Law Council
OF AUSTRALIA

Performance and integrity of Australia's administrative review system

Legal and Constitutional Affairs References Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges the contributions of the Law Institute of Victoria and the Law Society of New South Wales to the production of this submission.

The Law Council is also grateful to the National Human Rights Committee and the following committees of the Federal Litigation and Dispute Resolution Section for their review and guidance:

- Administrative Law Committee;
- Administrative Appeals Tribunal Liaison Committee; and
- Migration Law Committee.

Executive Summary

1. The administrative law system is intended to provide a web of accountability which:

    - protects individuals against unfair and arbitrary use of public power;
    - is needed to legitimise and ensure public confidence in government; and
    - enables informed participation in democratic processes.

2. The main pillars of the suite of reforms which took place in the late 1970s to early 1980s as a result of the Report of the Commonwealth Administrative Review Committee[1] chaired by Sir John Kerr, are the establishment of the Administrative Appeals Tribunal (**AAT**), the Commonwealth Ombudsman and the Administrative Review Council (**ARC**), and the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The *Freedom of Information Act 1982* (Cth) (**FOI Act**) followed later, underpinned by the same goals of government transparency and accountability.

3. These transformative reforms were only possible because they enjoyed high levels of bipartisan political support and commitment. In the Law Council's view, political commitment to maintaining the performance and integrity of the administrative law system has declined significantly since that time.

4. However, the need for a well-functioning administrative law system is just as crucial today as it was in the late 1970s and early 1980s. Modern legislation is longer and more complex; government relies extensively on non-legally binding policy and guidance material, automated administrative decision making is increasingly prevalent, and government has increasingly used the private and community sectors to exercise administrative functions and deliver services. Taken together, the potential for accountability deficits is clear.

5. A large focus of this submission relates to the performance of the AAT, in particular, the appointment and qualifications of members, and the need for adequate resourcing to address current backlogs. As detailed throughout this submission, the Law Council has some concern that the current administrative law system is not functioning optimally, and this is primarily due to the lack of political commitment to the integrity of the system.

6. For example, the recent failings in respect of the Government's Online Compliance Intervention scheme, popularly known as the '*Robodebt'* scheme, occurred despite the existence of the Automated Decision-Making Better Practice Guide prepared by the Office of the Australian Information Commissioner (**OAIC**), the Attorney-General's Department, and the Office of the Commonwealth Ombudsman. This example also illustrates, among other things, the lack of impact relevant AAT decisions had on rectifying the issues identified in the administrative decision-making process,[2] and the clear need for the reinstatement of an effective mechanism for oversight and continuous improvement of the administrative law system, that is, the ARC.

[1] Commonwealth Administrative Review Committee, Report (Parliamentary Paper No 144/1971, August 1971).
[2] T Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' (2019) 44(1) *Alternative Law Journal*, 4-10 at 6-7.

The Administrative Appeals Tribunal

7. The AAT is a cornerstone of Australia's administrative law system and plays an important part of merits review of government decisions that impact people's lives. In this regard, the Law Council notes that the Government has yet to formally respond to the *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (**Callinan Review**). This report was completed in December 2018 and tabled in July 2019, and recommends measures that continue to be pressing and relevant, including to this inquiry's Terms of Reference.

8. For the AAT to effectively perform its functions, it must be independent and perceived to be independent. However, in the Law Council's view, the AAT's independence has the potential to be undermined where there is a lack of transparency in the appointments process and perceptions of political influence. This, together with the loss of highly qualified members over time, has compromised the AAT's productivity and contributed to lengthy delays and backlogs.

9. That said, the Law Council considers that the AAT's performance has been improving in many areas post-amalgamation on 1 July 2015, and improvements have been seen in more recent years, most likely due to the AAT overcoming the teething issues which unavoidably must have arisen from combining various tribunals which had their own tailored structures and subject areas. In addition to the improvements already observed, there are clearly areas in which performance could be improved, and the Law Council addresses below its views on the following areas of the AAT's performance:

    - member appointments and expertise;
    - complaints processes; and
    - responsiveness to public health lockdowns.

Member appointments and expertise

A need for additional appointments

10. The most recent AAT Annual Report suggests that the AAT is 'not sufficiently resourced to substantially reduce' its caseload.[3] It is critical that additional members are appointed to the AAT to provide it with the resources and opportunity to address the backlog and delays that currently exist. In this regard, the Law Council recommends that additional members be appointed to the AAT with a focus on qualified decision-makers across the Divisions with the greatest backlogs, so as to maximise the efficiency and effectiveness of the AAT in achieving its statutory aims.

11. In particular, the Law Institute of Victoria (**LIV**) has noted that a loss of members (at least in Victoria) from the Migration and Refugee Division (**MRD**) has meant that there are not enough members who have the expertise to undertake such hearings. The LIV understands that in 2016 and 2018, many Victorian members with years of experience with refugee and protection visa matters were not re-appointed. These members were replaced by members (some of whom had no legal background) with little or no migration and/or refugee law experience. During this time, the AAT decided to assign members only to specific areas of migration law. This meant that members were presiding over the same type of matter every day and therefore when there were peaks

[3] Administrative Appeals Tribunal, *Annual Report 2020-21*, 9 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf>.

in other areas of migration law, members were not sufficiently skilled to step in to undertake those other cases.

12. The LIV's Migration Law Committee recently obtained information released under the FOI Act which outlines, among other things:

    - the number of cases allocated to each of the 173 members in the MRD between 1 January 2020 and 31 March 2021; and
    - the number of cases finalised by members in the MRD between 1 January 2020 and 31 March 2021.

13. It appears that the number of cases finalised by members over that period varied between 1 and 1,117, with the average resolved by each member over that 15-month period being 177 matters. The number of matters currently allocated to members varies between 1 and 1,056, and the average allocation is 177 matters. Some members were dealing with fewer than 50 cases (around 25 members), while others were undertaking over 500 cases.

14. AAT members may be appointed on either a full or part-time basis and the nature of their appointment is not clear in the data. Further, some members may have been on leave for periods. Further, cases may vary significantly in complexity depending on the type of visa involved. However, even taking those assumptions into account, the above information suggests, on its face, a significant variance in the productivity of AAT members. Whilst some members may undertake multiple applicant hearings, no jurisdiction decisions, and less complex cases, there is clearly a need to review why some members appear significantly more productive than others in the disposal of cases and to have some form of accountability and oversight in productivity of members.

15. The appointment of additional members who are appropriately qualified, both in the MRD and more broadly across the AAT, is also likely to facilitate the better allocation and management of caseloads with the result that the decisions made by the AAT are more likely to be timely and of higher quality such that they are legally correct and thereby able to withstand judicial scrutiny. Importantly, higher quality decisions will further address the backlog by way of reducing the delays associated with cases being remitted to the AAT by the federal courts as a result of jurisdictional or other legal error.

Recommendations:

- **In close consultation with the President of the AAT, the Government should assess the need for new member appointments, particularly in the MRD, and prioritise meeting the identified needs.**
- **A review of members undertaking migration and refugee work should be undertaken, with the view to improving the quality and timeliness of decisions, and increasing the number of appropriately qualified and experienced members in the MRD and other Divisions.**

Selection process for members

16. It is critical that appointments to the AAT are conducted through a merit-based, transparent process that includes public advertisement, clear and relevant selection criteria, and an independent selection process.

17. Merit-based appointments will assist with reducing delays and improving quality of decisions whilst also bolstering the independence of the AAT and fostering public confidence in its independence and impartiality. The comments of Logan J (then Acting

President) in *Singh (Migration)* [2017] AATA 850,[4] while made under different circumstances, highlight the vulnerability of non-judicial AAT members and, in our view, reinforces the importance of appointments/reappointments being made in a transparent and merit-based manner.

18. Currently, the eligibility requirements under subsection 7(3) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) for appointment as a senior member or member are that the appointee:

    - be enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years; or
    - in the opinion of the Governor General, has special knowledge or skills relevant to the duties of a senior member or member.

19. It is understood that the existing protocol governing appointments to the AAT, namely the *Protocol for Appointments to the AAT 2015* (**the AAT Protocol**), was agreed between a past President of the AAT and the then Attorney-General.[5] It is understood that the AAT protocol was reviewed and reissued in August 2019. Under the AAT Protocol, the President of the AAT provides the Attorney-General with an assessment of the appointments needs of the AAT, together with recommendations about reappointments. The Attorney-General then indicates which positions will *not* require public advertisement for expressions of interest, because either:

    - a particular member will be reappointed without the requirement for advertising; or
    - the Attorney-General has chosen a suitable person who is appropriately qualified.[6]

20. The AAT Protocol thereby affords the Attorney-General significant discretion in the appointment process. In recent years, the Law Council has noted concerns regarding processes for appointing members to the AAT under the current approach.[7] This reflects broader public disquiet about the degree of independence of recent appointments.[8] The Law Council considers that appointments and reappointments to the AAT should

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[4] For example, see Logan J's comments at [18]:

> *That does not mean that Tribunal decisions are immune from criticism. It does mean that, in respect of such individual decisions, Tribunal members speak via their reasons and otherwise not at all. It would be subversive of the very independence from the partisan or political that is a feature of the Tribunal were it otherwise. Further, any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction.[9] For those members who do not enjoy the same security of tenure as judges, that may call at times for singular moral courage and depth of character.*

[5] See, *Protocol: Appointments to the Administrative Appeals Tribunal* (2015), <https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/sup1617/AGD/~/media/Committees/legcon_ctte/estimates/sup_1617/AGD/QoNs/SBE16-051_Attachment1.pdf>.

[6] Ibid clause 2.

[7] See, Michael Pelly, 'Lawyers back Labor plan to end 'jobs for party mates'' (1 February 2019) *Australian Financial Review*; Law Council of Australia, 'AAT appointments must be transparent and merit-based' (Media Release, 22 February 2019); 'Accountability, transparency and diversity – the importance of an independent tribunal appointment process' (Speech by Arthur Moses SC, 2019 Council of Australasian Tribunals National Conference, 7 June 2019).

