

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 26 April 2024

Question date: 29 April 2024

Paul Scarr asked the following question:

1. Reference is made to the Law Council of Australia submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs dated 2 February 2024 ('the LCA Submission').

The Law Council of Australia proposes a number of amendments to the Bill to provide greater emphasis on role of the ART in "merits review". Please refer to the recommendations contained on page 14 of the LCA Submission. How does the Department respond to the points made by the Law Council?

2. In paragraphs 54 and 55 of the LCA Submission, the LCA raises a concern that the inclusion of 'without prejudice' privilege may: 'have the unintended consequence of limiting the capacity and/or willingness of parties to engage in frank discussions, and, in turn, could minimise the potential for early and cost-efficient resolution of disputes'.

Could you please provide the rationale for including the 'without prejudice' privilege in clause 30? How is the inclusion of the privilege consistent with the objects of the Bill?

3. Please respond to the drafting suggestion contained in paragraph 59 of the LCA Submission. Is it needed for clarity?

4. Please refer to the recommendations made in the LCA Submission in relation to the power to remove a person's representative. Refer to page 23 of the LCA Submission. How does the Department respond to the concerns raised in the LCA Submission and the resultant recommendations in this regard?

5. Please refer to the proposed amendment to clause 71(2)(d)(ii) in relation to consideration of whether to hold a hearing in private or public. How does the Department respond?

6. Have the provisions of Part 6 been referred to the Independent National Security Legislation Monitor for review and input as part of the consultation process? If not, why not?

7. Refer to the recommendations contained on page 37 of the LCA Submission. Please provide a response to the recommendations. Are the concerns raised addressed elsewhere in the Bill?

8. In relation to the formation of assessment panels under clause 209, it is noted that there is now an obligation for these to be formed. Refer to the commentary at paragraph 168 of the LCA Submission. Is there any requirement in the Bill that the members (or a majority of members) of an assessment panel must be "independent" of Government?

9. How does the Department respond to the recommendations made by in the LCA Submission in relation to the Administrative Review Council? Please respond to each of the recommendations on pages 46 to 48.

10. In Schedule 2 of the LCA Submission, recommendations are made in relation to migration matters. How does the Department respond to each of the recommendations made by the LCA on pages 55 to 60?

The response to the questions are as follows:

1. The ART Bill does not attempt to define merits review, which is a well-established, and understood, concept of administrative law. Defining merits review could unintentionally limit the meaning and evolution of the term, which is otherwise well-understood.

Despite this, the elements of merits review are integrated in the ART Bill through the role and functions of the Tribunal. Particularly, the Tribunal stands in the shoes of the original decision-maker, with all their powers, and is able to consider all relevant evidence and circumstances (including the facts, law and policy settings) that was before the original decision-maker to make the correct or preferable decision.

The ART Bill further enshrines the principles of merits review in Division 5 of Part 3 of the ART Bill, outlining that the Tribunal:

- has discretion in relation to procedure (clause 49)
- is to act informally (clause 50)
- is not bound by the rules of evidence (clause 52)
- controls the scope of review (clause 53)
- can exercise all the powers of the original decision-maker (clause 54);
- must give parties reasonable opportunity to present their case (clause 55)).

Title of clause 54

Clause 54 provides that the Tribunal, when reviewing a reviewable decision, may exercise all the powers and discretions conferred on the original decision maker. The title of clause 54 was drafted to reflect this purpose. Amending the heading to “Tribunal to review decision on the merits” would not provide an accurate reflection of the substance in clause 54.

2. Clause 30 of the ART Bill provides that documents required to be given by the decision-maker must be given, regardless of legal professional privilege, without prejudice privilege, or public interest immunity in relation to the production of documents. This clause is equivalent to the current settings within the AAT Act (s 37(3)), with minor changes to reflect modern drafting practices and clarity on the specific privileges that are displaced. The abrogation of privilege only applies to documents provided by the decision-maker that are relevant to the review.

The Tribunal’s objective (set out in clause 9) is to provide a mechanism of review that (amongst other things) is fair and just, improves the transparency and quality of government decision-making and promotes public trust and confidence in the Tribunal. Clause 30 supports these elements of the objective by ensuring the Tribunal has access to the same materials that the original decision-maker had when making the reviewable decision. This is a key component of merits review, and allows the Tribunal to ‘stand in the shoes’ of the original decision-maker and freshly consider all of the relevant facts, law and policy aspects of the original decision. It also improves the transparency of government decision-making by

supporting full disclosure of materials, which in turn promotes public trust in both the Tribunal and the decision-making (and review) process.

