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

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 Senate Legal and Constitutional Affairs Legislation Committee to provide a submission regarding the Administrative Review Tribunal Bill 2023 (**ART Bill**), the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (**Consequential and Transitional Bill**), and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024. The ASRC's legal team, the Human Rights Law Program, has considerable experience representing applicants before the Administrative Appeals Tribunal and witnessing the challenges that refugees and people seeking asylum face in accessing a fair and transparent merits review process.

The abolition of the Administrative Appeals Tribunal provides a critical opportunity for urgent reform 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 exacerbating the additional challenges that refugees and people seeking asylum face in accessing justice including language barriers, experiences of trauma and immigration detention. 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. From 2015 to 2023, 37% of IAA 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 clear pathway to permanence for the remaining 9,000 people failed by the Fast Track process.

[1] Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, *Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)*, 25 January 2024, [5]-[6].

Recommendations

Fair and just decision-making

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

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

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

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

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

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

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

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

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

Accessible and responsive to diverse needs

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

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

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

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

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

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

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

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

Recommendation 17:

- Amend ART Act to provide discretion for a complete waiver of the application fee for people facing significant financial hardship and/or other vulnerabilities;
- The ART Bill should facilitate the harmonisation of the review application fee across jurisdictional areas;
- In the interim, the application fee for migration and protection visa decisions, set by the Migration Regulations, should be reviewed as a matter of priority; and
- Where an application to the Tribunal is successful, any application fees paid should be refunded.

Recommendation 18: Amend section 98 of the ART Bill to prevent dismissal of an application where a fee is not paid if the applicant is in prison or immigration detention.

Recommendation 19: Amend s 36(1)(f) of the ART Bill to maintain in-person hearings as a default position, with the option to make provisions for virtual participation where relevant and consented to by an applicant.

Recommendation 20: Amend section 79 of the ART Bill to provide direction-making powers to order the Minister or Department agency to facilitate an applicant's attendance at a location for their hearing or during the duration of their proceeding.

Recommendation 21: Amend subsections 68(1) and (2) of the ART Bill to require that the ART appoint an interpreter where requested by an applicant.

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

Recommendation 23: Amend section 67 of the ART Bill to prevent a decision-maker from being appointed as a litigation guardian, and ensure that applicants who have a litigation guardian are eligible for free legal representation.

Recommendation 24: Remove Part 5 of the ART Bill.

Recommendation 25: Amend subsection 79(2)(k) of the ART Bill to remove the ART's power to limit the ability of a party to give information to the ART within a period before the start of a hearing.

Recommendation 26: Amend section 37 of the ART Bill to require the ART to specify the member constituting the Tribunal for a proceeding.

Recommendation 27: Amend section 59 of the ART Bill to limit the Attorney-General's ability to become a party to a proceeding, and require the Commonwealth to pay the applicant's costs if this occurs.

Recommendation 28: Amend section 100 of the ART Bill to include a non-exhaustive list of what circumstances may determine what is a 'reasonable' timeframe.

Recommendation 29: Amend section 102 of the ART Bill to include a non-exhaustive list of what is considered as 'special circumstances'.

Transparency & quality of government decision-making

Recommendation 30: Establish an independent appointments commission with members of this Commission appointed by the judiciary. In the alternative, amend section 209 of the ART Bill to:

- Require the Minister to establish an assessment panel to assess candidates for appointment as a member under relevant appointment provisions;
- Require that assessment panels must consist of independent individuals with appropriate expertise; and
- Where no assessment panel is established, or where a candidate is selected who has not been shortlisted by the assessment panel, the Minister should be required to provide reasons, in writing, why a different approach was adopted.

Recommendation 31: Amend section 208 of the ART Bill to provide:

- members allocated to migration and protection jurisdictional areas must have legal qualifications; and
- social and cultural diversity are incorporated as membership criteria.

Recommendation 32: Amend section 199 of the ART Bill to provide an exhaustive list of 'exceptional circumstances'.

Recommendation 33: Amend sections 221 and 234 of the ART Bill to provide a mechanism for performance and conduct of judicial members to be raised with the Chief Justice of the Federal Court of Australia.

Recommendation 34: Amend sections 221 and 234 of the ART Bill to expand the grounds of mandatory termination including in relation to conviction of an indictable offence, inability to perform duties due to physical or mental incapacity and serious misconduct.

Recommendation 35: Amend section 242 of the ART Bill to provide that the annual ART report should include the number of ART decisions overturned and affirmed by the Federal Court on appeal for each jurisdictional area.