[8] Katina Curtis, 'Government tribunal paid some members in years they did no work' (25 October 2021) *The Sydney Morning Herald*; Christopher Knaus, 'Liberal-appointed tribunal members' pay claims 'fishy', says Labor senator' (14 April 2021) *The Guardian*; David Hardaker and Justine Landis-Hanley, 'How Tony Abbott made sure the AAT would never come under scrutiny' (27 November 2019) *Crikey*.

be, and be seen to be, non-political. This will help to ensure public confidence in the institution and the soundness of decision-making. By way of comparison, the Judicial College of Victoria's *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* provides for high levels of transparency in relation to the assessment criteria for court and tribunal appointments in Victoria.[9]

21. In June 2021, the Law Council's Directors agreed to a policy on the process of judicial appointments (**the Appointments Policy**), which extends to appointments of members and presidents of the AAT as well as judges of federal courts.[10] The Appointments Policy addresses the key processes and principles which the Law Council considers should govern the appointment of members and/or presidents in the AAT, and is designed to ensure transparency in appointments and diversity in the AAT's membership.

22. The Appointments Policy sets out a process for identifying candidates, consulting with members of the Australian legal profession as part of the assessment of candidates, conducting interviews, considering candidates, making recommendations to the Attorney-General, and preserving accountability and confidentiality. It is submitted that the adoption and adherence to such a process will go a long way to restoring public trust in the appointment process for AAT members, and the Law Council commends the Appointment Policy to the Committee.

23. Consideration should be given to how procedural steps such as those contained in the Appointments Policy (especially in relation to consultation requirements and transparency in decision-making) can be embedded in the AAT appointments process.

Recommendation:

- **Appointments to the AAT should be subject to a merit-based protocol that promotes greater transparency and involves consultation with key stakeholders, including members of the Australian legal profession.**

Qualifications

24. The performance of the functions and responsibilities of AAT members requires specialised legal knowledge and skills. The Law Council considers that generally, any person appointed to become a member of the AAT should be capable of demonstrating the legal skills and knowledge required to perform the duties required of AAT members.

25. The Law Council notes the view expressed in the Callinan Review that there is 'no necessity to appoint professionals other than lawyers to the AAT (except perhaps for accountants to the Taxation and Commercial Division)'.[11]

26. In the Law Council's view, it is not necessary that all members of the AAT have legal qualifications (for example, the use of medically trained members is often helpful in the compensation jurisdiction). However, the Law Council acknowledges the increasing complexity of the legislative schemes which AAT members are required to apply, which may require consideration as to whether the AAT should ensure that it has a baseline

[9] Judicial College of Victoria '*Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*' (2008) <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-05/2009jcvframework-jcvsite1.pdf>.
[10] Law Council of Australia, 'Policy on the Process of Judicial Appointments' (Policy Statement, 26 June 2021).
[11] The Hon Ian Callinan AC QC, '*Report on the Statutory Review of the Tribunals Amalgamation Act 2015*' (tabled 23 July 2019), 175.

quota of legally qualified members at any one time. By way of example, given the significantly complex legislative scheme governing migration and refugee law decision-making and the significant backlog that has arisen in the MRD, the Law Council suggests the consideration of a quota of at least 80 per cent of all MRD members must have previously been enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory for at least 5 years prior to their appointment.

27. Noting the above, the Law Council has received strongly expressed views from its members that appointments in the MRD should be legally qualified and capable of presiding over the complexity of migration and refugee matters. The Law Council is supportive of this approach.

Duration of appointments

28. It is understood that recent appointments to the AAT have been for a duration of five years or more. However, it is recalled (as it was in the Law Council's response to the Callinan Review) that there was a time during which members were appointed for far shorter periods.[12] In this regard, there appears to be a lack of consistency in the duration of appointments, without a clear basis for the duration of any given appointment.

29. The Law Council notes its concern that appointing members for a limited period carries with it the potential to damage the perceived independence of the AAT, because it may be apprehended that members whose reappointment is imminent could be concerned about deciding matters adversely to government agencies. This would tend to undermine the public perception in the fair and impartial administration of justice. Conversely, appointing members for a longer term runs the risk of a tribunal having members who underperform or lack the skills, or legal or specialist knowledge, to make objective and effective decisions. Lengthy term appointments should, accordingly, go hand in hand with improvements to the appointments process to ensure that the independence, skills and knowledge of members is appropriate for their role (see earlier discussion about improving the processes of appointment).

Complaints processes

30. The Law Council suggests that there is scope for complaints processes within the AAT to be strengthened. In this regard, the Law Council has received feedback from its membership that responses to complaints raised with the AAT by practitioners have not always addressed the issues of concern raised by a complaint, and that AAT members are seldom removed from cases if a complaint has been made. Similarly, it has been reported that the Immigration Assessment Authority (**IAA**) does not have a formalised complaints process. The Law Council has been informed that some practitioners may be hesitant to suggest a member may be biased given the lack of consequences of getting the matter being reconstituted.

31. A means of fairly and punctually addressing complaints in relation to AAT members in an independent, structured manner is essential in promoting accountability and trust in the administrative law system. An improved grievances process will go some way to ensuring that representatives and self-represented clients can raise matters about their cases independently and ensure their grievances are heard and dealt with effectively.

32. To support such a process, attention is drawn to the Law Council's Policy Statement on principles underpinning a proposed Federal Judicial Commission, which outlines a

[12] See, Law Council of Australia, 'Submission to the Statutory Review of the Tribunals Amalgamation Act 2015' (27 August 2018) 16.

process for fairly and punctually addressing complaints about the judiciary.[13] In the view of the Law Council, a Federal Judicial Commission could provide a separate, stand-alone mechanism to deal with any allegation of lack of competency, serious misconduct or corruption amongst the federal judiciary, and has the potential to extend to complaints about AAT members.

Recommendation:

- **Steps should be taken to formalise an independent and structured approach to addressing complaints in relation to AAT members.**

Responsiveness to public health lockdowns

33. The Law Council appreciates that public health measures such as extended lockdowns in Victoria and New South Wales have had an ongoing impact on the AAT's productivity. However, the way in which the AAT responded to these events is an issue the Committee may wish to consider.

34. For example, the Law Institute of Victoria (**LIV**) has commented that in Victoria, it took some time for the AAT to shift to online hearings, and today there remains a degree of inconsistency in the productivity of members and the way they have adapted to changes. For example, it is understood that some members only conduct telephone hearings rather than using Microsoft Teams.

35. The LIV has relayed a number of concerns relating to operational issues concerning the conduct of remote AAT hearings, with a focus on migration and refugee matters, including:

    - members not using video or only choosing to do telephone hearings;
    - members not putting their cameras on;
    - interpreters not being authorised to view applicants' faces, making interpreting difficult at times;
    - inconsistency in how hearings are run;
    - inconsistent practices regarding invitations to attend hearings;
    - refusing to accommodate the vulnerability of an applicant in a more preferable method of hearing; and
    - failing to turn up to allocated hearings.

Issues specific to migration and refugee matters

Case management

36. Increased funding and improved case management strategies and processes are required to ensure that the backlog of migration and refugee cases is effectively managed and reduced. Practitioners have reported that the accumulation of cases in the MRD is causing significant delays to their clients' cases; for example, it has been reported from the LIV that remittals from the court which are usually afforded priority are still taking over a year to be constituted. This leaves many clients who have already been through the judicial review process to wait even longer for an outcome. The most

[13] Law Council of Australia, Principles underpinning a Federal Judicial Commission (5 December 2020).

recent AAT Annual Report suggests that the AAT is 'not sufficiently resourced to substantially reduce' its caseload.[14]

37. In 2020-21 alone, migration and refugee matters made up 43 per cent of the AAT's new applications, 52 per cent of finalised applications, and 86 per cent of 'on hand' (or undecided) matters.[15] The backlog of migration and refugee matters in the AAT has increased significantly, from 16,764 at the end of 2015-16[16] to 63,305 at the end of 2019-20,[17] before dropping to 56,036 in 2020-21.[18]

38. In each of the years between 2015-16 and 2019-20, the number of applications lodged was greater than the number decided.[19] In 2020-21, the number of applications dropped considerably due to the impact of COVID-19, which enabled the AAT to make some inroads into the backlog.[20] However, there is reason to believe that this progress is temporary.

39. In the financial years 2016-17, 2017-18 and 2018-19, the AAT decided between 17,960 and 20,892 migration and refugee matters.[21] In 2019-20, the number of migration and refugee matters finalised jumped to around 26,000. However according to the AAT's 2020-21 Annual Report, this is because at the outset of the COVID-19 pandemic, the MRD focused on the less complex cases that could be finalised without a hearing or by a remote hearing. The number of new applications has ranged between 20,000 and 40,000 in all years apart from the COVID-affected number in 2020-21.[22]

40. The AAT's 2020-21 Annual Report states:[23]

> *As noted in the previous annual report, this left the Division with a more complex and aged backlog of cases on hand, which presents significant challenges for the years ahead. These cases tend to become more complicated and time consuming as waiting times are progressively extended.*
>
> *…*
>
> *The Division will continue to focus on case management through proactive triaging and outreach but unless there is a significant and sustained decline in lodgements, an increase in membership and staffing and legislative changes to give the Division the power to enforce directions, it is anticipated that the backlog and delay in finalising cases will continue.*

41. According to the 2020-21 AAT Annual Report, the key reason for the backlog is refugee refusal matters, which constitutes 57 per cent of outstanding applications in the MRD,[24]

[14] Administrative Appeals Tribunal, *Annual Report 2020-21* (24 September 2021), 9.
[15] Ibid, 40.
[16] Ibid, 24.
[17] Ibid, 54.
[18] Ibid.
[19] Ibid, 39.
[20] Ibid, 54.
[21] Administrative Appeals Tribunal, *Annual Report 2017-18*, 32 and AAT *Annual Report 2018-19*, 26.
[22] Administrative Appeals Tribunal, *Annual Report 2020-21* (24 September 2021), 39.
[23] Ibid, 54.
[24] Ibid, 55.

