Law Council
OF AUSTRALIA

# Administrative and Judicial Review Legislation Amendment Bill 2026

## Senate Legal and Constitutional Affairs Legislation Committee

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# Introduction

1. The Law Council of Australia thanks the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) for the opportunity to provide a submission to its inquiry into the *Administrative and Judicial Review Legislation Amendment Bill 2026* (**AJRLA Bill**).

2. At the outset, the Law Council acknowledges that the Administrative Review Tribunal (**ART**) is experiencing high levels of applications for review, and that measures to ensure its efficiency are important in these circumstances. The Law Council appreciates that a range of practices need to be adopted to assist the ART to manage its continuing and large number of pending applications. To this end, the Law Council supports proposed measures in the Bill to:

   - assign the President of the ART to every jurisdictional area;
   - revise the means by which members of the ART are reappointed;
   - provide for the classification of ART members to be changed from ongoing to sessional and vice versa;
   - correct errors in orders of registrars (provided that its use does not extend to substantive errors that may require judicial review);
   - clarify that parties can apply for leave to examine or cross-examine witnesses (provided there are safeguards to ensure applicants are able to exercise this right effectively); and
   - change the method of notifying the Secretary of the Department of Home Affairs (**DHA**) of dismissal decisions.

3. However, the AJRLA Bill also continues an ongoing trend of reforms to the ART with concerning implications for procedural fairness and access to justice.[1] This is particularly so for vulnerable and unrepresented migration applicants, in a jurisdiction that is already restrained by strict time limits, technical procedural requirements, significant demand for migration assistance services, and a high number of self-represented applicants.

4. In addition, only a short timeframe has been provided for consideration of the Bill's proposed measures. The extent to which consultation was undertaken, and with whom, is not identified in its Explanatory Memorandum (**EM**).

5. The Law Council has become increasingly concerned by rushed legislative reform processes that have lacked adequate transparent public scrutiny. The Law Council's 2025 Call to Parties observed that good law-making processes underpin the rule of law and democracy in this country and should not be taken for granted.[2] That is why, in July 2025, the Law Council published a Best Practice Legislative Development Checklist (**Checklist**) to assist with evaluation of law-making processes.[3]

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1 See for example Law Council of Australia, Submission No 5 to the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, *Administrative Review and Other Legislation Amendment Bill 2025* (1 October 2025).

2 Law Council of Australia, '2025 Federal Election Call to Parties' (Policy Statement, March 2025), 4.

3 Law Council of Australia, 'Best Practice Legislative Development Checklist' (July 2025).

6. The AJRLA Bill also follows other legislative amendments that have been introduced less than two years into the ART's operation,[4] which the Law Council has previously observed were "without adequate public consultation or explanation as to why the ART's demand-driven, sustainable funding model does not appear to be working as intended".[5]

7. Consistent with the Checklist, the Law Council recommends further consultation be undertaken for the AJRLA Bill with adequate time provided for public consideration of its measures, their proposed rationale and their consequences. This would also help ensure that the measures promote the ART's ability to achieve its objectives, including to provide a mechanism of review that is fair, just, accessible and responsive to diverse needs; that improves the transparency and quality of government decision-making; and that promotes public trust and confidence in its functions.[6]

8. In the limited time available, the Law Council has identified several issues for the Committee's attention, as set out in this submission. The Law Council's principal concerns with the Bill include:

   - the expansion of powers for registrars to make orders that involve merits review assessments, such as when an application for review has no reasonable prospects of success;
   - provisions to the effect that, when the ART gives an oral decision, written statements of reasons for decisions will only be provided at the request of a party to the application—especially in the migration jurisdiction;
   - removal of the ART's capacity to reconsider its own decisions; and
   - the lack of detail in primary legislation about the identity verification processes in Part 12 of the AJRLA Bill.

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4 See also, for example, the *Administrative Review Tribunal and Other Legislation Amendment Act 2026* (Cth).

5 Law Council of Australia, Submission No 5 to the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, *Administrative Review and Other Legislation Amendment Bill 2025* (1 October 2025) 2.

6 *Administrative Review Tribunal Act 2025* (Cth) s 9.

# Comments

## Part 1—Authorisations for registrars

9. At present, section 285 of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) and section 18 of the *Administrative Review Tribunal Rules 2024* (**ART Rules**) together enable the President of the ART to authorise a registrar to dismiss an application for review under specified provisions of the ART Act.