Clause 30 does not prevent, or disincentivise, parties from negotiating settlements after an application has been made to the Tribunal. Clause 30 only applies to the initial production of documents to the Tribunal (ie. documents in the control or possession of the decision-maker that is relevant to the Tribunal's review of the decision – per clause 23), and where the Tribunal has requested the production of a specific document or statement for the review (clauses 24 and 26). Clause 30 does not apply to documents obtained by the decision-maker after the review has commenced (per clause 25). Where a decision-maker is required to produce documents to the Tribunal, they are able to seek non-disclosure or publication orders in relation to those documents (clause 70).

3. Subclause 39(3) of the ART Bill currently provides the Tribunal constituted must have no more than one member who is a Judge. The Explanatory Memorandum at paragraph 408 explains this subclause prohibits the Tribunal from having more than one member who is a Judge constituted for a proceeding. It goes on to say this 'recognises that having more than one Judge hear a single matter is likely to significantly impact the pool of Judges available to consider other complex or significant matters'.

The current drafting of subclause 39(3) achieves this policy intention, and does not require amendment.

4. The ART Bill allows any party to a proceeding to be represented by another person, without requiring the leave of the Tribunal (clause 66, ART Bill). Reflecting the character and ethos of administrative review and more particularly Tribunal reviews, the ART Bill also requires that all parties and their representatives use their best endeavours to assist the Tribunal to make the correct or preferable decision; and to achieve the objective in clause 9 of the ART Bill.

The AAT has an implied ability to remove representatives where they are not assisting the Tribunal, and does so currently. The ART Bill makes this power explicit and ensures that it can only be used in certain circumstances – that is, where the Tribunal considers that:

- the representative has a conflict of interest in representing the person
- the representative is not acting in the best interests of the person
- representation of the person by the representative presents a safety risk to any person
- representation of the person by the representative presents an unacceptable privacy risk to any person, or
- the representative is otherwise impeding the Tribunal (subclause 66(3), ART Bill).

Where a party's representative is bound by a professional code of conduct, the Tribunal may consider reporting a breach to the relevant professional association or standards body. Under clause 193 of the ART Bill, the President's functions include promoting the training, education and professional development of members, which may include ensuring that they are aware of legal practitioners' and other professionals' ethical obligations. It is ultimately a matter for the Tribunal to determine its processes and policies for referring representatives to relevant entities.

However, such referrals usually involve a delay between the tribunal proceedings, investigations and any outcomes from the relevant professional association/standards body. Subclause 66(3) (which allows the Tribunal to remove a party's representative) ensures that the Tribunal is able to take more immediate steps to manage the conduct of proceedings.

Recognising the significance of this power, the ART Bill contains a number of safeguards – augmented by existing obligations in relation to procedural fairness – which will govern the exercise of the power.

The Tribunal is under a general duty to provide procedural fairness to all parties, whether they are represented or not. This sits alongside the specific duties imposed on the Tribunal, which reflect particular elements of procedural fairness, including the fair hearing principle reflected in clause 55 of the ART Bill. The Tribunal is required to observe procedural fairness when exercising powers under subclause 66(3) (which could include providing the representative with adverse information and an opportunity to respond). More specific guidance for Tribunal members on this matter could be provided for in the Tribunal's Practice Directions (made under clause 36).

The note to clause 66 clarifies that if the Tribunal orders the removal of a person's representative, that person may choose another representative. Depending on the circumstances of the removal, the person might also elect to have the removed representative as a support person, rather than a representative to proceedings.

5. The ART Bill responds to feedback received in consultation that the prospect of having one's personal information made public could be a deterrent, for some individuals, to seeking review of an administrative decision. While open justice remains the primary consideration, with public hearings as the default, the list of considerations in clause 71 is expanded to include considerations both in favour of, and against, making a non-disclosure order. This includes the likely harm that may occur to a person if the order is not made.

As set out in paragraph 568 of the revised explanatory memorandum to the ART Bill, this clause requires the Tribunal to balance the principles of open justice and procedural fairness with the circumstances of the person in each case. Depending on the individual's circumstances, harm could take many forms and it is ultimately for the Tribunal to exercise their discretion to address the unique circumstances of each individual.

The Parliament cannot envisage or predict all the types of harm that may result to a person in unforeseeable circumstances. There is a risk of limiting the Tribunal's ability to consider types of 'harm' that were not envisaged when legislation was developed.

6. The Independent National Security Legislation Monitor (INSLM) may review the operation, effectiveness and implications of Australia's national security and counter-terrorism laws. Whether to refer particular matters to the INSLM is a matter for the Government.