66 per cent of all lodgements[25] and which are generally the MRD's 'most complex cases'.[26] The Report states:

> *In the past 5 reporting years, the Migration and Refugee Division has received sustained, high levels of lodgements relating to decisions about protection (refugee) visas, without a commensurate increase in member resources.* [27]

42. In 2020-21, 20 per cent of migration and refugee matters were decided within 12 months and the median time for deciding a migration matter was 98 weeks and 104 weeks (728 days) for a refugee matter.[28] According to the AAT website, the average time taken to resolve a protection visa matter between 1 May 2021 and 31 October 2021 was 1,077 days – almost three years.[29] In 2020-21, the AAT did not meet performance measures set down in its corporate plan regarding the number of AAT applications and IAA referrals finalised and the proportion of such matters finalised within a time standard.[30]

Addressing the backlog

43. There are several reasons why it is desirable to resolve merits review matters as promptly as possible.

44. First, a number of applicants are in immigration detention – the AAT records that 235 applications were lodged by persons in immigration detention in 2020-21.[31] Whilst the AAT gives the highest priority to constituting and processing these matters in its MRD,[32] when the backlog lengthens, so does the time taken to resolve matters where the applicant is in detention and this is highly undesirable.

45. As noted, the AAT considers that refugee matters become more complex as time passes and the conditions in the relevant country evolve.

46. Further, applicants have an interest in the prompt resolution of the matter to ensure that they are able to be granted the visa in question and benefit from the rights that that entails. Not all bridging visas granted to applicants to the AAT have work rights – for example, applicants who have not previously held a substantive visa will need to demonstrate they have a compelling need to work, which essentially requires that they be suffering from financial hardship.

47. More broadly, the earliest resolution of migration and refugee matters would also afford earlier immigration status certainty to AAT users, thereby reducing the prospect of those in Australia from having to enter into or remain in exploitative personal and employment arrangements while their immigration status is being resolved.

48. The Law Council does not recommend the IAA as a solution to tackling the backlogs in the AAT as mentioned above. This process does not reduce appeals to court, in fact

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[25] Ibid, 58.
[26] Ibid.
[27] Ibid.
[28] Ibid, 55.
[29] Administrative Appeals Tribunal, '*What happens after lodgement?*' (website), <https://www.aat.gov.au/steps-in-a-review/migration-and-refugee/refugee/what-happens-after-lodgement>.
[30] Administrative Appeals Tribunal, *Annual Report 2020-21*, 27.
[31] Administrative Appeals Tribunal, '*Migration and Refugee Division Caseload Report – Financial Year to 30 June 2021'*, <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2020-21.pdf>, 3.
[32] President of the AAT, *Prioritising Cases in the Migration and Refugee Division*, <https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Presidents-Direction-Prioritising-Cases-in-Migration-Refugee-Division.pdf>. See also, reg 4.25 of the Migration Regulations.

quite the opposite, and is difficult for unrepresented applicants to navigate. Further, the lack of a right to a hearing and the inability to introduce new evidence except in exceptional circumstances, means cases with merit regularly fail, placing applicants at risk of refoulement. Rather than further reliance on the IAA, the IAA should be abolished as the flaws in its legal framework, which deny procedural fairness and natural justice, cannot be remedied (as expanded on below). All cases potentially in the IAA pipeline or on remittal from the IAA should be re-directed to the regular part of the MRD.

49. One possible solution to addressing backlogs in the MRD is the use of directions hearings as a way of progressing matters. The Law Council is informed that the use of directions hearings had previously been working well and should continue to be used. Providing clients with plenty of warning about hearings would also be useful so to allow more time for hearing preparation.

Increased funding

50. Present Government policies to address the backlog have not been successful. The previously quoted statements in the 2020-21 AAT Annual Report were made after the announcement in the Budget in May 2021 that the Government would provide $54.8 million over four years from 2021-22 to address the backlog of cases in the MRD (**AAT Budget funding measure**).[33]

51. Evidence given by the AAT subsequently to Senate Estimates suggests that this measure will not address the backlog. In the 27 May 2021 Senate Estimates hearing, the AAT indicated that funding is 'not just for the AAT but for a range of the federal courts as well' and that 'we were previously funded on a baseline of 18,000 finalisations in the MRD per year and the AAT Budget funding measure will 'allocate funding for up to 20,000 finalisations in the Migration and Refugee Division'.[34]

52. In the 26 October 2021 Senate Estimates hearing, the AAT stated:[35]

> *The decrease in lodgements enabled us to make modest inroads into our well-documented backlog, leaving 65,374 cases on hand at the end of the reporting year, compared with around 72,000 the year before. We are now seeing an increase in lodgements in 2021-22, so it will be difficult to sustain the trend with our current member and staff resources*.

53. If the number of applications returns to the figures that pertained prior to the COVID-19 pandemic, and there is no reason to believe they will not, the AAT Budget funding measure will not be sufficient.

54. On 22 November 2021, the Prime Minister announced that from 1 December 2021, a large number of visa holders will be able to enter Australia, suggesting that as many as 200,000 could enter Australia.[36] The presence in Australia of those visa holders is likely to give rise to a number of additional adverse migration decisions as those holders apply for further visas or have their visas cancelled.

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[33] Commonwealth of Australia, 'Budget Measures – Budget Paper No.2 2021-22', 131.
[34] Commonwealth, *Hansard*, Senate (Legal and Constitutional Affairs Legislation Committee), 27 May 2021, 20 (Ms Sian Leathem, Registrar).
[35] Commonwealth, *Hansard*, Senate (Legal and Constitutional Affairs Legislation Committee), 26 October 2021, 5 (Ms Sian Leathem, Registrar).
[36] Prime Minister of Australia, Press Conference (transcript), 22 November 2021, <https://www.pm.gov.au/media/press-conference-canberra-act-29>.

Recommendation:

- **Significant additional resources should be given to the AAT on a permanent basis to bolster its ability to efficiently process migration applications.**

Immigration detention

55. The Migration Regulations 1994 (Cth) (**Migration Regulations**) require the MRD of the AAT to undertake its review in migration cases where the applicant is in immigration detention immediately on receipt of the application and to give notice of its decision in respect of such an application as soon as practicable.[37] The Migration Regulations do not impose that requirement on the MRD of the AAT in refugee matters.

56. As noted, an AAT President's Direction requires that all cases dealt with in the MRD of the AAT are given the highest priority for processing.[38] However, the experience of some practitioners is that the prioritisation of immigration detention cases is not always complied with. The AAT does not include information regarding its timeframes for resolving matters involving applicants in immigration detention in its annual reports.

57. Further, other materials which apply to cases dealt with in the MRD of the AAT provide for special hearing arrangements for persons in detention[39] and provide guidance for dealing with vulnerable persons in immigration detention.[40] Notably, none of this material applies to matters in IAA nor to matters in the AAT's General Division. As discussed below, the AAT's General Division hears reviews of visa refusals and cancellations made on the basis of the character test in section 501 of the *Migration Act 1958* (Cth) (**Migration Act**).

58. The Law Council also recommends that the AAT in General Division matters should more robustly ensure, via directions issued to the Minister (or his or her representatives) under section 33 of the AAT Act, that applicants are able to attend their hearings in person and that they be entitled to continuity in their detention in the period leading up to their hearings. This would help to avoid the frequent situation practitioners have witnessed where their clients are transferred right before, or in the weeks prior to, their hearings. In the experience of practitioners, these transfers often involve excessive use of force, and are traumatic and unsettling for applicants, and interfere with their ability to calmly prepare for their cases and have contact with their lawyers in those important lead-up weeks when all the evidence and submissions are due.

Recommendations:

- **The AAT should :**
  - **be more transparent regarding the time taken to resolve matters involving applicants in immigration detention;**

[37] Reg 4.25 of the Migration Regulations.
[38] President of the AAT, *Prioritising Cases in the Migration and Refugee Division*, <https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Presidents-Direction-Prioritising-Cases-in-Migration-Refugee-Division.pdf>.
[39] President of the AAT, *Conducting Migration and Refugee Reviews*, <https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Presidents-Direction-Conducting-Migration-and-Refugee-Reviews.pdf>.
[40] Administrative Appeals Tribunal, *Guidelines on Vulnerable Persons*, <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Vulnerable-Persons.pdf>, [91].

- **provide for guidance material to be issued in relation to matters in the IAA and the AAT's General Division involving applicants in immigration detention; and**

- **make use of its directions power which applies to matters in the General Division to require applicants in immigration detention be given continuity in their detention in the period leading up to their hearings.**

The codes of procedure

59. The AAT review of many migration decisions must be conducted in accordance with a code of procedure, which prescribes the powers, functions and obligations of the AAT in conducting a review and is expressly taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with[41] or in the conduct of the review.[42]

60. The Law Council submits that it may assist to reduce the backlog of MRD matters if the codes of procedure for migration and refugee matters in the MRD were removed. As has been pointed out by many, including the ARC and in the Callinan Review, the codes are not justified. Given the limited resources of the AAT, it is unhelpful to have large amounts of time spent training members to navigate the code as well as the time involved in cases where it is used.

61. There are effectively four different procedural schemes which apply to the AAT when performing reviews of migration decisions:

- some decisions, such as character test cancellation decisions, are subject to a restrictive procedural scheme and are not managed under the AAT's normal procedures. The scheme has been described by some Federal Court judges as being designed to disadvantage review applicants;[43]
- Part 7 reviewable decisions, which are mostly protection-related decisions other than fast-track decisions, are subject to a bespoke procedural scheme in Part 7 of the Migration Act;
- Fast-track reviewable decisions, which are decisions to refuse a protection visa to a fast-track applicant who is not an excluded fast-track applicant;
- Part 5-reviewable decisions – which are essentially the remaining decisions.

