Law Council
OF AUSTRALIA
Office of the President

12 May 2023

Ms Sara Samios
First Assistant Secretary
Administrative Review Taskforce
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: AATReformEnquiries@ag.gov.au

Dear Ms Samios

Administrative Review Reform Issues Paper

The Law Council welcomes the opportunity to respond to the Attorney-General's Department's comprehensive Administrative Review Reform Issues Paper (**Issues Paper**). I am pleased to enclose the Law Council's submission, which responds to each of the 67 questions set out in the Issues Paper in table form.

Summary

The enclosed submission includes the following key points that I wish to highlight at the outset.

- Accessibility, independence and impartiality must underpin all aspects of the new body. The new body must also prioritise rigorous and accurate decision-making, and most importantly (and by consequence of these principles), fairness.
- The re-establishment of an adequately funded Administrative Review Council (or similar body) is strongly supported and should aim to be an appropriate mechanism for the facilitation of ongoing, objective and apolitical review of the performance and integrity of Australia's administrative review system.
- The new body must be properly resourced, with an appropriate number of suitably skilled and qualified members to be able to carry out its functions. A simplification in structure, compared with the existing divisional structure of the Administrative Appeals Tribunal (**AAT**), is supported as that would assist in facilitating an efficient and effective merits review body.
- There is a need for increased efforts to achieve simplification, efficiency and better coherence of procedures. In particular, the backlog of migration matters would be reduced if the Codes of Procedure for migration and refugee matters as set out in the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) were removed altogether.
- Appointments to the new body must be conducted through a merit-based and transparent process that includes public advertisement, clear and relevant selection criteria, and an independent selection process. Rigorous and transparent procedures should also be applied at the time of reappointment.

- The primary focus when appointing members to the new body should be the quality of administrative decision-making of which they are capable. Whilst it ought not be necessary that all members have legal qualifications, the complexity of legislative schemes considered by the AAT (and, presumably, the new body) should necessitate a baseline quota of legally qualified members at any one time. Appointees who are not legally qualified should be confined to the level of 'member' only.
- There is a need for certainty and clarity in the length of appointments within any new administrative review body, as well as clearly defined roles and responsibilities to avoid ambiguity in how senior leadership of the body's administration operates.
- There should be fewer levels of membership within the new administrative review body. The levels of member and senior member should remain. However, the differences between those levels, and amount of experience and/or expertise, should be clearly set out and justified.
- The diversity of the new body's jurisdiction should be reflected in a diversity of skills, knowledge and lived experience of its members.
- Lodgement processes should be flexible and accessible to all applicants. There is a need for greater consistency in time limitations within which applicants should apply to the new body.
- Application fees should not be excessive and should incorporate meaningful hardship waiver options for applicants. Consideration should be given to harmonising the review application fee across matters, with any application fee being refunded where an application is successful.
- Alternative dispute resolution (**ADR**) provisions must focus on early resolution, rather than simply creating additional steps for matters that will ultimately end up progressing to a hearing before the review body. There should be a discretion to direct or not direct ADR to occur.
- There is a need for greater consistency in how and when reasons for decisions are issued by the new body. Further, decisions should be made within a reasonable time after a hearing. That would preferably be within a month and no more than 6 months in exceptional circumstances.

Acknowledgements

I wish to acknowledge that this submission has been informed by a substantial number of contributors who have provided invaluable practice-based and other perspectives, including the Law Council's Federal Administrative Law Reform Working Group, comprised of members from the Law Council's Federal Dispute Resolution Section (**FDRS**) in addition to nominated Constituent Body representatives. I have listed each member of the Working Group below and wish to thank them for their guidance and expertise.

Law Council FDRS members

- Mr Peter Woulfe (Chair)
- Professor Robin Creyke AO
- Ms Margaret Allars SC
- Ms Georgina Costello KC
- Ms Valerie Da Gama Pereira
- Ms Rachael James
- Ms Joanne Kinslor
- Ms Kristina Miller
- Ms Pip Mitchell
- Ms Kate Slack

Constituent Body representatives

- Dr Ruth Higgins SC (New South Wales Bar Association)
- Mr Chad Jacobi KC (Law Society of South Australia and the South Australian Bar Association)
- Mr Chris Fitzgerald (Victorian Bar)
- Ms Carina Ford (Law Institute of Victoria)
- Ms Mary Hanna (Law Institute of Victoria)
- Ms Victoria Lenton (Queensland Law Society)
- Mr Julian Murphy (Victorian Bar)

I also gratefully acknowledge the contributions of the Law Council's Federal Dispute Resolution Section, including from its Administrative Law Committee, AAT Liaison Committee, Migration Law Committee and Commonwealth Compensation and Employment Law Committee, as well as the Law Council's Business Law Section's Taxation Committee.

More broadly, this submission has been informed by valuable contributions from the following Constituent Bodies of the Law Council:

- The Law Institute of Victoria
- The Law Society of the Australian Capital Territory
- The Law Society of New South Wales
- The New South Wales Bar Association
- The Victorian Bar

Contact

The Law Council would welcome the opportunity for further discussion as the Department progresses its consideration of these significant reforms. For that purpose, members of the Law Council's Federal Administrative Law Reform Working Group have volunteered to meet with representatives of the Department at any mutually convenient time.

If you require further information or clarification, please contact Ms Leonie Campbell, Director of Policy, on (02) 6246 3754 or at leonie.campbell@lawcouncil.asn.au or Mr Nathan MacDonald, Deputy Director of Policy, on (02) 6246 3721 or at nathan.macdonald@lawcouncil.asn.au.

Yours sincerely

Luke Murphy
President

Part 1 – Structure and Membership

Design

1. What are the most important principles that should guide the approach to a new federal administrative review body?	There is broad support for the establishment of an administrative review system that aligns with the principles outlined by Professor Creyke in the Issues Paper.[1] It is critical that the new body promotes independence and procedures that are not overly complex. The lack of perceived independence in particular has been one of the critical factors in the AAT not performing to its optimum capacity. The Law Council endorses and reiterates following principles of merits review as set out by the Administrative Review Council (**ARC**): *The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct … [or] preferable:* • *correct – in the sense that they are made according to law; and* • *preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.* *This objective is directed to ensuring fair treatment of all persons affected by a decision.* *Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.*[2] In order for the new body to appropriately exercise its merits review function, it has to be 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 or preferable decision depends upon hearing both sides.[3]

[1] Commonwealth Attorney-General's Department, *Administrative Review Reform: Issues Paper, Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair* (2023) 18; Robin Creyke, 'Tribunals – "Carving out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) AIAL Forum 71.

[2] Administrative Review Council, '*What decisions should be subject to merit review*?' (1999), online at <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999#:~:text=2.1.,be%20subject%20to%20merits%20review>.

[3] 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).

	The new review body should continue to be empowered to exercise merits review. There would be little point in having a separate general jurisdiction tribunal unless this was the foundation principle. The Commonwealth Administrative Review Committee (**Kerr Committee**) concluded in 1971 that the basic fault of the entire administrative law structure at that time was that review could not, as a general rule, be obtained on the merits, despite that being what the aggrieved citizen was seeking. This foundational observation must be retained in the new body. As set out against several of the consultation questions, an emphasis on accessibility, independence and impartiality must underpin all aspects of the new tribunal. The new body must also prioritise rigorous and accurate decision-making, and most importantly (and by consequence of these principles), fairness. In terms of accessibility, this should include accessibility to applicants, witnesses and representatives, and should be reflected in the rules, practice and procedures of the body, as well as its physical architecture, online services and publications. Finally, and as is set out in several of the below responses, wherever possible and appropriate, consistency in procedures across 'divisions' is desirable, whilst acknowledging that there will be necessary variations to processes and formality depending on the type of decision under review.
2. Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?	The Law Council is generally supportive of the existing objects set out at section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), namely to provide a mechanism of review that: • is accessible; • is fair, just, economical, informal and quick; • is proportionate to the importance and complexity of the matter; and • promotes public trust and confidence in the decision-making of the Tribunal. However, views have been expressed by some members of the Law Council that this is an opportunity to reconsider and expand on the existing objectives. For example, the NSW Bar Association has noted that the aim of having a 'just' mechanism of review can mean different things in different contexts (for example, it is not clear whether this refers only to procedural fairness), and 'informal' is not an end of itself, but is useful only to the extent to which it enhances accessibility. The Issues Paper refers to the objects contained in several state-based civil and administrative tribunals, including extracting the expansive objectives set out in the *South Australian Civil and Administrative Tribunal Act 2013* (SA). The Law Council acknowledges the potential benefit in expanding objectives along similar terms, with an emphasis on improved public administration, and independence. These two concepts are discussed further below.

In relation to an additional objective to improve public administration, it is noted that this principle underpinned the recommendations of the Committee on Administrative Discretions (**Bland Committee**) report which stated in relation to the proposed package of review processes:

> '*One significant purpose and a clear result of such machinery is to improve the quality of decision making and to lessen the possibility that unwise and uninformed decisions will be taken'*.[4]

A public administration object has been adopted in the legislation of most general jurisdiction tribunals in the states and territories.[5] A new paragraph could be added to section 2A of the AAT Act to provide:

> *(e) promotes good public administration and improvement in the quality of decision-making of agencies.*

The new objective of promoting good administration would align with the recommendation below for a new function of the President, namely, to report to the ARC on systemic issues, including implementation by agencies of AAT decisions, as discussed further below.

In relation to a statutory object concerning independence, examples of similar objectives can be found in the Northern Territory, Queensland, South Australian and Tasmanian tribunals. One way to achieve this expansion could be to insert the word 'independent' at paragraph 2A(b) so that it reads as follows:

> *(b) is independent, fair, economical, informal and quick;*

The NSW Bar Association acknowledges the utility of the current objects, however suggests that they could be better drafted in such a way as to enable tribunal members to use that part of the statute to inform questions of procedure where relevant. To this end, it has suggested the following wording be considered:

> *The objects of the tribunal are to provide a wholly independent merits review of government decision making where:*
>
> *a. The tribunal is independent and impartial;*
> *b. Decisions are rigorous, reasoned and accurate;*
> *c. The tribunal is accessible with or without legal representation;*
> *d. Decisions are made in accordance with procedural fairness; and*
> *e. The process is economical and efficient, and proportionate to the subject matter of the decision in question.*

[4] *Final Report of the Committee on Administrative Discretions* (Bland Committee report) (AGPS, 1973) [40].
[5] *ACT Civil and Administrative Tribunal Act 2008* (ACAT) s 6(e), (h); NSW *Civil and Administrative Tribunal Act* 2013 (NCAT) s 3(c), (f), (g); *Northern Territory Civil and Administrative Tribunals Act 2014* (NTCAT) s10(a), (b), (c); *Queensland Civil and Administrative Tribunal Act 2009* (QCAT) s 3(d)(e); *South Australian Civil and Administrative Tribunal Act 2013* (SACAT) s 8(a); *Tasmanian Civil and Administrative Tribunal Act* 2021 s 10(1)(2). The *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) contains no objects clause for the Act or in respect of VCAT.

3. Should the Administrative Review Council, or a similar body, be established in the new legislation? What should be its functions and membership?	As suggested above, the Law Council strongly supports the re-establishment of an adequately funded ARC or similar body, a view also supported by the Callinan Review and academic and other commentators.[6] The functions of the ARC were envisaged by the Kerr Committee to include determining which decisions should be reviewable by the proposed Administrative Review Tribunal and what procedures should the tribunal adopt, as well as being 'an advisory body on legislation' to inform administrative law reforms.[7] These functions were conducted effectively by the ARC, as evident in its 50 reports and numerous letters of advice on proposed legislative changes, and they should be continued. The re-established ARC or similar body should aim to be an appropriate mechanism for the facilitation of ongoing, objective and apolitical review of the performance and integrity of Australia's administrative review system. A potential additional function for the ARC would be to monitor and regularly report on whether AAT decisions are being implemented by relevant agencies. If they are not, the ARC could be empowered to request the agency to provide an explanation. The ARC would need to be properly resourced to perform this role. The ARC could report on its findings to the Government and the Parliament. Although the Ombudsman has a role of investigating failures to implement its own recommendations made in its reports, the administrative review system otherwise lacks such a general monitoring body. Rectifying this deficiency would help to justify the existence of, and the monies spent on, the decision-making or recommendatory bodies. It should also improve public administration and satisfy applicants or those who gave evidence leading to a decision or recommendatory report. An ARC monitoring function, assuming it was well-resourced, would likely have uncovered the practice of ignoring findings of illegality made by AAT first review, and which led to the continuance of the *Robodebt* scheme. Had this practice been identified earlier, Government could have saved considerable amounts in compensation. More importantly it could have ensured that it acted in accordance with law and avoided great personal harm being inflicted on a significant number of individuals. Only if such steps are taken will the normative effect of the tribunal's decision-making be realised; that is, improving public administration.[8] Finally, if a body such as the ARC were re-established, it should be subject to a review after a period of operation to ensure it is meeting its stated objectives.