10. Part 1 of Schedule 1 to the AJRLA Bill would amend subsection 285(1) of the ART Act to allow the President to authorise registrars to exercise the following additional powers:

    - to dismiss an application if it has no reasonable prospects of success;[7]
    - to make orders requiring an applicant to obtain the leave of the ART to make subsequent applications of a specified kind;[8] and
    - to reinstate a dismissed application, if the initial dismissal was made under a power that a registrar is authorised to exercise.[9]

11. The Law Council recognises that delegating powers and functions to registrars in specific circumstances may be a cost-effective solution to address resource constraints and increase efficiency. However, the Law Council is concerned that the proposed amendments place significant decision-making powers in the hands of registrars that are more appropriately reserved for ART members, as outlined below. The Law Council also notes in this respect that the ART has had a considerable increase in appointments of members over the last two years.[10]

### *Dismissal on the basis of "no reasonable prospects of success"*

12. In the Law Council's view, authorising registrars to dismiss an application on the basis that it has no reasonable prospects of success represents a significant increase in their powers and responsibilities.

13. It is a serious matter to dismiss a claim without proceeding to its merits. A decision that involves consideration as to potentially contested facts or issues of law is not one to be made lightly. Such a decision is a significant step that should only be exercised in exceptional circumstances, and only then on the basis of care, consideration and expertise, particularly for vulnerable application cohorts.

14. Delegating such a power to registrars, whose appointment is not subject to the same stringent merits-based appointment requirements as members, and who may or may not be legally trained, creates the following additional risks for applicants:

    - Many self-represented applicants, and in particular protection visa applicants, struggle to identify or articulate legal issues in writing. Consequently, matters involving vulnerable applicants could be dismissed at an early stage before the

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7 Proposed Item 19A in the table in subsection 285(1) of the ART Act.
8 Proposed Item 19B in the table in subsection 285(1) of the ART Act.
9 Proposed Item 19C in the table in subsection 285(1) of the ART Act.
10 See for example the Hon Michelle Rowland MP, 'Albanese Government Announces New Appointments to the Administrative Review Tribunal' (Media release, 1 May 2026).

opportunity for a hearing because they are poorly presented rather than because they genuinely lack merit. This is particularly risky for many self-represented applicants as they may not be aware that they may apply for reinstatement of the application within the 28-day timeframe of receiving the notice of dismissal. It is also of particular concern in respect of protection applications, due to the consequences that can flow from dismissal of such applications (for example, such applicants may be at risk of persecution or significant harm, including torture, cruel, inhuman or degrading treatment or punishment, or even death if returned to another country).

- Dismissing a matter before a final hearing can impact on an applicant's ability to seek legal advice, as Community Legal Centres (**CLCs**) and pro bono providers typically only assist when a hearing is scheduled. This may have subsequent flow-on effects for applicants who are unable to receive legal advice. For example, in the migration jurisdiction, such applicants may be unaware that they can request Ministerial Intervention under section 351 of the *Migration Act 1958* (Cth).

- Dismissing a matter may also impact the ART's ability to recommend referral for consideration of Ministerial intervention under section 351 of the Migration Act.

15. The possibility of reinstatement under proposed item 19C may not be a sufficient mechanism to prevent injustice occurring. An application for reinstatement would involve further time, requires leave, and may incur additional expenses for applicants. As a result, applicants are likely to be inhibited from taking this further step.

16. Allowing applications to be dismissed by registrars may also generate an increase in applications for judicial review. That is, applicants who consider that a registrar has incorrectly exercised a summary dismissal power may seek review of that decision in the Federal Circuit and Family Court of Australia (**FCFCOA**), alleging jurisdictional error or a denial of procedural fairness. That has the potential to shift, rather than reduce, the overall caseload within the system and unduly tie up the resources of the FCFCOA. In this respect, there have also been instances where decisions by ART members to dismiss an application on this basis have also been set aside on judicial review.[11] Again, this power should be exercised with caution.

17. The EM states at paragraph 19 that "it is expected that this power would only be exercised by registrars where an application has no reasonable prospects of success based on clear objective criteria, such that an application is bound to fail". However, the Bill itself does not contain any such criteria to guide the registrar's exercise of discretion. While the President's ability to limit the scope of the registrar's power this way may present a safeguard, there needs to be further guidance on what the objective criteria mean to be effective.

[11] See for example *Burns v Comcare* [2025] FCA 1327.

18. To mitigate risk of inappropriate dismissals, additional safeguards may include:

- a requirement that only registrars who have legal qualifications and sufficient post-admission experience may exercise the dismissal powers;
- a qualification requiring that a registrar be required to consult with a Senior Member or the relevant Jurisdictional Area Leader where uncertain about a finding, before committing themselves to that finding;
- ensuring that, if an application is dismissed under this power, this will not prevent an applicant being able to make a request to the Minister under section 351 of the Migration Act, or for the ART to continue to be able to refer a matter for consideration to the Minister under section 351; and
- an express requirement that, before an application is dismissed, the applicant must be given notice that the Registrar has formed a view that it may be appropriate to dismiss an application, and the applicant be provided the opportunity to be heard specifically on that question. A failure to give notice or to hear the applicant should be expressed as rendering any dismissal to be of no effect.