Fast-track decisions

62. Fast-track applicants are certain cohorts of unauthorised maritime arrivals or other persons determined by a legislative instrument.[44] Decisions made to refuse to grant a visa to a fast-track applicant are either excluded from review (this is discussed further below) or mandatorily sent to the IAA,[45] a body within the AAT.

[41] Migration Act, sections 357A and 422B.
[42] Ibid, section 473DA.
[43] *Goldie v Minister for Immigration and Multicultural Affairs* [2001] FCA 1318; (2001) 111 FCR 378 AT [26].
[44] See subsection 5(1) of the Migration Act.
[45] Ibid, section 473CA.

63. Fast-track reviewable decisions are subject to an abbreviated review process conducted in accordance with a code of procedure which exclusively provides for the hearing procedure (excluding natural justice)[46] under Part 7AA of the Migration Act.

64. The Law Council policy is that access to a robust and independent system of merits review should be provided for all administrative decisions concerning protection visas.[47] Further, the Law Council's policy provides that protection determination processes should include procedural fairness guarantees, such as the right to present and challenge evidence.[48]

65. The Law Council considers the IAA's ability to provide effective and fair review is far from certain, given that:

- the IAA will make a decision on the papers, and will not offer a review applicant an interview or the opportunity to comment on an application, except where 'exceptional circumstances' exist;[49]
- the IAA is generally prohibited from presenting new information or evidence except where 'exceptional circumstances' exist;[50]
- IAA reviewers are public servants[51] and thus not independent in the same way as members appointed by the Governor-General to the MRD;
- as any submissions must be made in English and without any translating service available, many decisions are made by the IAA without any engagement with unrepresented applicants; and
- the IAA does not reflect the inquisitorial merits review process that characterises other statutorily independent merits review bodies.

66. The Law Council has previously made a number of recommendations to bolster the standard of merits review provided by the IAA, but as stated above, the preferable position is to abolish to IAA to ensure that applicants are provided with a full de novo review of their claims.[52]

67. Those submissions were made on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), which introduced the fast-track scheme. It has been reported to the Law Council that the experience of practitioners is that the fast-track scheme does not reduce appeals to court, that it is difficult to navigate for unrepresented applicants; and that the inability to introduce new evidence except in exceptional circumstances means cases with merit fail.

68. This is borne out by the data. In the financial years between 2017-18 and 2020-21 (inclusive), approximately 81.1 per cent of IAA decisions were appealed and 36.5 per cent of IAA decisions were allowed.[53] In the financial years between 2017-18 and

[46] Ibid, section 473DA.
[47] Law Council, '*Asylum Seeker Policy*', [7(b)(iii)], <https://www.lawcouncil.asn.au/publicassets/129a0b1b-bed6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>.
[48] Ibid, [9(e)].
[49] Migration Act, section 473DB.
[50] Ibid, section 473CC.
[51] Ibid, subsection473JE(1).
[52] Law Council, Submission to the Senate Legal and Constitutional Affairs Committee, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014', (5 November 2014), [121]-[122].
[53] This is an extrapolation of data at AAT, *Annual Report 2018-19*, 73 and AAT, *Annual Report 2020-21*, 89.

2019-20,[54] approximately 23.4 per cent of migration and refugee matters were appealed and approximately 20 per cent were allowed.[55]

Parts 5 and 7 reviewable decisions

69. Part 5 reviewable decisions and Part 7 reviewable decisions must be conducted in accordance with codes of procedure which are set out in Parts 5 and Part 7 of the Migration Act.

Issues with the operation of the codes of procedure

70. The view of the High Court on the consequence of a failure to comply with the code has evolved over time. Put simply, the statutory hearing procedures exclude common law procedural fairness, replacing it with more limited procedural protection for the applicant, and occasionally more onerous protection, and overall more complex and technical requirements.

71. In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[56] (***SAAP***) the AAT did not comply with section 424A of the Migration Act, which requires the AAT to invite the applicant in writing to give information that the AAT considers would be the reason, or a part of the reason, for affirming the decision that is under review. It had been held by the Federal Court in the first instance that notwithstanding the technical breach of section 424A, the applicant had been provided with the degree of procedural fairness which the legislature intended, since the applicant had been put on notice during the hearing of the dispositive elements of the review.[57] However, the High Court held that a failure to comply with section 424A – that is, to provide the dispositive information in writing – rendered the AAT's decision invalid, regardless of whether it was procedurally fair.[58]

72. In *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*[59] the Full Federal Court allowed a number of appeals on the basis of a breach of section 424A despite, in one case, there being 'nothing procedurally unfair about what the Tribunal actually did'.[60]

73. Weinberg J made the following concluding comments:

> *There are several other comments that I wish to make about these appeals generally. They seem to me to illustrate, and not for the first time, the problems that can arise when the legislature embarks upon the course of establishing a highly prescriptive code of procedure for dealing with visa applications, and with subsequent applications for review, instead of simply allowing for such matters to be dealt with in accordance with the well-developed principles of the common law.*
>
> *…*
>
> *However, since SAAP, fairness is no longer the touchstone. Indeed, it may be regarded as being only marginally relevant. The requirements of the*

[54] The AAT's *Annual Report 2020-21* does not publish the appeals data for 2020-21.
[55] This is an extrapolation of data at AAT, *Annual Report 2018-19*, 73 and AAT, *Annual Report 2020-21*, 89.
[56] [2005] HCA 24.
[57] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 577, [50].
[58] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24, [209] (Hayne J).
[59] [2006] FCAFC 2,
[60] Ibid, [166].

> *section have been construed as being imperative, and accordingly, must be met, whatever the circumstances may be. …*
>
> *With great respect, I doubt that the legislature ever contemplated that s 424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility in this area. This desire to set out by way of a highly prescriptive code those requirements was no doubt well-intentioned, and perhaps motivated by a concern to promote consistency. However, the achievement of consistency (assuming that this goal can be attained) comes at a price. As is demonstrated by the outcome of at least some of these appeals, codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense. To put the matter colloquially, and to paraphrase, "the cake may not be worth the candle.*[61]

74. Subsequent legislative changes did not seek to return to 'well-developed principles of common law', but instead continued to increase the complexity of the code. This included the insertion of section 424AA of the Migration Act, which permits compliance with the procedural fairness requirements of the code to be undertaken orally, rather than in writing. Practitioners have informed the Law Council that the operation of this section in practice is confusing for applicants and often creates apprehension amongst applicants that the AAT is not independent and objective, since significant amounts of time can be spent in a hearing focusing upon details that may give rise to adverse inferences.

75. In the Explanatory Memorandum for the bill which introduced section 424AA, it was explained that the 'very literal' construction of section 424A in *SAAP* was having 'considerable practical ramifications' for the operations of the AAT, including delays, and had 'led to a highly technical application of the law in circumstances where little or no practical injustice can be found in the way the tribunals have dealt with a matter'.[62]

76. The High Court has recently held that failure to comply with a statutory procedural requirement will not give rise to jurisdictional error as it is it not material to the decision.[63] This development means that a breach of the code that is shown to have made no difference to the decision made does not invalidate the decision. Giving operative effect to the significance of a breach may address some of the concerns raised by Weinberg J above, but this has involved adding an additional consideration to compliance with the code. Rather than simplifying matters by employing the 'well-developed principles of common law', considerations of materiality must follow analysis of compliance with the code, adding additional layers of complexity to an already highly complicated system.

77. Furthermore, the principle of materiality does not address the inverse issue – i.e. where a tribunal may technically comply with the code of procedure but does not afford meaningful procedural fairness. This is not only relevant to ensuring that justice is done, but also to the experience of justice and the prospects of decisions being accepted by those who are subject to them. There has been a very high number of judicial review applicants appealing decisions of the MRD over the time in which the

[61] Ibid, [174]- [183].
[62] Explanatory Memorandum, Migration Amendment (Review Provisions) Bill 2006 (Cth), 2-3.
[63] *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17.

code has been in operation. Whilst motivations for seeking judicial review are various, experiencing the decision-making process as fair will reduce one impetus towards appeal and is thus likely to reduce the number of judicial review applications.

78. To the extent that the code could be said to be an attempt to reduce litigation of trivial failures to afford procedural fairness, it is submitted that the history outlined above evidences that attempt to have been a misguided one. Further, the principle of materiality referred to above calls into question the need for a code of procedure at all.

79. In 2012, the ARC considered the codes of procedure in the Migration Act.[64] The report quoted submissions made to it by the then Department of Immigration and Citizenship (**DIAC**) and the AAT (then the MRT-RRT) on whether the inclusion of the code is beneficial to the operation of the Migration Act:

> *DIAC submitted that the code of procedure that applies in the migration context could not be removed without being replaced by some form of guidance for decision makers. They noted that although there has been extensive litigation over the code, the interpretation is now 'fairly settled'. They submitted that the code 'was intended to eliminate the legal uncertainties that flow from the non-codified common law principles of natural justice while retaining fair, efficient and legally certain decision making procedures. Conversely, the MRT-RRT submitted that the code of procedure in the migration context 'leads to unexpected interpretation, uncertainty and extensive litigation'. They argued that statutory codes of procedure 'cannot replicate the adaptiveness of common law procedural fairness*.[65]

80. The ARC considered that the endeavours to achieve compliance with the codes have not necessarily enhanced the fairness of the review process, and have come at considerable cost to efficiency and increased litigation.[66]

81. The codes of procedure in the Migration Act were also considered in the Callinan Review. The Department of Home Affairs made a submission to that Review which was described as suggesting that the codes of procedure were 'essential to the maintenance of fair and efficient processes in the MRD' and 'underpin policy settings by assisting in the management of the caseload'.[67]

82. The Hon Ian Callinan AC QC did not accept that submission and stated:[68]

> *The Codes of Procedure are too prescriptive. They are a distraction from effective and fair decision making. Many to whom I spoke, or who made relevant submissions, criticised the Codes. They have not in practice promoted consistency or efficiency. They have instead encouraged a formulaic approach rather than a reflective consideration of all relevant factors, that is the case as a whole.*

[64] ARC, 'Report 50 – Federal Judicial Review in Australia', <https://www.ag.gov.au/legal-system/publications/report-50-federal-judicial-review-australia-2012>.
[65] Ibid, [7.88].
[66] Ibid, [7.91].
[67] The Hon Ian Callinan AC QC, Callinan Review, [6.81].
[68] Ibid, [6.82].