[6] 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).
[7] Kerr Committee report [390] recs 12-13, 30.
[8] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (14 November 1995) [6.13].

4. How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?	It is critical that decisions of the new administrative review body are used to inform and improve the quality and consistency of the decisions of primary decision-makers. This is particularly important where systemic trends in problematic agency-level decision-making are identified. As such, both the ARC and the President of the new tribunal should be given functions designed to ensure the normative effect of tribunal decisions in improving public administration is realised. Clearly there needs to be an appropriate feedback mechanism between the new administrative review body and relevant government agencies, in addition to a commitment from agencies to identify and address issues in administrative decision-making. However, the Law Council does not consider that the role of the new review body should extend to the making of mandatory orders in relation to systemic issues, beyond addressing the decision in question. Four options are presented for consideration when determining how to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body: 1. The re-established ARC maintains a monitoring and law reform function in relation to the operation of federal administrative law arrangements. That should include monitoring with regard to ensuring that the normative effect of tribunal decision-making is realised. The membership of the ARC is suited to that function. It comprises five ex officio members, being the President and heads of the key accountability bodies closely associated with the operation of administrative law, as well as between 3 to 10 other members generally drawn from the Federal Court, academia, the profession and senior officers in government agencies. The number of members has in practice been 11 to 13. Any larger number could become unwieldy with difficulties in convening meetings and its size might inhibit discussion. As it stands the ARC's constitution is conducive to some form of liaison with agencies, however this is not enough. A proposed statutory function of the ARC (see response to question 3) is to monitor compliance with AAT decisions and request agencies to explain systemic failures. A proposed function of the President (see response to Question 10) is to report to the ARC to enable it to carry out this function. The ARC may also be well-placed to propose/deliver training in response to systemic issues identified, while noting that the Council of Australasian Tribunals also has critical functions in this area. It could also develop benchbook resources, noting that the United Kingdom's *Equal Treatment Benchbook* for courts and tribunals has been put forward as a strong example in this regard.[9]

[9] UK Judicial College, *Equal Treatment Bench Book February 2021 Edition* (April 2023 Revision) <https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/#:~:text=The%20Equal%20Treatment%20Bench%20Book,appearing%20in%20courts%20and%20tribunals>.

2. A further option for consideration is providing the President of the new body with an express statutory function of advising agency heads of any issues in legislation or decision-making on a regular basis and in the Annual Report. This would be in addition to the function of the ARC under Option 1.

3. Regular meetings of the President and other senior members of the tribunal with senior officers within agencies could be utilised to discuss trends from decisions and what improvements to public administration should continue to take place.

4. A final option concerns best practice by agencies. Agencies should be encouraged to use webinars, websites, social media, in-house publications, conferences, and sharing information with legal sections to publicise case reports, identify important precedents and to explain when decisions should be regarded as 'precedents'.

   In order to be ready to respond to review and questions asked by the ARC, agencies should be encouraged to introduce mechanisms of feedback of the outcomes of external review to their decision-makers, for example, making this a performance indicator.

The above options are not mutually exclusive. One or all could be pursued. However, the Law Council is particularly supportive of implementing at least Option 1.

It is noted that the publication of reasons for substantive decisions of the new body should occur as a means to enhancing transparency and providing an avenue whereby government decision-makers can inform themselves of review outcomes, and ultimately improve best practice decision-making. Publication of reasons is discussed further at question 52.

Finally, the Royal Commission into the *Robodebt* scheme is due to report on 7 July 2023. Findings from this process may well include procedural recommendations for how decisions of the new federal administrative review body can more readily influence future decisions of government agencies. Regard should be had to this report once published, and recommendations arising from it.

Structure

5. What structure would best support an efficient and effective administrative review body?	An option being considered in the Issues Paper is to 'move away from a formal divisional structure and instead allow the new body to structure its work around practice groups or lists, similar to the model in operation within courts'.[10] This is in part due to the requirement to seek the approval of relevant Ministers for assignment of members to a particular division. This existing procedure is cumbersome, slows down the assignment process and unnecessarily limits the powers of the President who is uniquely placed to understand the strengths, expertise and capabilities of the various members in order assign practice areas. The Law Council supports the simplification of the new tribunal's structure as this would assist to facilitate an efficient and effective federal administrative review body, noting that the current divisional structure hampers the President's ability to assign members speedily to jurisdictional areas in need of support. The current process also limits the opportunities for members to broaden their knowledge of the various jurisdictions reviewed by the tribunal, can impact negatively on promotion of members, and may have an adverse effect on existing and potential members due to loss of interest in and commitment to work in the tribunal. For administrative purposes *some* form of structural division within the new tribunal is needed. Any new federal administrative review body, with likely personnel over 1,000, requires a coherent internal structure to manage its operations. The need is more pressing given the variety of jurisdictions covered by the legislative remit to the tribunal. Such a structure facilitates training, supervision and mentoring of members by more senior and jurisdiction-experienced members, allocation of resources, and development of jurisdiction-specific practice notes and guidelines, a factor of particular interest to professional advisers for clients. To this end, sections 17A and 17B of the AAT Act should be retained, noting that the divisions listed in section 17A appear to remain appropriate. A solution is to appoint members to the new tribunal and entrust to the President the function of assignment of members to jurisdictional areas as needed. There is no proper justification for giving Ministers a role in determining assignment of members to divisions. As set out in responses to below questions, the Law Council considers flexibility in the allocation of matters to be a critical aspect of an efficient and effective administrative review body. Allocations should be made after an assessment of the nature and complexity of the matter, with regard to the expertise and seniority of available members. The President should have ultimate control of matter allocation, however on a day-to-day basis, it would seem most efficient for matters to be allocated by an appropriate member or registrar in consultation with the President and senior appointees.

[10] Commonwealth Attorney-General's Department, *Administrative Review Reform: Issues Paper, Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair* (2023), 17.

	Another aspect of the structure is the number of senior positions, specifically, Deputy Presidents, within the tribunal. Each division should be headed by a Deputy President who has specific responsibilities with respect to the work of the division. There is presently no limit on the number of Deputy Presidents that can be allocated to a particular division. Where a division has a large volume of cases, having more than one Deputy President available, for allocation to more complex cases, may be justified. It may be as well that the President or the Deputy President who is the head of the division should have power to authorise, on a flexible basis, an additional Deputy President or even Deputy Presidents, in the division to undertake particular organisational functions such as monitoring and efficient management of specific areas of the business of the division.
6. How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?	The current process concerning movement of members between divisions is highly inefficient and undesirable. Under the present AAT Act, assignment of members to divisions is undertaken by the Minister after consultation with the President.[11] As noted above, the assignment or movement of members should be a function of the President or delegate such as a Deputy President, or other senior members as part of the function of managing members. It is a personnel, not an administrative, function, and accordingly, the process under section 17C of the AAT Act requiring the Minister to be consulted prior to a member being appointed to a division should be removed as this creates unnecessary delay. It would be desirable for divisions to be less siloed and to follow a model more akin to practice lists, which would allow for reallocation of matters to members according to their capacity. The flexibility of assignment of members is predicated on all members meeting basic tribunal decision-making skills and ability. These include the ability to analyse and apply legislation, and 'a capacity to undertake forensic analysis and write reasoned judgments'.[12] Appropriate training must be provided to members who may cross over various divisions to ensure they have the appropriate skills. The Issues Paper notes that in 2020-2021, *'three of the nine AAT divisions saw nearly 90% of lodgements'*,[13] indicating some core areas in which all full-time members should be able to operate. The three are migration, national disability insurance, and social services divisions.[14] At the same time, all three jurisdictions involve complex legislation, jurisprudence and/or policy, and it cannot be expected that mastering that trove of information can be done quickly. The specialised nature of these three jurisdictions means it may be more difficult to cross-refer members and the quality of decision-making can be adversely affected by allocating members with general

[11] AAT Act Part III div 1, subdiv B.
[12] Senate Legal and Constitutional Affairs References Committee *The performance and integrity of Australia's administrative review system* Final report (2022) [4.75], citing the Callinan report p 9.
[13] Commonwealth Attorney-General's Department, *Administrative Review Reform: Issues Paper, Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair* (2023), 26.
[14] *AAT Annual Report 2021-2022*, 1.

	tribunal skills only to such jurisdictions. However, legally qualified members with appropriate and regular training in administrative law could well have utility across a range of jurisdictions, including these complex areas. To enhance this ability for members to be assigned across the full spectrum of matters, one option is for members less familiar with a jurisdiction to sit as part of a two-member tribunal for a certain period and be mentored by a specialised member. Such an approach will contribute to members having strong interchangeable skills, and will reduce the potential for siloing to occur within the new body. The President must ensure the expeditious and efficient discharge of the business of the Tribunal.[15] The President's focus should be on quality decision-making. Ensuring that the President has the power to appoint members with the skills needed to operate in these core areas is a priority. In practice, assignment will also need to recognise that some members will have or are better able to acquire skills and knowledge in particular jurisdictional areas. Allowing flexibility to the President will assist in the identification of excellent members from other divisions to spend time in other areas. Achieving this outcome will require that the President should be charged with ensuring that there is a regular program of training and professional development for new and existing members.
7. How can the legislation best provide for or support the application of different procedures for specific categories of matters?	Separate procedures have applied in some jurisdictions from the inception of the AAT. At the same time, efficiency is enhanced where there are consistent procedures adopted across jurisdictions, and an understanding of, and effort to follow, common procedures may assist in avoiding unintended denials of procedural fairness in a particular case. Where different processes are justified across practice areas, the new body should have sufficient flexibility to issue practice notes to deal with different procedures relating to specific subject matter. The Law Council, in its submission to the Callinan review, illustrated the need for increased efforts to achieve simplification, efficiency and better coherence of procedures.[16] A casualty of too great a divergence from a core set of tribunal processes is the additional burden on practitioners from adapting to the different procedures. The multiplicity of different processes also increases the difficulty of assigning members who lack understanding of, or find it difficult to adapt to, the demands of different requirements in specific divisions. These difficulties apply particularly to the Migration and Refugee Division (**MRD**). The Law Council maintains the view that a key response to concerns regarding the different processes in the MRD is the repeal of section 24Z of the AAT Act. Section 24Z exempts matters heard in two divisions of the MRD from the AAT's normal review processes, in favour of more restrictive processes in the *Migration Act 1958* (Cth) (**Migration Act**).[17] Substantial amendments would also need to be made to the Migration Act.

[15] AAT Act s 18A.
[16] Law Council of Australia submission, *Statutory Review of the Tribunals Amalgamation Act 2015* (2018) by The Hon IDF Callinan AC QC [47]-[51], [70]-[72].
[17] AAT Act Part IV.