### *Power to make orders preventing further applications without leave*

19. Extending to registrars the power to make orders preventing certain further applications without leave—particularly in cases where a registrar has dismissed an application for having no prospects of success—will generate unnecessary additional workload for the ART and for applicants. Further, it is not clear whether, if leave is granted for an applicant to reapply, that would result in the applicant being required to pay a new application fee. This may have repercussions for applicants with Bridging Visas, or with applications for Bridging Visas, depending on the length of time for that process (see next section).

20. Self-represented litigants are unlikely to understand an order made pursuant to proposed subsection 101(2) and would face particular difficulty in seeking leave of the ART to make a subsequent application. The EM suggests that in practice registrars would only make an order where they have dismissed a matter for no reasonable prospects of success.[12] However, this may also disproportionately impact vulnerable and self-represented applicants who failed to include, for example, specific evidence of compliance with a visa condition in their application for review.

21. Subsection 101(2) of the ART Act also permits an application by a party to the proceeding to request that the ART makes an order of this kind. In the migration jurisdiction, the DHA is the other party to the proceeding[13] and the party that made the decision under review. It is potentially unfair to allow the DHA to request the ART to make an order of this kind, and the Committee should consider an amendment to subsection 101(2) of the ART Act, taking into account the observations above.

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[12] Explanatory Memorandum, *Administrative and Judicial Review Legislation Amendment Bill 2026 (Cth)* (2 July 2026), [63].

[13] Although the Minister for Home Affairs is usually only represented at the ART in reviews under section 500 of the Migration Act, which concerns character-related migration applications. See Administrative Review Tribunal, *Administrative Review Tribunal (Migration, Protection and Character) Practice Direction 2026* (27 January 2026), [4.2]–[4.5].

22. Further, the amendments proposed in this Part could have particular implications for applicants with Bridging Visas. For example, if an applicant for ART review in a migration matter holds a Bridging Visa A (**BVA**) and their review is dismissed as having no prospects of success, the BVA will cease 35 days after that decision is made.[14] It is not clear whether the applicant's BVA would remain in effect if they applied to reinstate the application. If not, that would significantly impact the applicant's work rights, lawfulness and status.

### *A power to remit applications*

23. In light of the above concerns, consideration could be given to the delegation of powers that may be exercised in favour of applicants where appropriate. For example, registrars could be given the power to remit applications for redetermination where it is apparent that the original decision is plainly an administrative oversight, or where the decision-maker failed to consider material that was available or could readily have been obtained. Such remittal powers could be used in, or limited to, the following instances:

    - where a student visa or Temporary Graduate (subclass 485) visa application was refused because the Department overlooked an English language test result that had been validly submitted before the decision;
    - where an applicant who inadvertently omitted to attach an English language test result to the visa application, but provided the valid test result with the application for review, demonstrating that the substantive criterion had been met at the relevant time; or
    - cases where the refusal is based on an administrative error or a failure to consider evidence that was available to DHA.

24. Providing registrars with a limited, or tightly confined, power to remit such matters to the primary decision-maker would be consistent with the objective of resolving cases in a manner that is fair, just, economical, informal and quick. It would also reduce the ART's workload by avoiding the need for full merits review where the matter could be appropriately reconsidered by the primary decision-maker.

## Part 2—Period for providing reasons and documents

25. Currently, sections 23 and 25 of the ART Act require that certain documents in the possession of an agency be provided to the ART within 28 days of the agency being notified of the application for review, or of the document coming into the possession or control of the decision-maker during the review. This timeframe may be extended or shortened by the ART.[15]

26. Proposed new subsections 23(2), 25(2) and 25(3) of the ART Act would exclude the period between 24 December and 14 January from the calculation of time in which a decision-maker must provide certain documents to the ART. These new provisions would have no effect on the existing subsection 28(4) of the ART Act, which permits the ART to make an order shortening the period within which the decision-maker

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[14] Subparagraph 010.511(1)(b)(iii) of Schedule 2 to the Migration Regulations.
[15] See *Administrative Review Tribunal Act 2024* (Cth) subsections 28(4), 28(6).

must provide such documents if it appears that a party could suffer hardship otherwise.