83. The Callinan Review recommended removal of the codes of procedure from the Migration Act.[69]

84. Following the Callinan Review, the Law Council wrote to then Attorney-General the Hon Christian Porter MP about the outcomes of a forum held between legal practitioners, academics and policy officers, as well as representatives from the AAT and the Attorney-General's Department, titled *Callinan Review: past reflections, future directions*. The letter records that the recommendation of the Callinan Report that the codes of procedure be removed was 'endorsed by attendees'.

85. Under the AAT Act, the AAT must pursue the objective of providing a mechanism of review that:[70]

    (a) is accessible; and
    (b) is fair, just, economical, informal and quick; and
    (c) is proportionate to the importance and complexity of the matter; and
    (d) promotes public trust and confidence in the decision-making of the AAT.

86. The AAT Act provides flexible procedural powers to enable it to perform this function subject to an overriding duty to provide procedural fairness.[71]

Preferred position: codes of procedure are repealed

87. The Law Council considers that the repeal of the codes of procedure from the Migration Act would:

    - likely improve the quality of decision-making and the fairness of the review process for applicants, as decisions would be made subject to common law principles; and

    - cease the large caseload of migration and refugee litigation, which is directed at the construction of, and compliance with, provisions forming part of the code of procedure.

Fallback position: codes are reviewed and amended

88. However, noting the views of the Department, the Law Council considers that a less desirable but reasonable alternative course of action may be a review of whether the codes of procedure achieve the objective of being 'fair, efficient and legally certain' or, in fact, operate as a constraint on the AAT. This review should consider the extent to which the codes of procedure have contributed to the significant backlog of matters in the AAT's MRD (including in relation to training required for new members), whether it impairs the ability of the AAT to enable a full range of members to decide migration and refugee matters, and an analysis of the nature of the litigation conducted in relation to matters arising from the AAT's MRD compared to its other matters.

89. Any such review should consider addressing current inconsistencies in the codes of procedure in Parts 5 and 7 of the Migration Act in relation to representatives and access to documents.

90. Applicants seeking review of migration decisions under Part 5 of the Migration Act are entitled to be 'assisted' by another person, albeit that assistant is not entitled to

[69] Ibid, [1.23].
[70] Section 2A of the AAT Act.
[71] Subsection 39(1) of the AAT Act.

present arguments or to address the AAT unless the AAT is satisfied there are exceptional circumstances.[72]

91. There is neither an express right nor an express prohibition to any assistance or representation for applicants seeking review of refugee decisions under Part 7 of the Migration Act.

92. Review applicants under Part 7 are an especially vulnerable group. However, given the complexities of migration law, both cohorts may benefit from legal representation as does the AAT itself. Unrepresented applicants in courts and tribunals impact adversely on the efficiency of these organisations.

93. By way of contrast, section 32 of the AAT Act (which does not apply to matters in the MRD)[73] provides that parties to proceedings generally have a right to be represented by another person, although non-agency parties[74] in the Social Services and Child Support Division require the permission of the AAT to be represented. Section 32 suggests that representation may be an alternative to the person appearing themselves.

94. The Law Council can understand why it is preferable for a visa applicant to appear in person and to give their own evidence to the AAT, particularly in refugee matters. However, its view is that a representative should be permitted to appear with them.

95. Similarly, a review applicant under Part 5 of the Migration Act is entitled to have access to written material before the AAT, subject to certain limitations.[75]

96. There is no such right to review applicants under Part 7, and access to documents must be done via a Freedom of Information (**FOI**) request. If the documents requested relate to a Departmental file, the review applicant must lodge their FOI request with the Department of Home Affairs. This prolongs the review process considerably. The Law Council considers that an applicant's right to access information in Part 7 should be the same as that of Part 5 applicants.

97. Finally, the Law Council notes that the AAT does not have the power to extend the timeframe for making an application to it in MRD matters.[76] This contrasts with the position which applies in AAT matters in the General Division[77] and in judicial review matters,[78] where power to extend time exists.

Recommendations:

- **The codes of procedure should be repealed from Parts 5 and 7 of the Migration Act.**
- **Alternatively, to address the concerns of the Department of Home Affairs, a review could be conducted of whether the codes of procedure in Parts 5 and 7 of the Migration Act are enhancing efficiency and fairness in AAT decision-making or detracting from it.**

[72] Subsections 366A(1) and (2) of the Migration Act.
[73] Section 24Z of the AAT Act.
[74] An 'agency party' is essentially defined to be certain Commonwealth agencies (see subsection 3(1) of the AAT Act), which suggests that a 'non-agency party' would include the subject of the decision.
[75] Section 362A of the Migration Act.
[76] See regs 4.10 and 4.31 of the Migration Regulations.
[77] Subsection 29(7) of the AAT Act and
[78] Subsection 477(2) of the Migration Act.

- **If the codes of procedure remain in the Migration Act, reviews of migration and refugee decisions should be subject to the same procedures in relation to the right to representation in hearings and to access to information before the AAT. Further, the MRD should be empowered to extend time to make an application to it.**

Increased application fees

98. Given a central principle of the administrative law system is to protect individuals against unfair or arbitrary use of public power, the Law Council draws attention to recent increases in fees for the lodging of migration applications to the AAT and calls for the introduction of a more significant hardship waiver for applicants.

99. The Migration Amendment (Merits Review) Regulations 2021 (Cth) (**Amendment Regulations**) amended the Migration Regulations to increase the fee for an application to the AAT for review of a non-protection visa migration decision from $1,826 to $3,000,[79] which is a 64 per cent increase.

100. The Law Council has made its view clear that the previous figure was unjustifiably high, in comments made in the context of amendments made in late 2020 to increase fees for judicial review of AAT migration decisions in the Federal Circuit and Family Court from $690 to $3,330.[80] The AAT Registrar may reduce the fee by 50 per cent if the fee would cause severe financial hardship to the review applicant;[81] and successful applicants for review are entitled to a refund of 50 per cent of the fee.[82]

101. A baseline fee of $3,000 for review of non-protection migration decisions is more than three times the amount of the baseline fee for a standard application fee to the AAT, which is $962,[83] reducible to $100 in a range of circumstances in addition to financial hardship.[84]

102. The fee increase is couched as an offsetting measure – however, in practice it could dissuade a potential applicant from seeking review of a decision or from obtaining advice about a possible review when the costs of obtaining legal advice are added to the application fee.

103. As the Law Council President stated on 17 November 2020, in the context of the increase to the Court filing fees in migration matters:

> *The rule of law and human rights of all people are core tenets of our modern democracy and having access to justice is an important part of*

[79] Item 1 of sch 1 to the Migration Amendment (Merits Review) Regulations 2021. The base fee before the amendment was $1,764; however, at the time of the amendment the actual fee payable was $1,826, due to indexation calculated in accordance with reg 4.13A of the Migration Regulations: see Explanatory Statement, Migration Amendment (Merits Review) Regulations 2021, 1. The figure of $3,000 will also increase with indexation from 1 July 2023 – see subreg 4.13A(3).
[80] Law Council, 'Unfair hike to FCC migration fees' (media statement), 17 November 2020, <https://www.lawcouncil.asn.au/media/media-releases/unfair-hike-to-fcc-migration-fees>.
[81] Item 1 of the table in subregulation 4.14(1) of the Migration Regulations 1994 (Cth).
[82] Ibid, items 5 and 6.
[83] The baseline fee is $920: see subregulation 20(1) of the Administrative Appeals Tribunal Regulation 2015 (Cth). However, due to indexation of the fee which is calculated in accordance with regulation 27 of the Administrative Appeals Tribunal Regulation 2015, the present fee is $962: AAT, 'Fees' (website), <https://www.aat.gov.au/apply-for-a-review/other-decisions/fees>.
[84] Subsection 20(3) of the Administrative Appeals Tribunal Regulation 2015 (Cth).

protecting those rights … Justice is not a commodity and our justice system should not be reduced to a user pays model. [85]

104. The Amendment Regulations engage a number of human rights obligations to the extent they may, by increasing the fee for an application to the AAT, limit a person's ability to seek merits review of a migration decision. These include articles 13 and 14 of the International Covenant on Civil and Political Rights (**ICCPR**)[86] which respectively provide, in summary:

- that an alien should have access to a right to seek review of a matter relevant to their possible expulsion from a territory; and

- that all persons are to be equal before courts and to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

105. These rights should be afforded to all people without discrimination or distinction of any kind.[87]

106. In its review of the Amendment Regulations, the Parliamentary Joint Committee on Human Rights (**PJCHR**) considered that the fee increase imposed by the Amendment Regulations engaged and limited the rights enshrined in articles 13 and 14 of the ICCPR[88] and that for those individuals who cannot afford to pay the application fee, there is a 'significant risk that the measure impermissibly limits the right to access to justice.[89]

107. Ultimately, the PJCHR reported that the proportionality of the measure may be assisted by amendments to:

- provide the Registrar of the AAT with the discretion to provide an applicant with a full fee waiver, having regard to the individual circumstances of the applicant, including their ability to pay the reduced fee, and the merits of their case; and

- allow an applicant to seek review of the Registrar's decision to grant or refuse a fee waiver application.[90]

108. The Law Council agrees that the fee increase imposed by the Amendment Regulations limits the right to access to justice for unsuccessful visa applicants and is discriminatory in its application as the fee paid by migrants in Australia seeking an Australian visa is more than three times the standard fee paid in other AAT matters. No other cohort pays a fee greater than the standard fee, and several pay a lesser fee.