	The Law Council submits that it will reduce the backlog of migration matters if the Codes of Procedure for migration and refugee matters as set out in the Migration Act and the Migration Regulations were removed altogether. Given the limited resources of the tribunal, 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. 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 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'. The Hon Ian Callinan AC QC did not accept that submission and recommended removal of the codes of procedure from the Migration Act, stating: *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.*[18] The Law Council considers that the repeal of the Codes of Procedure from the Migration Act will: • 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; • ameliorate 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; • improve efficiency and make handling matters easier for members allocated across lists or practice groups; and • make the new body easier for unrepresented applicants to navigate. It is appreciated that the removal of the codes of procedure for migration and refugee matters represents a significant shift in the current operations of the AAT, however the new body is an opportunity improve efficiency and accessibility as well as make handling matters easier for members allocated across lists or practice groups. Removal of the codes will be important to achieving these goals.
8. Should the requirement that the President be a Federal Court judge be retained? Should any modifications be made? For	The Law Council supports the retention of the existing requirement that the President be a Federal Court judge, noting that this guarantees a measure of quality of an applicant and guaranteed independence that a wider selection, however rigorous, is unlikely to yield. Further, this approach has the advantage of promoting an understanding and effective dialogue between the two bodies, and perhaps more importantly, confirms that the

[18] The Hon Ian Callinan AC QC, Callinan Review, [6.82].

example, should the requirement be extended to include former judges or judges of other courts?	new administrative review body is led by a judicial officer that has constitutionally enshrined independence from the Executive. The Law Council and others opposed an extension of eligibility when it was proposed for inclusion in the Administrative Appeals Tribunal Amendment Bill 2004.[19] These objections were noted in the report of the Senate Legal and Constitutional Legislation Committee as follows: *… not one stakeholder has expressed support for the removal of the requirement that the President be a Federal Court judge. In particular, the ARC, the body representing the peak professional and governmental expertise in this area, is opposed to this measure, despite supporting the majority of the provisions of the Bill.*[20] The arguments put to that Senate Committee in favour of retention of the existing requirement that the President be a Federal Court judge were: • being a judge assured the independence of the headship of the Tribunal given the person's judicial tenure; • the actual and perceived independence of a judge was important as government was always a party and the President (or if retained, a judicial member) could sit in cases involving political issues, thus insulating members from any reappointment issues; • the experience, skills, knowledge of a judge contributed to the standing and authority of the Tribunal; • the status of a judge was important as the President was seen as the public face of the tribunal; and • it would be odd if judicial deputy presidents were reporting to a President who did not hold judicial office. The significance of the second dot point is that in cases involving, for example, sensitive political issues, constituting the President to hear the matter, insulates members from any possible adverse reappointment consequences. That possibility was envisaged by the Law Council, which said it had: *…a general concern about whether there is a sound framework which sufficiently protects the independence of Tribunal members. Australian tribunals are expected to exhibit impartiality and fairness. Public confidence in the integrity of any tribunal may be undermined if it is seen to be vulnerable to indirect governmental influence.*[21]

[19] Senate Legal and Constitutional Legislation Committee, report [2.2].
[20] Ibid [2.24]
[21] Law Council of Australia submission, *Statutory Review of the Tribunals Amalgamation Act 2015* (2018) by The Hon IDF Callinan AC QC, [59].

	The expectations of a holder of judicial office as listed by the Law Council in its recommended appointment criteria are also best assured by having a President who is also a Federal Court judge. It is notable that all but three of the state and territory civil and administrative tribunals is headed by a judge.[22] Even in the smaller jurisdictions, the President must also be qualified and suitable for appointment as a judicial officer. The exceptions apply in the smaller jurisdictions, namely, the two territories and Tasmania. A hypothesis explaining these exceptions is that the removal of a judge from their courts would create difficulties given the limited number of judicial officers in these jurisdictions. It is critical that where a judge is appointed to President, that individual must have time and capacity to ensure they can carry out the tasks and duties associated with the role. In short, the role must not simply be a 'figurehead' position. This is particularly important in that the benefits of having a judicial President with independence from the Executive may also result in less opportunities for scrutiny in forums such as Senate Estimates. Given the critical role of the President in overseeing the work of the tribunal's membership, consideration should be given to ensuring sufficient accountability frameworks are in place for the role pf President, and further thought should be given to how adequate transparency can occur as a means of promoting public trust and confidence in the leadership of the new tribunal.
9. Should the new body have other judicial members and what should their role be?	The appointment to the tribunal of judicial members provides, as has been seen in recent years, an appropriately qualified person to act in circumstances when the President is not available. Although the figures indicate that such members in practice only sit once a month, their availability has been valuable in decisions on sensitive matters of government policy. It can also be assumed that those who have been appointed as judicial deputy presidents of the Tribunal have taken the appointment willingly and have a genuine interest in the Tribunal's jurisdiction. The value of these judicial members has been demonstrated by their ability to step into the role of Acting President, and to chair meetings such as the Law Council's Administrative Appeals Tribunal Liaison Committee and other similar commitments. Their presence has also ensured greater understanding by the judiciary of the distinction between merits and judicial review and the nature of the objectives of the procedural freedoms which operate in the Tribunal. That knowledge can only assist the jurisprudence of the Federal Court when such members sit on matters on appeal from the tribunal.

[22] NCAT Act s 13; QCAT Act s 175(1); SACAT s 10; SAT s 108(3); VCAT s 10.

	The use of Federal Court judges as judicial members may be particularly helpful in giving general guidance when there is new jurisdiction, or significant changes to the law governing jurisdiction or procedure, or in cases where differences in the construction of legislation are emerging between members of the Tribunal. It is likely to remain a reality that non-judicial members and public servants are more likely to accept statements of more general application made in individual matters by a member who is a Federal Court judge. The President will need assistance at that level and the provisions for appointment of Federal Court judges as Deputy Presidents should make that assistance possible. However, it is acknowledged that there are differing views amongst the Law Council members on the desirability of judicial members beyond the President, with the Law Institute of Victoria (**LIV**) noting that appointments may be inconsistent with the new review body being a tribunal rather than a court. The LIV further notes that there is little evidence to suggest that judicial appointments have assisted in improving the performance of the AAT.[23] Finally, there was some support within the Law Council for consideration to be given to utilising retired judges within the new body. This is an issue on which the Law Council does not have a clear view, however it raises it for consideration by the Attorney-General's Department.

Senior leadership

10. What should be the role and functions of the President (or equivalent) of the new body? What qualifications and skills should be required?	The breadth and depth of the qualities desired of the President of the new tribunal should not be underestimated. The pool of potential suitable candidates is small. Currently, the role of the President in the AAT Act includes: • the operations of the Tribunal; • the procedure of the Tribunal; • the conduct of reviews by the Tribunal; • the arrangement of the business of the Tribunal; and • the places at which the Tribunal may sit.[24]

[23] Commonwealth Attorney-General's Department, *Administrative Review Reform: Issues Paper, Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair* (2023), 28.
[24] These powers appear in the directions power: AAT Act ss 18B, 68AA.

	Other specific powers of the President include the constitution and reconstitution of the Tribunal for a hearing,[25] management of the administrative affairs of the Tribunal other than those bestowed on the Registrar,[26] preparation of the Annual Report,[27] holding of directions hearings,[28] directing that a matter be dealt with by an alternative dispute resolution process,[29] issuing summonses,[30] giving leave to parties to inspect material produced under summons,[31] being consulted about referral to a Full Court of the Federal Court of an appeal from the Tribunal constituted by a Deputy President,[32] arranging a referral to the Federal Court on a question of law,[33] and authorising a member or an officer of the Tribunal to undertake specified functions under the AAT Act.[34] Assuming the President has the overall function of management of the new body, all these powers or functions should be retained and allocated to the President of the new tribunal. However, the ultimate focus of the President should be on ensuring high quality decision-making across the tribunal. As suggested at question 4 above, the President could be given an additional function of reporting to the ARC on systemic issues. This could mirror the function of the President of the Queensland Civil and Administrative Tribunal (**QCAT**) '*to advise the Minister about: (b) how this Act or an enabling Act could be made more effective'*.[35] In the ACT it is an object of the ACAT (rather than its President) to '*identify and bring to the Attorney-General's attention systemic problems in relation to the operation of authorising laws'*, and the President has a duty to tell the Attorney-General about systemic problems.[36] It could also be a function of the President (with the assistance of the Registrar) to make regular confidential reports to the ARC on 'systemic issues'. This would not be an advisory function of the President but a matter for report, similar to an annual report on cases (and the annual report function in section 24R could be modified to add reporting to the ARC). The systemic issues would include: repeated instances of an agency making decisions on the basis of an invalid policy notwithstanding an AAT decision holding it invalid, with further affected persons

[25] AAT Act ss 19B-19F.
[26] AAT Act s 24A. It is notable that the Chief Justices of the Federal Court and of the Federal Circuit and Family Court of Australia have the management of the administrative affairs (as defined) of their Courts: *Federal Court of Australia Act 1976* (Cth) s 18D; *Federal Circuit and Family Court of Australia Act 2021*(Cth) s 78.
[27] AAT Act s 24R.
[28] Ibid, s 33(1A),(2).
[29] Ibid s 34A
[30] Ibid s 40A
[31] Ibid s 40B.
[32] Ibid s 44(3)
[33] Ibid s 45,
[34] Ibid ss 59A, 59B.
[35] QCAT Act s 172(3)(b). See also requirement that the annual report note "any trends or special problems that emerged during the preceding financial year": s 232 (1)(d).
[36] *ACT Civil and Administrative Tribunal Act 2008* (ACAT) ss 6(h), 105A.

	seeking AAT review; a pattern of delay in an area of an agency's decision-making; or an agency's failure to implement AAT decisions.
11. What should be the role and functions of the administrative head(s) of the new body? For example, should there be a separate Principal Registrar and CEO?	Whilst the Law Council has received mixed views on whether the new body would benefit from separate statutory positions of Principal Registrar and CEO, it reiterates the importance of having clearly defined roles and responsibilities if this approach is endorsed, to avoid ambiguity in how senior leadership of the body's administration operates. Regardless of title, the Law Council emphasises the importance of the new body being able to effectively triage matters and having a Registrar (or other senior administrator) that is familiar with the practice area, to be able to triage cases. That role should then be appropriately supported by an administrative team, with a clear position description and time allocation for the role to carry out those tasks and duties. By way of example, the types of cases that can be triaged in migration matters can include: • matters remitted by the courts to be re-determined according to law; • student visa review applications with 'confirmation of enrolments' that will cease within a very short period; • general visa cancellations where the visa would naturally cease while awaiting an outcome on the review application; • review applications where materials have been provided to assist the tribunal in making a decision on the papers, that is in employer sponsored matters, student visa cases, where a document had not been provided in time at the Department; • complex cases that would benefit from a case conference; and • cases that result in the separation of family units. Should the position of CEO sit alongside a Registrar, caution must be had so as not to create another level of administration without an identifiable benefit. If considered appropriate, a discussion on how the CEO and registrar roles could be split is set out at question 12.
12. What is the appropriate split of responsibilities and powers between these roles?	In both the Federal Court and the Federal Circuit and Family Court of Australia, the statutory role of the CEO is to support the Chief Justice in relation to the administrative affairs of the Court.[37] A comparable role for a CEO in the new body could operate in the same manner, however, as set out above, there would need to be a clear delineation between the role of a CEO and Principal Registrar to avoid misconception as to areas of responsibility.

[37] *Federal Court of Australia Act 1976* (Cth) s 18C; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 83.

	Under this model, the CEO would be responsible for the overall functioning of the new body (matters such as premises, human resources etc), whereas the Principal Registrar's chief function would be the administration of the new body's caseload, in consultation with and at the direction of the President or other appropriate members.
13. Below the President (or equivalent), what should be the most senior level of membership in the new body and what should their primary responsibility be?	Consideration should be given to the creation of a Vice President role as the next most senior position behind the President. This role can support the President in the oversight of decision-making within the new body and would be available to perform the functions of the President in their absence, in line with a '2IC' approach to senior management. Deputy Presidents have an important role in supporting the work of the President, and may be appointed with responsibility for particular areas of the tribunal, including setting procedures and managing caseload (under the ultimate direction of the President). Where possible, Deputy Presidents should be spread across registries.
14. What aspects of leadership, management and administration should sit with the most senior levels of membership in the new body, and which should sit with APS leadership of the new body?	It is critical that the President has primary responsibility for the quality and timeliness of decision-making within the new body, with support from senior membership. The Registrar and/or CEO should maintain responsibility for the 'back end' functions of the new body. It would be beneficial for the new legislation governing the administrative review body to clearly delineate these matters, including responsibility for work health and safety matters pertaining to both staff and members. Senior Executive Service staff in the new body are delegates or authorised officers of the Registrar. These officers should not perform adjudicative functions in the tribunal. That is incompatible with the independence of the new tribunal from agencies whose decisions it reviews. For the same reason, the Immigration Assessment Authority, staffed under the Public Service Act, should not be located within the structure of the new tribunal.[38]

Members

15. What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?	Levels of membership are needed in the new body for career advancement within the tribunal and in recognition of members' differing degrees of experience and knowledge. However, the current differential levels of membership within particular bands as summarised in the Issues Paper bands (e.g. member level 1, 2 and 3, senior member levels 1 and 2), require justification and greater transparency as to the responsibilities and expectations at each level.

