Submission to Senate Legal and Constitutional Affairs Committee

Administrative Review Tribunal and Other Legislation Amendment Bill 2025

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 and Other Legislation Amendment Bill 2025.*

The ASRC's legal team, the Human Rights Law Program, has considerable experience representing applicants before the Administrative Review Tribunal and witnessing the challenges that refugees and people seeking asylum face in accessing a fair and transparent merits review process.

The right to an oral hearing is fundamental to justice and fairness for applicants seeking protection, many of whom have experienced torture and trauma in their country of origin or during their time in Australia, and / or are experiencing mental health difficulties that can contribute to difficulties with memory. Protection applicants are also often facing language barriers, difficulties in understanding the process of seeking review of their decision and general unfamiliarity with Australian institutions.

Given that the purpose of the Administrative Review Tribunal is to be 'accessible and responsive to the diverse needs of parties to proceedings'[1], it is deeply concerning that applicants experiencing these barriers may be deprived of the opportunity to participate in an oral hearing.

As noted in our March 2024 submission to this committee on the *Administrative Review Tribunal Bill 2023* & related bills, the ASRC only supports dispensing with a hearing where a decision in favour of the applicant can be made. Without this safeguard, the ASRC has observed that provisions allowing resolution without a hearing are often used to resolve cases unfairly, perhaps due to decision-making pressures on the Tribunal.

Summary of Recommendations

Recommendation 1:

Given the concerns we have about the Bill, the ASRC recommends that the Senate opposes the *Administrative Review Tribunal and Other Legislation Amendment Bill 2025* in its entirety. If the Committee does not see fit to follow this recommendation, we have also provided alternatives in recommendations 2 and 3.

Recommendation 2:

We recommend that all of Schedule 1 be omitted.

[1] https://www.art.gov.au/about-us/our-role/our-objective

Recommendation 3:

We recommend that proposed section 367C(2)(b) be omitted, which is the subsection that provides the power to designate a temporary visa type by regulation to be *'an application to be reviewed on the papers'.*

Summary of amendments of concern for protection applicants

Schedule 1, Part 1, Items 1-3 of the Bill which amends the *Administrative Review Tribunal Act 2024*, would establish a new discretion for the Tribunal to make decisions without an oral hearing when it appears that the issues can be adequately determined in the absence of the parties, and it believes it is reasonable to do so. This discretion will not apply to certain migration decisions (student visas and temporary visas designated by regulation) because in these circumstances the Tribunal will be *required* to decide the matter without an oral hearing. However, the discretion can apply to any other type of matter - including protection decisions.

In Schedule 2, Part 2 , item 16 (new Section 367C(2)(b) of the *Migration Act 1958*) the Bill provides that decisions to refuse a student visa and certain temporary visas prescribed in the regulations are *'application[s] to be reviewed on the papers'* meaning that the Tribunal must make its decision without holding the hearing of the proceeding. Reviewable protection decisions and permanent visa decisions cannot be designated as an *application to be reviewed on the papers,* but these provisions could foreseeably be used in the future to prevent hearings on important temporary visa types such as bridging visas, which have implications for whether or not a person is held in immigration detention. And as noted above, protection decisions and permanent visa decisions are still subject to the broad discretionary powers outlined above.

Finally, Item 16 would also establish new Division 4A of Part 5 of the *Migration Act 1958 (Cth)*, which further narrows the natural justice that applicants are entitled to, by creating a new procedure for reviewing applications only on the papers that would be considered a replacement for the existing 'exhaustive statement of natural justice' in the Act, but without an oral hearing.

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Discretion to make decisions without an oral hearing

The Administrative Review Tribunal (ART) is currently able to dispense with an oral hearing only when all of the parties consent, the decision is in the applicants' favour, a participating party fails to appear or a party does not comply with the ART Act or an order of the tribunal within a reasonable time.[2] However, this Bill amends that section to provide additional reasons for the Tribunal to decide to dispense with a hearing, including if it appears to the Tribunal that the matter can be 'adequately determined' in the absence of the parties or it is 'reasonable in the circumstances' to make its decision without a hearing. It appears that such discretion can be applied to any matter before the Tribunal including protection visa matters.

[2] Administrative Review Tribunal Act 2024, Section 106

This is a significant increase in the discretion of the Tribunal to decide that a hearing should be dispensed with, and is almost unlimited in the ways in which it could be interpreted by decision makers to apply. The AAT had similarly broad discretion in the former s426A of the Migration Act to dismiss a matter for non-appearance at hearing. This was often used to resolve cases unfairly, perhaps due to decision-making pressures on the Tribunal. The way in which such a discretion was previously utilised to the detriment of protection applicants, leaves us concerned about the ways in which the broader discretion in s106 will be applied.

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.

While the ASRC agrees that dispensing with a hearing where a decision is going to be made in favour of the applicant does provide significant improvements in efficiency, this is the only circumstance in which we believe that a hearing is not necessary. The failure of the Immigration Assessment Authority - a central feature of the now-abolished 'Fast Track' system that conducted reviews solely on the papers - demonstrates that review bodies which deny applicants an oral hearing are ineffective in protection matters.

Many protection applicants we work with have difficulty in navigating their legal processes on paper. While interpreting services (oral) are funded and provided for interviews and hearings, there are no translation services (to translate written documents) funded. This means that our clients are often unable to understand written requests and respond to them in writing, but are able to explain themselves at an oral hearing.