27. The Law Council considers that the proposed allowances should also apply to review applicants. As recognised in the EM, many law firms are closed or working at a reduced capacity during this period.[16] That has effects on review applicants seeking access to legal advice and applies more broadly across the legal profession. It has also been raised directly with the ART each year.

28. For example, many CLCs that specialise in migration law also have a shutdown period over the same time. This creates significant barriers for applicants who have strict statutory timeframes within which to respond, especially where, in the experience of practitioners, applicants are often notified of visa refusals immediately before the Christmas period.

29. Finally, the Law Council notes that proposed subsection 25(3) would specifically provide that the 24 December to 14 January "shut down period" would not apply in relation to the review of a decision of a kind mentioned in subsection 500(6L) of the Migration Act.[17] The Law Council has previously argued that subsection 500(6L) should be reconsidered,[18] and not applying the new subsection 25(3) to this provision would only exacerbate its unfairness.

## Part 3—Correcting errors in orders of registrars

30. Part 3 of Schedule 1 to the AJRLA Bill would amend section 281 of the ART Act to enable authorised persons to correct obvious errors in a decision issued by a registrar, regardless of whether the registrar who made the original decision is available. Exercise of the power would still require the approval of the President.

31. The Law Council has previously submitted that there should be a flexible approach to correcting errors, including where processes might diverge between jurisdictional areas.[19] The Law Council therefore supports the amendments proposed by Part 3 of Schedule 1 to the AJRLA Bill, provided that this new power's use is restricted to correction of obvious errors such as typographical errors or a statement that a decision has been affirmed when it has in fact been set aside, for example. It should not be used to correct substantive errors that may require judicial review.

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16 Explanatory Memorandum, *Administrative and Judicial Review Legislation Amendment Bill 2026 (Cth)* (2 July 2026) [75].

17 Schedule 1, Part 2, Clause 8 of the AJRLA Bill.

18 Law Council of Australia, Submission to Administrative Review Council, *Migration Inquiry* (27 February 2026), [86], [91], [122].

19 Law Council of Australia, Submission to the Attorney-General's Department, *Administrative Review Reform Issues Paper* (12 May 2023), Table Item 30(a).

## Part 8—Approved forms for Migration Act reviews

32. Part 8 of the AJRLA Bill seeks to amend subsection 347(2) of the Migration Act to require that, as part of properly making an application for review of a reviewable migration decision or a reviewable protection decision, an applicant must make the application in the approved form. The EM states that the ART has reported that "in practice, applicants regularly put forward applications that lack sufficient information and without paying the prescribed fee", and as a result, "resources are diverted from the timely registering and progressing of applications".[20]

33. This proposed amendment may clarify the requirements to make a "complete" application for ART review. It should also assist to mitigate uncertainty that has arisen out of the High Court's Decision in *Miller v Minister for Immigration, Citizenship and Multicultural Affairs*,[21] regarding the requirements to make a valid review application.

34. However, an application for a visa is not always decided based solely on the information in the application form. Many cases will be decided based on supplementary information, and so whether it is provided in a mandatory form or by other means may not significantly affect the efficiency of decision-making.

35. Accessibility—which is among the ART's statutory objectives[22]—must also be taken into account, including for applicants with poor literacy or difficulty with English, applicants with disabilities, self-represented applicants with limited understanding of the ART's processes, or those for whom documents are not readily available (or available at all). Introducing a new and mandatory form could be regarded as imposing a greater formality for applicants, which would also be contrary to the ART's statutory objectives.[23]

36. In the Law Council's view, any mandatory form, or a guide to such a form, should be available in different languages, particularly the languages of applicants commonly seeking review of migration or protection decisions. Any amendment mandating a review application form should also include a statutory discretion to prevent unfairness, such as giving the ART the power to waive use of the form in, for example, compelling and compassionate circumstances. Introducing a new form without proper administration and guidance may otherwise constitute an unjustifiable additional barrier for disadvantaged and self-represented applicants to access the review process and to receive a fair hearing. It is also unclear from the EM as to the extent of this issue. For example, no statistics have been provided to indicate such a change is warranted.

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[20] Explanatory Memorandum, *Administrative and Judicial Review Legislation Amendment Bill 2026 (Cth)* (2 July 2026), [164].

[21] [2024] HCA 13. This case found that, despite the wording of paragraph 29(1)(c) of the former *Administrative Appeals Tribunal Act 1975*, failure to provide a statement of reasons for the application in an application to the Administrative Appeals Tribunal did not render the review application invalid.

[22] *Administrative Review Tribunal Act 2024* (Cth) s 9(c).

[23] Ibid s 9(b).