Recommendation 36: Amend section 110 of the ART Bill to provide that judicial members should have regard to Tribunal guidance decisions**.**

Recommendation 37: Amend section 251 of the ART Bill to a minimum number of ARC meetings per year.

Fair and just decision-making

Procedural fairness for refugees, people seeking asylum, and migrants

Proposed section 359A(4)(d) provides that the ART is not required to notify applicants of information that it intends to rely on to affirm the decision under review if this information is included in the original decision.[2] **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 of Home Affairs (Department) decision, even where this material was not relied on by the Department in making its decision, without providing any notice to the applicant. The ART may give different weight or importance to the information in a Departmental decision, and denying an applicant from addressing these concerns is inconsistent with the objective of the ART to provide fair and just decision-making and is an inadequate procedural safeguard for a de novo merits review process.[3] The ASRC echoes the concerns raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), including that the disadvantage caused by this section would be compounded as people seeking asylum have limited access to legal assistance and experience language barriers.[4]

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 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.**

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 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.

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

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

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

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).

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

> "information about a class of persons to which the applicant is a member could have relative significance to a protection visa application. For example, this could include relevant country of origin information about the treatment of members of an applicant's ethnic or religious group which could have bearing on the applicant's claim for refugee status…the remaking of this provision provides an opportunity to consider the procedural fairness implications for applicants. It cannot, in the committee's view, be reasonably assumed in all cases that such information would be known to the applicant, and there may therefore be circumstances in which these measures create unfairness.[5]

In addition, the Committee warned that subclause 359A(4)(e), which seeks to allow the regulations to prescribe additional matters that the Tribunal can rely on but does not need to disclose to an applicant, could severely impact the fair hearing rights of applicants.[6] The ASRC agrees with the Law Council of Australia's recommendation to remove this section.[7]

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

[5] Ibid [1.66].

[6] Ibid [1.69].

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

Unfavourable inference against new claims by refugees and people seeking asylum

The ASRC has grave concerns regarding proposed section 367A in the Migration Act, which requires the ART to 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.[8] **Protection visa applicants 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 continue to cause severe hardship and unfair outcomes for protection applicants.

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.

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. Further, the Department new visa processing model of 'real-time priority processing'[9] has resulted in our clients being denied a meaningful opportunity to provide details of their protection claims (including denial of Department interviews, no opportunity to comment on adverse information or provide any supporting material). In these circumstances, people seeking

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

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

asylum cannot be expected to raise all their claims and evidence before the Department makes a decision.

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

Natural justice hearing rule

The Consequential and Transitional Bill No. 1 preserves section 357A of the Migration Act regarding the codification of the natural justice hearing rule for the review of migration and protection decisions, and newly inserted subsection (2C) explicitly states that the ART is not required to observe any principle or rule of common law in its review of these decisions.[10]

It is unjust that protection and migration applicants are deprived of the benefits of common law natural justice, especially when their decisions have grave consequences such as removal from Australia, permanent family separation and refoulement. The Scrutiny of Bills Committee shares our concerns as this provision "removes the requirement for the Tribunal to consider what fairness requires in the circumstances of each case".[11]

The House of Representatives - Standing Committee on Social Policy and Legal Affairs (Committee on Social Policy and Legal Affairs) considered that the separate code for migration and protection applicants will help address the delays in the Migration and Refugee Division of the AAT, which are purportedly motivating bad actors to lodge disingenuous applications for protection. However, **research by the Kaldor Centre Data Lab emphasises that the distinctive treatment of applicants in the Migration and Refugee division for the purpose of efficiency has only created inefficiencies and unjust outcomes**.[12] Also, the Scrutiny of Bills Committee observed that the meaning of the procedural code has been the subject of extensive litigation, which suggests that codification has not resulted in more clarity and certainty and queried whether there is sufficient justification for its use.

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

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

[10] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 151.
[11] Senate Standing Committee for the Scrutiny of Bills (n 4) [1.59].
[12] Kaldor Centre Data Lab (n 1) 7-12.