Interacting with written requests from the tribunal not only requires a good command of the English language, but also an understanding of the information the Tribunal is looking for and the ability to present it clearly, even when language is not a barrier. In contrast, our clients are often able to respond to questions from an interviewer setting out their safety concerns, clarifying timelines or to provide other information of interest to the Tribunal.

We are also concerned that the proposed safeguards in the amendments to s 106 require that a decision maker be satisfied that 'it is reasonable in the circumstances' and that applicants have had a 'reasonable opportunity to make submissions in relation to the Tribunal making a decision without a hearing'. What constitutes reasonableness in these circumstances is not defined in the Act and is open to broad interpretation by decision makers. As noted above, there are a myriad of barriers that visa applicants face in providing written responses to the ART. As such, these suggested safeguards are deficient.

Our view is that oral hearings are therefore critical to ensure that people seeking asylum receive a fair assessment of their protection claims.

Recommendation 2:

We recommend that all of Schedule 1 be omitted.

Designated 'applications to be reviewed on the papers'

Schedule 2, Part 2 would create a type of application called an 'application to be reviewed on the papers'. Item 9 makes clear that the scope of the existing migration procedures applies to reviewable migration decisions and reviewable protection decisions, but does not apply to an 'application to be reviewed on the papers. This provides clarity that Part 2 does not apply to protection decisions, therefore allaying some of our concerns about this Part as it relates to the people we work with. However, it is our view that the right to an oral hearing must be preserved for all migration applicants to safeguard the fairness, accessibility and integrity of the ART. As became evident in the recently-abolished Fast Track system, the lack of an oral hearing means that applicants are less likely to accept the decision of a review body, resulting in the review burden shifting to the court system and an increase in applications for judicial review in the Federal Circuit and Family Court of Australia.[3]

Item 16 of the Bill inserts new section 367C(2), which designates student visa applications as applications to mandatorily be reviewed on the papers, also creates a power for the Minister to prescribe types of temporary visas that can be designated as an 'application to be reviewed on the papers'. There is no limitation on this power, and it means that in the future, any temporary visa type can be made one for which the Tribunal must make its decision without holding an oral hearing.

Despite the fact that the Government seems to indicate[4] that their intention is for these provisions to be applied only for student visas at this point in time, we are deeply concerned that in future, other visas could be designated as applications to be reviewed on the papers. In particular, this power could be applied to bridging visas, which creates a real risk that decisions could be made without an oral hearing that have the consequence of placing people in immigration detention because without a visa, they must be detained.[5]

In the *Administrative Review Tribunal Bill 2023 Consequential and Transitional Bill No. 1*, Division 4, section 357A was preserved regarding the codification of the natural justice hearing rule for the review of migration and protection decisions, and newly inserted subsection explicitly stated that the ART is not required to observe any principle or rule of common law in its review of these decisions.

This Bill now proposes to expand this principle by inserting a new Division 4A, which would serve as an exhaustive statement of natural justice for 'applications to be reviewed on the papers'. ASRC has always held concerns about the codification of separate migration procedures, also expressed

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[3] Submission to the Attorney-General's Department responding to the Administrative Review Reform: Issues Paper, Kaldor Centre Data Lab, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Sydney, D Ghezelbash, https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Submission_Administrative_Review_Reform.pdf?, p.14

[4] Minister's second reading speech, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0020%22

[5] *Migration Act 1958 (Cth) section 189*

in our submission to this committee on the *Administrative Review Tribunal Bill 2023 & related bills.*[6] However, in addition to our opposition to any provisions of this kind, we are specifically concerned about proposed new section 367M of proposed Division 4A of Part 5 if it were to be applied to bridging visas in the future.

This proposed new section provides that 'the ART must dismiss an application if the applicant does not respond to an invitation, in relation to the application, given by the ART'. This would mean that where an applicant does not have legal assistance, does not understand the invitation to make a submission and therefore does not respond in time, the application must be dismissed. This is very concerning for vulnerable bridging visa holders, who may struggle to respond to notices in English which in these circumstances would be likely to be complex and difficult to understand. If the applicant doesn't understand the importance of the invitation and does not have legal representation, a slow response could mean that they are placed in immigration detention because their application is dismissed.

It is our view that the proposed Bill gives future governments a new power that could be used to further punish people seeking asylum. The power could be used to make it easier to detain them and could be applied to deny them a fair hearing at the Tribunal.

Recommendation 3:

We recommend that proposed section 367C(2)(b) be omitted, which is the subsection that provides the power to designate a temporary visa type by regulation to be *'an application to be reviewed on the papers'.*

Conclusion

The amendments proposed in this Bill would erode the basic safeguards of fairness that are essential to a functioning merits review system. In particular, the expansion of the Tribunal's discretion to dispense with oral hearings in schedule 1 creates an unacceptable risk that people seeking asylum will be denied the opportunity to properly present their claims, with life-altering consequences.

For these reasons, the ASRC recommends that the Senate oppose the Bill. Should the Committee not accept this recommendation, the ASRC provides Recommendations 2 and 3 to ensure that protection visa applicants or those on bridging visas for whom the consequence of affirming the Department's decision would result in their detention, can not now or in the future be subject to decisions made without an oral hearing. Preserving this safeguard is necessary to maintain both the fairness and the credibility of the Tribunal's processes.

[6] Submission to Senate Legal and Constitutional Affairs Committee Inquiry Administrative Review Tribunal Bill 2023 & related bills, Asylum Seeker Resource Centre March 2024, https://asrc.org.au/wp-content/uploads/2024/03/ASRC-Administrative-Review-Tribunal-Bills-SLCAC-Inquiry.pdf