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24 November 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Secretary

The performance and integrity of Australia's administrative review system

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs References Committee in relation to its inquiry into the performance and integrity of Australia's administrative review system. This submission is made on behalf of the Australian Human Rights Commission.

Our submission responds to each of the Committee's terms of reference.

For the past 45 years, Australia has had a strong and robust system for seeking review of decision making by government. This system seeks to ensure that administrative decision making is principled and consistent.

However, in some areas, particularly in relation to migration decisions, special rules have been made that create a different system of review which is less fair and less robust than the usual system that applies to most kinds of government decision making.

Further, decision making by Ministers increasingly is being exempted from the ordinary requirements of administrative review. For some national security decisions, this may be appropriate, but the classes of decisions exempt from merits review has expanded into a range of ordinary decisions that affect the lives of individuals, particularly migration decisions where broad claims of 'public interest' and 'national interest' are far harder to justify. In some circumstances, Ministers are even given the power to overrule decisions of the independent umpire, the AAT.

In recent years, there have been attempts to extend these kinds of Ministerial powers to decisions about citizenship.¹ The Commission is concerned by this trend, which amounts to an expansion of executive power that is unreviewable on the merits.

The Commission is also concerned about the lack of transparency and accountability for the exercise of these extraordinary powers. As described in more detail below, the current transparency mechanisms in relation to migration decisions are inadequate.

The re-establishment of the Administrative Review Council (ARC) would assist in remedying the erosion of review rights in relation to government decision making. During its long period of operation, the ARC provided independent and robust advice to government about the kinds of decisions that should be subject to merits review and judicial review, and the way in which such reviews should take place. This kind of scrutiny and expert analysis is vital to ensuring the continued integrity of the system and protecting individual freedoms.

(a) Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) is the principal federal administrative tribunal and exercises a broad jurisdiction to review decisions made across government where a right of review is provided for by legislation.

AAT merits review is an important element in realising an individual's rights to a fair hearing and to an effective remedy under articles 14(1) and 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR).²

¹ See, for example, Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Australian Citizenship Legislation (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017*, [77]–[100], <https://www.aph.gov.au/DocumentStore.ashx?id=f398c0c0-376d-4b96-9007-5b0b98cbf729&subId=514189>; Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Australian Citizenship and Other Legislation Amendment Bill 2014*, [37]–[57], <https://www.aph.gov.au/DocumentStore.ashx?id=2ce044cf-a0dc-4fda-9d28-27a6f0b5a9f6&subId=301530>.

² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). For more detail on the engagement of human

Merits review is a process by which a person or body:

- other than the primary decision maker
- reconsiders the facts, law and policy aspects of the original decision, and
- determines what is the correct and preferable decision.

The usual stages of review of an administrative decision involve:

- an original decision by a member of the executive branch of government – for example, by a Minister, a delegate of a Minister, or another public official with power to make decisions
- merits review of that decision by an independent tribunal, resulting in a new administrative decision by the tribunal
- judicial review, if it is alleged that there were legal errors in the decision of the tribunal.

This inquiry is concerned with the performance and integrity of Australia's administrative review system. The Commission has longstanding concerns about the significant limitations on the review of decisions made under the *Migration Act 1958* (Cth) (Migration Act). Three key concerns are as follows:

- First, asylum seekers who are part of what has been described as the 'legacy caseload'³ may only seek review of decisions to refuse them protection visas in a specialised division of the AAT (the Immigration Assessment Authority) that provides them with significantly fewer review rights than ordinary merits review.
- Secondly, there are broad discretions available to Ministers to make decisions that are not reviewable in the AAT and to overturn decisions of the AAT that they disagree with.

rights by the merits review process, see: Australian Human Rights Commission, *Administrative Appeals Tribunal Statutory Review*, submission to the Hon Ian Callinan AC QC, 24 August 2018.

³ Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy caseload'* (2019), at <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>.

- Thirdly, the administrative law grounds on which migration decisions may be reviewed by a court have long been narrower than the grounds available for ordinary government decision making.

Each of these issues undermines the integrity and fairness of the system of reviewing migration decisions. I expand briefly on those points below.