[38] Regarding the Law Council's concerns about the IAA, see Law Council of Australia, 'Performance and integrity of Australia's administrative review system – submission to Legal and Constitutional Affairs References Committee (07 December 2021) at 13-14, 16-18.

	Whilst there should be fewer levels of membership within the new federal administrative review body, the levels of member and senior member should remain. Importantly, the differences between these levels, whether experience or expertise, should be clearly set out and justified. Within each of these levels, band levels could operate to encourage progression within the tribunal membership. The new federal administrative review body must be appropriately resourced with an appropriate number of suitably skilled and qualified members to be able to carry out the functions of the body. The allocation of members must also take into account the numbers of review applications across matter types, that is, there must be a sufficient allocation of members to undertake migration, protection and character related review applications or any other area that may require members. It will also be important for senior members and general members to have adequate levels of support from senior leadership, with subject matter expertise. Such persons should be responsible for overseeing and encouraging the development of members and senior members, and demonstrating leadership by hearing the most complex cases as they arise. Practice group leaders should be selected on both subject matter expertise and also their leadership qualities, noting that the provision of pastoral support to members within their practice areas will be an important aspect of their leadership role.
16. Should all members be required to be legally qualified to be eligible for appointment?	The primary focus when appointing members to the new body should be the quality of administrative decision-making of which they are capable. To this end, the Law Council reiterates its view expressed to the Senate Legal and Constitutional Affairs References Committee in 2021 that whilst it ought not to be necessary that all AAT members have legal qualifications, the complexity of legislative schemes considered by the AAT should necessitate a baseline quota of legally qualified members at any one time.[39] Whilst the new body will not be a court, many, if not most, of the decisions to be reviewed will involve some form of statutory interpretation. The original decision-maker will likely have been able to call upon in-house and external legal assistance available to executive government to assist with their application of the relevant statutory framework. By contrast, individual members of the new body will be required to reach their decisions independently (albeit with possible research support), including in cases where parties are not legally represented and thus these members are unlikely to be able to be in a position to receive substantial assistance with this task.

[39] Law Council of Australia, 'Performance and integrity of Australia's administrative review system – submission to Legal and Constitutional Affairs References Committee' (07 December 2021) at [4.80].

	This discrepancy between the position of the original decision-maker and members of the new body weighs in favour of members of the new body holding legal qualifications. At the very least, all heads of divisions or practice groups should be legally qualified, consistent with the former requirement (prior to the 2015 amalgamation) that Deputy Presidents be legally qualified. Further, the Law Council submits that all members considering migration matters should be legally qualified due to the complexity of the legislative regime, and regard should be had to ensuring expertise in this area is retained. The Law Council agrees that for some matters involving technical or specialised professional fields such as medicine, defence or social security, having a member with qualifications in that area can promote better exploration of issues and higher quality decision-making. However, given that such matters frequently involve legal complexity as well as technical complexity, consideration could be given to whether there is scope for non-legal experts to at times sit alongside legally qualified members for the purposes of achieving uniformly higher quality decision-making across the new body. However, the Law Council has received a note of caution from its membership in relation to how the appointments of external non-legally qualified persons has at times been exploited to appoint persons based on political affiliation. In this regard, the current subsection 7(3) of the AAT Act has facilitated the appointment of an increasing number of politically aligned appointments including ex-politicians, candidates who have run for political parties, who worked for politicians or were aligned to partisan lobby groups which has led to a perception of inefficiencies in the Tribunal or a perception that it is not independent. If non-legally qualified member appointments are to be retained, there needs to be a minimum threshold of eligibility and potential periods of ineligibility before being able to be considered (for example, a minimum period of time elapsing since running for a political party). In light of these considerations, and without devaluing the important contribution that expert members have made historically and can continue to make to decision-making within the new body, there is a case for confining such appointments to the level of member, while limiting appointments to senior member or Deputy President to legally qualified decision-makers. Finally, should a discrete taxation division remain within the new structure, the Law Council submits that there should be a requirement that those hearing tax cases should be legally qualified (or at least an accredited accountant) given the complexity of the tax regime and the burden of proof required to be met by applicants.
17. What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-	The diversity of the new tribunal's jurisdiction should be reflected in a diversity of skills, knowledge and lived experience of its members - this was recognised by the Kerr and Bland Committees. A criticism of the proposal for a merits review tribunal referred to in the Kerr Committee report was that 'a general tribunal could not have the experience and expertise in particular fields which was generally accepted to be a

matter expertise (alongside more general qualifications)?	necessary characteristic of Tribunal'. In its response, the Kerr Committee's report noted the tribunal: 'would need to have built-in arrangements for appropriate specialist members representative of the relevant government department or administrative authority in each type of case'.[40] In other words, the value of members holding specific expertise relevant to the matters they determine is to meet the demands of the multiple areas of jurisdiction bestowed on the tribunal. That necessity has been recognised from the commencement of the Tribunal. That need was recently acknowledged by Justice Pritchard in a seminal article on the state and territory civil and administrative tribunals. Her words apply equally to the AAT: *The philosophical foundation for CATS means that there is an important role for members who are not legally trained, but who have specialist knowledge and expertise in fields of endeavour related to the work of the CATS. … The assistance able to be provided by non-legally trained members is also especially valuable in the mediation of disputes involving technical or professional standards, where the presence of a specialist member can assist the parties to more quickly come to understand the potential strengths and weaknesses of their case, and that of their opponent. Finally, in other areas of a CAT's decision-making roles, the value of the different perspectives offered by members who have expertise outside the law, and who are experienced decision-makers, should not be underestimated. The opportunity for collaboration between legally trained members and members with other specialist qualifications is also an important feature of CATS which facilitates the efficient resolution of disputes. When the philosophical foundation for CATs is borne in mind, it is apparent that a CAT will be best placed to deal with the diverse jurisdiction conferred on it if it has members with a range of qualifications and expertise, who are able to deal with cases individually or collaboratively, to enable the tribunal to quickly and efficiently deal with the issue of the case.*[41] Specification of particular criteria for subject-matter expertise will vary from time to time and should be left to the administrative processes attached to appointments. These can be included in the expressions of interest in appointment. Finally, the new tribunal needs to focus on appropriate training to ensure it does not target sectors of the legal profession to fill its gaps and backlogs. Concerns have been raised with the Law Council in relation to the appointment of suitably skilled and qualified members with experience in migration or refugee law, noting that as

[40] Kerr Committee report [230].
[41] The Hon Janine Pritchard, President of SAT and Judge of the WA Court of Appeal 'Australian civil and administrative tribunals: challenges and opportunities' (2020) 100 *AIAL Forum* 148, 158-59.

	this may come from private and not-for-profit practitioners in the area, the number of available practitioners to represent applicants may be substantially reduced.
18. Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?	The Law Council suggests caution be exercised in relation to the appointment of expert witnesses to assist the tribunal in a specific matter. Whilst some advantages may exist, there are concerns that when an expert is appointed, their assessment may be binding on parties without the opportunity to be adequately challenged. Noting this caution, the Law Council has received support from at least some of its membership towards retaining the ability to appoint experts to assist with matters and provide advice where they have specific expertise, knowledge or experience, specifically within migration, protection and character related matters. These experts may also have specific cultural or industry experience that makes them suitable to sit on the panel. The benefits of having such an ability should be measured against the financial costs associated with the appointment of experts. Provisions for expert witnesses, although advantageous for reasons of independence of litigant funding bodies, would be more expensive than having expert part-time members, and may appear to not be in keeping with the object of providing low-cost review. In the absence of adequate funding for disbursements for applicants, there would be likely benefits in the new body having power to appoint experts in a matter where there is a contested expert question and the applicant could not afford to engage necessary and relevant expertise to support their case for review. In a recent complex NDIS funding allocation review, for example, neither the NDIA nor the applicant had an expert assessment of funding needs by an appropriate medical specialist. The applicant was unable to afford this, and the agency chose not to obtain it. On balance, it is considered that the tribunal should have a power to appoint a tribunal expert in a limited number of circumstances. However, it would be expected that the power would be exercised infrequently, and noting the cautions outlined above.
19. Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?	The terms ‘sessional’ and ‘part-time’ as applied to members of tribunals are used interchangeably. At present there are part-time members who largely fulfil the specialist expertise category of members. The AAT Act at paragraph 10(3)(b) states members may be appointed who have ‘special knowledge or skills relevant to’ their duties. The ability to appoint part-time or sessional members should be retained, as this has the benefit of attracting members with appropriate skills and expertise who may be unwilling or unable to be full time, including those with caring responsibilities. As these responsibilities are disproportionately borne by women, the availability of flexible membership is an important means of ensuring equal and full participation in decisions of the new body. Sessional

	and part-time membership may therefore allow for greater diversity and gender equity across the membership of the tribunal. Sessional membership also provides a capacity to attack a backlog as required. However, some concern has been raised amongst some Law Council members in relation to the ability for sessional members in the past to effectively address these backlogs, pointing to the Issues Paper's observation that some members did not make themselves available when called upon.[42] If sessional membership is to remain, it is important to ensure that regard is had to any preclusion period that prevents members from appearing before the tribunal after a sessional appointment, as this may have the effect of limiting the cohort of individuals willing to accept such roles.

Appointments and reappointments

20. Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?	To the greatest extent possible, without creating rigidity, the criteria and procedures for membership appointments should be in the new body's governing legislation. This recommendation rests on the observation that in the past guidelines do not seem to have been followed. It will be critical that appointments to the new federal administrative review body are conducted through a merit-based, transparent process that includes public advertisement, clear and relevant selection criteria, and an independent selection process. Appointments and reappointments should be seen to be non-political to ensure public confidence in the institution and the soundness of decision-making, with the President having a central role in final decisions. There is value in having the essential features of a merit-based process for appointments in the legislation. The statutory iteration ensures that the base level criteria cannot be ignored. The potential content of such a provision is illustrated by the terms cited in the Issues Paper of the equivalent Ontario legislation.[43] Identification of the baseline statutory criteria could draw on the criteria listed in item 4 of the new *Guidelines for Appointments to the Administrative Appeals Tribunal*.

[42] Commonwealth Attorney-General's Department, *Administrative Review Reform: Issues Paper, Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair* (2023), 39.
[43] Ontario *Adjudicative Tribunals Accountability, Governance and Appointments Act 2009* s 14(2).

	The Law Council has received support for the requirements for appointment set out in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**), noting that any new body needs to significantly diversify its membership taking into account the requirements identified in paragraphs 183(5)(a)-(d) the QCAT Act. New member appointment guidelines should also consider subject matter expertise as a core selection criteria.
21. Should the legislation require the Minister to consult the President before appointing or reappointing members?	The Minister responsible for advising Cabinet and the Governor-General as to appointments, namely the Attorney-General, should consult the President before giving that advice. The current *Guidelines for Appointments to the Administrative Appeals Tribunal* require that the President (or delegate) be a member of the independent appointment panel. In those circumstances, assuming the President personally does not sit on all the appointment panels, there would be value in a requirement that the Attorney-General consult with the President prior to finalisation of the list to go to Cabinet and the Governor-General. A requirement to consult can provide a brake on too blatant reliance on political appointments.
22. What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?	The current *Guidelines for Appointments to the Administrative Appeals Tribunal* provide for a public advertisement, and a list of suitable applicants to be assessed by an independent appointments panel. These requirements meet many of the complaints about the processes which had evolved prior to the change of federal government in 2022. 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.[44] 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 tribunal, and is designed to ensure transparency in appointments and diversity in its membership. 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. There should be limits on the discretion of the Attorney-General to recommend appointment of a person who has not been selected via the proposed statutory process. One possibility is that the Attorney-General must at least publish an explanation. That solution may make it harder for political appointments to occur.
23. What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be	Appointing members for a limited period carries with it the potential to damage the perceived independence of the tribunal, because it may be apprehended that members whose reappointment is imminent could be concerned

[44] Law Council of Australia, '*Policy on the Process of Judicial Appointments'* (Policy Statement, 26 June 2021).

