

1 October 2025

Senator Jana Stewart
Chair
Senate Standing Committee on Legal and Constitutional Affairs—Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
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By email: Senator.Stewart@aph.gov.au and legcon.sen@aph.gov.au

Dear Senator Stewart

Inquiry into the *Administrative Review Tribunal and Other Legislation Amendment Bill 2025*

1. The Law Council of Australia thanks the Senate Legal and Constitutional Affairs Committee (**Committee**) for the opportunity to make a submission in response to its inquiry into the *Administrative Review Tribunal and Other Legislation Amendment Bill 2025 (ART Amendment Bill)*. The Bill seeks to amend the *Administrative Review Tribunal Act 2024 (Cth) (ART Act)* and the *Migration Act 1958 (Cth)*.
2. The Law Council acknowledges that the Administrative Review Tribunal (**ART**) is experiencing high levels of applications for review, resulting in more than 110,000 cases on hand.¹ The Attorney-General's Second Reading Speech identified that "since early 2024, the [ART] has experienced a significant surge in applications for review of decisions to refuse student visas".²
3. It is important to ensure the efficiency of the ART's operations in these circumstances. Inefficiency impacts all users of the ART. The quick resolution of matters with as little formality and expense as a proper consideration of the relevant matter permits is a key objective of the ART.³ The Explanatory Memorandum to the ART Amendment Bill identifies that its proposed amendments are intended to support that objective.⁴
4. However, efficiency should not undermine the ART's various other objectives, including that it be fair and just; that it be accessible and responsive to the diverse needs of parties to proceedings; that it improves the transparency and quality of

¹ Administrative Review Tribunal, *Corporate Plan 2025–26*, 1 <https://www.art.gov.au/sites/default/files/2025-08/ART_Corporate_Plan_2025-26.pdf>.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2025, 11 (Michelle Rowland, Attorney-General).
<<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2F8849%2F0020%22>>

³ *Administrative Review Tribunal Act 2024 (Cth)*, s 9(b).

⁴ Explanatory Memorandum, *Administrative Review Tribunal and Other Legislation Amendment Bill 2025* 1 [5], 2 [6].

government decision-making; and that it promotes public trust and confidence in its functions.⁵

5. The Law Council is concerned by the ART Amendment Bill's removal of the opportunity for an oral hearing for certain groups of applicants. In particular, the proposed blanket requirement to review certain migration matters on the papers limits the ART's flexibility in matters where an oral hearing may be necessary to accord procedural fairness and presents a more efficient option than reliance on written materials alone. The proposed requirement may particularly disadvantage unrepresented applicants and those from diverse backgrounds, who may struggle to present their case(s) in a written form, without affording the ART appropriate discretion to hold an oral hearing for applicants where the circumstances require it.
6. The Law Council is further concerned that the proposed amendments are being introduced only one year into the ART's operation, without adequate public consultation or explanation as to why the ART's demand-driven, sustainable funding model⁶ does not appear to be working as intended. The proposed amendments also tend to retreat from the user-focused design and simpler and more consistent processes originally contemplated for the range of migration and other proceedings before the ART. Among other reasons, such reforms were introduced in recognition that the now-abolished Independent Assessment Authority (IAA), which conducted its reviews solely on the papers, was not producing fair outcomes.⁷ It should also be noted that, while the former Administrative Appeals Tribunal (AAT) was permitted to make decisions on the papers, this still required the consent of the parties to the proceeding under section 34J of the *Administrative Appeals Tribunal Act 1975* (Cth).
7. This submission addresses the ART Amendment Bill's proposals for the ART Act and Migration Act in turn.

Amendments to the ART Act

8. The ART at present is generally required to hold an oral hearing. That requirement is subject to the exceptions identified in section 106 of the ART Act. The ART may reach a decision on review without conducting an oral hearing if it appears that the issues can be adequately determined in the absence of the parties, *and* one of the following circumstances exist:
 - (a) the parties consent (in multi-party reviews);
 - (b) the decision is wholly in favour of the applicant or the applicant requests a decision be made without a hearing (in single party reviews);
 - (c) a party fails to comply with the ART Act or a Tribunal order; or
 - (d) a party fails to appear at a Tribunal case event.

