ADMINISTRATIVE REVIEW IN REFUGEE CASES: THE VULNERABLE PERSONS GUIDELINES AND THE ROLE OF LEGAL REPRESENTATIVES

FRANCES SIMMONS* AND CHANTAL BOSTOCK**

In this article, we examine how the vulnerability of asylum seekers informs the refugee status determination process in Australia, focussing on administrative review. As vulnerability is not defined under Australian migration law, we turn to international law to explore its meaning and its relationship with international non-refoulement obligations. We then examine the Administrative Appeals Tribunal's ('AAT') Guidelines on Vulnerable Persons and, following a systematic review of published AAT decisions between 2015 and 2022, explore its impact on decision-making. This analysis shows that identifying a person as 'vulnerable' can have significant procedural and substantive implications for the review process. With a significant backlog of protection visa cases at the AAT and the imminent establishment of the new Administrative Review Tribunal, finally, we consider the role of legal representatives in complex cases involving vulnerable persons.

I INTRODUCTION

In the wake of the Commonwealth Government's announcement that the Administrative Appeals Tribunal ('AAT') would be abolished and replaced by a new 'fit for purpose' administrative review body,[1] the Attorney-General's

* Lecturer, University of Technology Sydney Law Faculty.

** Senior Lecturer, University of New South Wales Faculty of Law & Justice. The law referred to in this article is current as at 1 November 2023. The article draws on a joint submission the authors made in May 2023 in response to a publication by the Commonwealth Attorney-General's Department on reforming Australia's administrative review system. At the time of writing that submission and this article, the authors were academics at the University of Technology Sydney and the University of New South Wales. The authors have previously worked as members of the AAT, the former Refugee Review Tribunal ('RRT') and Migration Review Tribunal ('MRT'). After this article was submitted and accepted for publication, Frances Simmons commenced an appointment as a member of the AAT in 2024. All views expressed are the authors' personal views and not the views of the Tribunal. The authors thank Gretel Emerson for her invaluable research assistance. The authors also thank the two anonymous reviewers for their constructive comments.

1 Mark Dreyfus, 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 16 December 2022). This article was submitted prior to the introduction of the *Administrative Review*

Department published the *Administrative Review Reform: Issues Paper* ('*Issues Paper*').[2] Among the issues canvassed by the *Issues Paper* is this question: how could the new administrative body 'enhance access for vulnerable applicants?'[3] This article focuses on this question in the context of merits reviews of 'refugee decisions' by the Migration and Refugee Division ('MRD') of the AAT under part 7 of the *Migration Act 1958* (Cth) ('*Migration Act*'). While the AAT is soon to be dismantled, the new Administrative Review Tribunal ('ART') will continue to hear applications for review of migration and refugee decisions in accordance with the procedural framework in the *Migration Act*.[4] Accordingly, the *Migration Act* provides a unique statutory context in which to examine procedures to identify and support vulnerable applicants to participate in the review process and to consider the role of legal representatives, particularly in complex cases, in assisting vulnerable asylum seekers to effectively present their case.

In Part II we provide an overview of how the concept of vulnerability can inform the adjudication of protection claims. The concept of vulnerability is not defined by international law or Australian migration law. However, the United Nations High Commissioner for Refugees ('UNHCR') recognises that decision-makers may need to adapt their procedures to enable vulnerable asylum seekers to participate in the decision-making process[5] and that legal representatives have a 'critical' role to play in cases involving vulnerable asylum seekers.[6] While there is a growing body of scholarship about the impact of the concept of 'vulnerability' on refugee adjudication in the European context,[7] the impact of identifying a protection visa applicant as 'vulnerable' in Australia is under explored.[8] The *Guidelines on Vulnerable Persons* ('*Guidelines*') published by the MRD of the AAT recognise

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Tribunal Act 2024 (Cth) ('*ART Act*'), the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) ('*ART Provisions No 1 Act*') and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 2) Act 2024* (Cth). Any analysis of the Acts and the implications of these reforms for issues discussed in the article are beyond the scope of this article.