37. Finally, substantial compliance with such a form should be sufficient, conforming to the operation of section 25C of the *Acts Interpretation Act 1901* (Cth). The Law Council respectfully agrees with the statement of Buchanan J in *MZAIC v Minister for Immigration and Border Protection* that requiring strict compliance with a form "would rightly be thought to bring the administration of justice in this country, and the Court system upon which it depends, into disrepute".[24]

## Part 9—Examination and cross-examination in Migration Act reviews

38. Part 9 of Schedule 1 to the AJRLA Bill would amend the heading to section 366D of the Migration Act to "Examination and Cross-Examination" and would insert a new subsection 366D(2) to clarify that the ART may permit an applicant to examine or cross-examine any other person appearing before the ART to give evidence.

39. The Law Council supports this amendment but, to be effective, an applicant should be provided with information by the ART confirming that they may use this provision to seek leave to permit examination or cross-examination. It is paramount that applicants are aware of this right and how to access legal assistance to exercise this right effectively where appropriate.

## Part 10—Notices of decision and reasons

### *Oral decisions*

40. Part 10 of Schedule 1 to the AJRLA Bill would make a number of amendments to both the ART Act and the Migration Act to permit the ART to give oral decisions in certain kinds of review, and to provide that a written statement of reasons would only need to be provided if requested by a party to the review.

41. The proposed changes do not apply to various significant areas of the ART's jurisdiction, including social security, veterans' affairs, aged care and the National Disability Insurance Scheme (**NDIS**). The following observations focus on whether requiring oral reasons alone (in the absence of a request to provide a written statement of reasons) is sufficient in other jurisdictional areas—in particular, migration.

42. The Law Council is not opposed to the ART giving oral reasons for its decisions per se. This may help save resources and time where such reasons are delivered promptly and competently, where appropriate to the circumstances of case before it. This includes, for example, where the ART proposes to resolve the matter in the applicant's favour.

43. However, the Law Council is concerned about access to justice and transparency implications of the proposal in the ART's migration jurisdiction. Written reasons are essential for applicants to understand why a decision was made, seek legal advice and determine whether there are grounds to pursue further review. Written reasons are also useful for matters that are remitted to the DHA, as they assist a primary decision maker to understand the reasons for remittal and any next steps that need

[24] [2016] FCAFC 25, [137].

to be taken. This is true for both represented and unrepresented applicants, but the impact is likely to be greater on the latter. The Law Council observes that:

- Many applicants may not understand the reasons to seek a written decision and may risk unknowingly missing an important step or timeframe because they were unaware of further pathways for review. Accordingly, they may be deprived of an opportunity to understand the decision made about them, particularly given the complexity of migration law which can be difficult to understand.

- Applicants may be unable to obtain advice and assistance, particularly from CLCs that lack resources to assist with requests for reasons in the short span of time. This may then reduce transparency and increase the likelihood that people are without redress for decisions made unlawfully because they are unable to understand, or provide evidence of, an error in decisions in the absence of written reasons. Legal practitioners also rely on written reasons to help inform their approach to applications, which are useful in advising clients on prospects of success and ensuring consistent and accountable decision-making by the ART.

- The proposed timeframes do not lend themselves to allow practitioners to meet expectations when assessing whether a matter has reasonable prospects for judicial review where no written reasons are provided, particularly if they are not available within the review timeframe.

44. To the extent that written reasons are preserved for social security, veteran's affairs, aged care and NDIS matters on the basis that these jurisdictions involve particularly vulnerable cohorts, the Law Council notes that vulnerabilities similarly arise for many applicants in migration matters, including those from diverse cultural and linguistic backgrounds who may not have English as a first language and/or lack awareness of the legal system in Australia, and victim-survivors of family violence.

45. If the Bill is passed notwithstanding the above concerns, it will be important that, before delivering oral reasons, the Member is satisfied that the applicant understands that written reasons may be requested and the relevant timeframe to request them. Any process for obtaining written reasons must be straightforward and accessible.

46. The Bill proposes that the 35-day time limit to apply for judicial review to the FCFCOA under section 477(3) of the Migration Act would commence upon notification of the oral decision and not the issue of written reasons, if requested.[25] Written reasons must be requested within 14 days of the oral decision,[26] and once requested, must be issued within 14 days for migration decisions.[27] This amounts to nearly the entire 35-day period for preparing and filing a judicial review application to the FCFCOA. Consequently, most applications to the FCFCOA will be made without the possibility of reviewing the reasons for error. Applicants and practitioners would therefore be

[25] Proposed paragraph (b) of the definition of "date of the migration decision" in subsection 477(3) of the Migration Act. See also Explanatory Memorandum, *Administrative and Judicial Review Legislation Amendment Bill 2026 (Cth)* (2 July 2026), [248].
[26] Proposed paragraph 368AA(7)(a) of the Migration Act.
[27] Proposed subparagraph 368AA(6)(b)(i) of the Migration Act.

unable to comply with their obligations to not commence litigation without ascertaining prospects of success.[28]

47. This could put considerable resource pressure on the FCFCOA if it receives applications close to the deadline. It may also impact applicants' work rights and lead to applicants potentially becoming unlawful if DHA struggles to process Bridging Visa grants in a timely manner, as a sealed copy of a court application is needed to grant a Bridging Visa in respect of a judicial review application.