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

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

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

Public interest certificates deny procedural fairness

We echo the concerns raised by the Scrutiny of Bills Committee regarding provisions in the ART Bill in relation to public interest certificates that prevent disclosure of certain information to applicants.[13] Although these provisions are modelled on the existing legislation, we do not consider that this is a compelling rationale for maintaining their existence. The ART Bill only provides a very limited discretion for the Tribunal to disclose information covered by a public interest certificate,[14] which prevents applicants from responding to the case put against them, which is an unjustified breach of procedural fairness that is inconsistent with the ART's objectives, particularly transparency and fairness. This approach does not allow the Tribunal to consider the particular sensitivities of each case and determine whether disclosure (or at least partial disclosure) may be warranted, regardless of why the certificate was issued.[15]

The Parliamentary Joint Committee of Human Rights (PJCHR) also observed that the provisions in the ART Bill and the Consequential and Transitional Bill No. 1 that seek to restrict the disclosure of information or evidence limit applicants' right to a fair hearing and the prohibition against expulsion of aliens without due process (regarding migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia), and would not be proportionate in all circumstances.[16] The ASRC endorses the Scrutiny of Bills Committee and PJCHR's recommendation that the Bills should provide the Tribunal with discretion to disclose information to the extent that is necessary to ensure procedural fairness.[17]

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

[13] Administrative Review Tribunal Bill 2023 (Cth) cl 91; Senate Standing Committee for the Scrutiny of Bills (n 4) 2-6.
[14] Ibid.
[15] Senate Standing Committee for the Scrutiny of Bills (n 4) [1.14].
[16] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 1 of 2024, 7 February 2024) [1.51]-[1.53].
[17] Ibid; Senate Standing Committee for the Scrutiny of Bills (n 4) [1.19].

Decisions made without 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 also observed that provisions allowing resolution without a hearing are often used to resolve cases unfairly, perhaps due to decision-making pressures on the Tribunal. The risk of this should be removed.

Case study

A protection visa applicant, 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.

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

Timeframes for decision-making

To prevent the recurrence of exorbitant review delays, **maximum timeframes for different types of review matters should be legislated (up to a maximum of 12 months)**, with accountability mechanisms for the President of the review body (such as reporting to Parliament). However, if a

timeframe is passed, this should not 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.

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

Accountability for ministerial decisions

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

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

The ASRC also strongly recommends that the Minister's power to replace a decision of a review body (e.g. sections 133C and s 501(3) of the Migration Act) should be abolished to ensure that administrative decision-making remains free from political interference. The current legislative regime provides that the Minister has the power to overrule the Tribunal or to remove a person's right to merits review. This is a concerning departure from the rule of law and an overreach by the Executive aimed at avoiding proper and necessary accountability for government decision making.

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

Complaints mechanism

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

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

Accessible and responsive to diverse needs

Extensions of deadlines for refugees, people seeking asylum and migrants

The ability for the ART to extend deadlines under section 19 of the ART Bill has been excluded for reviewable migration and protection decisions under the proposed clause 347(5), which unfairly disadvantages migrants and protection applicants.[18] 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.**

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.

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.

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

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

Short timeframes for people in detention

The seven-day deadline for people in detention to submit a review application under proposed subsection 347(3)(a) provides insufficient time for them to obtain legal advice and engage with the review process.[19] The Explanatory Memorandum suggests that shorter lodgement deadlines and review timeframes for people in detention are required to reduce their time spent in detention.[20] 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).

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

Limited reinstatement for refugees, people seeking asylum, and migrants

The ART's powers for reinstatement are more limited for migration and protection decisions and exclude certain safeguards provided in section 102 of the ART Bill, including the ability for the ART to reinstate an application on its own initiative if the matter was dismissed in error and for an applicant to seek reinstatement on the grounds of error.[21] 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.

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

Unfair character visa cancellation and refusal proceedings

Concerningly, there are no significant changes to the review of character matters by the ART. Section 500 of the Migration Act, which provides for the conduct of review of decisions of a delegate of the

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

[20] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth), 12 [70].

[21] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 171.

Minister under s 501 and s 36(1C) of the Migration Act, still applies to the ART. In light of this, there are considerable access to justice and fairness issues that have not been addressed, including:

- nine-day timeframe under section 500 (6B) of the Migration Act to apply for a review of a decision to refuse or cancel a visa on character grounds. Generally people seeking review of character decisions are in immigration detention or prison and face the challenges mentioned above regarding short timeframes for people in detention;
- the prohibition on applicants raising relevant material during a hearing unless this has been provided to the Minister in writing two business days in advance; and
- deemed affirmation of the decision if no decision is made within 84 days.[22]

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.

The legislation, policy and practices entrench power imbalance that jeopardise lawful decision-making. 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

[22] *Migration Act 1958* (Cth), s 500(6H)-(6J), (6L). These concerns were also raised by the Law Council of Australia, see n7 [255].

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.

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.