fixed, and should there be a maximum number of reappointments?	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. Longer 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. The AAT has experienced a lack of consistency in the duration of appointments, with no clear basis for the duration of any given appointment. There is clearly a need for certainty and clarity in the length of appointments within any new structure. A common term for the head of Commonwealth agencies is 7 years. This ensures that after 7 years, there is renewal of the energy and vision of the head of the tribunal. It is suggested that this term could apply to other senior appointments (such as non-judicial Deputy Presidents) within the new tribunal. For senior members and members, the Law Council suggests a term of not less than 5 years and not more than 7 years, renewable (while renewals could be capped, this should not be set too low). It is common for it to take up to two years for a member appointed to the tribunal to become 'competent'. That leaves at least 3 to 5 years for the person to operate at an appropriate level of efficiency prior to the reappointment process. That efficiency can be capitalised on if the member is reappointed. A 5-to-7-year duration also has the advantage of spanning across more than one term of government, which may assist to address perceptions that appointments and renewals are aligned with the parliamentary cycle. An appropriate performance review framework is important to ensure longer appointments remain productive, and renewals are justified on past performance.
24. What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?	As with initial appointments to the new body, rigorous and transparent procedures should be applied at the time of reappointment to prevent a perception that a member of the new body could be denied renewal as a result of political dissatisfaction with, or reprisal for, decisions that the member has made. To support this, a check should be built in which involves an objective assessment against key performance indicators and other performance measures. Renewal of an appointment should be made on application, and go before the independent appointments panel, but on a less intensive basis. It is understood that in 2019 the AAT introduced a program of reforms to its induction, training and assessment programs. As part of that program, members are required to undertake a valuable self-assessment element. There is also assessment by an independent reviewer (generally a former and respected AAT member). The purpose of the periodic evaluation and development of member capacity is to prepare an individual development plan, agreed between the member, the independent assessor and the senior member in charge of

	the jurisdiction in which the member regularly works. Legislative provisions could be introduced to impose on the President the requirement to ensure ongoing training and performance review for all members. In situations where a full reappointment is unjustified, brief extensions should be permitted under the legislation on an ad hoc basis where members have cases that will run over the end of the term of the appointment for no more than 30 or 60 days to be able to finalise those matters rather than have the matter be re-constituted, including where that would result in a further hearing. To minimise this occurrence, the new federal administrative review body should have internal processes which consider the end date of a term for a member to ensure that they are not allocated matters which would be unable to be heard before their appointment term ends. Finally, consideration should be given to restricting the reappointment process to a member who has less than 18 months on their current appointment.
25. How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?	The Law Council recognises the need to identify and manage real or perceived conflicts of interest amongst members, noting that the independence of a decision-maker is critical to promoting public trust and confidence in the administrative review framework. In recognition of this, the Law Council has expressed support for the approach adopted within the ARC's *Guide to standards of conduct for Tribunal members*, as it relates to management of conflict and real/perceived bias, namely: • A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities so that their actions do not give rise to an apprehension of bias, or actual bias. • A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision. • A tribunal member should have regard to the potential impact of activities, interests, and associations in private life on the impartial and efficient performance of their tribunal responsibilities. • A tribunal member should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the member or the tribunal. The legislation could refer to this guidance (or others) in a note. However, there has been some support for including requirements in the primary legislation. A balance will need to be struck between the benefits of flexible guidelines and the certainty provided through legislative drafting. For example, there is merit in re-drafting section 14 of the AAT Act so that there is a proactive element where the member has a duty to tell the President whether there is a conflict as soon as the case is allocated, and with the President's permission be removed from that case before any directions hearing. This is the approach typically taken by courts, to avoid an application for disqualification for apprehended bias. For the AAT, which does not

	have well-known conventions internally, and includes non-lawyers unfamiliar with apprehended bias, it could be spelled out in the governing legislation. To the extent the legislation prescribes conduct, it is noted that the legislation for some of the state and territory civil and administrative tribunals contains lists of activities which would justify suspension from or removal from office, and may provide a useful guide.[45] The provisions may cover conflicts of interest, and may also set out a cessation of appointment or termination process to facilitate the appointment ending in appropriate circumstances. Regardless of the legislative approach, it will be critical that there is ongoing education and support for tribunal members in identifying and managing conflicts of interest. Education and guidelines should clearly set out what may fall within a conflict of interest and appropriate behaviour relating to members' social media, speaking engagements and social conduct publicly to ensure that there is independence and integrity in the new body. There are several reputable guidelines for identification and management of conflicts of interest. These include the Council on Australasian Tribunals' *Practice Manual for Tribunals* (5th edition, 2020); the ARC's *A Guide to Standards of Conduct for Tribunal members* (Revised edition, 2009); and the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* (3rd ed, 2022). Those guides contain useful information for tribunal presidents and members on desirable behaviour as a tribunal member. Members, especially non-lawyers, should be trained on the law relating to apprehended bias and know when to disclose matters and when to disqualify themselves.
26. What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?	There may be an inherent conflict of interest for a member such as a medical member who is also an adviser or allied with a body such as a medical defence union which provides insurance to members for behaviour which falls below expected standards of conduct. This exemplifies the issue for members who have a professional/personal interest which has the potential to conflict with their impartiality as a member of the tribunal empanelled to hear a matter touching those interests. The best solution to this issue is education and constant reminders to ensure members are sensitive to the possibility of a conflict of interest occurring. Part-time members appointed for their specific expertise and experience should not have to give up their professional engagement when appointed because of their possession of those attributes. Their infrequency of use makes such a move impractical. For a specific hearing, after the member has received their papers for the hearing, the presiding member should check in advance of the hearing whether the member(s) has/have a possible conflict of interest.

[45] Eg *Queensland Civil and Administrative Tribunal Act 2009* ss 188-190.

	Outside employment is currently statutorily covered for AAT members and the Registrar.[46] The requirements for prior approval to conduct outside employment is a safeguard. Each member must renew the statement on outside employment, annually. In situations which are novel or at the margin, consultation with a more senior member of the tribunal would be a wise step. The LIV has encouraged statutory requirements for members to disclose their involvement or affiliation with activities including: • migration or other related work; • political campaigning and other related activities, including public political affiliations; and/or • active membership/affiliation with certain groups and organisations, such as anti-immigration groups. The LIV has suggested that disclosure in relation to involvement or affiliation with any of the above should occur at appointment.
27. Should members be prevented from appearing as a representative or an expert witness in matters in the tribunal while they are members or for a period after their term as member concludes?	As a general rule, serving as a representative or expert witness after cessation of tribunal membership should not be permitted for a set period of either 12 months (as is commonly required), or two years as required of former VCAT members. The requirement would apply for the same reasons these restrictions are imposed on former government officers. A statutory limitation on members' ability to appear as advocates, representatives, or expert witnesses before the new body while serving as a member, or for a prescribed period after their appointment concludes, would enhance the perception of independence of the new body. However, any statutory limitation on former members appearing in the new body should be balanced so as not to serve as a disincentive to persons seeking appointment. In particular, consideration should be given to creating exceptions in circumstances to ensure the tribunal can attract skilled talent when making short-term surge appointments. If, for example, a member is appointed to fill a short-term need (as is the case with the 75 new appointments to assist with current backlogs), a preclusion period that prevents appearances once that term expires means that a large cohort of otherwise suitable practitioners may be reluctant to apply.

Performance management and removal of members

28. How should the legislation empower the new body to	The President and senior leadership of the new body should have all powers necessary to identify and respond to issues relating to member performance and conduct.

[46] AAT Act, s 11, and s 24J.

manage and respond to issues relating to member performance and conduct?	A clear and transparent process for the resolution of performance and conduct concerns is desirable. However, there may be some risk in adopting an overly prescriptive approach in legislation, given the variety of contexts in which complaints about conduct and performance may arise. Whilst perhaps not legislatively enshrined, a focus on mentoring by more senior members within the same area of jurisdiction as the member whose performance and conduct is at issue, together with professional development training, should be used as a means of managing these issues. When considering member performance, there may be a range of factors to be considered including their rate of finalised review applications as an efficiency measure (that is, meeting a minimum benchmark of decisions per year, noting this should be weighted based on the complexity of the matter). Data on recurring complaints regarding bias and inappropriate conduct towards applicants and their representatives should also be factored in when evaluating members' performance.
29. What are the appropriate grounds, thresholds and process for suspending or terminating the appointment of a member? Who should be responsible for suspending or terminating the appointments of members?	The grounds for removal of a member are the standard grounds for statutory appointments and should be appropriately retained.[47] Useful additional grounds could be a significant breach of the obligations of the criteria for appointment to the position, findings of bullying or harassment by a member in the course of their employment, or if an indictable offence has been committed, similar to section 188 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). The Law Council is concerned that the current process of 'terminating' a member by not allocating them any cases is a costly and ineffective approach. An enforceable code of conduct must have a clear structure for dealing with member performance and conduct. Notwithstanding the costs implications referred to at page 49 of the Issues Paper, the President's former powers to suspend members should be reinstated, for the purpose of enabling interim action to be taken in a formal way while serious issues are being investigated. The Law Council supports the point made in the Issues Paper that in addition to legislative thresholds, there should be appropriate and effective systems or processes in place to facilitate the reporting and identification of issues potentially leading to termination, to investigate such issues transparently and fairly, and determine the possible range of consequences, including removal.

[47] AAT Act s 13.

Part 2 – Powers and Procedures

Making an application

30. How can the new body ensure that application methods and processes are accessible to all those seeking review? For example:	
a. What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?	In order to maximise accessibility, a standard approach should be sought in the application processes, including standard fees, form and timeframes as far as practicable. There should be a flexible approach to correcting application errors, including where processes between lists/divisions might diverge. For the new review body to be truly accessible, there should be no 'wrong door'. Whilst lodgement of applications should have baseline requirements to enable questions of the tribunal's jurisdiction to be satisfied, these should not extend to requiring a formal statement of reasons, and could be limited to requiring a copy of the decision notification and reasons as to why the review is being sought. The Law Council does not believe that an applicant needs to articulate in detail the grounds for applying in the application for review. It is plain that in seeking merits review an applicant is seeking a re-exercise of the power. A short statement of the basis on which the applicant seeks review may be desirable in giving the AAT some idea of the complexity of the matter, but it should not be essential, and, if given, should not descend into detail. Finally, it is suggested that consideration be given to properly supporting vulnerable applicants to make valid applications, including assistance with filling out forms. This might include consideration of interpreter services.
b. What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an	There is a need for greater consistency for time limitations within the new body, noting that the Issues Paper acknowledges that application times vary significantly depending on the types of decisions. The High Court has observed that limitation periods should not be seen as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society, but rather the legislature's judgment that the welfare of

extension of time or set the date of effect of a decision?	society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.[48] In terms of an appropriate period, the Law Council is of the view that a general 28-day timeframe in which to apply across divisions is suitable (including for onshore and offshore related migration matters), with a discretion to extend if it is considered reasonable in all the circumstances to do so. In relation to such extensions of time, these should be reserved for exceptional circumstances, that is, where defective notifications are sent or where applicants have particular vulnerabilities. This may include people such as those in prison, immigration detention, people experiencing homelessness, victim/survivors of family violence, people with serious mental or physical illness, and those suffering other unforeseen circumstances (for example, unforeseen illness, or fraudulent migration agent/legal representation).
c. Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?	Given a central principle of the administrative law system is to protect individuals against unfair or arbitrary use of public power, there is a need to ensure application fees are not excessive and incorporate meaningful hardship waiver options for applicants. Unjustified increases to fees 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. The Law Council has previously noted that fee increases – especially in the MRD, where these are disproportionately high – pose a severe threat to access to justice for migrants and are a fundamental rule of law issue. Increasing fees is not the way to deal with the backlog of administrative appeals and will likely result in an upsurge in unrepresented applicants as people will be even less able to afford access to legal assistance after paying the application fee. This will likely increase the workload of the tribunal and produce further delays. Consideration should be given to harmonising the review application fee across matters, with fees not being payable by persons in immigration detention or prison, or by persons whom the tribunal is satisfied are experiencing financial hardship (which would be consistent with the Federal Courts). The Law Council is supportive of application fees being refunded where an application is successful.
31. What should be the consequences of failing to comply with application requirements, including non-payment of fees,	The new legislation should specify the consequences of not complying with lodgement requirements, however this should adopt a permissive approach. In particular, where there has been a failure to provide a statement of reasons, an application made within time should be valid, with issues of this nature to be addressed at a case management hearing.