48. In addition, migration matters can be complex. There may be a higher risk of jurisdictional error in oral decisions and oral reasons, noting that written reasons from the ART in some migration matters can be up to 50 pages. The proposed changes also do not clearly confirm whether, if an oral decision is made, the ART will make available the recording of that decision immediately or shortly thereafter the decision.

49. Proposed subsection 111(4B) provides that the ART's decision would still be valid even when the reasons are not provided within 28 days. This may increase the number of applicants being forced to consider whether to lodge a review application without the benefit of legal advice about the decision. An increased number of reviews does not contribute to the efficiency of the review process.

### *Other drafting matters*

50. The repeal of subsections 111(4) and (4A) of the ART Act and the substitution of the new subsections 111(4), (4A) and (4B) provide certainty about timelines and the circumstances in which reasons are to be provided. This amendment would apply to the legislation affecting the main areas of the ART's jurisdiction.

51. However, the proposed amendments to subparagraph 111(2) only appear to provide that the ART has 28 days to provide written notice of the decision (the outcome of the decision, not a statement of reasons for the decision). A statement of reasons is then to be provided if requested by the applicant. This statement must then be provided to the applicant by the ART within a further 28 days unless a practice direction dictates otherwise. If a person is given a written record of the oral decision within 28 days and is then required to separately request a statement of reasons, then that could take another 28 days from the date the request is made.

52. The above dates do not line up with sections 477 and 477A of the Migration Act, which require that an applicant for judicial review at the FCFCOA and Federal Court of Australia (**FCA**) respectively must apply for review within 35 days of the date of the migration decision. While the FCFCOA and FCA have the power to extend the time to apply for judicial review, it would be preferable if applicants were not put in the position of requiring an extension of time to begin with. It is preferable that ART applicants continue to receive statements of reasons for their decisions as a matter of course, at least where that decision is adverse to their interests.

53. Proposed subsection 368AA(2) appears to provide that the ART would need to provide a copy of a statement of reasons (written statement including all matters covered in an oral statement) within 14 days (or longer as prescribed by regulations)

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[28] Note in particular the effect of Part 8B of the Migration Act.

of a request from an applicant. There is no obvious reason why the period imposed by this proposed provision should be different to that in proposed subsection 111(2).

54. Proposed subsection 111A(6) would provide for a category of "covered decisions", for which the ART would be required to give statements of reasons in every case. Paragraph 200 of the EM to the AJRLA Bill provides as follows:

> *This new section would retain the current requirement to follow oral reasons with written reasons for certain kinds of reviews of reviewable decisions otherwise covered under section 111. The kinds of reviews covered by this section would be "covered decisions" listed in the table under new subsection 111A(6). These would include reviewable decisions under legislation relating to social security, veterans' affairs, aged care and the National Disability Insurance Scheme. This would recognise that, for these matters, the Tribunal should provide written reasons when it has made a decision under section 105 of the ART Act as a matter of course. Applicants in these matters may be particularly vulnerable such that enabling the Tribunal to give reasons orally, and requiring applicants to request written reasons, would have a disproportionate impact on applicants with diverse needs. It would also recognise that agency decision-makers require a written record of reasons in all such cases, including to improve transparency in decision-making.*

55. Justice Kirby of the High Court of Australia set out the rationale for obligations to give reasons as follows in *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Palme*:

> *The rationale of the obligation to provide reasons for administrative decisions is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others".*[29] *They encourage "a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making".*[30] *They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process*".[31]

Similar considerations apply for the importance of written reasons in the present context to promote good administrative decision-making practice.

56. In any event, it is unlikely that a requirement that written reasons must be provided on the request of a party will result in any significant diminution of work for the ART.

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29 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet and Maxwell, 5th ed, 1995) 459, citing *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872.

30 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, (Sweet and Maxwell, 5th ed, 1995) 459.

