



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: PuLC:BMvk150124

15 January 2024

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
PO Box 5350  
Braddon ACT 2612

By email: [natalie.cooper@lawcouncil.asn.au](mailto:natalie.cooper@lawcouncil.asn.au)

Dear Dr Popple,

**Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023**

Thank you for the opportunity to contribute to the Law Council's submission to the inquiry into 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**).

The Law Society's submission is informed by its Public Law Committee, and provides comments at a relatively high level.

**Positive features**

In general, we support the Bills and note there are a number of positive features arising from the ART Bill and the Consequential and Transitional Bill. We have previously submitted<sup>1</sup> that the legislation governing the new review body should achieve greater harmony between subject areas, and to some extent the Bills attempt to do this, for example, by replacing the existing divisions with lists. We note also that the Bills go some way towards addressing our concerns in respect of clarifying the roles of senior leadership, in particular in respect of the leadership and guidance roles to be played by the President, Deputy Presidents and senior members to support decision-making processes. We also support the creation of the guidance and appeal panel, which in our view has the potential to assist with improving the quality and consistency of decision-making. In our view, the power provided to the President to reconstitute the Tribunal if the member, or one of the members has an actual or apprehended bias in relation to the proceeding (cl 46(b)) is a positive development.

We support the re-establishment of the Administrative Review Council (**ARC**). We reiterate our previous submissions that "as governments and governing become more complex, and

---

<sup>1</sup> Law Society of NSW submission to the Law Council of Australia, "Administrative Review Reform Issues Paper" 26 April 2023, online here: <https://www.lawsociety.com.au/sites/default/files/2023-06/Letter%20to%20Law%20Council%20of%20Australia%20-%20Administrative%20Review%20Reform%20-%20Issues%20Paper%20-%2026%20April%202023.pdf>.

the nature of decision making evolves, the need for an over-arching body with a longer term view, and drawing from a cross-section of experts, is even more critical today.”<sup>2</sup>

In respect of refugee and migration reviews, we support the abolition of the Immigration Assessment Authority. We also support the harmonisation of protection and migration reviews, including timeframes for seeking review, and the right of representation in migration and refugee reviews. We support the limited use of exhaustive statements of the natural justice rule.

### **Remaining concerns and missed opportunities**

However, some concerns remain, and we suggest that some opportunities may have been missed, particularly in respect to refugee and migration matters.

As a threshold issue, we suggest that the objective set out in cl 9 of the ART Bill should include express reference to “merits” review, and its principal objective, which is to ensure that the correct or preferable decision is achieved. We acknowledge that these concepts appear in other parts of the ART Bill (“merits review” is referred to in the simplified outline at cl 3, and the “correct or preferable” concept is referred to in cls 56 and 63). However, in our view may be helpful to include specific reference to these fundamental concepts in the objectives. This may assist in informing parties, members and the general public about the role and function of the ART, and to ensure that these objectives inform the proper interpretation of any other statutory provisions.

We note that there is no general provision in the Bills for the Administrative Review Tribunal (**ART**) to order costs in circumstances where an agency or department has departed significantly from conduct consistent with a model litigant. We suggest that, in light of the findings of the Royal Commission into Robodebt, such a general provision would be of utility. It might be one that would be expected to be utilised only on rare occasions.

Clause 247 of the ART Bill provides that the ARC consists of the President, the Commonwealth Ombudsman, the Australian Information Commissioner and three to ten other members. While this is not a matter that necessarily requires inclusion in the legislation, we suggest that, across the membership of the ARC, there should be expertise on key issues, including refugee and migration matters, social security, the NDIS, and the use of machine technology in administrative decision-making.

We note also that a critical role that the newly re-established ARC might play is, where systemic failures or problems have been identified within a particular portfolio by a decision or decisions of the ART, to bring those matters to the attention of the leadership of the agency or department by the ARC.