2 Attorney-General's Department (Cth), *Administrative Review Reform* (Issues Paper, April 2023) ('*Issues Paper*').

3 Ibid 11. See also at 84.

4 *ART Act* (n 1); *ART Provisions No 1 Act* (n 1). When the former RRT and MRT were amalgamated with the AAT in 2015, no substantive changes were made to the procedural framework in which the AAT conducts reviews of migration and refugee decisions in accordance with parts 5 and 7 of the *Migration Act 1958* (Cth) ('*Migration Act*'): *Tribunals Amalgamation Act 2015* (Cth) ('*Amalgamation Act*').

5 United Nations High Commissioner for Refugees, *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process* (November 2017) <https://www.unhcr.org/au/media/guidance-note-psychologically-vulnerable-applicant-protection-visa-assessment-process> ('*Guidance Note*').

6 Ibid 10.

7 Luc Leboeuf, 'The Juridification of "Vulnerability" through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences' (2022) 11(3) *Laws* 45 <https://doi.org/10.3390/laws11030045>.

8 There is a lack of research on the impact of the Administrative Appeals Tribunal, Migration and Refugee Division, *Guidelines on Vulnerable Persons* (Guideline, November 2018) ('*Guidelines*') although this has previously been identified as an area that deserves further scholarly attention: Jill Hunter, Linda Pearson and Mehera San Roque, 'Mental Health Expertise in Refugee Status Decision-Making: Judging or Caring?' (2014) 18(4) *International Journal of Evidence and Proof* 310, 315 <https://doi.org/10.1350/ijep.2014.18.4.462>; Jill Hunter et al, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41(3) *Federal Law Review* 471, 485 <https://doi.org/10.1177/0067205X1304100304>.

that in cases involving applicants in migration and refugee matters 'whose ability to understand and effectively present their case or fully participate in the review process may be impaired or not developed',[9] the Tribunal may need to adjust its procedures so that applicants can effectively present their case. Drawing on case law, as well as decisions of the MRD of the AAT that consider the *Guidelines*,[10] this article seeks to address this gap by examining how the identification of an asylum seeker as a 'vulnerable person' can impact on the process of merits review.

In Part III, we investigate the procedural and substantive implications of identifying a protection visa applicant as vulnerable in the merit review system. We examine case law, which interprets section 425 of the *Migration Act* to require the Tribunal to provide applicants with a real and meaningful opportunity to participate in the hearing and explore what happens when questions arise about the competency of applicants to give evidence and present arguments. To assess the impact of the *Guidelines*, we examine case law that is binding on the Tribunal, as well as Tribunal decisions that consider the application of the *Guidelines*. This analysis suggests that while there is no legal requirement for the Tribunal to identify 'vulnerable' applicants as such, the identification of an applicant as 'vulnerable' can impact on the conduct of the review, and the assessment of protection claims. However, while the *Guidelines* emphasise the importance of early identification of vulnerable persons and the subsequent consideration of a range of measures to assist the person to participate in the review process, this can be particularly challenging in cases involving unrepresented applicants.

In Part IV, we focus on the role of legal representatives in complex refugee matters in assisting vulnerable applicants to participate in the review process and enhancing access to justice.[11] Following a 2018 review of the amalgamated AAT,

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9 *Guidelines* (n 8) 3 [6]. Prior iterations of the *Guidelines* (n 8) were published by the MRT and RRT in 2009 and 2012: see Hunter et al (n 8) 485 n 76, 495.

10 This article draws on analysis of the 85 publicly available decisions that draw on the *Guidelines* (n 8). Decisions were identified by undertaking searches via the Australasian Legal Information Institute ('AustLII') AAT databases for the following terms: 'vulnerable persons guidelines', 'guidance on vulnerable persons', 'guidelines on vulnerable persons', 'vulnerable person AND guidelines', 'vulnerable person', and 'vulnerability AND guidelines' between July 2015 and April 2022. Decisions where the *Guidelines* (n 8) were applied in the context of reviews under part 5 of the *Migration Act* (n 4) were excluded as were decisions before the amalgamation of the MRT and RRT into the AAT. At the merits review stage, the *Guidelines* (n 8) recognise that persons who are 'vulnerable' in the sense that their capacity to participate in the review is impaired or undeveloped require additional assistance to participate in the review process. This dataset provides a valuable but partial insight into the adjudication of claims involving 'vulnerable' applicants. Only a small percentage of MRD decisions are published on AustLII: in 2021–22, 5,357 AAT and Immigration Assessment Authority ('IAA') decisions were published of the 45,353 decisions finalised: Administrative Appeals Tribunal, *Annual Report 2021–22* (Report, 23 September 2022) 24 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202122/AAT-Annual-Report-2021-22.pdf>. This is significantly less than the AAT's stated objective of publishing 40% of decisions. Furthermore, the omission of any reference to the *Guidelines* (n 8) does not mean the AAT failed to consider the applicant's specific vulnerabilities in conducting the review and nor does reference to the *Guidelines* (n 8) indicate that its contents were given detailed consideration.