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

Access to legal representation

Proposed subsection 336P(l) in the Migration Act precludes protection and migration applicants from accessing financial and legal assistance under section 294 of ART Bill.[23] which retains the existing exclusion under the AAT Act for applicants in the Migration & Refugee Division. Although this provision retains the existing exclusion under the AAT Act for applicants in the Migration & Refugee Division, as noted by the Scrutiny of Bills Committee, this is not an appropriate justification to preserve limitations to people's access to a fair hearing.[24]

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

[23] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 120.
[24] Senate Standing Committee for the Scrutiny of Bills (n 4) [1.50]-[1.55].

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.[25] We echo the Law Council of Australia's recommendation that clause 294 of the ART Bill should apply to all applicants to ensure the ART is accessible, and that applicants have access to funded legal representation on a means-tested basis.

The ASRC reiterates the Standing Committee on Social Policy and Legal Affairs' strong support for additional funding to be provided through National Legal Assistance Partnership,[26] and the Law Council of Australia's call for an adequately funded legal assistance sector to meet the demand for legal support, noting that it is likely that section 294 will only apply to applicants unable to access support from a Legal Aid Commission or Community Legal Centre.[27]

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

The ART's new discretionary power to order a person not to be represented by a certain representative in specific situations raises concerns.[28] 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).

The ASRC endorses the Law Council of Australia's recommendation that clause 66(3) should be amended to provide for procedural fairness prior to a decision by the Tribunal to remove a person's representative.[29] In addition, if such an order is made, the ART must provide the applicant with a reasonable amount of time to find alternate representation.

---

[25] 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.

[26] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Report, February 2024) [2.188].

[27] Law Council of Australia (n 7) 50 [204].

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

[29] Law Council of Australia (n 7) 22 [67].

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

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

Access to documents

The amendments to section 362A of the Migration Act displaces an applicant's ability to seek materials provided to the Tribunal for the purpose of the review, and instead merely permits applicants to request written materials from the Department which it has provided to the ART. There is no obligation for the Department to provide that information, nor is there any time limit prescribed. We are concerned that without an obligation and timeframe to provide this material, applicants will be prevented from accessing relevant documents within a reasonable amount of time or at all.

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.

As noted by the Law Council of Australia, it is unclear how this amended provision will work practically because if the Department fails to provide the information sought, it is uncertain how the Tribunal can provide a fair hearing, as it is required to do.[30]

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

Alternatively, if proposed section 362A of the Migration Act proceeds, it should be amended as it currently appears under the Migration Act as an entitlement to the requested information, and there should be an obligation on the Department to respond within a legislated timeframe.[31]

[30] Law Council of Australia (n 14) 56 [235].
[31] Ibid [236].

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

Exorbitant and inconsistent fees

The cost of Tribunal application fees undermines the objectives of the ART. The current fee for lodging a review in the Migration and Refugee Division is $3,374. We reiterate the Law Council of Australia's concerns that these fees are disproportionately high and pose a severe restriction on access to justice for people seeking asylum and migrants. Also, applicants can only request a fee reduction of 50% (not a complete waiver) where paying the fee would cause them severe financial hardship.

As observed by the Law Council of Australia, increasing fees is not an appropriate or effective way to address the backlog of administrative appeals, and it will likely result in an increase in unrepresented applicants, as people will be less able to afford legal assistance after paying the application fee.[32]

Recommendation 17:

- **Amend ART Act to provide discretion for a complete waiver of the application fee for people facing significant financial hardship and/or other vulnerabilities;**
- **The ART Bill should facilitate the harmonisation of the review application fee across jurisdictional areas;**
- **In the interim, the application fee for migration and protection visa decisions, set by the Migration Regulations, should be reviewed as a matter of priority; and**
- **Where an application to the Tribunal is successful, any application fees paid should be refunded.**

In addition, the ASRC recommends that the ART should not have the power to dismiss an application if a fee is not paid (as provided under section 98 of the ART Bill) where an applicant is in prison or immigration detention in light of the significant barriers they face in accessing review processes.

Recommendation 18: Amend section 98 of the ART Bill to prevent dismissal of an application where a fee is not paid if the applicant is in prison or immigration detention.

[32] Ibid 51 [209].

Mode of hearing

While the President may make practice directions that allow a person to participate in a proceeding without being physically present,[33] **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).

> **Recommendation 19: Amend subsection 36(1)(f) of the ART Bill to maintain in-person hearings as a default position, with the option to make provisions for virtual participation where relevant and consented to by an applicant.**

In addition, 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

[33] Administrative Review Tribunal Bill 2023 (Cth) cl 36(1)(f).

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.