We have previously submitted that the exercise of creating a new review body presented a significant opportunity to favour substance over form, and to address disparities in process and fees, particularly between refugee and migration matters and other matters. We note that the ART continues to have no power to extend time for migration reviews. We reiterate our view that, when a time limit is imposed, we consider that it is appropriate to provide for a dispensing power, and one that can be exercised in the case of an application for an extension itself made out of time. To the extent that there are concerns that the system can be ‘gamed’, an appropriately worded discretion can deal with this. Further, there is no change to the fee associated with seeking review of a migration decision, which we understand is now \$3,374, increasing consistently with regulation 4.13B. This fee is prohibitive, and excludes many

---

<sup>2</sup> Law Society of NSW submission to the Law Council of Australia, “Inquiry into the performance and integrity of Australia’s administrative review system,” 17 November 2021, 4.

applicants from review, even with a 50% reduction obtained via a successful financial hardship waiver application. In our view, this is an egregious disparity that should be corrected in the ART. In order to ensure that the ART is accessible, we suggest that the fee, set by regulation, be reviewed.

We welcome the harmonisation of the conduct of migration reviews with other types of decisions, noting that many of the procedural rules under Div 5 of Part 5 of the *Migration Act 1958* (Cth) (*Migration Act*) have been repealed by the Consequential and Transitional Bill. However, there are still some provisions restricting access to information. We note that a particular concern is the proposed amendment to s 362A which removes the entitlement of the applicant to have access to information given to the ART by the Department and replaces it with an entitlement to request the Department to give them that material (cl 164). There is no obligation on the Department to provide the information, let alone within a specified timeframe.

We also note that there is no significant change to review of character matters. Section 500 of the *Migration Act*, which provides for the conduct of review of decisions of a delegate of the Minister under s 501 and s 36(1C) of the *Migration Act*, still applies to the new ART. Consequently, some of the provisions which disadvantage the applicant still apply, including the following:

- nine days to make an application (ss 500(6B) of the *Migration Act*);
- deemed affirmation of the decision if no decision is made within 84 days (ss 500(6L)(c) of the *Migration Act*);
- the prohibition on applicants raising relevant material during a hearing (whether orally or in writing) unless this has been provided to the Minister in writing two days in advance (ss 500(6H) and 500(6J) of the *Migration Act*).

We consider this a significant missed opportunity to improve procedural fairness and reduce the apparently arbitrary disparities between migration and other types of decisions.

We also previously submitted that effective access to the new review body can only be realised if its processes are sufficiently informal and flexible to accommodate the most vulnerable applicants. In this regard, and by way of example, we note that cl 367A(2) of the Consequential and Transitional Bill requires the ART to draw an “unfavourable inference to the credibility of the claim or evidence if the ART is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made.” In our view, this is an example of a provision which is unnecessarily prescriptive.

### **Review, oversight and community engagement**

It appears that the Bills afford a significant level of flexibility and discretion to the President and the ART, and ultimately the success of the ART will rest on a number of issues, including resourcing, the quality of appointments, and the quality of practice directions and rules. We suggest that the process of issuing regulations, rules, practice directions and other supporting guidance material should be subject to thorough and meaningful consultation, beyond consultation with the Tribunal Advisory Committee (as required of the President in respect of practice directions by cl 36(3)). More generally, we suggest that the new ART engage with the community through periodic standing mechanisms. We understand that the Migration and Refugee Division currently holds an annual consultation. There is an opportunity to increase the frequency of these consultations. The involvement of practitioners in the preparation of practice directions in particular may be of considerable utility. We also suggest that the governing legislation of the ART (and the ARC) be subject to periodic statutory review, which is not currently contemplated by the ART Bill or Consequential and Transitional Bill.

Finally, we repeat that, overall, the Bills contain considerable helpful changes to the current legislative regime and, if enacted in their proposed form, would be an improvement on the current position.

Thank you for the opportunity to contribute. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on 02 9926 0354 or [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a long horizontal stroke extending to the right.

**Brett McGrath**  
**President**