[48] *Brisbane South Regional Health Authority v Sharon Annette Taylor* (1996) 186 CLR 541, per McHugh J.

and what powers does the new body need to manage non-compliant applications effectively?	The Law Council is of the view that non-payment of fees should not be used to determine the jurisdiction of the tribunal to dispose of a matter. Where a fee has not been paid whether the fault of a representative or applicant, the new administrative review body should provide a period for the applicants to rectify the fault, rather than automatically determining an application as invalid. The current non-compliance processes appropriately provide that if an errant practitioner fails to meet deadlines on a regular basis, they can be reported to their relevant Law Society/Barristers' Board. A sanction against a practitioner/representative which would impact adversely on the applicant is not desirable.
32. What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?	Consistent with ensuring that application processes and methods are accessible, including to vulnerable cohorts of applicants, lodgement processes should be flexible and accessible to all applicants. Where possible, harmonisation in the method of lodgement across divisions is a desirable objective. Whilst applications via telephone are not ideal, it is appreciated that this can be particularly useful for people with accessibility issues including literacy or technology needs (noting greater technological barriers may exist in rural, regional and remote areas). The ability to apply online should be consistently available across all areas of the new body, noting that this should not be mandatory given there may be difficulties for those that are digitally excluded. The form for making an application for review should be kept simple. The website for the new body should make clear which form to use. Registries should have available some paper copies for people with no computer/ printer/toner. Any websites and online portals should be compliant with the Web Content Accessibility Guidelines.
33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?	As noted above, oral applications should be limited to situations where accessibility issues prevent or significantly impede the ability for an application to be made in writing. This may include where the review applicant is in prison or immigration detention. Further, the Law Council supports oral applications for review being available for those who are illiterate, experiencing homelessness, are victim/survivors of family violence, or have a disability or health condition that may prevent them from completing a written application.

Case Management, Directions and Conferencing

34. What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?	Case management powers and procedures are a useful means by which to achieve effective and efficient management and resolution of applications. For that reason, the Law Council is supportive of conferencing being available widely within the new administrative review body. However, such procedures must be adopted and employed in a way that is sensitive to the circumstances of each particular applicant, including vulnerable cohorts of applicants and applicants who are self-represented. It is important that case management procedures, including case conferencing, deal only with procedural (and not substantive) matters.
35. What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?	Certain classes of applications (particularly social security and child support, where a majority of applicants are self-represented) could certainly benefit from case conferencing provided by registrars. This would remove the need for members of the new body to undertake case management in relation to all classes of decisions. The selection of conference registrars should pay regard to the need to ensure appropriate diversity on the basis of gender, disability and First Nations identity. Similarly, as the new body will have a substantial migration caseload, employment of conference registrars from non-English speaking backgrounds and with lived experience of migration will be important. Conference registrars, if they are to issue directions, for example, should be legally qualified. They are currently widely used to conduct mediation and are required accordingly to be qualified mediators.
36. What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?	The Law Council has previously suggested that directions powers were one of the two principal means of achieving the harmonisation envisaged as a product of amalgamation. As the Law Council noted: *The second objective is effected by the President's authority under section 18B of the AAT Act to give written directions for the arrangement of business, including the procedures of the Tribunal. This power can ensure consistency in matters of procedure. The Law Council notes, however, that the President must consult the head of any Division likely to be affected by a direction prior to its implementation. This provision in practice can mean the exercise of the directions power is vetoed or delayed, to the detriment of the benefits of harmonisation. There may be scope to re-evaluate this process to ensure it is achieving the desired balance between harmonisation and diversity*.[49] A directions power should in principle be available generally, and as such, the inability to hold directions hearings in the MRD under section 24Z of the AAT Act should be repealed.

[49] Law Council of Australia submission, *Statutory Review of the Tribunals Amalgamation Act 2015* (2018) by The Hon IDF Callinan AC QC, [72].

	Directions powers should enable the new body to make reasonable adjustments necessary for full and effective participation for applicants, witnesses and representatives with disability, having regard to the particular circumstances of the case and the overarching guiding principles. The existing directions powers are generally suitable, however a power to obtain reasons/adequate reasons statement could be added. The direction, if oral, should be followed by a written record of its terms which is provided to the parties.
37. What powers should the new body have to address non-compliance with directions?	Subsection 42A(5) of the AAT Act presently permits the AAT to dismiss an application for review if an applicant does not comply with a direction. The current sanctions for non-compliance with directions are effective, however, provisions in the legislation for the Victorian and Queensland equivalent bodies (as set out at page 61 of the Issues Paper) may be useful in terms of additional powers for the new body. Regard should be had, however, to the differences between Commonwealth and state-based tribunals, noting the latter deals with certain civil claims (such as residential tenancy) where directions to compensate for non-compliance with a direction may be appropriate. Any application within the new body should consider whether such directions powers may operate unfairly against applicants. Finally, the Law Council cautions against the early dismissal of a matter because of non-compliance with directions.
38. What other interlocutory processes and proceedings should be available in the new body?	The Law Council considers the various interlocutory processes and proceedings that currently apply in the AAT perform useful functions. However, those processes and proceedings differ depending on the category of application. For example, different interlocutory processes and proceedings apply in the MRD to other divisions of the AAT. Ideally, the new body should allow for the same interlocutory procedures across all categories of applications for review. For example, the Law Council also supports consistency across all divisions in relation to the ability to add new parties to MRD matters. This is particularly relevant in circumstances where families have new-born children to add to applications following their AAT application being lodged. In relation to acceptance of further evidence, section 38AA of the current AAT Act provides a mandatory requirement for a decision-maker to provide material up to the time the Tribunal finalises its review. That provision should be included in the legislation for the new body. Finally, the new tribunal needs the power to stay the operation or implementation of a decision where that is necessary, as is currently provided for by subsection 41(2).

39. What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?	General Practice Direction cl 4.15 lists that the criteria for expedition require that:
	• the decision has significant implications for a party;
	• the application requires an urgent determination;
	• the outcome of the review:
	  ○ turns on one or more discrete questions of law; or
	  ○ requires factual findings that can be conveniently made having regard to evidence that is already available, or which can readily be obtained and considered within an expedited time frame; and
	• the statutory objective cannot be adequately met by making an order under section 41 of the AAT Act or by adopting any other procedure set out in this Direction or another direction under section 18B of the AAT Act.
	
	These remain generally appropriate and should also include matters where there are compelling and compassionate reasons for them to be prioritised.
	
	Whilst the approach of setting out criteria in a practice direction provides much-needed flexibility, consideration could also be given to specifying in the legislation the ability to expedite certain categories of matters, while retaining a general discretion to expedite matters depending on the circumstances.
	
	The disadvantages of limited procedures for achieving expedition heighten the possibility for an appeal. That possibility is illustrated by the numbers of appeals against decisions by the Immigration Assessment Authority. The significant issues created by this framework, which has ultimately not delivered fair or efficient outcomes, should not be replicated under the new body.
	
	Consideration should be given to the operation of section 34J of the AAT Act (circumstances in which hearing may be dispensed with), noting that a hearing on the papers currently cannot proceed if one party objects. There may be scope for a greater ability of the tribunal to exercise its own discretion on that question.

Information provision and protection

40. What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?	As a general principle, all relevant documents should be given to a review applicant as a matter of course, in contrast to requiring applicants to lodge separate requests for information. To the greatest extent possible, this should be standardised across all categories of decisions. The consistent use of 'T documents' across all divisions would greatly assist in the decision-making process, especially for migration matters. However, it is noted that this may not be possible in relation to particular decisions such as in the Security Division, and the new review body should retain the ability to dispense with any standardised information provision requirements in particular cases. Such an ability could operate similarly to rule 1.34 of the *Federal Court Rules 2011* (Cth). To ensure applicants have access to all relevant information, freedom of information request processing must be improved, noting that current wait times can exceed one year and released material is often highly redacted which prevents applicants responding to adverse information. It is acknowledged that these delays are at agency-level rather than tribunal, however they remain relevant to the effective operation of the new administrative review body. Finally, respondents should be required to state whether any automated process applied to the decision, including the application of any algorithm or artificial intelligence. The new body should be empowered to direct that the respondent be required to produce and explain the instructions for any such automated process on the applicant's reasonable request, including assumptions on which any algorithm is based, and to explain steps taken by the respondent to identify and avoid unreasonable disadvantage to or discrimination against the applicant.
41. What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?	The Law Council supports the recommendations in the *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (**Metcalfe Review**) for harmonisation of the requirements for providing documents and information to the new body, and standardisation of the power of the new body to compel persons to provide information or give evidence by summons. The Law Council does not support the codified provisions in the MRD division as they are procedurally complex and do not allow for flexibility. Where such information is security classified or like information, a process should be available by which that information is provided to the new body via its Security Division rather than not providing it at all. The new legislation could then set out a procedure by which the Security Division should handle information. Finally, the new body should have the power to direct the respondent to produce material in a form that is reasonably accessible to the applicant and in a manner that promotes efficiency. Where the applicant is a person

	with disability, the new body should be empowered to direct any reasonable adjustments required for the produced material to be accessible to that person.
42. What documents and information should the Tribunal share or not share with applicants?	All relevant documents pertaining to the decision on review should be provided to both parties (noting that exceptions are needed for security and public interest certificated cases). Applicants need to be aware of the materials on their file, including adverse information, to be able to respond to the reasons that may result in the decision being affirmed upon review. Should certificate provisions carry over to the new federal administrative review body, for example, sections 375 and 375A of the Migration Act, there need to be clear and cogent reasons why the information cannot be disclosed and clear waivers for those provisions to allow a member to provide sufficient information to the review applicant to be able to respond.
43. By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?	Section 35 of the AAT Act currently empowers the AAT to hold hearings in private and make non-disclosure and non-publication orders. Given the broad range of Commonwealth administrative decisions that may be able to be reviewed by the new body, it is necessary that powers equivalent to the current approach are retained. Currently, the principle of open justice is the default position when determining powers under section 35, as is appropriate. However, the new federal administrative review body must protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse. This can be achieved through mechanisms that allow matters to be heard in private, pseudonyms to be issued for cases, including published cases, and guidelines for members on how to deal with vulnerable applicants.
44. Should all matters involving sensitive national security information have a common set of protections and processes? What should those protections be?	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. There are currently inconsistencies in the way sensitive information is handled depending on whether a matter is heard in the AAT's Security Division or another division. This inconsistency also arises in secondary decisions related to decisions that are reviewable in the Security Division. For example, an Australian passport is cancelled by the Minister after receiving advice in the form of an adverse security assessment. Whilst the review of the passport cancellation is heard in the AAT's General Division, the review of the adverse security assessment is heard in the Security Division, notwithstanding the same or similar evidence in both applications. The Law Council supports an approach that would provide for consistent treatment of all matters involving sensitive national security information.

Resolving a matter

45. What types of dispute resolution should be available in the new body?	Alternative dispute resolution (**ADR**) provisions must focus on early resolution, rather than simply creating additional steps for matters that will ultimately end up before the tribunal. In its submission to the Callinan review, the Law Council commented on the role of ADR within the AAT, noting: *The use of ADR processes was pioneered by the Tribunal in dispute resolution in Australia and its work has been widely replicated in other tribunals and courts. The multiple forms of ADR in use – conferencing, mediation, neutral evaluation, case appraisal, conciliation and other procedures – are a core component of the Tribunal's function and contribute to an economical, informal and quick review process for those Divisions that have embraced it.*[50] However, the frequency of use of some of the present dispute resolution processes, such as case appraisal and neutral evaluation,[51] suggests their use could be dispensed with. ADR should always be potentially available but there may be cases (perhaps many) where it is simply not suitable. There should be a discretion to direct or not direct ADR to occur, and regard should be had to whether multiple ADR processes in a matter will be consistent with the objective of the process being 'quick'.
46. Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?	ADR has been a feature of the AAT's pre-hearing processes since its establishment, and where appropriate, should be made available across an expanded class of matters. The process works particularly well in all areas except the Security Division, the SSCSD, the MRD where the applicant is in detention, and the NDIS Division for some applicants. For reasons of need for speedier resolution in income matters in the SSCSD, special procedures may be needed if alternative dispute resolution is to be adopted in that Division. It is significant that the Independent Expert Review process introduced in the NDIA area late in 2022 can be classified as an alternative dispute resolution process. Finally, the Law Council submits that where dispute resolution involves an applicant in prison or detention, they should be provided with a referral to (potentially free) legal representation.
47. What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be	In order to encourage dispute resolution prior to a hearing, it should be open to the new body to refer an application for review to a form of dispute resolution without requiring any of the parties to make an application for referral to dispute resolution. If parties agree to such a referral, it would be appropriate for that power to be exercisable by a registrar.