Immigration Assessment Authority

The AAT is divided into nine divisions dealing with decisions in different subject areas. By far the greatest workload of the AAT is in the Migration and Refugee Division, which includes the Immigration Assessment Authority (IAA).⁴

The IAA deals with migration decisions made in relation to a specific group of asylum seekers: those who arrived in Australia by sea between 13 August 2012 and 1 January 2014 and had not been taken to a regional processing country.⁵

The review provided by the IAA is described as 'limited' form of merits review in accordance with a 'fast track' decision making process.⁶ It contains fewer rights for those seeking to review government decisions, typically a decision to refuse to grant them a protection visa.

Two key problems with the fast track process at the IAA, which distinguish it from normal merits review in other divisions of the AAT, are as follows:

- First, the IAA must not accept relevant information in relation to an applicant's claim, if this information was not raised by the applicant before the initial decision was made to refuse to grant them a protection visa (unless there are 'exceptional circumstances').⁷ In practice, this forces an applicant to provide all relevant information at an initial interview with departmental officials, at a time when they may

⁴ As at 30 June 2021, the AAT had 56,036 applications on hand in the Migration and Refugee Division, comprising 86% of the total of applications on hand across all Divisions of the AAT. During the course of the 2020-21 year, there were 15,969 applications lodged in the Migration and Refugee Division, comprising 43% of all new applications to the AAT. See Administrative Appeals Tribunal, *2020-21 At a glance*, <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/2020-21-At-a-glance.pdf>.

⁵ Migration Act, s 5 (definition of 'fast track applicant').

⁶ Migration Act, s 473BA (simplified outline of Part 7AA).

⁷ Migration Act, ss 473DB(1)(a) and 473DD.

not have access to legal advice or assistance. The risk of prejudice to an applicant is obvious.

- Secondly, the IAA must not interview the applicant and must conduct a review on the papers (unless there are 'exceptional circumstances').⁸ This is contrary to procedures recommended by the former ARC, the former Joint Standing Committee on Migration Regulations, and the United Nations High Commissioner for Refugees in their advice about processing refugee claims.⁹

The Commission raised procedural fairness concerns with the 'fast track' process when it was first introduced.¹⁰ Soon after its introduction, the Australian Law Reform Commission (ALRC) completed its inquiry into the encroachment by Commonwealth laws into traditional rights and freedoms. The ALRC recommended that 'fast track' process be subject to further review to consider whether it unjustifiably excluded the duty to afford procedural fairness.¹¹

In addition to the 'fast track' process in the IAA, I note that there is also a separate 'expedited' process in the General Division of the AAT for the review of decisions by a delegate of the Minister to refuse or cancel a visa on character grounds. The Commission has made comments elsewhere about the problems with this process and I don't repeat them here.¹²

⁸ Migration Act, s 473DB(1)(b).

⁹ Australian Human Rights Commission, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, submission to the Senate Legal and Constitutional Affairs Legislation Committee, 31 October 2014, at [85]–[98] and [109], <https://www.aph.gov.au/DocumentStore.ashx?id=e50d519a-f240-4c6e-8f7e-baa7e3af7c33&subId=301611>.

¹⁰ Australian Human Rights Commission, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, submission to the Senate Legal and Constitutional Affairs Legislation Committee, 31 October 2014, at [69]–[156].

¹¹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Final Report (2015), at [14.65]–[14.74] and [14.83] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf.

¹² Australian Human Rights Commission, *Review processes associated with visa cancellations made on criminal grounds*, submission to the Joint Standing Committee on Migration, 27 April 2018, at [116]–[144] <https://www.aph.gov.au/DocumentStore.ashx?id=92c3250b-7f7f-44a7-be0e-148869775611&subId=565322>.

The Commission submits that people affected by migration decisions should have the same substantive and procedural rights as anyone else in Australia who seeks a review of a decision by government.

Overly broad Ministerial powers

A significant proportion of decisions considered in the General Division of the AAT are decisions to refuse or cancel a visa on character grounds.¹³ Within this class of decisions, decision making by a Minister is given a special status unlike that in most other areas of government decision making.