11 Historically, the role of representatives before the tribunal was restricted to registered migration agents but following the enactment of the *Migration Amendment (Regulation of Migration Agents) Act 2020* (Cth), legal practitioners are now able to provide migration advice without also being registered migration agents: at sch 1.

Ian Callinan reported that 'most' applicants in the MRD are unrepresented[12] and described as 'onerous' the duties that Tribunal members now have to assist such applicants, particularly in complex cases.[13] Noting that the Tribunal has no power to refer an applicant in a part 7 review to pro bono legal assistance, we consider a proposal to give the Tribunal a discretionary power to refer an applicant in a proceeding before the Tribunal to pro bono legal representation in circumstances where the Tribunal is satisfied that the applicant would otherwise be disadvantaged in presenting evidence and arguments or where a case raises complex legal issues.

II THE CONCEPT OF VULNERABILITY IN ASYLUM PROCEDURES

A The Principle of Non-refoulement and Procedural Safeguards for Vulnerable Asylum Seekers

Australia has obligations under the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*')[14] and the *Protocol Relating to the Status of Refugees*[15] to respect and protect the principle of non-refoulement, which is the cornerstone of international refugee law.[16] Australia seeks to implement its international obligations through section 36 of the *Migration Act* which provides

12 IDF Callinan, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019) 20 [1.29], 152 [8.23] <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf> ('*Callinan Review*').

13 Ibid 20 [1.29].

14 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

15 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

16 *Refugee Convention* (n 14) art 33. Article 1A(2) of the *Refugee Convention* (n 14), as modified by article 1(2) of the *Refugee Protocol* (n 15), sets out the definition of a 'refugee', which includes any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. The protection against non-refoulement in article 33 of the *Refugee Convention* (n 14) does not exist in isolation but is supplemented by the more expansive protection provided by other international documents: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6–7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1948, 1465 UNTS 85 (entered into force 26 June 1987) art 3; *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37. See Vincent Chetail, 'Moving towards an Integrated Approach of Refugee Law and Human Rights Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 202 <https://doi.org/10.1093/law/9780198848639.003.0012>. See also *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981) art 2(d), noting the United Nations Committee on the Elimination of Discrimination has read an implied non-refoulement obligation into article 2(d). For discussion on this topic, see Madeline Gleeson, 'Unlocking *CEDAW*'s Transformative Potential: Asylum Cases before the Committee on the Elimination of Discrimination against Women' (2023) 118(1) *American Journal of International Law* 41 <https://doi.org/10.1017/ajil.2023.55>.

for the grant of a protection visa to a person to whom Australia owes protection obligations because the person is a 'refugee'[17] or owed complementary protection.[18] To give effect to its international obligations to prohibit refoulement, Australia is required to grant individuals seeking protection access to fair and effective asylum procedures that can reliably ascertain whether a person is a refugee as defined in article 1A(2) of the *Refugee Convention*[19] or – if a person is not a refugee – whether they are owed complementary protection. However, the *Refugee Convention* 'give[s] no indication of procedures to be adopted for the determination of refugee status', leaving to each State party the task of establishing 'the procedure that it considers the most appropriate, in conformity with its particular constitutional and administrative structure' for determining whether a person's claim to be owed protection should be accepted or rejected.[20]