The functions of the re-established Administrative Review Council include monitoring the integrity of the Commonwealth administrative review system, and inquiring into and reporting on systemic challenges in administrative law. As such, the Council has a role in assessing procedures and arrangements within the Tribunal, including those within the Intelligence and Security jurisdictional area, to ensure they remain adequate and appropriate. It is anticipated that in undertaking such reviews, from time to time and as required, the Council could monitor and inquire into the processes outlined in Part 6 of the ART Bill, and related matters, as a component of Australia's federal administrative review system.

7. Consultation with the Tribunal Advisory Committee on rules

The President is empowered to make practice directions under clause 36 of the ART Bill. Before making a practice direction, the President must consult the Tribunal Advisory Committee.

Rules will be made by the Minister, in accordance with clause 295 of the ART Bill. The President does not make rules under the ART Bill.

Section 17 of the Legislation Act 2003 requires that the Minister must be satisfied that any consultation that is considered appropriate by the Minister and is reasonably practicable to undertake has been undertaken prior to making the rules.

This would include consultation with the President, as a person who has expertise in the field relevant to the proposed instrument. It would be open to the President to consult with the Tribunal Advisory Committee as part of this process.

President's Report – action taken in relation to the code of conduct/performance standard

Paragraph 242(2)(j) requires that an overview of actions taken in relation to the code of conduct, performance standard, investigations and professional development is included in the President's annual report.

The term "overview" has been deliberately chosen to ensure that the President is not required to describe actions taken in relation to individual members or specific complaints. The description in the report should respect individual privacy and be sensitive to the interests of persons involved (whether complainants, or those who are the subject of a complaint). This intention is outlined at paragraph 1520 of the revised explanatory memorandum to the ART Bill.

The department considers it is sufficiently clear that details of individual investigations are not expected to be published, and an amendment is not necessary.

Responses to notifications of systemic issues

The Tribunal has been designed with the lessons from Robodebt in mind, and contains measures to ensure systemic issues with government decision-making are identified, escalated and resolved. One such measure is a new function for the President of the Tribunal to inform relevant Ministers, relevant Commonwealth entities and the Administrative Review Council of any systemic issues related to the making of reviewable decisions that have been identified in the caseload of the Tribunal (paragraph 193(i)).

The ARC has the function of inquiring into systemic issues relating to the making of administrative decisions (paragraph 249(1)(c) ART Bill), and they are able to prepare reports in response to their inquiries (clause 250 ART Bill). Paragraph 264(3)(b) provides that the ARC's annual report may also include a description of any response that the ARC is aware of from a Commonwealth entity or Minister during that year in relation to a systemic issue related to the making of reviewable decisions.

The Bill is not prescriptive about how responses are given. Instead, the ARC has discretion to inquire into and report on the issue as appropriate.

8. Clause 209 provides that regulations may make provision for and in relation to assessment panels, including how they will be established, the composition, operation and procedures of the assessment panels, the methodology of the panels, as well as any assistance provided by the Department.

It is anticipated that these regulations would draw on the December 2022 Guidelines of Appointments to the AAT (The Guidelines). The Guidelines provide that the assessment

panels will comprise of the following:

- the Secretary of the Attorney-General's Department (or a representative), who will be the Chair;
- the President of the AAT (or a representative), and
- a person nominated by the Attorney-General.

Delegates/nominees are generally eminent persons, such as retired judges, former Tribunal members, other expert practitioners and advocates, academics and current or former senior public servants.

Panel members (including delegates or nominees) are expected to act independently in undertaking an assessment of candidates' suitability for appointment. Panel members are also required to declare, and manage, any conflicts of interest.

Please refer to the department's response to the question from Senator Scarr on the composition of the assessment panels for the Administrative Review Tribunal processes currently underway (page 32 of the Hansard).

9. In its submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Administrative Review Tribunal Bill, the Law Council of Australia (LCA) welcomed the reinstatement of the Administrative Review Council (Council) under the Administrative Review Tribunal Bill (ART Bill).

Composition and staffing of ARC – requirements

The provisions of the ART Bill are intended to provide certainty about key requirements for the composition, membership and staffing of the Council and enable an appropriate degree of flexibility in how the Council organises itself and performs its functions.

To effectively discharge the functions of a Council member, a person is required to have specialist skills and expertise in administrative law or public administration, or have direct experience working with groups of people significantly affected by government decision making.

Senior officials of Commonwealth entities with responsibility for administrative decisions may have the requisite skills and experience and be eligible for appointment to the Council. The ART Bill provides that a person may qualify for appointment as a member of the Council if they are an official of a Commonwealth entity who:

- is an Agency Head (within the meaning of the Public Service Act)
- is an SES employee, or
- holds a position that is equivalent to, or higher than, a position occupied by an SES employee.