31 (2003) 216 CLR 212 at [105]. See also Cain Sibley et al, 'Public Law Essentials: Statements of Reasons', (Web page, Clayton Utz, 2 December 2024); Justice Melissa Perry, 'Statements of Reasons: Issues of Legality and Best Practice' (Speech, Federal Court of Australia,10 June 2020).

It is likely that many unsuccessful applicants will seek a statement of reasons in order to determine whether an application for judicial review is worthwhile.

57. Further, if an applicant must request a statement of reasons, the number of unsuccessful applications that are subject to judicial review may then increase, as applicants will make such applications as soon as they receive an adverse decision, in order to meet the time limits set out in sections 477 and 477A of the Migration Act. Alternatively, the FCFCOA may experience an increase in applications to apply for judicial review out of time, as applicants will wait until they receive a statement of reasons from the ART before making an application to the court. Accordingly, the proposed amendments may create rather than diminish workload.

### *Prohibition on the ART amending its own decisions*

58. Separately, it should be noted that proposed subsection 368AA(4) of the Migration Act provides that the ART "has no power to vary or revoke a decision made orally under this section after the day and time the decision is given orally". Proposed subsection 368(5) provides that the ART "has no power to vary or revoke the decision after the day and time the written statement under subsection (1) is made".

59. These provisions effectively reverse the decision of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Bhardwaj*.[32] That decision was controversial[33] as it authorised rectification by the then Migration Review Tribunal of its own decisions where the Tribunal made an error of law in conducting its review. The only recourse for an applicant that will be available if the AJRLA Bill is passed is an appeal to the FCA or to the FCFCOA. This involves extra time and expense for an applicant, and is limited because it relates solely to whether a jurisdictional error can be found in the ART decision.

60. There is an alternative to judicial review, which is to seek review by the Guidance and Appeals Panel (**GAP**) of the ART. Provided review by the GAP is accepted by the President, then that should remove the necessity taking the matter to a federal court. However, it would be desirable for the EM to the AJRLA Bill to specifically mention this possibility.

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[32] (2002) 209 CLR 597.

[33] See for example Caroline Bush et al, 'Administrative Law Mythbuster no 06: *Bhardwaj*' (Web page, Clayton Utz, 16 April 2020).

## Part 12—Identity verification requirement for some Migration Act matters

### *Amendments effected by Part 12*

61. Part 2 of Schedule 1 to the AJRLA Bill is split into two Divisions. Division 1 would amend Division 4 of Part 5 of the Migration Act to introduce a new requirement for applicants who are not in immigration detention and who make an application for review of prescribed migration or protection decisions to verify their identity. Failure to do so will result in mandatory dismissal of the application. Division 2 would amend Part 8 of the Migration Act to impose a similar regime for applicants for judicial review of migration decisions before the FCFCOA. If an applicant fails to meet identity verification requirements, a matter before the ART must be dismissed in accordance with proposed section 358B, and a matter before the FCFCOA may be dismissed in accordance with proposed subsection 476AC(5).

62. The Law Council understands there is a need to disincentivise unmeritorious applicants and applications made without consent by third parties. The proposed measures may also help address the problem of "shadow representatives".[34] However, aspects of these provisions warrant further attention, as outlined below.

### *Access to identity documents*

63. The Law Council notes that the proposed identity verification measures may disadvantage and discriminate against genuine applicants with limited access to identity documents. For example, some protection visa applicants, particularly those who may have fled without documents, or those who are stateless, may not have the required documentation to satisfy an identity requirement. Mandatory dismissal without discretion is disproportionate and may cause irreversible harm, particularly in protection visa matters where *non-refoulement* is at stake. Applicants who have experienced family violence or exploitation in Australia have often had their documents, such as passports, taken from them. In addition, applicants may effectively be denied access to review because they do not have access to or competency with modern technology.

64. Practitioners have reported that vulnerable applicants have applied for passports from their home country, putting them or their family overseas at risk because they believe they need them in order to prove their identity to DHA. Such actions could also leave an applicant open to an allegation that they have "voluntarily re-availed themselves of the protection of their own country", which could in turn result in refusal of a protection visa.[35]

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[34] This term refers to persons who provide immigration assistance for an application but are not identified as a representative, so that the application would be made personally by the applicant.

[35] See for example *CPQ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 191.

65. Practitioners also report that, in general, DHA understands the risks described above and takes a flexible approach in relation to applicants in those situations. If the regulations made under the proposed amendments to the Migration Act are inflexible, or if the courts and ART are less cognisant of these issues, the proposed provisions could become a barrier to justice.