109. The AAT's online system for the MRD requires review applicants to pay the review fee in full and then apply for a fee reduction on the basis of **severe** financial hardship. A person in severe financial hardship is unlikely to be able to pay the full fee. The only way to avoid this is by faxing the review application or lodging it at the Registry. This is not acceptable for a jurisdiction where time limits for review are short and non-extendable.

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[85] Law Council, 'Unfair hike to FCC migration fees' (media statement), 17 November 2020, <https://www.lawcouncil.asn.au/media/media-releases/unfair-hike-to-fcc-migration-fees>.
[86] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[87] Articles 2 and 26 of the ICCPR.
[88] PJCHR, Human rights scrutiny report (Report no 12 of 2021), [2.186]-[2.188], [2.206].
[89] Ibid, [2.207].
[90] Ibid, [2.208].

110. For completeness, no fee is payable by certain persons in immigration detention in migration matters in the MRD of the AAT.[91] The Law Council suggests consideration be given to amending the Migration Regulations to provide that the fee payable by any person in immigration detention who the AAT is satisfied is experiencing financial hardship be nil. In the experience of practitioners, many immigration detainees find it difficult to afford even a reduced fee.

Recommendations:

- **Fees imposed on persons applying to the AAT for review in non-protection migration matters should be reduced to at least as low as the standard fee (a baseline of $920) and subject to the same waiver provision as applies in those standard matters (i.e. reducible to $100 with the waiver decision itself being merits reviewable).**
- **No fees should be payable by persons in immigration detention whom the AAT is satisfied is experiencing financial hardship.**

Migration decisions which are not merits reviewable

111. Not all decisions made under the Migration Act are subject to review by the AAT.

Categories of unreviewable decisions

Miscellaneous character cancellation decisions

112. There are a number of cancellation powers, unrelated to the character test, which if exercised personally by the Minister – either at first instance or in overturning a decision of the delegate or AAT – are not merits reviewable.[92]

Excluded fast track applicants

113. Further, some fast track applicants are excluded from merits review by the IAA altogether due to the nature or way in which they made their claims. Specifically, a fast track applicant will be an excluded fast track applicant (and thus excluded from merits review) if:

- they made claims which were previously refused;
- they have a right to enter or reside in another country;
- without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister in support of their application;
- makes a claim which, in the Minister's opinion, is manifestly unfounded
  - because it has no plausible or credible basis; or
  - is based on conditions, events or circumstances in a particular country but is not able to be substantiated by any objective evidence; or
  - is made for the sole purpose of delaying or frustrating the fast track applicant's removal from Australia.

[91] Subregulation 4.13(2) of the Migration Regulations.
[92] Ibid, paragraphs 338(3)(c) and (d).

Refusal or cancellation decisions involving national interest reasons

114. There are three kinds of decisions which are not reviewable by the AAT, either because the Minister has decided it would not be in the national interest for the decision to be reviewed or changed, or the Minister has decided that a refusal or cancellation of a visa is in the national interest and that decision is not reviewable. (**national interest powers**).

115. First, a personal decision of the Minister to:

- deport a person who has been convicted of an offence and sentenced to at least one year's imprisonment; or
- refuse a protection visa on the basis that the Minister considers, on reasonable grounds, that the person is a danger to Australia's security or to the Australian community,

where the Minister personally decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person (**exclusion decision**), is not reviewable by the AAT.[93]

116. Secondly, any decision to refuse or cancel a visa in relation to which the Minister has issued a 'conclusive certificate' because the Minister considers it would be contrary to the national interest to change the decision or for the decision to be reviewed.[94] It does not appear necessary that this power be exercised by the Minister personally.[95]

117. The third type of decision is a personal decision of the Minister to refuse to grant or to cancel a visa in circumstances whether the visa holder is found not to satisfy the character test (**character test decisions**). While all character test decisions made personally by the Minister are not reviewable,[96] only some involve some assessment of the national interest. Specifically, those where:

- the Minister reasonably suspects that the person does not pass the character test and is satisfied that the refusal or cancellation is in the national interest – effectively foregoing providing natural justice in relation to the decision;[97]
- the Minister overrides a decision of a delegate or the AAT to:
  - not make a character test decision to refuse or cancel a visa (and instead decides to refuse or cancel the visa); or
  - revoke a cancellation decision (and instead decides to cancel the visa).

  In these circumstances, whether or not natural justice is provided, the power is only available if the Minister is satisfied the refusal or cancellation is in the national interest;[98]
- the Minister overrides a decision of a delegate to make a character test decision to refuse or cancel a visa in circumstances and makes their own character test decision to refuse or cancel a visa in its stead, where the Minister is satisfied

[93] Paragraph 500(1)(a) of the Migration Act.
[94] Ibid, paragraph 338(1)(a), paragraph 441(2)(b) and definition of 'fast track reviewable decision' in section 473BB.
[95] Ibid, section 339, subsection 411(3), section 473BD and 496.
[96] Ibid, paragraph 500(1)(b).
[97] Ibid, subsection 501(3).
[98] Ibid, subsections 501A(1)-(3) and section 501BA.

> the refusal or cancellation is in the national interest. The intention of a decision of the Minister to override a decision of a delegate in these circumstances and make, in effect, the same decision, is to put the review of that decision beyond the reach of the AAT.[99]

118. It is accepted that content of the 'national interest' is a matter for the Executive to determine.[100] While the AAT forms part of the Executive,[101] the national interest has been recently referred to by the Full Federal Court as a 'political [decision] best suited to resolution by the holder of a political office'.[102] Thus, it may follow that if a matter is suitable to be subject to a national interest determination, then the decision of the Executive should not be merits reviewable.

119. The question is whether these national interest powers are appropriately employed in these scenarios and subject to sufficient Parliamentary scrutiny.

120. An exclusion decision is relatively narrow in scope. A judgement as to the 'national interest' is contextualised, with reference to the seriousness of the circumstances in which a person has committed an offence or is a danger to the community or Australia's security. It is also subject to Parliamentary scrutiny – the Minister must cause a notice of the making of such a decision to be tabled in each House of Parliament.[103]

121. A conclusive certificate is very broad in scope. The applicable 'national interest' need not be connected to the reasons for the decision – it permits the Minister to form a view that the national interest in the visa *staying refused* outweighs the importance of permitting a review on the merits of the decision.

122. Further, a conclusive certificate is not subject to any Parliamentary scrutiny and no reasons need be given for the issuing of such a certificate. It is an executive power of significant scope and operation.

123. The national interest consideration in the character test decision-making power is only exercisable in circumstances where a person has been found not to pass the character test.[104] While in some cases the character test may be found not to be met on matters of fact, it can also be found not to be met as a result of an evaluative exercise – for example, there is a risk the person would engage in criminal conduct in Australia.[105] The merits of these evaluations, if made personally by the Minister, are not able to be tested. Some of the character test decisions are required to be tabled in Parliament – including decisions where no natural justice is provided (other than certain decisions involving an adverse security assessment or a substantial criminal record)[106] or when the Minister decides whether or not to revoke such a decision after new information becomes available.[107]

124. These national interest powers give an overly broad mandate to the Minister to make a decision to deny a visa to an individual with reduced transparency and accountability. The Law Council considers that national interest powers are better attached to large-scale, polycentric decision-making, which genuinely attracts

[99] Ibid, section 501B.
[100] *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195, [15] (Allsop CJ) (**CWY20**).
[101] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24, [200] (Hayne J).
[102] CWY20, [136] (Besanko J).
[103] Subsection 502(3) of the Migration Act.
[104] CWY20, [136] (Besanko J).
[105] Subparagraph 501(6)(d)(i) of the Migration Act.
[106] Ibid, subsection 501(4A)-(4B).
[107] Ibid, 501C(8).

parliamentary and public debate – these in turn provide the necessary oversight and safeguard to the Executive decision-making. In general, the Law Council considers that there is a real question as to whether these powers can be appropriately applied to decisions in relation to individuals, who will never be known in Parliament, as opposed to genuine matters of 'national security'. As these powers are employed here, the Law Council considers that the scope of these powers should be narrowed and that there should be a mandatory Parliamentary oversight of their use.

Administrative law principles

125. The ARC in its report '*What decisions should be subject to review?*' (**ARC Merits Review Report**) sets out factors which may justify excluding merits review and factors which do not.[108]

126. These factors are informed by the objectives of merits review articulated in the ARC Merits Review Report. These objectives include the short-term objective of ensuring the fair treatment of all persons affected by a decision, and the long-term objective of improving the quality and consistency of the decisions of primary decision-makers, and enhancing the openness and accountability of government decisions.[109]

127. Relevantly, factors which may justify excluding review include:

- policy decisions of high political content, such as decisions affecting the Australian economy or Australia's relations with other countries, or decisions concerning the national security and major political controversies; [110]
- decisions of a law enforcement nature. [111]

128. In relation to the first of these two categories, the ARC took the view that exclusion from merits review for those purposes should:[112]

- be limited to decisions personally made by a Minister;
- only be effected by that Minister issuing and tabling in the Parliament a certificate on a case-by-case basis, providing for the particular decision to be excluded from review, and indicating the basis of the exclusion; and
- only take effect from the date of tabling of the Minister's certificate.

129. Factors that do not justify excluding merits review include:

- that a decision-making power involves matters of national sovereignty (such as the question of who is admitted to enter the country);[113]
- decisions made by reference to government policy.[114]

130. It is not clear that all of the migration decisions which are not merits reviewable satisfy the requirements proposed by the ARC for their exercise. For example:

[108] Administrative Review Council, 'What decisions should be subject to review?' (1999), <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.
[109] Ibid, [1.3]-[1.5].
[110] Ibid, [4.22]-[4.30].
[111] Ibid, [4.31]-[4.33].
[112] Ibid, [4.29].
[113] Ibid, [5.3]-[5.5].
[114] Ibid, [5.12]-[5.15].

