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Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
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Subject: Parliamentary Inquiry into Administrative Review Tribunal Legislation

Dear Committee,

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide input to the House of Representatives Standing Committee on Social Policy and Legal Affairs in respect of its inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill).

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (together, "the Refugee Convention"), as well as the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Statelessness Convention* (together, "the Statelessness Conventions"). Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers, and stateless persons in accordance with their provisions.

At the outset, UNHCR wishes to acknowledge and commend the government's concerted efforts to reform the federal system of administrative review to strengthen decision-making. The stated purpose of such reform is to, amongst other things, protect the rights and interests of people, especially the most vulnerable members of society. It is well recognized that the people we serve under our mandate—that is, asylum-seekers, refugees, and stateless persons—are a particularly underprivileged, vulnerable, and often marginalized population group in need of protection. Thus, this reform presents a valuable opportunity to ensure that processes are strengthened to ensure rights arising under international law are protected and enshrined in legislation.

In this context, UNHCR warmly welcomes the proposed repeal of Part 7AA of the *Migration Act 1958* (Migration Act) and related consequential amendments. UNHCR's long-held concerns with respect to the fast track review process are well documented. Since its commencement, UNHCR has considered that the efficiencies created by such a review process have come at the expense of key procedural safeguards, the lack of which has ultimately undermined the reliability and accuracy of such decisions. Consequently, a heightened risk of *refoulement* arises for those who have

received a negative outcome or were altogether denied access to merits review. While transitional arrangements have been made for some unresolved fast track reviewable decisions, including those excluded from review to have access to the Tribunal, **UNHCR urges the government to address the situation of those with resolved cases who may require re-adjudication or access to alternative solutions.** Considering the recognised deficiencies of the fast track review process, and in some cases, the significant passage of time since the assessment of claims for protection, humane solutions are needed to ensure adherence with Australia's obligations under international refugee and human rights law, including the right to a fair hearing, an effective remedy, and ultimately the right to not be returned to harm.

While recalling the stated objective of the reform is to establish a new administrative review body that is user-focused, efficient, accessible, independent, and fair, UNHCR considers that some provisions that have been introduced, modified, or retained in the migration and protection jurisdictions, fail to adequately incorporate key procedural standards akin to those maintained or created for other jurisdictional areas of the Tribunal.

For example, under the legislation, the Administrative Review Tribunal (the Tribunal) is unable to extend the timeframes for applying for review, which varies according to the type of decision and the situation of the applicant. In other jurisdictions, there is greater uniformity (28 days being the standard under clause 19 of the ART Bill), and the Tribunal can extend the timeframe for lodgement if it considers it reasonable to do so. Moreover, this can occur even after the timeframe has expired. This is stated to be in recognition of the fact that for some people, a 28-day timeframe may be insufficient to secure legal assistance and other necessary support services, or personal circumstances might prevent the making of an application. This is equally true for applicants seeking review of migration or protection decisions.

Retaining varying lodgement timeframes, inflexible timeframes for decision-making, and the absence of any discretion to extend timeframes, even in the most exceptional circumstances, can have dire consequences for those we serve, especially if deprived of their liberty and at risk of removal. **UNHCR considers that creating equivalent procedural fairness for *all applicants* before the Tribunal is critical to achieving the overall objective of the reform**. We emphasize that it is possible to create an efficient system while maintaining procedural fairness, therefore, **UNHCR strongly recommends the adoption of reasonable and fair timeframes that can be extended, as necessary, consistent with other jurisdictions of the Tribunal's operation.**

Similarly, proposed section 367A (Schedule 2 to the Consequential and Transitional Bill) prescribes how the Tribunal is to deal with new claims or evidence in review of reviewable protection decisions. The Tribunal must draw an inference unfavourable to the credibility of new claims or evidence provided to the Tribunal if the applicant does not have a reasonable explanation to justify why the claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application. **UNHCR strongly recommends that this provision is removed from the legislation, as it is unnecessary, undermines the integrity and neutrality of the decision-making process, and has the potential to compromise fairness**.

In addition, several other proposed amendments to reviewable migration and protection decisions similarly undermine procedural fairness. For instance, proposed paragraph 359A(4)(d) (Schedule 2 to the Consequential and Transitional Bill) provides that the Tribunal is not required to give to the applicant information that was included or referred to in the written statement of the decision that is under review, even if the information is information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review. The accompanying explanatory materials emphasise that applicants are provided with written statements of decisions therefore it is reasonable that they are aware of its contents without requiring the Tribunal to proactively draw matters to their attention. However, **UNHCR considers this to be an inadequate**

procedural safeguard for a *de novo* merits review process as applicants should be put on notice and provided with an opportunity to address information that the Tribunal (as opposed to the delegate), considers to be the reason, or part of the reason, for affirming a decision on review. In turn, it also has the potential to create inefficiencies for both the applicant and the Tribunal and thus UNHCR recommends it should be removed.

