

22 March 2024

Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra, ACT 2600

Dear Senate Committee

RE: Inquiry into the Administrative Review Tribunals Bill 2023 [Provisions] and related bills

During the Committee's public hearing on 15 March 2024, the Refugee Advice and Casework Service (**RACS**) and the Asylum Seeker Resource Centre (**ASRC**) undertook to provide a response to the following questions received from Senator Scarr:

1. "I'm interested to know from your perspectives any...areas where existing rights, existing processes and existing procedures are being or would be eroded as part of the transition...What I'm interested to specifically identify is whether or not there are, and details with respect to, any areas where from your perspective the new system would be worse than the existing system. Could you take that on notice and provide submissions which are particularly directed at that issue?"

There are several proposed provisions of the Administrative Review Tribunal Bill 2023 (**ART Bill**) and the Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023 (**Consequential and Transitional Bill**) which risk eroding an applicant's rights under the existing merits review system.

From the Consequential and Transitional Bill, this includes:

- **Section 359A(4)(d)** - This amendment provides that the ART is not required to notify the applicant of information that it intends to rely on to affirm the decision under review if this information is 'was included, or referred to, in the written statement of the decision that is under review'. 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, unless the applicant gave the information for the purpose of the application for review (*Migration Act 1958*, s424A(3)(b)).

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

This will mean that applicants will be burdened to address every issue in their Department decision, irrespective of what was deemed relevant at that time, without any knowledge of if the Tribunal would consider them at all in its decision-making. The result would be that applicants are likely to provide lengthy submissions and voluminous materials to the Tribunal and incur higher legal fees for the preparation of these materials. Consequently, this will create an inefficient use of the Tribunal's time and resources as it will be required to consider all these materials, which may not be relevant to its review. The Tribunal 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 Tribunal to provide fair and just decision-making.

Case study: Jibrail

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

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

The Tribunal then notified Jibrail that it considered that he could safely return to Mazar-E-Sharif, and Jibrail had an opportunity to address this matter before the Tribunal. Had subsection 39A(4)(d) been in place, Jibrail would have been denied the opportunity to respond to the adverse information the Tribunal intended to rely upon regarding relocation to Mazar-E-Sharif as this matter was considered in the Department decision (even though the Department reached a different finding).

** Names and other personal identifiers have been changed in case studies in order to protect confidentiality.*

Further, and fundamentally, a significant proportion of people accessing review do not understand their primary stage decisions, or why their applications were refused.

Primary decisions are in English, are legally and factually complex, and many pages long. They often follow what was an incomprehensible and intimidating process, where applicants were not able to access information or assistance. People report panic, fear, overwhelm, and incomprehension with respect to their decisions. Common barriers to comprehensive engagement and understanding include health, language, and education.

It is not onerous in the least for the Tribunal to be required to raise issues that will be determinative with applicants, in circumstances where applicants will have the benefit of interpretation, and with the end of having a meaningful and procedurally fair hearing. People are entitled to understand decisions being made about them, particularly where the consequences include detention, permanent family separation, and refoulement, and an opportunity to engage meaningfully in response.

This provision erodes appropriate and necessary protections of the integrity of decisions, and is particularly important where legal assistance is not available.

- **Section 362A(1)** - Applicants are currently entitled to request access to material that has been provided to the AAT for the purpose of review by seeking it from the Tribunal directly. Section 362A(1) of the Consequential and Transitional Bill would no longer allow applicants to do so, and instead directs them to apply to the Department of Home Affairs (**the Department**) to access materials provided to the Tribunal for the purposes of the review. The existing caseload

and backlog of Freedom of Information (**FOI**) requests within the Department has led to serious delays in the provision of requested material, which in turn can significantly undermine the ability of legal services providers' ability to properly advise or assist applicants with respect to their matter. The AAT's ability to be able to release these documents outside the scope of an FOI request provided for the prompt and timely provision of material in preparation and anticipation of an upcoming hearing, where notice is provided at most four weeks prior to the date.