[50] Law Council of Australia submission, *Statutory Review of the Tribunals Amalgamation Act 2015* (2018) by The Hon IDF Callinan AC QC, [82].
[51] AAT Act s 3 (definition of 'dispute resolution processes').

able to refer a matter to dispute resolution?	The Law Council suggests that online ADR has technical and evidentiary difficulties and may be best reserved for matters such as people in detention in some MRD matters, and those in prison. Overall, the process could be used more regularly and conducted in person.
48. What powers should the new body have to resolve a matter before hearing? Which of these powers should be conferred on non-members? Should these powers be standardised across all matters?	The Law Council supports the new body having broad powers to resolve a matter before hearing. Such powers could be applied flexibly, having regard to the nature and complexity of the matter, and should be standardised across divisions. In particular, the Law Council supports powers being available to resolve a matter before a hearing, and without a hearing, where a decision can be made in favour of the applicant and the review applicant consents to that process. Should a triaging process be in place, it should include identifying matters that can be decided on the papers, that is, without the need for hearing, which can quickly be brought to the attention of a member so they may make a decision to resolve the matter. It may be that legally trained registrars should have the power to make consent orders disposing of matters. There is a need before making such orders to check that the tribunal has jurisdiction to make the orders sought by the parties (e.g., under section 42C of the AAT Act).
49. What powers should the new body have to manage applications that are frivolous or vexatious?	Current powers to manage applications that are frivolous or vexatious under section 42B of the AAT Act are generally appropriate and should be retained. However, regard should be had to the ability for the tribunal to control/prohibit the re-litigation of matters, including the adequacy of section 42B in this regard (Power of Tribunal if a proceeding is frivolous, vexatious etc.) and section 33 (Procedure of Tribunal).
50. In what circumstances should the new body be able to dispense with a hearing?	Any step that can reduce delay without diminishing the quality of decision-making should be considered, including the ability to dispense with hearings, providing that the parties are accorded procedural fairness by a process of receiving written submissions. In this regard, steps to vacate a hearing should only occur where a fair decision can be made, and the applicant consents to that course of action. Further, consideration should be given to the operation of section 34J of the AAT Act (circumstances in which hearing may be dispensed with), noting that a hearing on the papers currently cannot proceed where one party objects. There may be scope for a greater ability of the tribunal to exercise its own discretion in instances where it is reasonable to proceed even in the absence of consent from each parties. Finally, it is noted that conferencing is currently undertaken by officers/registrars and that is where settlement usually occurs. The powers should be standardised except possibly in Security matters, or where special procedures such as those applying under sections 360 and 425 of the Migration Act where an applicant is invited to appeal but fails to do so. There may be a discretion to re-open a matter if reasonable explanation is provided.

	Other circumstances in which no hearing may be required are when the parties agree at a conference or other dispute settlement process that the decision should be in the applicant's favour. It is important that powers should only be delegated to legally trained registrars. This applies to the powers under section 42 (resolving disagreement), section 42A (discontinuance, dismissal, reinstatement etc of application), section 42B (if proceeding is frivolous, vexatious, etc), section 42C (power if parties reach agreement) and section 42D (power to remit).
51. How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?	Attention should be paid to the architecture of hearing rooms so that there are a range of models in each registry. Accessibility can be enhanced by architecture of hearing rooms and appearance and behaviour of those at front-desk. Online directions hearings, and in cases affecting users with special issues, should be adopted where appropriate and consented to by the applicant. In determining the appropriateness of conducting a virtual hearing, regard should be had to the mode best suited to affording procedural fairness to the parties. To assist in this decision, the Law Council refers to its 2022 publication, *Principles for determining the appropriateness of online hearings*, which sets out several considerations when assessing whether a hearing should be in-person or remote.[52] Where possible, hearings (especially those considering substantive matters) should proceed in-person, and if more practical, video-link rather than by telephone. In this regard, the Law Council understands that there has been an over-reliance on online hearings in recent years, even where all parties (and the AAT member) are in the same city. Telephone hearings should only proceed at the request of the applicant, noting they may often give rise to a number of procedural issues. Currently, leave is required to appear remotely. Consideration should be given to whether for experts, remote attendance should be the default, noting that this may have the ability to save resources while not sacrificing quality.

[52] See <https://www.lawcouncil.asn.au/policy-portal/policies-and-guidelines/principles-for-determining-the-appropriateness-of-online-hearings>.

Decisions and appeals

52. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?	There is a need for greater consistency in how and when reasons for decisions are issued by the new body. In achieving this objective, there should be an acknowledgement of the important role of written reasons to allow parties to understand why the tribunal has formed its decision, and to assist in identifying trends and systemic issues before the tribunal. Those which are not published are either factually distinctive, or do not contain any new or revised principles of law. Noting the Issues Paper's comments that written reasons can be time-intensive and may contribute to backlogs, the Law Council is supportive of greater support and standardisation for the delivery of oral decisions in certain matters. The Law Council supports that a short decision can be made in writing where the decision is favourable and the case is not complex, noting that it is important that written decisions are clear as to what the reasons are for making the decision and what was relied upon in forming that decision. Decisions should be made within a reasonable time after a hearing. This is preferably within a month and no more than 6 months in exceptional circumstances. Further support should also be provided to members on how *ex tempore* decisions can be effectively utilised, noting that if appropriate processes are in place this can lead to an effective and efficient way to deliver decisions.
53. How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?	It is important that all applicants, including those from vulnerable cohorts, understand the new review body's reasons for decisions, and written reasons can assist in that understanding. However, as the Issues Paper points out, written reasons take time to produce and it is difficult to prescribe timeframes having regard to the broad range of administrative decisions that could be the subject of review. As noted above, the Law Council is supportive of greater support and standardisation for the delivery of oral decisions in certain matters. Ongoing professional development and support from bodies such as the Council of Australasian Tribunals (and/or, as flagged, the ARC) will assist in the production of high quality and accessible reasons for decisions. The ARC's best practice guide *Decision Making: Reasons* (2007) and its *Practical Guidelines for Preparing Statements of Reasons* (2000) are useful in this context. The President should maintain oversight of the quality of reasons produced by the tribunal and identify areas for improvement.
54. Are there ways to streamline appeal processes and pathways	Whilst understandably desirable in the context of growing backlogs, the disadvantages of streamlined procedures as a way of achieving expedition may well heighten the possibility for an appeal. That possibility is illustrated by appeals against decisions by the Immigration Assessment Authority, and the issues created by this framework

to reduce the overall duration of a matter?	should not be replicated under the new body. Otherwise, the current processes for appealing to the Federal Court are workable and could be retained.
55. What should be the timeframes for lodging an appeal from a decision of the new body? Should this date from the receipt of a decision, or the receipt of written reasons for decision?	The new body should aim for consistency in the timeframes for appealing a decision of the tribunal. The unjustified distinction between migration and non-migration appeals (the former being subjected to a different appeal pathway under Part 8 of the Migration Act), should be addressed. The 28-day timeframe currently in place could be retained. Time should run from when the reasons for decision are received.
56. When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?	Section 44 of the AAT Act permits appeals to the Federal Court of Australia on a question of law, however there are some exceptions: namely, certain migration decisions (section 43C) and certain decisions of the SSCSD (subsection 44(1A)). The existing appeal on a question of law is well understood and does not need alteration. Since the *Haritos* decision, the operation of section 44 of the AAT Act has been clarified. The addition of subsection 44(7), under which the Federal Courts, if appropriate, can make findings of fact is also useful.[53] The Law Council has not been aware of any compelling reason to change the current provisions dealing with the right of appeal for questions of law. Rather, the focus ought to remain on ensuring the merits review process is fair and accessible. Accordingly, there is unlikely to be a need to refer questions of law if current structures are retained and improved. There is also unlikely to be a need to refer questions of law if an appeal panel is created (see also questions 57 and 58 below). In summary, the referral power should be retained but should only be exercised in the clearest of cases.
57. What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?	Section 45 of the AAT Act permits the President of his/her own motion to refer a question of law to the Federal Court. This appears to have been used rarely. The jurisprudence appears to have been affected by a conservative approach to use of this power by the AAT, however this power should remain. It should only be exercised in the clearest of cases (eg, where the facts are not in dispute) so there is utility in the referral and so important questions of law may be decided.
58. Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an	In New South Wales, the *Civil and Administrative Tribunal Act 2013* (NSW) makes provision for appeals of non-interlocutory decisions to an Appeal Panel as of right on questions of law and with leave on any other grounds (subsection 80(2)). The Law Council has not previously identified a need for an equivalent regime within the federal tribunal system, noting that the introduction of such an appeal mechanism risks adding complexity and delay to the existing framework.

[53] *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315.

appeals mechanism within the new body for complex matters or matters raising systemic issues? a. If available, how should the second tier of review operate and how should it be accessed? For example, should the President be able to refer a matter of their own motion? Should leave be required to appeal? b. Should some matters be referred to a second tier of review from the outset and in what circumstances should this occur?	Whilst there is a general concern that the introduction of second tier review may lead to increased delay and cost within the merits review system, the Law Council has since noted that the circumstances of *Robodebt* illustrate the potential value of some limited form of selective review function. Importantly, cases which are first reviewed in the AAT are not always reported. In the *Robodebt* context, this prevented earlier identification of the issue. If an own-motion power (as suggested below) had been in operation, the President could have been advised of the continued refusal of the agency to abide by the AAT's first tier findings of unlawfulness. In those circumstances, the President could have scheduled the next similar matter before an elevated panel of review. Following that appeal, assuming that unlawfulness has again been identified, the finding would be published and resultant media and other publicity may well have foreshortened the length of time taken to uncover the illegality identified at the first tier. An advantage of this finding, assuming publicisation had halted the agencies' practices, would have resulted in earlier resolution of the matter, thus producing considerable savings to the Commonwealth budget and overcoming unlawfulness in decision-making. Two options can be considered: (i) a presidential panel; and (ii) a general second tier appeal: (i) <u>Referral to a presidential panel:</u> The 'second tier' proposed here would not actually provide for a second round of merits review as exists with First and Second Tier social security matters at present. It would be a panel to which the President directs certain kinds of cases. As explained below, it would not strictly be 'second' tier, or strictly an 'appeal'. Hence the suggested label of review by a 'presidential panel'. This development would complete one of the ARC's key recommendations in Chapter 8 of its *Better Decisions* report, which noted: *8.42 Review and appeal rights can function not only as a quality control mechanism to ensure that the correct and [sic] preferable decision is reached in individual cases, but also as a mechanism for ensuring that cases of particular significance are given appropriate attention by suitably experienced and authoritative tribunal members ….* *8.44 The Council … regards the availability of a second tier of external merits review as most important. This is because cases that have particular significance for government or agency policy – because they raise an important issue or principle of general significance – should be able to be reviewed by a review panel that is able to give such decisions particularly careful and comprehensive treatment. …* *8.48 …[I]t is inevitable that there will be a small number of division decisions which, although they do not raise an issue or principle of general significance, involve a manifest error and should, for reasons of efficiency and practicality, also be able to be determined by a Review Panel.*

The *Better Decisions* report contemplated that on occasions where an application involved an issue or principle of general significance, or a manifest error, the President should have a discretion to refer the application directly to the proposed review panel. This step would also obviate delay and be likely, with the enhanced authority of a decision by the panel, would result in an improved 'normative effect', that is, improved government decision-making.

Recommendation 97 of the ARC was that such applications would be referred or be permitted by the President only if:

- … 'the case raises a principle or issue of general significance';
- … the decision of the … division involved a manifest error of fact or error of law that is likely to have materially affected the decision';
- … 'new information is brought to the attention of the … President which … could not reasonably have been discovered prior to the finalisation of the case before the … division, and which would have materially affected the decision'.

The own motion power could be exercisable where a proceeding involves an important issue of principle, new and material evidence, errors of fact or law, or disregard by agencies of findings of illegality by the AAT, and criteria similar to those governing applications for special leave to appeal. The power could be exercised after a directions hearing where the parties have an opportunity to present a case in support of, or in opposition to, the referral.

There would be little concern about an excessive volume of cases, as say in the migration area, because the President retains power to refer cases only where appropriate.