Recommendation 20: Amend section 79 of the ART Bill to provide direction-making powers to order the Minister or Department agency to facilitate an applicant's attendance at a location for their hearing or during the duration of their proceeding.

Accessibility for people from diverse cultural backgrounds

The ART should be required to appoint an interpreter if requested by an applicant. The current wording under clause 68 of the ART Bill 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.

Recommendation 21: Amend subsections 68(1) and (2) of the ART Bill to require that the ART appoint an interpreter where requested by an applicant.

To ensure accessibility, the ASRC recommends that 'appropriate notice' to applicants regarding ART case events and hearings and notification of decisions 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 (clause 81), may dismiss a matter (clause 99) or make a decision without a hearing (clause 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, hearings and the opportunity to seek judicial review.

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

Litigation guardians

The ability for the ART to appoint litigation guardians under clause 67 of the ART Bill 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.

Recommendation 23: Amend section 67 of the ART Bill to prevent a decision-maker from being appointed as a litigation guardian, and ensure that applicants who have a litigation guardian are eligible for free legal representation.

Second tier of review creates additional barriers

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.

Recommendation 24: Remove Part 5 of the ART Bill.

Other accessibility issues

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.

Recommendation 25: Amend subsection 79(2)(k) of the ART Bill to remove the ART's power to limit the ability of a party to give information to the ART within a period before the start of a hearing.

Section 37 of the ART Bill provides 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.

Recommendation 26: Amend section 37 of the ART Bill to require the ART to specify the member constituting the Tribunal for a proceeding.

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).

Recommendation 27: Amend section 59 of the ART Bill to limit the Attorney-General's ability to become a party to a proceeding, and require the Commonwealth to pay the applicant's costs if this occurs.

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.

Recommendation 28: Amend section 100 of the ART Bill to include a non-exhaustive list of what circumstances may determine what is a 'reasonable' timeframe.

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.

Recommendation 29: Amend section 102 of the ART Bill to include a non-exhaustive list of what is considered as 'special circumstances'.

Transparency & quality of government decision-making

Member appointment

It is concerning that the Governor-General, upon recommendation of the Minister, retains the power to appoint members under section 209 of the ART Bill 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. The ASRC notes that the Commonwealth's interim Guidelines for appointments to the AAT require an assessment panel to be established.

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

- (**cooling-off period for former parliamentarians**) for integrity reasons and to prevent the politicisation of the ART, a former member of the Commonwealth parliament should not be eligible to be appointed as a member until completion of a two year cooling-off period from the end of their term;
- (**publication of details of members**) requiring publication of details of the qualifications and prior work experience of all members of the ART; and
- (**post-appointment obligations**) requiring all appointees to the ART to resign political party memberships, and to resign from the ART before standing for political party pre-selection.[34]

Recommendation 30: Establish an independent appointments commission with members of this Commission appointed by the judiciary.

In the alternative, amend section 209 of the ART Bill to:

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

[34] House of Representatives Standing Committee on Social Policy and Legal Affairs (n26) 76.

- **Require that assessment panels must consist of independent individuals with appropriate expertise; and**
- **Where no assessment panel is established, or where a candidate is selected who has not been shortlisted by the assessment panel, the Minister should be required to provide reasons, in writing, why a different approach was adopted.**[35]

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.

Recommendation 31: Amend section 208 of the ART Bill to provide:
- **members allocated to migration and protection jurisdictional areas must have legal qualifications; and**
- **social and cultural diversity are incorporated as membership criteria.**

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.

Recommendation 32: Amend section 199 of the ART Bill to provide an exhaustive list of 'exceptional circumstances'.

Sections 221 and 234 of the ART Bill 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.

[35] Law Council of Australia (n 7) 44.

Recommendation 33: Amend sections 221 and 234 of the ART Bill to provide a mechanism for performance and conduct of judicial members to be raised with the Chief Justice of the Federal Court of Australia.

Subsections 221 (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) of the ART Bill 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.

For similar reasons above, subsections 234 (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.

Recommendation 34: Amend sections 221 and 234 of the ART Bill to expand the grounds of mandatory termination including in relation to conviction of an indictable offence, inability to perform duties due to physical or mental incapacity and serious misconduct.

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.

Recommendation 35: Amend section 242 of the ART Bill to provide that the annual ART report should include the number of ART decisions overturned and affirmed by the Federal Court on appeal for each jurisdictional area.

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.

Recommendation 36: Amend section 110 of the ART Bill to provide that judicial members should have regard to Tribunal guidance decisions.

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.

Recommendation 37: Amend section 251 of the ART Bill to a minimum number of ARC meetings per year.

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.