⁵ *Administrative Review Tribunal Act 2024* (Cth), ss 9(a), (c)-(e).

⁶ Mark Dreyfus MP, 'First day of the Administrative Review Tribunal' (Media Release, 14 October 2024) <<https://www.markdreyfus.com/media/media-releases/first-day-of-the-administrative-review-tribunal-mark-dreyfus-kc-mp/>>.

⁷ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Performance and Integrity of Australia's Administrative Review System* (7 December 2021) [65] <<https://lawcouncil.au/publicassets/b3de0516-505d-ec11-9445-005056be13b5/4137%20-%20Inquiry%20into%20administrative%20review%20system.pdf>>.

9. The Explanatory Memorandum to the ART Amendment Bill states as follows in relation to the proposed amendments to section 106:

*The new discretion would give the Tribunal additional flexibility in relation to the procedures to be followed in a proceeding. Exercise of the new discretion would be conditioned by appropriate safeguards, to ensure that it would be able to be exercised compatibly with the Tribunal's existing obligation to afford parties an opportunity to present their case. This would support the objective of the Tribunal resolving matters as quickly and with as little formality as a proper consideration of the matter permits, especially given the time and resources required to conduct a substantive hearing.*⁸

10. The new subsection 106(7) would provide that the ART must give the parties to the proceeding a reasonable opportunity to make submissions in relation to the Tribunal making its decision without holding a hearing for the proceeding, and that the ART must take into account any submissions received. The Law Council considers that to be an important safeguard so as not to cause disadvantage, unnecessary cost or inefficiency where the ART decides to make a decision on the papers.

Amendments to the Migration Act

11. The ART Amendment Bill would amend the Migration Act to require the ART to review certain migration matters on the papers, without conducting an oral hearing. The Explanatory Memorandum explains that the amendment would “facilitate an efficient and proportionate method of review, while ensuring that genuine applicants are given a meaningful opportunity to present their case to the Tribunal in writing”.⁹
12. Some applications can be resolved on the papers in a satisfactory manner which does not result in a denial of procedural fairness, including in cases that do not address discretionary criteria. However, requiring the ART to decide all student visa refusals and other specified visa matters on the papers affords *no* flexibility in approach to provide an oral hearing where individual circumstances require, including to provide procedural fairness and promote accessibility.
13. To that extent, the ART Amendment Bill represents a disproportionate response. It addresses inefficiency in a way that unduly restricts the ART and may disadvantage applicants before it. Other more flexible and proportionate responses to promote efficiency before taking such a restrictive measure could include:
- (a) providing the ART with discretion to review matters on the papers with individual safeguards, similar to that in the proposed new subsections 106(6) and (7) of the ART Act;
 - (b) amending proposed new subsection 367C(3) of the Migration Act to permit a Member to hold an oral hearing in circumstances where, after reviewing the written materials, the Member takes the view that an oral hearing is required to engage meaningfully with the application;

⁸ Explanatory Memorandum, *Administrative Review Tribunal and Other Legislation Amendment Bill 2025*, 1 [5].

⁹ *Ibid* 2 [6].

- (c) improvements to the ART’s internal processes, supported by adequate resourcing, or to the Department of Home Affairs’ visa processes (including consideration of what is driving an increase in refusal rates, and whether such an increase is only projected to be temporary) to reduce the high volume of review applications subsequently being made to the Tribunal; and/or
 - (d) effectively using triage following an application to identify cases that are more appropriately dealt with by an oral hearing.
14. The Law Council identifies the following limitations to the ART Amendment Bill’s proposals in respect of student visa refusal decisions and decisions relating to prescribed temporary visas.