From the ART Bill the relevant provisions include:

- **Section 66** - The ART's new explicit and discretionary power to order a person not to be represented by a certain representative in specific situations raises concerns. Whilst the provision may provide greater protection to applicants from being subjected to fraudulent or negligent representation, there is a risk that this power could jeopardise an applicant's interests and be overreaching by infringing on an applicant's right to choose their own representative. If the Tribunal retains the power to make these orders, that order should be subject to review by the President or Deputy President. The provision should also be amended to note that:
 - The Tribunal must not make such an order if it would disadvantage an applicant; and
 - If an order is made, the Tribunal must provide the applicant with a reasonable timeframe to secure alternative representation.
- **Section 68** - Subclauses 68(1)-(2) of the ART Bill requires the Tribunal appoint an interpreter at an applicant's request, save for where it considers that the applicant does not need an interpreter to communicate or understand evidence and submissions. An applicant's request for an interpreter should be honoured by the ART, as they are in the best position to advise on their needs to properly participate in a hearing. Denying access to an interpreter when requested not only maintains an asymmetry of power between the ART and the applicant, but also contravenes the ART's objective of being responsive to the diverse needs of parties to a hearing.

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

Outlined above is a summary of new provisions that have been introduced in the proposed ART and Consequential and Transitional Bills that risk eroding applicants' existing rights under the current merits review system. We reiterate the recommendations that have been put forward in our respective submissions to the House of Representatives Standing Committee on Social, Policy and Legal Affairs as well in our joint submission to this Committee.

While it is important to appraise the new features of the proposed ART that may adversely impact applicants, it is equally important to stress that the Committee is presented with a vital opportunity to correct the longstanding exclusion of applicants with reviewable migration and protection decisions from appropriate integrity standards that have been maintained in the proposed legislative framework for the ART.

Examples include provisions that have proven, over time, to impair the Tribunal's proper function: the proposed s 367A of the Consequential and Transitional Bill which retains the unfavourable inference direction, the inapplicability of the ART's power to extend deadlines (ss 202(5) and 37(5)), and s 357A(2C) which preserves a separate procedural code that relieves the ART of its obligation to observe any principle or rule of common law in its review of decisions are just three measures that have had a plain deteriorative impact on the integrity of decision-making processes and the accessibility of a fair and just mechanism of merits review for applicants with reviewable migration and protection decisions.

We urge the Committee to make use of this opportunity to not only avoid the deterioration of an applicants' existing rights under the current system of merits review, but to also address the features of the legislative framework which have been demonstrated to not be fit for purpose.

2. "I must say that, when I looked at the concept of this panel, one of the issues it raised in my mind was: what about the applicant whose case has been chosen to go through this panel process? Their case is being used as a mechanism—as a vehicle—to elaborate on the law to potentially fix the systemic issue, so their case is being used in a particular way for the common good. There should be some sort of recognition of that in terms of costs, in terms of time and process and in terms of how those cases are selected from a triaging point of view. There might be urgent cases which are inappropriate to go to the panel. Those are the sorts of considerations that you think should be given if we were to retain the panel—to make sure those sorts of considerations are factored in. If those considerations are factored in, would that give you more comfort in terms of continuing to provide for the panel? Could both of you give your view with respect to that?"

The proposed guidance and appeal panel (**Panel**) does present an opportunity for greater consistency and harmony across decision-making at the Tribunal. However, this must be balanced with a number of considerations that are sensitive to the accessibility and efficiency of the Panel. Historically, attempts at guidance have been shown to become quickly outdated and negatively impact correct and preferable decision-making, which can lead to a risk of cohort-based treatment where specific facts are critical. We recommend the following:

- more clarity to be provided around an applicant's rights to judicial review on Tribunal and Panel decisions where the application for a review by the Panel is made following a Tribunal decision (per Division 3 of Part 5 of the ART Bill). Specifically, if a decision made by the Panel is taken to replace the first decision made by the Tribunal and/or that first decision made ceases to be a valid decision in instances when the Panel is constituted to provide a further decision. From that, whether a decision from the Panel extinguishes any rights to judicial review on a first Tribunal decision;
- that free legal representation or assistance is provided to applicants;
- the Panel's review of a decision moves expeditiously, within defined timeframes, and avoids any unnecessary delay for the applicant; and
- there are clear provisions built in recognising that determination in these jurisdictions are fact-specific (that is, protecting against overreliance on guidance decisions and appropriate

attention to individual claims), and subject to rapid change based on international conditions (that is, subject to regular and defined review including validity periods); and

- the functions, operation and efficacy of the Panel are subject to regular statutory review.

We trust that this information is useful for the Committee in their deliberation of the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023.

Yours sincerely,

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