(ii) Second tier review in an appeal panel. The two-tier review available in the social services area could be extended to all areas of the tribunal's jurisdiction, except for certain areas where volume may make such a mechanism inefficient or an additional tier would be used to lengthen a stay in Australia such as in migration protection visa and cancellation of visa cases. This would permit development of more authoritative decisions by experienced senior members to guide members of the tribunal, the agency and others including practitioners. The option also gives applicants a right to review when they identify errors of fact or law in decisions of the tribunal at first instance, and enhances the accessibility and fairness objectives of the tribunal. Such a right is not available under option (i).

This internal review mechanism could be available for veterans' matters, social security and child support matters (as presently provided), and tax – where a high proportion of matters are settled in

	advance of a hearing, student visa and other similar types of visas matters, however, would unlikely to be appropriate in protection and cancellation of visa matters. Section 70 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) provides a useful example of how such an internal review mechanism could be developed. Under the above option, any further review would benefit from the tribunal relying on the material produced in the first instance, rather than conducting a *de novo* hearing, with the ability to produce further material only permissible with the leave of the tribunal. In relation to formation of an internal review, there should be a discretion provided to the President to determine whether the matter is reviewed by a single member or panel (similar to the process adopted in appeals before the Federal Court). Such a decision could be based on an assessment of several factors, including the public importance of the matter being reviewed. As part of this process, there is an opportunity for parties to have input as to which option is most appropriate. Finally, it is noted that options (i) and (ii) set out above are not mutually exclusively. One or both can be pursued.

Supporting parties with their matter

59. Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?	Legal representation for applicants should be permitted, noting the value of legal representation in the orderly and effective management of hearings. There should be no requirement to seek leave to appear with representation, as such an approach will only delay the progression of matters while issues of leave are resolved. In particular, the current restrictions in the migration jurisdiction on the role of legal representatives should be removed. The nature of migration matters, the complex legislation, policy and jurisprudence, and the short timeframes for members to write their reasons would benefit from legal representation. Further, consideration should be given for a mechanism whereby certain matters involving self-represented applicants are identified and referred for legal assistance. Whilst acknowledging the additional costs of what could resemble a 'duty lawyer' scheme, there are likely to be significant efficiencies realised if a representative is able to support an applicant through matters where there are underlying complexities. The right to representation is a vital part of fair merits review and in circumstances where applicants are unable to obtain representation, free legal representation could be made available. Facilitating advice and representation for vulnerable applicants is a critical aspect to ensuring the legitimacy of decisions within the new body. Given the narrow scope of judicial review, it is critical that applicants are able to present their matter in an informed way at the merits review stage. The availability of legal advisers to support

	individuals, through a combination of a publicly funded duty lawyer scheme and pro bono referral pathways, could be an essential element to the new body achieving its goals as a fair, just and accessible mechanism for reviewing government decisions. Whilst the new body should strive for consistency across practice areas, caution should be exercised before any proposal to extend the adversarial procedures currently used in the General Division of the AAT to areas such as the MRD. The LIV in particular has noted that Department contradictor representation in these matters could be counterproductive in MRD matters, as it could increase the length of hearings, place unfair burdens on self-represented applicants and subject them to potentially stressful cross-examination. The LIV assert that introducing a Departmental contradictor could also significantly increase the workload of lawyers who represent applicants which is what has occurred in the character cases of the General Division. Whilst there may be some cases where the appearance of a Departmental representative may be supported, this should not be introduced as process in all matters.
60. Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?	Legal representatives are already subject to strict professional and ethical obligations when engaged by a client, with serious consequences applicable where such obligations are breached. As such there is no need for a code of conduct for legal representatives. However, a code of conduct for non-legal representatives attending the tribunal may assist in setting expectations as to standards of behaviour and provide a reference point for members who may be forced to remind representatives of their responsibilities, and in some cases ask that they remove themselves. Stakeholders should be engaged on the development and drafting of any such code of conduct, similar to the consultation process for the President's Direction for the MRD.
61. What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided: a. by departments and agencies b. by the new body c. by other organisations.	The new administrative review body should ensure its interpreter service facilitates parties' full participation in migration, protection and character related matters and improves the user experience. The Law Council is aware of difficulties with interpreters from the panel service provider that the AAT currently utilises and is supportive of an open and transparent process for deciding the panel service providers that are used in the future. In addition, there should be a code of conduct in place for interpreters. The code of conduct should express a strong preference for interpreters to appear in-person rather than via video link. Where an interpreter appears via video link, they must have appropriate access to technology for this, such as a computer with webcam and not a mobile phone.

	Finally, to improve accessibility, the Tribunal's website, practice directions and other resources should be translated into languages frequently used by applicants.
62. How can the new body (or ancillary services) enhance access for vulnerable applicants?	The new review body should adopt procedures and processes which enhance accessibility for vulnerable applicants and persons with disabilities. As noted throughout this submission, this will be assisted through the new review body possessing broad case management, dispute resolution and procedural powers that can be applied flexibly on recognition of the need for accessibility, inclusion and the making of reasonable adjustments in the objects of the exercise of such powers. Accordingly, accessibility must remain in the legislated objects for the new body. Beyond that, given the administrative nature of these steps, they should be left to guidelines as to how best to be achieved. However, there should be reporting and oversight to ensure that the body is accessible in practice to a broad range of Australians, noting that accessibility issues exist across the population. In terms of encouraging accessibility, it is important that legal representation is made available for review applications, particularly in protection and character related matters. Having legal representation in those matters will enhance access for vulnerable applicants. The role of legal practitioners must be legislated so that the role played is consistent across matter types and how that is implemented in practice by members conducting matters. Allowing legal practitioners to intervene where appropriate to do so will assist vulnerable applicants going through a review process.
63. How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?	The Law Council supports the new federal administrative review body protecting the safety and interests of applicants who have experienced or are at risk of trauma or abuse. This can be achieved through mechanisms that allow matters to be heard in private, pseudonyms to be issued for cases, including published cases, and guidelines for members on how to deal with vulnerable applicants. There should be specific procedures regarding how to communicate with victim/survivors of family violence (who are often included in the same application as the perpetrator). It is likely that a number of refugee applicants will have a history of trauma and abuse, as will persons who have experienced family or institutional violence. Special support should be provided to such persons to ensure they are not retraumatised through the review process. The availability of psychological support, liaison officers and remote provision of evidence will assist in this regard. The Law Council encourages engagement with specialist services with experience dealing with traumatised people when developing these support networks.
64. Should the legislation place an obligation on the new body to	That would be a preferable approach, ideally through the objects of the new body. There are examples in the statutory objectives of the state and territory civil and administrative tribunals.

promote accessibility for all users?	One practical outcome of an obligation to promote accessibility is requiring the new body to consider how it can reach applicants outside of metropolitan areas. It is understood that the AAT had previously conducted circuit proceedings in regional centres which greatly improved accessibility to applicants in those areas. Whilst appreciating this is a resourcing challenge, the Law Council is supportive of similar measures to occur under the new body. Ongoing professional development for the membership of the new body in areas such as cultural competency will be essential in promoting accessibility, noting that a key aim for the tribunal should be to be sensitive and responsive to the diverse nature of applicants appearing before it.
65. How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?	In addition to accessibility considerations set out above, the new review body can ensure that a party with disability is further supported to participate in proceedings by: • ensuring there are processes that identify any accessibility needs of parties, and offering tailored reasonable adjustments to accommodate those needs; • providing concierge services to greet and assist persons with disability at registry buildings; • providing clear signage and electronic wayfinding technology within registries to guide participants to hearing rooms; • ensuring buildings provide accessible parking, bathroom facilities, access points and seating; • providing power sources for recharging electronic assistance devices and electric mobility devices; • providing variations in the manner in which evidence is taken or the location of a hearing if reasonably required; and • providing training for all staff to deal respectfully and inclusively with parties with disability, and to expect and facilitate requests for reasonable adjustments.
66. Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?	Concerns have previously been raised by the Law Council regarding the AAT's inability to appoint a litigation guardian for applicants who are unrepresented and appear to lack capacity to understand the nature of the proceedings, or who have legal representation but may be unable to provide competent instructions. These situations most often arise in the context of applicants who are seeking to bring an action against the NDIA. In contrast to other comparable Australian tribunals, such as NCAT[54] and VCAT[55], there is no specific power in the AAT Act for the AAT to appoint a litigation guardian for incapacitated applicants.

[54] *Guardianship Act 1987* (NSW) s 14.
[55] *Guardian and Administration Act 2019* (Vic) s 30.

	Consideration should be given to providing the new body with equivalent statutory powers to appoint a guardian for applicants who lack capacity. Such powers should ideally allow the tribunal to appoint a guardian, once it determines a party lacks capacity to conducting legal proceedings themselves, and: • the guardian can be any capable adult who has no interest in the matter; • the proceedings cannot be conducted except by a legal practitioner; • the guardian provides instructions to the legal practitioner after considering the applicant's wishes and the advice of the legal practitioner; and • the legal practitioner takes instructions from the guardian who accordingly stands as the client. Members should be trained in recognising and determining capacity issues. Wherever possible, however, supported decision-making principles should be front and centre of the new tribunal's design and delivery. For migration, protection and character related matters, litigation guardians should be available for underage applicants and applicants who do not have capacity to provide instructions.

Other matters

67. Do you have any other suggestions for the design and function of a new administrative review body?	*Awarding of costs* The Law Council has received support for consideration to be given to an enhanced ability for the new body to award a party its costs. The preference amongst contributors to this submission is that there are potential benefits with an asymmetrical costs power to award costs against the government party, in appropriate cases. Such a provision could mirror approaches adopted in certain state-based tribunals, including the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)[56] and the *South Australian Civil and Administrative Tribunal Act 2013* (SA)[57] where the default position is that parties bear their own costs. However there is a discretion to award a party costs where appropriate, and with reference to listed considerations. A power within the new body to award a successful applicant its costs could: • incentivise respondents to resolve, or limit the scope of, disputes;

[56] Section 109.
[57] Section 57.

- incentivise representation in matters with prospects of success where practitioners may work on contingent costs agreement rather than solely relying on the tribunal administering pro bono representation; and
- partly restore applicants to the position if the original decision had been made correctly, which would be consistent with principles underlying Appeal Costs Acts in respect of judicial decisions across Australia.

A discretion for costs in the new federal body could have a salutary effect and would improve the quality of decision-making within agencies and support compliance of government agencies with their obligations as model litigants.

However, the introduction of a discretionary costs power must be careful not to add undue complexity to proceedings, and must strive to be a simple, efficient and effective process for applicants to pursue.

Any cost provision within the new framework would need to be subject to other relevant legislative schemes which already allow for costs to be recovered.

As noted against question 30(c), the Law Council is supportive of application fees being refunded where an application is successful.

Legal assistance

As set out in the response to question 59, the new administrative review body must be able to ensure an applicant's right to representation, through a combination of a publicly funded duty lawyer scheme and pro bono referral pathways. This will be an essential element to the new body achieving its goals as a fair, just and accessible mechanism for reviewing government decisions.

Given the narrow scope of judicial review, it is critical that applicants are able to present their matter in an informed way at the merits review stage. Whilst aspects of a legal representation/advice scheme may be a resourcing issue to address at a later stage, the Law Council supports the inclusion in the governing legislation for a power within the tribunal to refer applicants for legal assistance when appropriate to do so.

This need is particularly acute for character cancellation matters within the current General Division where many applicants appear unrepresented due to a lack of funds for legal support or ability to find pro bono services. Pro bono services may be unable to represent applicants due to the length of most cases and the complexity of dealing with applicants in detention. The nature of an adversarial matter can also be traumatising for applicants particularly for those from refugee or humanitarian backgrounds.

The LIV have further pointed out that there is also a chronic shortage of free psychological or psychiatric assessments available for these matters, which are crucial in terms of attempting to show the risk of an applicant if

	their visa was re-instated. If such a system for character cases is to be maintained, there should be the ability to provide legal representation in all such matters and consideration of funding assessments. *Resourcing* Needless to say, the ability for the new body to effectively progress its objectives will be reliant on a sustained commitment from successive governments to adequately resource the new body. Whilst outside the scope of the current consultation, it is submitted that if the new tribunal is regarded as an apolitical body that improves decision-making and maintains public trust and confidence, the case for appropriate funding levels becomes easier to prosecute. *Direct access briefs* The Law Council understands that under the current online portal for filing AAT documents, barristers who are directly briefed by an applicant or respondent are unable to register for portal access. Provision should be made to allow barristers to register directly as occur in state-based registries such as NSW's Justice Link.