In relation to staffing, the ART Bill provides for the Council to be assisted in performing their functions by staff of the Attorney-General's Department (the department). There are no minimum requirements specified in the Bill regarding the number or expertise of staff who should be made available to the Council. Rather, the Secretary of the department would be required to consult with the Chair of the Council before making staff available to the Council. Staff performing services for the Council would be subject to the direction of the Council in undertaking tasks for the Council. Division 5, Part 9 of the Bill is equivalent to section 57 of the AAT Act—which provides that staff of the Council shall be engaged under the Public

Service Act—but provides greater detail and clarity about how staff should be engaged and directed.

Functions of the ARC – education and training and monitoring function

The Council’s functions under the ART Bill respond to recommendations 20.5 and 23.4 of the Robodebt Royal Commission Report.

- Recommendation 20.5 called for the Council to be reinstated with similar functions to the Council previously established under the AAT Act, with a particular role in reviewing Commonwealth administrative decision-making processes.
- Recommendation 23.4 called for the reinstated Council’s functions to include providing training and developing resources to inform the APS about the Commonwealth administrative law system.

The LCA proposed functions would be possible under the ARC’s functions as drafted.

The ARC’s functions have been broadly framed to ensure the Council’s functions sufficiently cover the breadth of Commonwealth administrative law systems and issues, and administrative decision making, as well as the activities intended to be undertaken by the Council.

The Council will inquire into and promote knowledge about the administrative law system to improve the quality of administrative decision-making and review processes. The Council’s publications will be relied upon to support better decision making across government.

The Council will have discretion to engage with government in the performance of its functions, including on implementation of reports and recommendations relating to the Australian administrative law system as the Council considers appropriate.

The Council’s discretion to determine how it will exercise its broad functions will ensure it can operate as an independent body.

10.

Natural justice hearing rule

The migration system is a specialised and distinct part of Australian government decision-making. The reform significantly harmonises the powers and procedures that are available to the Tribunal when conducting reviews of reviewable migration and protection decisions. The Consequential and Transitional Bill No. 1 makes significant amendments to the *Migration Act 1958 (Cth)* (the Migration Act). In particular, the Bill would:

- Repeal Parts 7 and 7AA of the Migration Act, significantly harmonising provisions relating to reviews of migration and protection matters in Part 5 of the Act
- Abolish section 24Z of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which displaces all AAT Act provisions relating to its conduct of procedure on review for migration and protection matters
- Standardise a large number of procedural provisions, so that the general powers and procedures of the ART Bill apply, except where special provisions are necessary due to the specific nature of migration and protection reviews.

The Bills make significant changes to standardise procedures between reviewable migration and protection decisions and the rest of the Tribunal's caseload, while retaining limited procedural modifications from the current system. For example, section 357A of the Migration Act, which provides an exhaustive statement of the natural justice hearing rule in relation to the matters it covers, is retained from the current framework. However, the reform would significantly reduce the scope of matters covered by section 357A so that it applies in limited, critical areas. The Committee may wish to refer to question 17 of the Questions on Notice to the House of Representatives Standing Committee on Social Policy and Legal Affairs for detail on the scope of the adjusted exhaustive statement of the natural justice hearing rule.

The exhaustive statement of the natural justice hearing rule, as amended, is consistent with the Tribunal pursuing its objective – particularly of providing fair, efficient and accessible review.

Access to documents or information

Section 362A of the Migration Act allows applicants to obtain access to the material that has been given or produced to the Tribunal for the purposes of their review. The Consequential and Transitional Bill No. 1 would expand the provision so that it applies to both reviewable migration and protection matters. Under the current legislation, protection visa applicants can only seek access to documents through freedom of information requests, or requests under the *Privacy Act 1988*.

The new provision has been clarified through Government amendments (as passed by the House of Representatives on 21 March 2024) to explicitly provide that if an applicant makes a request for the written material, the Department must provide the applicant with access to the material. This amendment provides applicants with a simpler process to access documents and to understand the issues that arise in their application. A legislated timeframe for response has not been proposed at this time, due to the range of materials that may be required for production, and the different requirements to prepare these for release.

New paragraph 336P(2)(g) of the Migration Act disapplies clause 27 of the ART Bill, which requires decision-makers to provide other parties to a proceeding for review with certain documents and statements that they have provided the Tribunal. The modification has been retained because the volume of reviewable migration and protection decisions necessitates a more tailored approach to fact-finding and information production to support reviews. However, section 362A of the Migration Act has been expanded, as outlined above, ensuring that applicants are able to access the material provided to the Tribunal by the Department upon request.