- conclusive certificates need not be issued personally by the Minister;
- non-character test cancellation decisions made personally by the Minister are excluded in all cases by operation of the law – the Minister need not form the view that the national interest requires that the decision should be reviewed and there is no Parliamentary scrutiny of such decisions;
- not all decisions are subject to Parliamentary scrutiny and even those that are do not all require the Minister to explain the reasons for the decision not being merits reviewable;
- in some matters, there is no limit on the power to make a non-reviewable decision which requires it only be exercised in the kinds of circumstances suggested by the ARC.

131. The Law Council has previously expressed concerns about the position of excluded fast-track applicants.[115] A number of the matters which permit an application to be treated as an excluded fast-track application are evaluative matters – including whether a person has made a 'manifestly unfounded claim for protection' or has not provided a 'reasonable explanation' for providing bogus documents. Applying the ARC framework, these are not matters which should be exempt from merits review.

International law principles

132. The decision-making powers which are not subject to merits review may also engage Australia's international obligations.

133. These powers were considered by the PJCHR in its scrutiny report on the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth), which if made would have consolidated the current codes of procedure which apply to a number of decisions which may be made under the Migration Act. Importantly, that Bill would have included a provision (**proposed section 338A**) which retained the decisions referred to in the previous paragraph as not being subject to review.[116]

134. The PJCHR stated, relevantly, in relation to proposed section 338A:[117]

> *Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person (in the Australian context including merits review), is integral to giving effect to non-refoulement obligations.*
>
> *As noted in the initial analysis the measure engages the right to nonrefoulement and the right to an effective remedy as it fails to ensure sufficient procedural and substantive safeguards apply to ensure a person is not removed in contravention of the obligation of non-refoulement. The right to non-refoulement is an absolute right: it cannot be subject to any permissible limitations.*
>
> *…*
>
> *… The court cannot undertake a full review of the facts (that is, the merits) of a particular case, for instance, an assessment as to refoulement to*

[115] Law Council, Submission to the Senate Legal and Constitutional Affairs Committee, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014', (5 November 2014), [97]-[99].
[116] See item 34 of Schedule 1 to the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth).
[117] PJCHR, Human rights scrutiny report (Report no 4 of 2017).

torture or persecution, to determine whether the case was correctly decided.

Accordingly, in the Australian context, judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not address whether that decision was the correct or preferable decision. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

135. Ultimately, the PJCHR concluded that:

> *The measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.*

136. The Law Council agrees with this analysis.

137. The United Nations Human Rights Committee (**UNHRC**) has stated that the obligation in article 13 of the ICCPR[118] to provide an alien with access to a right to seek review of a matter relevant to their possible expulsion from a territory may only be departed from when 'compelling reasons of national security' so require.[119] As discussed above, not all the executive decisions under the Migration Act that are unreviewable by the AAT arise in circumstances in which compelling reasons of national security apply. As a result, given that right may be limited in a number of circumstances, the Law Council considers that further justification of these restrictions on review is required to ensure that they are consistent with that international obligation.

138. The obligation of non-refoulement essentially prevents a State from returning a refugee or person owed complementary protection to the country where the risk of harm arises.[120]

139. It is the Law Council's policy that Australia is obliged to enact robust safeguards to protect against refoulement, including access to merits review of all administrative decisions concerning protection status and a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive.[121]

140. The fast-track scheme, which currently applies to unauthorised maritime arrivals and children of such persons,[122] contravenes this principle.

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[118] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).
[119] UNHRC, CCPR General Comment No. 15: The Position of Aliens Under the Covenant (11 April 1986), <https://www.refworld.org/pdfid/45139acfc.pdf>.
[120] Law Council, 'Asylum Seeker Policy', [6], <https://www.lawcouncil.asn.au/publicassets/129a0b1b-bed6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>.
[121] Ibid, [7(b)(iii) and (c)].
[122] See subsection 5(1) of the Migration Act; Class of Persons Defined as Fast Track Applicants 2016/008, IMMI 16/008; Class of Persons Defined as Fast Track Applicants 2016/010, IMMI 16/010; Class of Persons Defined as Fast Track Applicants 2016/049, IMMI 16/049; Migration (Fast Track Applicant Class – Temporary

141. A number of the executive decision-making powers which are not reviewable may be exercised in relation to persons seeking protection – these include character test decisions made personally by the Minister, protection visa matters subject to a conclusive certificate, and fast-track decisions.

142. Following recent amendments to the Migration Act,[123] the Minister (or delegate) is now obliged to consider and make a record of whether the applicant satisfies Australia's protection obligations under international law prior to deciding whether to grant or refuse to grant a protection visa.[124] A record made that a person engages Australia's protection obligations is a 'protection finding' for the purposes of the Migration Act.[125] The effect of this amendment is to separate protection visa refusal decisions into two classes – those made on the basis that the decision-maker was not satisfied Australia's protection obligations were engaged and those made on the basis that other criteria (eg, going to security risk, criminal record or character) were not satisfied.

143. Presently, it is possible for the Minister or delegate to make a positive decision not to make a 'protection finding' in relation to an applicant and for that decision to not be merits reviewable. This may occur in matters involving excluded fast track applicants and refusal decisions subject to a conclusive certificate. Consistent with its Asylum Seeker Policy, the Law Council considers that all positive decisions not to make a 'protection finding' in relation to an applicant should be reviewable by the AAT.[126]

Comment on judicial review

144. These decisions which cannot be subject to merits review could still be subject to an application for judicial review to the Federal Court in its original jurisdiction, where the Court could consider the lawfulness of the decision, though not its merits.

145. It has been held by superior courts that the concept of 'national interest', 'although broad and evaluative, is not unbounded'[127] and that it is the responsibility of the Court to identify those boundaries.[128] The Full Federal Court recently held that the Minister erred by not considering Australia's non-refoulement obligations as part of the consideration of whether it was in the national interest to cancel a visa,[129] although it noted that if the Minister did consider that matter the weight to be given to it was a matter for the Minister.[130]

146. The Law Council considers that a review should be conducted of the decision-making powers in the Migration Act which are not subject to merits review to ensure that the absence of merits review is consistent with principles of administrative law and Australia's international obligations. The Law Council notes that the present powers are subject to conflicting standards and controls and considers this to be unsatisfactory.

Protection and Safe Haven Enterprise Visas) Instrument 2019. The Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017 does not specify whether the persons subject to it at unauthorised maritime arrivals.

[123] *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).

[124] See section 36A of the Migration Act.

[125] Ibid, subsections 197C(4)-(7).

[126] Law Council, 'Asylum Seeker Policy', [7(b)(iii)], <https://www.lawcouncil.asn.au/publicassets/129a0b1b-bed6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>.

[127] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [57], (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[128] CWY20, [167] (Besanko J).

[129] Ibid, [156]-[172].

[130] Ibid, [169].

147. In other words, such powers should be circumscribed in a way which limits their exercise to matters properly amenable to executive determination, subject to appropriate Parliamentary oversight in all cases, and consistently employed.

148. The Law Council considers that without these statutory features, these powers to make non-reviewable decisions are open to abuse, undermining the quality, transparency and accountability of administrative decision-making under the Migration Act.

Recommendations:

- **A review should be conducted of the decision-making powers in the Migration Act which are not subject to merits review – namely those that permit the making of :**
  - **a deportation decision which is excluded from review on national interest grounds;**
  - **a decision to refuse or grant a visa which is subject to a conclusive certificate issued on national interest grounds;**
  - **personal decisions of the Minister to cancel a visa, which may or may not involve national interest grounds;**
  - **the exclusion of some fast track applicants from any merits review by the IAA; and**

  The review should consider whether these powers can continue to be justified by reference to the administrative law principles of fairness, consistency and accountability in government decision-making and Australia's international obligations.
- **Any powers of this kind should be:**
  - **exercised personally by a Minister; and**
  - **subject to a requirement that the Minister issues and tables in the Parliament a certificate, providing for the particular decision to be excluded from review, and indicating the basis of the exclusion.**
- **All positive decisions not to make a 'protection' finding in relation to an applicant should be reviewable by the AAT.**

Limitations on the provision of information to the AAT

149. The Migration Act currently provides for the protection of information from disclosure to the AAT which is subjectively considered confidential by the Minister or a Commonwealth official.

150. First, the Migration Act permits the Minister to limit the disclosure of information by the Department of Home Affairs to the AAT and the IAA in relation to Part 5-reviewable decisions, Part 7-reviewable decisions and fast-track reviewable decisions.

151. Specifically, the Minister may certify that the material has a character or status of a kind which will mean that it would be contrary to the public interest to:

- disclose it to the AAT; or
- disclose it to anyone other than the AAT, and either prohibit the AAT from onward disclosure or provide a discretion to the AAT in relation to onward disclosure.

152. In relation to material not to be disclosed to the AAT, the Secretary may not disclose the material to the AAT, if the Minister certifies disclosure would be contrary to the public interest because disclosure would: prejudice the security, defence or international relations of Australia; or involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet.[131]

153. Further, the Migration Act prohibits a Commonwealth official who has received 'confidential information' from gazetted agencies, including intelligence and law enforcement agencies (broadly defined), foreign law enforcement bodies or war crimes tribunals for the purpose of a character test decision[132] from disclosing the information to a person, court or tribunal, except by declaration of the Minister.[133] The Law Council made extensive submissions on this framework and a proposed Bill to replace it in a submission to the Parliamentary Joint Committee on Intelligence and Security regarding Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (Cth).[134]

154. In order for the AAT to appropriately exercise its merits review function, it has been granted powers to enable relevant information to be provided to it, consistent with foundational principles of administrative law that decision-making should be transparent and that making the 'correct and preferable' decision depends upon hearing both sides.[135]

155. The AAT already has powers under the AAT Act to deal with confidential information under section 35 through, for example, private hearings, non-publication and non-disclosure. This includes directing non-disclosure to a party of certain information; or where information poses a genuine risk to security (including law enforcement), the potential for the Security Division to handle such information.