First, the AAT does not have jurisdiction to review personal decisions by a Minister to refuse or cancel a visa on character grounds.¹⁴ This is unusual. The AAT has jurisdiction to review decisions under more than 400 Commonwealth Acts and legislative instruments.¹⁵ This typically includes decisions made by Ministers, departments and agencies.¹⁶

Secondly, under the Migration Act the Minister is given the power to set aside decisions of the AAT.¹⁷ This inverts the usual process of merits review: the AAT is supposed to be an independent check on executive decisions. But under the Migration Act, the Minister can reverse a decision by the independent umpire if the Minister disagrees with it. If the AAT decides not to refuse or cancel a visa, the Minister may set this decision aside and make a new decision refusing or cancelling the visa if the Minister reasonably suspects that the person does not

¹³ In 2020-21, 380 new applications of this kind were lodged with the AAT: Administrative Appeals Tribunal, *Annual Report 2020-21*, p 44, <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf>.

¹⁴ Personal decisions of a Minister under ss 501, 501A, 501B, 501BA and 501CA of the Migration Act are not subject to merits review in the AAT. Decisions by delegates of the Minister under ss 501 or 501CA(4) are reviewable by the AAT (see s 500(1)(b) and (ba)).

¹⁵ Administrative Appeals Tribunal, *About the AAT*, at <https://www.aat.gov.au/about-the-aat>.

¹⁶ The AAT maintains an exhaustive list of Commonwealth laws under which decisions may be made that the AAT can review: <https://www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf>.

¹⁷ Migration Act, ss 501A(3) and 501BA(2). See also Australian Human Rights Commission, *Review processes associated with visa cancellations made on criminal grounds*, submission to the Joint Standing Committee on Migration, 27 April 2018, at [189]–[194] <https://www.aph.gov.au/DocumentStore.ashx?id=92c3250b-7f7f-44a7-be0e-148869775611&subId=565322>.

pass the character test and if the Minister is satisfied that the refusal or cancellation is in the 'national interest'.¹⁸

The Commission considers that migration decisions, including those relating to the refusal or cancellation of visas on character grounds, should be subject to independent review, even if they are made by the Minister personally. This is because such decisions have a significant, sometimes life changing, impact on individual rights. Further, even Ministers of the Crown are not immune from making mistakes about questions of fact.

When the ARC was still in existence, it provided advice to government about the kinds of decisions that should be subject to merits review.¹⁹ Despite the abolition of the ARC, this advice continues to be relied on by the Australian Government when proposing new legislation.²⁰ The ARC said that, as a matter of principle, an administrative decision that will or is likely to affect the interests of a person should be subject to merits review.²¹ There is a limited range of factors that may justify excluding merits review for particular decisions. However, factors that do *not* justify excluding merits review include the fact that a decision maker is of a high status.²²

The Commission also considers that when a review decision has been made by the AAT, the Minister should not have the power to set it aside. As the Senate's Scrutiny of Bills Committee has warned:

Any system of independent merits review runs the risk that a tribunal may reverse a decision preferred by the original decision-maker or the Minister. However, overriding a decision by an independent decision-maker poses a risk to community perceptions about the availability of independent merits review and

¹⁸ Migration Act, s 501A(2) and (3). See also s 501BA(2): the Minister may set aside a decision by the AAT under s 501CA to revoke a 'mandatory' cancellation decision of a delegate of the Minister under s 501(3A), and instead cancel a visa that has been granted to a person.

¹⁹ Administrative Review Council, *What decisions should be subject to merits review?* (1999), <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.

²⁰ See, for example, Explanatory Memorandum for the Australian Security Intelligence Organisation Amendment Bill 2020 (Cth), at [132]-[133].

²¹ Administrative Review Council, *What decisions should be subject to merits review?* (1999), at [2.1].

²² Administrative Review Council, *What decisions should be subject to merits review?* (1999), at [5.16], [5.20]-[5.23].

the risk that individual cases may be unduly influenced by political considerations.²³

If the Minister considers that a decision of the AAT was not properly made, the Minister should take the ordinary course and seek judicial review of the decision by a court.

Judicial review of migration decisions

The third area of concern by the Commission relates to the limited rights accorded to individuals when seeking judicial review of migration decisions in the courts.