Adverse information

Paragraph 359A(4)(e) would enable the *Migration Regulations 1994* (the Migration Regulations) to prescribe types of information for the purposes of subsection 359A(4). The types of information and materials relied on can change quickly. Regulations provide greater flexibility than amending legislation, and allow the Government to quickly resolve uncertainty about what information ought to be provided to the applicant. Any amendments to the Migration Regulations for the purposes of paragraph 359A(4)(e) would be subject to parliamentary scrutiny and disallowance to determine whether the amendments are necessary and appropriate.

The exception in paragraph 359A(4)(e) is necessary to support efficient Tribunal reviews.

Drawing unfavourable inferences

New section 367A of the Migration Act in item 170 of schedule 2 of Consequential and Transitional Bill No. 1 replicates the effect of existing section 423A of the Migration Act.

This provision does not prevent applicants from raising new claims or evidence in the Tribunal. Applicants can put forward an explanation as to why claims were not raised or the evidence not presented earlier, and the Tribunal may accept that explanation and not make the adverse inference. “Reasonable explanation” is intentionally broad and not defined. The intent is to not limit what explanation the Tribunal could determine to be reasonable.

The purpose of this provision is to contribute to the integrity of the protection status determination process. Like existing section 423A, new section 367A is connected to the operation of section 5AAA of the Migration Act, which requires non-citizens to provide and substantiate claims on which they are seeking protection. Additionally, the criteria for the grant of a Protection (subclass 866) visa relevantly requires, at the time they apply for a visa, that the applicant makes *specific claims* about why Australia’s protection obligations are satisfied in their case. The provision sets a clear expectation that protection applicants raise all claims relevant to their visa application, and present all available evidence, at the earliest possible stage. This is to ensure that the decision made by the primary decision-maker in regards to an applicant’s protection status is as accurate as possible.

Section 367A intends to reduce opportunities for exploitation of the migration system. It will remove incentives for applicants to seek unmeritorious reviews to prolong their stay in Australia, and in turn, reduce the backlog of cases and enable faster resolution of matters.

The Committee may also wish to refer to question 19 of the Questions on Notice to the House of Representatives Standing Committee on Social Policy and Legal Affairs.

Application timeframes

The ART Bills would standardise timeframes for the majority of decisions under the Migration Act to the standard ART Bill timeframes for making an application for review (which cannot be less than 28 days).

There are two exceptions:

- where a person is in immigration detention and applies to the ART for review of a reviewable migration or protection decision – the timeframe is 7 days (in some cases, increased from 2 days), and
- where a person’s visa has been cancelled on character grounds – the timeframe is 9 days.

In the Government's view, it is not feasible to remove these exceptions. They are required to minimise the amount of time that a person spends in detention and to maintain the overall integrity of Australia's migration system.

Importantly, all that is required to be done in the initial timeframe is for the person to make an application to the Tribunal – and the requirements for an application to be ‘properly made’ are intended to be minimised. For example, applicants will not be required to provide a statement of reasons for their application (as previously required under paragraph 29(1)(c) of the *Administrative Appeals Tribunal Act 1975* (AAT Act)).

Application form and extensions

Applicants are not able to seek extensions of time to make an application because the immigration system requires certainty about a person's visa status at all times. For example, a person's Bridging Visa will cease a set time after the decision on their visa application is made, unless they have properly made an application for review by the Tribunal. Without a valid visa, a person is an unlawful non-citizen, must be detained in immigration detention and is expected to depart from Australia.

If the Tribunal were able to grant an extension of time for making an application for review of these decisions, it becomes more difficult to determine the end of the application period. This would be incompatible with how the migration system works, and particularly with decisions about a person's status as a lawful or unlawful non-citizen, and removal of unlawful non-citizens from the country.

Character test

The Department of Home Affairs (or the Minister) may refuse or cancel a visa if the visa applicant/holder does not pass the character test (outlined in subsection 501(6) Migration Act). Where a person fails the character test and has their visa refused or cancelled, it is important that any review occurs as quickly as possible, and, if the decision to refuse, cancel or not to revoke the mandatory cancellation of the visa is upheld, that the person is removed from Australia. This is an important power necessary to ensure the safety of the Australian community.

The modifications to ordinary ART procedures set out in section 500 of the Migration Act ensure the efficient conduct of Tribunal reviews in these matters. That includes the accelerated timeframes for making an application, setting a maximum duration for the review (84 days), and ensuring that hearings can proceed as scheduled by ensuring that all parties have sufficient time and awareness of relevant material ahead of time.