Student visa refusal decisions

15. In relation to student visa refusal decisions, the making of a decision on the papers may be appropriate where an objective criterion for a student visa has not been met, such as the lack of a valid Confirmation of Enrolment,¹⁰ a failure to provide an English test at time of application,¹¹ or a failure to satisfy prescribed English standards.¹² Dismissal of such an application is already permitted under paragraph 101(1)(b) of the ART Act, on the basis that it “has no reasonable prospects of success”. However, where more subjective considerations (such as the ‘Genuine Student Test’)¹³ are involved, an oral hearing may be the only procedurally fair way to resolve an application for review, and it may be vital in any case where the credibility of the applicant is in issue.
16. In considering a decision to refuse a student visa on the basis that the student is not a “genuine student”, the ART is required to comply with Ministerial Direction 108.¹⁴ Members of the legal profession are concerned that applicants, particularly those without legal representation or who have difficulty with English, may struggle to understand the multiple considerations to be addressed under the Direction. These can be complex and involve matters of judgement which is best exercised following an oral hearing.
17. Another difficulty which may arise for applicants and the ART is when the Member takes a matter into account not expressly addressed in the applicant’s written submissions. That could be avoided if the Member could raise the issue directly with the applicant at an oral hearing. While the ART Amendment Bill would allow the Member to request further written submissions, this would defeat the efficient review processes the amendments are intended to address.
18. Relatedly, in an oral hearing, it is common for matters that do not at first glance appear to be directly relevant to arise from questioning, and have an impact on the decision.

¹⁰ *Migration Regulations 1994* (Cth), Schedule 2, clause 500.211(a).

¹¹ *Migration Regulations 1994* (Cth), Schedule 2, clause 500.213.

¹² LIN 25/016, *Migration (Specification of Language Tests, Test Scores and Passports) Instrument 2025; Migration (English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Instrument (LIN 24/022) 2024*.

¹³ *Migration Regulations 1994* (Cth), Schedule 2, clause 500.212.

¹⁴ Minister for Home Affairs (Cth), *Direction No 108: Assessing the Genuine Temporary Entrant Criterion for Student Visa and Student Guardian Visa Applications* (21 March 2024) <<https://immi.homeaffairs.gov.au/Visa-subsite/files/direction-no-108.pdf>>.

19. Another benefit of an oral hearing is when the decision involves evidence of sensitive matters or nuance. An example is the recent matter of 2318630 (*Migration*) [2025] ARTA 517. While that matter concerned the cancellation as opposed to refusal of a student visa, it illustrates why an oral hearing may better enable the Member to reach the correct or preferable decision. In concluding that the decision to cancel the applicant's visa should be set aside in light of her circumstances as a victim of sexual assault, General Member T Quinn reflected on the detailed evidence given at hearing and made the following comments (at [39]):

The Tribunal deeply empathises with the applicant in this regard and found her evidence about these events and what she experienced in the aftermath was authentic and reliable and consistent with well-known literature on the impact of sexual violence on victims.

20. An oral hearing may similarly assist for subjective aspects of student visa refusal matters. For example, in *Oodun (Migration)* [2025] ARTA 1896 the applicant's initial student visa application was refused on the basis of a failure to meet clause 500.212 of Schedule 2 to the *Migration Regulations 1994* (Cth) (relating to whether the applicant was a genuine applicant for entry and stay as a student). The refusal was affirmed by the former Administrative Appeals Tribunal, but remitted to the ART on judicial review.
21. Following an oral hearing at which the applicant gave evidence and presented her arguments, General Member F Russo found as follows at [54] and [56]:

The applicant gave evidence that she has complied with the conditions of her visas to Australia, and I note that the applicant spoke frankly about working additional hours during the COVID-19 pandemic when her visa conditions allowed her to do so ... The applicant gave evidence that given her husband's work as a sheet metal worker, it would have been open for her and her family to obtain other visa options as a way out of the issues created by the refusal of the Student visa. The applicant gave evidence that she and her husband have no intention to remain in Australia permanently, which is why they have made no attempts to make such applications. I consider this weighs in favour of the applicant being a genuine temporary entrant.

...