There are also provisions that propose to disapply numerous provisions of the ART Bill to reviewable migration and protection decisions. For example, clause 27 of the ART Bill provides the general rule that the decision-maker *must* give copies of reasons and documents to the other parties to the proceeding. It requires that any document given by the decision-maker to the Tribunal must also be given to each party to the proceeding. This not only includes initial relevant documents but also any further information requested by the Tribunal, and any additional documents that come into the decision-maker's possession. Importantly, the decision-maker *must* also give the documents to the parties *within the same timeframe* that they are required to give them to the Tribunal and clause 28 Tribunal inserts flexibility to enable requirements to be adjusted, as necessary.

As noted in the explanatory materials, this is an important aspect of procedural fairness, as parties should have the opportunity to view and respond to any relevant information which may be used to make a decision impacting their rights or entitlements. Yet the general rule in clause 27 is disapplied from reviewable migration and protection decisions because proposed subsection 362A(1) provides the applicant is entitled to *request* the Department of Home Affairs provide access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review. **UNHCR is of the view that these arrangements are considerably inferior to those provided to other applicants before the Tribunal and despite the need for efficiencies, UNHCR considers that maintaining the same standards of procedural fairness is appropriate.** This is particularly important for persons we serve, who may suffer dire consequences if the correct or preferable decision is not made upon review.

Similarly, proposed paragraph 336P(2)(l) disapplies clause 294 of the ART Bill to reviewable migration and protection decisions, which provides that certain people can apply for, and be provided with, legal or financial assistance in relation to Tribunal proceedings. While this amendment retains the *status quo* under existing subsection 69(3) of the *Administrative Appeals Tribunal Act 1975*, **UNHCR recommends equivalent statutory safeguards be implemented to ensure persons under our mandate are assured accessible, reliable, and high-quality legal representation,** especially given their vulnerabilities, the complexities of asylum processes and the procedural inefficiencies that inevitably arise from unrepresented applicants or applicants with inadequate legal support.

Disapplying clause 294 of the ART Bill to reviewable migration and protection decisions also excludes persons under our mandate from accessing financial assistance that may be available for disbursement costs. This funding can cover such things as fees for the preparation of medico-legal reports and fees for the preparation of expert opinions. In this context, it is important to recognize that the mental state and cognitive abilities of asylum-seekers may be impaired for a range of reasons including mental illness, psychological trauma or torture, neurological disorders, intellectual and developmental disabilities, medications affecting mental state, physical illness, and chronic pain.

While asylum-seekers can submit documents and other evidence to support their asylum claims, there is a growing awareness globally that independent expert medical reports play an increasingly important role in the asylum adjudication process. Such reports establish medical facts within a legal context and require an objective examination using an approach that differs from the therapeutic context. State-commissioned independent expert medical reports can strengthen asylum systems by enabling decision-makers to make more accurate and reliable decisions, create

efficiencies by preventing unforeseen delays in processes, and support decision-makers by ensuring they have relevant and reliable evidence to perform their statutory function. **Therefore, UNHCR recommends that equivalent statutory funding arrangements are included for the commissioning of independent medico-legal reports, to help persons under our mandate meet the prohibitive costs of such reports and thereby strengthen decision-making, as is routinely done in other jurisdictions.**

In summary, while UNHCR commends the government's concerted efforts to reform the federal system of administrative review to strengthen decision-making and welcomes the introduction of this legislation and the abolition of the fast track review process, UNHCR has significant concerns with respect to a bifurcated system whereby applicants seeking review of migration and protection decisions are afforded diminished procedural standards.

Protection systems grounded in the rule of law offer legal certainty in the application of rules, as well as accountability, equity, and transparency. They are built on legal and policy frameworks that meet international standards. Such a system should not only contain mechanisms that provide an impartial and robust assessment of claims, without discrimination but should also demonstrate the utmost fairness and integrity. Thus, UNHCR urges adoption of the recommendations outlined herein, and further consideration of the input provided in our submission in response to the government's *Administrative Review Reform: Issues Paper*, which we take this opportunity to draw to the Committee's attention.

UNHCR stands ready to assist continued efforts to strengthen government decision-making to ensure the rights of refugees, asylum-seekers, and stateless persons are protected, thereby enabling Australia to fully adhere to its international refugee and human rights law obligations.

Yours sincerely,

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Adrian Edwards
Regional Representative