Before 1994, decisions made under the Migration Act were subject to ordinary administrative law review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Since 1994, there has been a separate statutory regime for judicial review of migration decisions.²⁴

The new regime introduced in Part 8 of the Migration Act narrowed the grounds upon which a decision could be reviewed. This meant that people seeking review of migration decisions had fewer grounds of review available to them than people seeking review of other Commonwealth administrative decisions under the ADJR Act. Migration decisions were protected against certain kinds of legal errors. As the Department of Immigration and Citizenship put it in a submission to the ARC in 2011:

Historically, separate statutory review regimes were developed by successive governments endeavouring to reduce the grounds of judicial review.²⁵

The Commission has described the evolution of this separate statutory scheme in a previous submission to this Committee (including the attempts to prevent judicial review of certain migration decisions entirely through the use of a

²³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, 21 June 2017 at [1.56], http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/scrutiny_digest/PDF/d07.pdf?la=en.

²⁴ *Migration Reform Act 1992* (Cth), the changes introducing Part 8 of the Migration Act came into effect on 1 September 1994.

²⁵ Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), p 2.

privative clause).²⁶ The Commission argued that that applicants seeking judicial review of migration decisions should have substantially the same rights as applicants seeking judicial review of other government decisions.

In 2012, in the last of its major reports, the ARC recommended that the long-term objective of the Government should be to bring migration litigation back into a general statutory review scheme, such as the ADJR Act.²⁷

Recommendation

The Commission makes the following recommendation to deal with the issues identified above.

Recommendation 1

The Commission recommends that the Australian Government task an appropriate body to report on how to transition:

- (a) merits review of all migration decisions to the usual rules that apply in the General Division of the Administrative Appeals Tribunal
- (b) judicial review of all migration decisions to the general statutory review process under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

²⁶ Australian Human Rights Commission, *Migration Amendment (Clarification of Jurisdiction) Bill 2018*, submission to the Senate Legal and Constitutional Affairs Legislation Committee, 4 April 2018, at [68]–[100], <https://www.aph.gov.au/DocumentStore.ashx?id=a62b50cc-c67f-4158-87a7-2f1e0b673175&subId=564701>. See also Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Final Report (2014), at [15.37]–[15.52] and [15.64]–[15.65] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf.

²⁷ Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012), p 119 [6.19], <https://www.ag.gov.au/legal-system/publications/report-50-federal-judicial-review-australia-2012>.

(b) Transparency and parliamentary accountability

The second term of reference asks about ‘the importance of transparency and parliamentary accountability in the context of Australia’s administrative review system’.

In dealing with this term of reference, I will again refer to the extraordinary powers given to Ministers in relation to certain migration decisions.

The Minister has personal powers, unreviewable by the AAT, to:

- refuse or cancel a visa on character grounds, or
- set aside a decision of the AAT, and replace it with a decision to refuse or cancel a visa on character grounds.²⁸

In each case, if the Minister considers that the refusal or cancellation is in the ‘national interest’ then the usual rules of procedural fairness do not apply to the Minister’s decision. Instead, there is a more limited statutory process where the person affected may make submissions to the Minister about whether the visa should be refused or cancelled.²⁹

The proposed trade-off for these unreviewable decisions that exclude procedural fairness, is a requirement that the Minister table a notice in Parliament.³⁰ This is intended to provide some level of transparency, and therefore accountability, in relation to these decisions. However, in practice, these provisions have proven to be wholly inadequate for either purpose. This is because the notices, although tabled, are not published, and do not contain enough information to determine whether the powers were exercised properly.

In 2018, the Commission sought to obtain copies of notices that had been made under s 501C(8) for the purpose of preparing a submission to the Joint Committee on Migration.³¹ None of these notices were available on the Parliament’s website and they had to be requested from tabling officers in the

²⁸ Migration Act, ss 501(3) and 501A(3).

²⁹ Migration Act, s 501C.

³⁰ Migration Act, s 501C(8).

³¹ Australian Human Rights Commission, *Review processes associated with visa cancellations made on criminal grounds*, submission to the Joint Standing Committee on Migration, 27 April 2018, at [212]–[222] and Annexure A <https://www.aph.gov.au/DocumentStore.ashx?id=92c3250b-7f7f-44a7-be0e-148869775611&subId=565322>.

