insulating the Department from ensuring sound decision-making. When plainly unlawful decisions are made and vacation is sought in accordance with *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, the Department often refers to the ability of an applicant to seek merits review before the AAT.

Changes are also required to the law and policy to ensure Australia's international non-refoulement obligations are properly articulated, that people are protected from constructive refoulement under s 197C of the Migration Act (a risk often not appreciated in AAT decisions), and that s 499 directions under the Migration Act minimise harm and offer appropriate protections for refugees, children, and people fleeing family violence. Similarly, it is critical that people have access to work rights throughout any review processes to protect them from destitution and to ensure they are able to meaningfully engage with the process.