Overall, while the length of the applicant's stay in Australia raises concerns, a closer analysis reveals that the applicant's progress in completing her chosen courses was impeded by a number of factors including college administration requirements and a lengthy wait as part of review processes. The Tribunal considers the applicant has demonstrated that she remains motivated to study and that her primary purpose for remaining in Australia is to obtain qualifications which will be of value to her future. While the Tribunal has concerns that the presence of the applicant's eldest son, who is an Australian citizen, may act as an incentive for the applicant and her family unit to remain in Australia, the Tribunal accepts the applicant's explanation for why she did not wish to deny her son the right to obtain Australian citizenship, as well as of her family's stated intentions to return to Mauritius. Overall, the Tribunal finds

that the factors set out in Direction No 108 weigh in favour of an assessment that the applicant remains a genuine temporary entrant.

22. It is clear from this decision that the oral hearing was important for the ART to consider subjective factors informing its decision. Oral hearings are vital for the ART to discern the individual elements of an applicant's case, especially when subjective criteria are involved, or the credibility of the applicant is a crucial issue.
23. To give another recent example, in *Soronzonbold (Migration)* [2025] ARTA 895 (27 May 2025), the applicant had also been refused a student visa, in this case because the delegate was not satisfied that the applicant intended genuinely to stay temporarily in Australia and therefore she did not satisfy clause 500.212 of Schedule 2 to the Migration Regulations. The AAT remitted the application to the Department of Home Affairs with a direction that the applicant satisfied the requirements of clause 500.212, and made various references to evidence provided at the oral hearing as the basis for its decision:

Having regard to the applicant's circumstances in her home country and having regard to the supporting documents provided by the applicant and her oral evidence, there is no evidence that has been presented to the Tribunal which indicate that her economic circumstances would present as a significant incentive for the applicant not to return to Mongolia ... In giving oral evidence at the hearing, the applicant spoke genuinely as to why it is important for her to gain her qualifications as soon as possible in Australia so that she can return to Mongolia to be with her family. The Tribunal also accepts as credible the applicant's oral evidence at the hearing that she is in contact with her parents and close family members regularly while she is studying in Australia.

The Tribunal is satisfied from the applicant's oral evidence at the hearing that the applicant is fully reliant financially on her parents while she is studying in Australia but that she needs their financial and emotional support back in Mongolia to help raise her child while she achieves her business goals there. ...

Having regard to the applicant's potential circumstances in Australia and having regard to the supporting documents and oral evidence provided by the applicant, there is no evidence that has been presented to the Tribunal which indicate that any potential circumstances in Australia would present as a significant incentive for the applicant not to return to Mongolia. The Tribunal is satisfied from her written evidence and oral evidence at the hearing that it is important for her to return to Mongolia to have her infant daughter (who was born in Australia) raised in Mongolia with the close support of her parents and close family members. ... The Tribunal accepts her oral evidence at the hearing that she is wanting her daughter to grow up, culturally, in Mongolia and that she needs the close support of her parents who are financially supporting her in Australia. ...

The applicant has stated in oral evidence at the hearing that she will return to Mongolia on completion of her course, namely INUS Customised English Program (ICEP) Certificate of English—Pre-Intermediate, Intermediate, Upper Intermediate and Advanced (which finishes on or about 24 April 2026). No evidence has been presented that she will need

*to stay further in Australia to study for a future career aim following completion of this course and should she choose to do so and present a further application for a student visa or enrolment in a further course this would be of concern.*¹⁵

24. For July 2025, the remittal rate from the ART for student visa refusals was 48%.¹⁶ For the year ending 30 June 2025, it was also 48%.¹⁷ These figures, based as they are on decisions by the Department of Home Affairs on the papers, clearly point to the need for oral hearings to identify where a delegate's decision needs to be reconsidered. Removing the opportunity for an oral hearing may lead to a lower remittal rate and in turn, a potential increase in judicial review applications being filed, with implications for federal courts' caseload.
25. A key design feature of the ART is its ability to identify systemic issues in administrative decision-making.¹⁸ Such issues may be more difficult to detect for decisions made on the papers, and the quality of Members' decision-making may be impacted where they are unable to call hearings to test evidence or to clarify an issue. For example, this process may result in repetitive decision-making without the opportunity to hold hearings to examine evidence or clarify matters. The IAA's inability to conduct oral hearings for "fast track" applicants, resulting in most decisions being made on the papers, was one of the limitations that led to "numerous cases challenging whether the IAA [was] in fact conducting a full and independent merits review" of those matters.¹⁹