The UNHCR, which has the duty of supervising the application of the provisions of the *Refugee Convention*,[21] has provided guidance on the 'basic requirements' of refugee status determination procedures.[22] States must introduce laws that establish an expert authority to determine applications in accordance with the law and provide asylum seekers who are denied protection with an opportunity to appeal against a negative decision to an independent body.[23] The United Nations Human Rights Committee considers that the ability to seek review of a decision to refuse to grant a protection visa on the basis of law and the facts at the time the review decision is made is an integral component of the right to an effective remedy against refoulement;[24] the 'wrong mistake' can have irrevocable consequences for an applicant and breach the prohibition on refoulement.[25] In this high stakes environment, it is critical that asylum seekers have a real and meaningful opportunity to present evidence and arguments in support of their

17 *Migration Act* (n 4) s 36(2)(a). Australia has codified the definition of 'refugee': at s 5H.

18 Ibid s 36(2)(aa). 'Significant harm' is defined in sections 5(1) and 36(2A).

19 United Nations High Commissioner for Refugees, *UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures* (21 May 2010) ('*UNHCR Statement*'). See also United Nations High Commissioner for Refugees, 'Fair and Fast: UNHCR Accelerated and Simplified Procedures in the European Union' (Discussion Paper, 25 July 2018) 13, noting that due process standards may require 'additional safeguards' for persons with specific needs including children and victims of trauma and that '[t]he right to information and the right to legal assistance are primordial for effectiveness and should be guaranteed at all stages of the process'.

20 United Nations High Commissioner for Refugees, *Note on Determination of Refugee Status under International Instruments*, UN Doc EC/SCP/5 (24 August 1977) ('*Determination of Refugee Status*'); United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/ENG/REV.4 (February 2019) ('*Handbook on Procedures and Criteria for Determining Refugee Status*').

21 *Refugee Convention* (n 14) art 35.

22 *Determination of Refugee Status* (n 20) 4.

23 *UNHCR Statement* (n 19); United Nations Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 6 [15].

24 United Nations Human Rights Committee, *Communication No 1416/2005*, CCPR/C/88/D/1416/2005 (10 November 2006) 34 [11.8].

25 Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018) <https://doi.org/10.1017/9781108551908>.

protection claims, both at the primary decision-making stage and through a system of merits review.

Asylum seekers as a group are widely considered to be in a vulnerable position because they are outside of their country of origin, do not enjoy the rights and entitlements of citizens,[26] and are suspended in a state of legal uncertainty until such time as their claims to be owed protection are finally determined. However, in the context of refugee status determination it is widely recognised that 'some asylum seekers are more vulnerable than others'[27] and that procedural modifications may be required to safeguard the rights of asylum seekers who would otherwise be disadvantaged in putting forward their claims.[28] The term 'vulnerability' is not defined by the *Refugee Convention*, but the UNHCR has long recognised that it is imperative that decision-makers have the flexibility to adapt their procedures to enable vulnerable asylum seekers (for example, children, survivors of torture and trauma, and asylum) to put forward their claims to be owed protection.[29] As the UNHCR explains:

> The psychological abilities required to undertake the protection visa assessment process may be impaired by: mental illness; psychological trauma; acquired brain injury; neurological disorders; intellectual and developmental disabilities; substance abuse; medications affecting mental state and physical illness. When an applicant's psychological abilities are reduced, the fairness and accuracy of protection visa

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26 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 98–102 [146] (McHugh J) ('*Miah*'); *AFD16 v Minister for Immigration and Border Protection* [2020] FCA 964, [103] (Perry J) ('*AFD16*').

27 Minos Mouzourakis, Kris Pollet and Ruben Fierens, European Council on Refugees and Exiles, *The Concept of Vulnerability in European Asylum Procedures* (Report, 8 September 2017) 9. See generally European Asylum Support Office, *Vulnerability in the Context of Applications for International Protection* (Judicial Analysis, 2021) ('*Judicial Analysis on Vulnerability*').