156. The Law Council considers that it is preferable that 'confidential information' be provided to the AAT for consideration, if necessary, by its Security Division, rather than not being provided to the AAT at all, and recommends that amendments to achieve that result be adopted.

157. At the very least, the Law Council supports the Scrutiny of Bills Committee's suggestion in relation to the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 that an amendment provide that the Minister has an obligation to consider the exercise of the power to allow disclosure of information supplied by law enforcement or intelligence agencies, including to specified tribunals undertaking merits review of relevant decisions.[136]

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[131] Sections 375, 437 and 473GA of the Migration Act.
[132] Specifically, the exercise of a power under sections 501, 501A, 501B, 501BA, 501C or 501CA.
[133] Sections 503A-503D of the Migration Act
[134] Law Council, ';Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020' (1 July 2021).
[135] See *Shi v MARA* (2008) 235 CLR 286 per Kirby J at [35], [81], [97-98] (with whom Hayne and Heydon JJ agreed, and [Kiefel J at [128] (with whom Crennan J agreed).
[136] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 17.

Recommendations

- **Consideration should be given to amendments to the Migration Act to:**
  - **permit 'confidential information' to be provided to the AAT for consideration, if necessary, by its Security Division, rather than not being provided to the AAT at all;**
  - **set out a procedure by which the Security Division should handle this information, which includes permitting:**
    - **a security-cleared legal practitioner (or if necessary, a special advocate) to attend hearings, access the relevant information and make submissions on behalf of an applicant to whom the information may not be disclosed;**
    - **the AAT to disclose the 'gist' of the information to the applicant, sufficient for them to respond to the allegations made against them;**
- **If these recommendations are not accepted, the Minister should be obliged to consider whether the nature of the information is such that it may be disclosed to specified tribunals undertaking merits review of relevant decisions.**

The Administrative Review Council

158. Government powers and functions are not static and as noted previously, how Government exercises its administrative functions and delivers services constantly evolves. Ongoing monitoring and responses are needed so that the system can adapt to new challenges in administration. The Law Council notes that among its other functions, this was a critical role that the ARC played before it was effectively abolished (in fact, but not in law) by removing its funding, and having its functions transferred to the Attorney-General's Department.

159. Indeed, over a number of years the ARC was starved of funds before its functions were consolidated into the Attorney-General's Department in 2015 as part of smaller government initiatives. The Minister for Finance announced on 11 May 2015 that the ARC would be abolished.

160. However, the ARC has not been abolished. It still exists on the statute book including provisions relating to its functions; its capacity to hold inquiries and produce reports; and its obligation under section 58 of the AAT Act to prepare and provide to the Minister an Annual Report each year.

161. The ARC is moribund in practical terms although that would not be appreciated by someone who reads the AAT Act. The Law Council considers that the ARC served a very important purpose in the development of ideas and policy in the field of administrative law nationally and internationally. Its reports were intensively researched, balanced by the breadth of perspectives of its members drawn from practice, from senior officials and from academies, and were as a consequence highly respected and influential.

162. The Law Council was disappointed by the 'discontinuation' of the ARC in 2015, as that step may be regarded as having removed an important mechanism from the suite of recommendations originally made in the Kerr Committee report.

163. The Law Council strongly supports the 're-establishment' of the ARC, a view also supported by the Callinan Review and academic and other commentators.[137] Not only would this step be consistent with the rule of law given that the terms of the AAT Act require it to exist and operate, but it would be beneficial for the continuing fair and effective development of Australia's administrative law system.

164. The composition of the ARC and the functions it is designed to perform provide an appropriate mechanism for the facilitation of ongoing, objective and apolitical review of the performance and integrity of Australia's administrative review system.

Recommendation:

- **The ARC should be 're-established' as a priority.**

Other relevant matters

Automated decision-making

165. Increasingly, new and amended Commonwealth Acts[138] are empowering a senior Commonwealth official to arrange for the use of computer programs to exercise statutory powers and functions, including to make, and assist in making, administrative decisions (**automated decisions**), in place of officials.

166. When automated decision-making is suitably applied, particularly to objective, data-based decisions, it can enhance accuracy and efficiency in public administration. However, it is widely accepted that risks can arise when applied to decisions which require the exercise of discretion or subjective judgment.

167. The administrative law principles which underpin lawful decision making evolved on the understanding that a human is making the decision. In forming a view about whether a decision-maker acted within power, a court will consider the state of mind of the decision maker, including whether the decision maker: provided procedural fairness; only considered relevant matters; was biased; or made a reasonable decision.

168. Automated decision-making presents a challenge to these principles and the systems that support them. The more a decision requires inherent *human* characteristics of reason and judgement, the less amenable it may be to automation.

169. Legislation is being passed which provides broad discretionary powers to agency heads to arrange for computer programs to make administrative decisions, including the exercise of discretionary decision-making powers. Whilst there is policy guidance

[137] Eg N Bedford 'The Kerr Vision for the Administrative Review Council and the (sad) modern reality' (21/05/2021) AUSPUBLAW; Justice Susan Kenny, 'The Administrative Review Council and Transformative Reform' in Anthony J Connolly and Daniel Stewart (eds), Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce (The Federation Press, 2015.

[138] These include: *Australian Citizenship Act 2007* (Cth), *Biosecurity Act 2015* (Cth), *Business Names Registration Act 2011* (Cth), *Fisheries Management Act 1991* (Cth), *Migration Act 1958* (Cth), *Patents Act 1990* (Cth), *Plant Breeder's Rights Act 1994* (Cth), *Social Security (Administration) Act 1999* (Cth).

to assist those officials to ensure automated decisions comply with administrative law principles,[139] there are few, if any, legal obligations to ensure compliance.

170. This raises rule of law principles of transparency and executive accountability. If the subjects of automated decisions do not know that automation has been used or do not understand its operation, this could affect their ability to challenge the lawfulness of a decision.

171. Increasingly, overseas jurisdictions are imposing regulatory checks and balances on the use of automated decision-making.[140] In Australia, the Australian Human Rights Commission has recommended that similar checks and balances be introduced in Australia.[141] The Law Council supports such proposals.

172. In December 2019, the Australian Law Reform Commission (**ALRC**) published '*The Future of Law Reform: A Suggested Program of Work 2020-2025'*, which included suggestions to the Attorney-General for potential future law reform inquiry topics pursuant to its function to make such suggestions under subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth).

173. The ALRC suggested a reference be made in relation to automated decision-making, for an inquiry into whether there should be law reform to facilitate and appropriately regulate automated decision making by Australian Government agencies. The ALRC suggested it could consider the inclusion of a number of the features of the international schemes referred to in the preceding paragraphs, including, relevantly, 'how rule of law concepts may need to be differently interpreted or applied in relation to automated decisions' and appropriate requirements for independent scrutiny of automated systems prior to implementation, for example by way of 'algorithmic impact assessment'. The Law Council is not aware of the Attorney-General making such a reference to the ALRC and according to the ALRC website, no such inquiry has commenced.[142]

174. Considering the challenges automated decision-making poses to rule of law principles of transparency and executive accountability, the Law Council considers that there is a pressing need for law reform in this area. The Law Council considers that the Attorney-General should make a reference to the ALRC for an inquiry along the terms the ALRC suggested.

175. If this does not occur, or alternatively, the Law Council suggests consideration should be given to a Parliamentary inquiry to consider whether legislative reform is required in relation to statutory authorisations for automated decision-making.

176. The Law Council has undertaken an initial analysis of Commonwealth statutory schemes which authorise automated decision-making and of burgeoning schemes in overseas jurisdictions, and would be happy to engage directly with Government on

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[139] Commonwealth Ombudsman, 'Automated decision making better practice guide', <https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide>.
[140] For example: Canadian Directive on Automated-Decision-Making < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>; articles 22-24 of the General Data Protection Regulation; and European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts', Brussels, 21.4.2021, COM(2021) 206 final 2021/0106(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0206&from=en>.
[141] Law Council of Australia, 'Human Rights and Technology' (21 April 2020), [42], [52], [59], [62] <https://www.lawcouncil.asn.au/publicassets/ccb3487c-2f84-ea11-9404-005056be13b5/3811%20-%20Human%20Rights%20and%20Technology.pdf>.
[142] ALRC, 'Current Inquiries' (website), < https://www.alrc.gov.au/current-inquiries/> (accessed on 29 November 2021).

this work or to provide further information to the Legal and Constitutional Affairs References Committee about it, should that be considered of assistance.

Recommendations:

- **Either:**
  - **the Attorney-General should refer an inquiry to the ALRC in relation to whether there should be law reform to facilitate and appropriately regulate automated decision making by Australian Government agencies; or**
  - **a Parliamentary inquiry should be established to consider whether legislative reform is required in relation to statutory powers to authorise the use of automated decision-making.**

Freedom of information

177. The transparency afforded by the FOI scheme through the FOI Act is critical to the effective operation of the administrative law system, and more broadly to the integrity of our democratic institutions.

178. The Law Council is concerned that, over the past 20 years, requests to access non-personal information under the FOI Act have been refused more often and granted in full less often. The fact the OAIC and AAT overturn more than 50 per cent of refusal decisions lends support to the impression that agencies may be over-using exemptions.[143]

179. Attempts were made to abolish the OAIC in 2014. The Freedom of Information (New Arrangements) Bill 2014 lapsed in the Senate in 2016, and the OAIC was instead stripped of most of its FOI funding, thereby severely limiting its ability to perform its strategic FOI functions. This has resulted in a backlog of reviews and widespread delays at the first instance decision stage. Practitioners have advised that the delay between an application and a decision by the Information Commissioner (if review steps are taken) can be well in excess of a year.

180. This is clearly an unacceptable situation for a system that is intended to ensure access to information, and the Law Council submits that funding must be restored to the OAIC to ensure effective, quick and independent responses to information requests.

Recommendation:

- **Funding should be restored to the OAIC to ensure effective, quick and independent responses to information requests.**

[143] Office of the Australian Information Commissioner, *Annual Report 2019-20* (Report, 15 October 2020) 155, 158.