Decisions relating to prescribed temporary visas

26. The Law Council is concerned about the potential scope of temporary visas that may be prescribed by regulation for the purposes of new paragraph 367C(2)(b) for applicants captured by it.
27. The Law Council is further concerned that decisions that remove the ability of whole classes of individuals to have a hearing should, if included in legislation at all, be determined by Parliament under primary legislation. These decisions go to the core of how the Tribunal operates for potentially wide groups of people, and relate to its overall design, as determined by Parliament only a year ago. Such decisions should not be left to delegated legislation.
28. Although the exclusion of reviewable protection decisions from the scope of this prescription is appropriate, given those matters can be more complex and involve vulnerable applicants, there may be other vulnerable applicants for visas prescribed by the regulations. For example, these could include:
 - (a) Provisional partner visa (Subclass 309 and 820) applicants and dependents with poor English skills who may be reliant on their sponsor for temporary (and later permanent) residence, or who may not have been involved in the visa process to begin with;

¹⁵ *Soronzonbold (Migration)* [2025] ARTA 895 (27 May 2025), [23]-[24], [26], [31].

¹⁶ <https://www.art.gov.au/sites/default/files/2025-09/Migration-Detailed-Caseload-Statistics-2025-26.pdf>

¹⁷ https://www.art.gov.au/sites/default/files/2024-12/ART_Migration_Caseload_2024-25.pdf

¹⁸ See, eg, *Administrative Review Tribunal Act 2024* (Cth) ss 193(i), 197(5)(f), 236(4)(e), 249(1)(c), 294B.

¹⁹ Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia', (2022) 45(3) *UNSW Law Journal* 1085, 1091-2.

- (b) Employer-sponsored visa applicants, where evidence of the nature of the business or clarification issues about financial information may be easier to convey orally;
 - (c) Visitor visa applicants, where families can better explain why a relative needs to visit Australia through an oral hearing; and
29. Bridging visas, where, if a refusal or cancellation decision is affirmed, this may result in the applicant being detained under s 189 of the Migration Act.
30. The ART Amendment Bill would not give the Member discretion to hold an oral hearing in such cases as appropriate. An oral hearing would provide further support for the exploration of more flexible alternatives, including those identified at paragraph 13 of this submission.
31. As mentioned earlier, consideration is needed about how to improve government processes that are presently contributing to high volumes of visa decisions for review by the ART. Members of the legal profession have identified that, in many cases, specific issues could have been resolved more efficiently had the Department of Home Affairs issued requests for further information under section 56 of the Migration Act instead of the application being refused and a review application being made to the Tribunal. Given their procedural nature, these issues could be adequately addressed on the papers, potentially allowing Members to remit such matters if sufficient evidence is presented. Examples include:
- (a) Subclass 186 and 482 visa nominations, where the employment contract having the signature of both sides appearing on the contract has not been provided with the application;
 - (b) Visa refusals on health check grounds, where the health check was not appropriately linked to the visa (for instance, 485 and 482 visa refusals based on a My Health declaration that the case officer could not adequately review);
 - (c) Subclass 482 and 500 visa refusals due to failure to upload English test result evidence; and
 - (d) Subclass 186 and 482 visa refusals due to missing evidence of prerequisite work experience that was not included in the initial application.

Recommendations

- The Law Council supports the discretion and safeguards in proposed new section 106(6) and (7) of the ART Act.
- The Law Council does not support the proposed amendments to the Migration Act. In particular:
 - The Law Council does not support the blanket requirement in proposed new section 367C of the Migration Act for student visa refusal decisions, and recommends that more flexible and proportionate options be raised for full consultation via a public discussion paper; and
 - The Law Council does not support the prescription of temporary visas by regulation for the purposes of new paragraph 367C(2)(b).

Contact

32. Thank you once again for the opportunity to make a submission on the Bill.

33. If the Law Council can be of any further assistance, please contact [REDACTED]

Yours sincerely



Juliana Warner
President