Senate. When the notices were produced, they contained only a bare statement that the relevant power had been exercised, without any detail of the nature of or reasons for the decision. What was designed as a transparency mechanism had evolved into a process that provided no real insight into the use of these extraordinary powers.

Significantly, when the Government sought to extend a similar regime to citizenship decisions, it proposed significantly more extensive transparency and accountability requirements.³² Those citizenship amendments were not passed, but the increased integrity requirements proposed should be introduced in relation to the suite of existing powers in the Migration Act.

Recommendation 2

The Commission recommends that if the Minister exercises a personal power to refuse or cancel a visa or to set aside a migration decision made by the AAT, the Minister be required to table in Parliament a notice setting out the effect of the Minister's decision and the reasons for it. The notice should not include the name or other identifying information of the person affected by the decision.

(c) Administrative Review Council

The third term of reference for the inquiry asks 'whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established'.

The ARC was one of the foundational pieces of Australia's administrative law system recommended in the Kerr Report 50 years ago. Indeed, it was described by the Kerr Report as 'the first step which should be taken in the evolution of an Australian system of administrative law'.³³

The ARC is established by s 48 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Part V of the AAT Act deals in detail with the composition, functions, powers and operations of the ARC.

³² Australian Citizenship Legislation (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth) proposed s 52B.

³³ Commonwealth Administrative Review Committee, *Report*, Parliamentary Paper No. 144 (1971), chaired by the Hon Justice JR Kerr CMG, p 103, <https://nla.gov.au/nla.obj-1928610510/view?partId=nla.obj-1933499998#page/n108/mode/1up>.

When I was President of the Australian Law Reform Commission, I was a member of the ARC by virtue of s 49(1)(c) of the AAT Act. Now that I am President of the Australian Human Rights Commission, s 49(1)(ba) of the AAT Act provides that I should continue to be a member of the ARC. Other *ex officio* members of the ARC provided for by statute include the Commonwealth Ombudsman and the Australian Information Commissioner.

However, despite the legislative requirement for an ARC continuing in force, the Government announced in the 2015-16 Budget that the ARC would be 'abolish[ed] ... with residual functions to be managed by the Attorney-General's Department'.³⁴ No amendment was made to the AAT Act. It appears that, in practice, the AAT was defunded by the Executive, contrary to the continuing intention of the Parliament of Australia as expressed through legislation.

In his statutory review of the amalgamated AAT in 2018, former High Court Justice the Hon Ian Callinan AC QC noted, with respect to the decision to 'abolish' the ARC, that '[i]t is the duty of the Executive under s 61 of the Constitution to execute and maintain the laws of the Commonwealth'.³⁵ Mr Callinan recommended that the ARC be reinstated and constituted in accordance with Part V of the AAT Act.³⁶

Aside from the continuing statutory requirement for an ARC, there are good policy reasons for its reinstatement. The functions of the ARC include keeping the Commonwealth administrative law system under review, inquiring into the process of government decision making to ensure that decisions are made in a just and equitable manner, and making recommendations about the kinds of decisions that should be subject to review and how such review should take place.³⁷

³⁴ Australian Government, *Budget 2015-16, Budget Measures, Budget Paper No. 2*, p 65, at https://archive.budget.gov.au/2015-16/bp2/BP2_consolidated.pdf.

³⁵ IDF Callinan AC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, Report (2018) at [1.27], <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>.

³⁶ IDF Callinan AC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, Report (2018) recommendation 26.

³⁷ AAT Act, s 51.

As noted by Mr Callinan, it is important for public confidence in the system for reviewing government decision making that these functions are performed by a body that is independent of government.

The previous parts of this submission have identified a range of areas where the advice of the ARC would be invaluable. These include the reintegration of the review of migration decisions back into the general system for review of government decision making, assessing the desirability of the current expansion of Ministerial decision making that is unreviewable on the merits, and providing advice about how to ensure that such decision making is transparent and accountable.

Recommendation 3

The Commission recommends that the Administrative Review Council be reinstated and constituted in accordance with Part V of the *Administrative Appeals Tribunal Act 1975* (Cth).

The Commission is happy to provide further assistance to the Committee if required in its consideration of these important matters.

Yours sincerely

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM
President

T: +61 2 9284 9614

E: president.ahrc@humanrights.gov.au