66. It is also unclear how the proposed provisions would apply where identity is a live issue in the matter before the ART. Many migration decisions arise because of the substantive identity requirements of visa and citizenship criteria. Some migration decisions, for example, involve findings adverse or contrary to a person's identity as claimed, or the identity shown in their documents. Decisions of this interlocutory nature are inappropriate for the ART to make prior to a substantive hearing and may only increase the number of applications for judicial review rather than addressing the ART's backlog.

67. If there is a concern about applications being lodged without an applicant's knowledge, sending the identification request to an agent or lawyer on the record (who is likely to be the person who in fact made the application) may result in an application being dismissed for non-compliance with this proposed provision and then a request for reinstatement being made. As a result, the measure may in fact increase the workload of both the ART and FCFCOA.

68. The Law Council is also concerned by the proposal to require that potential judicial review applicants must verify their identity. The Law Council understands that CLCs and other migration law practitioners are often presented with clients who do not have their original identity documents from their home country, do not have a valid passport, and in many cases are unable to obtain official Australian identity documents without providing documents obtained from their home country. As a result, such applicants may be unable to make an application, leaving them at risk of being removed from Australia without their matter being determined by a court.

69. The Law Council further notes that the FCFCOA will have the power to waive compliance with identity verification requirements under proposed paragraph 476AA(3)(c). The ART will have no such power. The Law Council recommends that it should. Otherwise, the proposed provisions represent a serious risk of unfairness to applicants, for which the possibility of reinstatement may be an insufficient safeguard that undermines the ART's efficiency.

### *Detail of the identification regime is left to regulations*

70. The Law Council is concerned that much of the detail of the proposed identity verification regimes is to be left to regulations, and no draft of proposed regulations has been provided. That includes (or may include) the following details:

- classes of persons who will be subject to identity verification requirements;
- classes of persons who will not be subject to identity verification requirements;
- how an applicant may satisfy the identity verification requirements;
- circumstances in which the ART or the FCFCOA may reschedule an appointment to attend the ART or FCFCOA to satisfy identity verification requirements;

- how identity verification requirements relate to other provisions of the Migration Act and the *Federal Circuit and Family Court of Australia Act 2021*;
- what kinds of migration decisions will be prescribed;
- the time and any place at which an applicant must satisfy identity verification requirements; and
- requirements for written notices by the ART and the FCFCOA regarding the identity verification requirement;
- whether an applicant would be required to successively verify their identity at the ART and the FCFCOA (when seeking judicial review of the ART's decision); and
- documents or information that must be provided by an applicant.

71. Given the potential for the proposed identity verification regime to affect applicants' substantive and procedural rights, the Law Council considers more of the details should be included in primary rather than delegated legislation. At a minimum, the kind of verification that may be required and the means by which identity can be verified before the ART and the FCFCOA should be set out in the Migration Act itself rather than in regulations.

### *Subordination of primary legislation to regulations*

72. The Law Council is also concerned about the effect of proposed subsections 358(5) and 476AA(7). Proposed subsection 358(5) provides as follows:

> *If an applicant for the review of a reviewable migration decision or reviewable protection decision is subject to the identity verification requirement under this section, a provision of the ART Act, or of Part 5 of this Act, prescribed by regulations made for the purposes of this subsection does not apply, or applies as modified by such regulations, in relation to the application for the review.*

73. Proposed subsection 476AA(7) provides as follows:

> *If the applicant is subject to the identity verification requirement under this section in relation to an application, a provision of the Federal Circuit and Family Court of Australia Act 2021, or of Part 8 of this Act, prescribed by regulations made for the purposes of this subsection does not apply, or applies as modified by such regulations, in relation to the application.*

74. Those provisions have the effect that regulations made under those provisions take precedence over specified primary legislation. Such provisions are popularly known as "Henry VIII clauses".[36] The EM notes that the regulations would be subject to parliamentary oversight through disallowance and states they would ensure flexibility in the transition to the new framework.[37] However, the Law Council considers that any regulatory changes to modify the application of the ART Act or Migration Act should only be made in primary legislation.

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[36] For a discussion of the meaning and effect of Henry VIII clauses, see Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 40th Parliament, February 2002 – August 2004*, [5.3] and [5.4].

[37] Explanatory Memorandum, *Administrative and Judicial Review Legislation Amendment Bill 2026 (Cth)* [292], [333].

### *Other issues*

75. Proposed section 476AC(3) of the Migration Act provides that, if an applicant for judicial review fails to satisfy the identity verification requirement under subsection (1), leave of the FCFCOA is required to continue the proceedings relating to the application, or reinstate an application that was dismissed under proposed subsection 476AC(5). Whilst that provision does allow an application to proceed, it introduces a costly and uncertain avenue of review which may not be utilised by many applicants.

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The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.