28 *Guidance Note* (n 5); United Nations High Commissioner for Refugees, *Unit 2.9: Applicants with Mental Health Conditions or Intellectual Disabilities in UNHCR RSD Procedures* (Procedural Standards, 26 August 2020) ('*UNHCR RSD Procedural Standards*'); United Nations High Commissioner for Refugees, *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, UN Doc EC/GC/01/12 (31 May 2001) ('*Refugee Protection and Migration Control*'); United Nations High Commissioner for Refugees, *Effective Processing of Asylum Applications: Practical Considerations and Practices* (March 2022) 26 [24]. In the European context, the relevant legal frameworks for assessing protection claims provide a non-exhaustive list of particular groups who have been identified as vulnerable persons with specific needs. *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60, 62–3 [29] recognises that

> [c]ertain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast) [2013] OJ L 180/96 ('*Standards for the Reception of Applicants*'). See generally *Judicial Analysis on Vulnerability* (n 27).

29 *Guidance Note* (n 5). See also *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) 42 [190], 150 [15]. In the European context, European Union law provides that certain categories of vulnerable persons are in need of special procedural guarantees, while the European Court of Human Rights has recognised the vulnerability of asylum seekers as a group (eg, *MSS v Belgium* [2011] I Eur Court HR 255 ('*MSS*')) as well as the specific vulnerability of certain groups of asylum seekers, such as children (eg, *Tarakhel v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 29217/12, 4 November 2014) ('*Tarakhel*').

> assessment may be compromised unless each stage of the process is informed by the applicant's mental state and cognitive abilities.[30]

Conversely, when vulnerabilities that impair a person's ability to participate in status determination procedures are identified at an early stage, then procedural accommodations can assist the person to provide evidence and to identify claims that, while arising on the facts as properly understood, might otherwise have been unidentified and unaddressed.[31] Within the context of protection assessment procedures, the identification of a person as vulnerable can have substantive as well as procedural implications: for example, a person's status as a victim of human trafficking may require consideration of what procedural adjustments are required to enable that person to give evidence, as well as whether they will be at risk of harm for reasons that relate to their status as a victim of trafficking.[32]

The proposition that certain 'vulnerable' groups require additional assistance in judicial and administrative proceedings to claim their rights on an equal basis with others has a long history in international human rights law but its application in the context of refugee status determination procedures is the subject of ongoing debate.[33] In the context of migration, the concept of vulnerability is sometimes described as 'situational vulnerability', where external factors impact on the risks faced by groups of people, or 'individual vulnerability', referring to individual characteristics or circumstances which elevate the risk that person will face harm.[34] The *New York Declaration for Refugees and Migrants* recognises the 'special needs of all people in vulnerable situations who are travelling with large movements of refugees and migrants', including persons with disabilities.[35] The UNHCR has provided guidance on procedures that should be adopted with respect to specific groups of asylum seekers,[36] while the European asylum system provides that certain

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30 *Guidance Note* (n 5).

31 See, eg, *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) 42 [190]; *Guidance Note* (n 5). In the Canadian context, see Immigration and Refugee Board of Canada, *Guideline 8: Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB* (15 December 2006); Melissa Mary Anderson and Dagmar Soennecken, 'Locating the Concept of Vulnerability in Canada's Refugee Policies at Home and Abroad' (2022) 11(2) *Laws* 25 <https://doi.org/10.3390/laws11020025>.

32 United Nations High Commissioner for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, UN Doc HCR/GIP/06/07 (7 April 2006); *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20).

33 Leboeuf (n 7); Ekaterina Yahyaoui Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in Relation to Refugees and Asylum Seekers in the ECtHR: The *MSS* Case 10 Years on' (2022) 34(2) *International Journal of Refugee Law* 192 <https://doi.org/10.1093/ijrl/eeac027>.

34 United Nations High Commissioner for Refugees, '"Migrants in Vulnerable Situations": UNHCR's Perspective' (June 2017) 2 ('Migrants in Vulnerable Situations'). See also *Judicial Analysis on Vulnerability* (n 27) 23.

35 *New York Declaration for Refugees and Migrants,* GA Res 71/1, UN Doc A/RES/71/1 (3 October 2016, adopted 19 September 2016); 'Migrants in Vulnerable Situations' (n 34).

36 For example, the *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) provides guidance on procedures that should be adopted with respect to unaccompanied or separated children, gender-related claims involving survivors of torture and trauma, and cases involving 'mentally disordered' asylum seekers. For an overview in the European context, see generally *Judicial Analysis on Vulnerability* (n 27); *Guidance Note* (n 5); *UNHCR RSD Procedural Standards* (n 28). For example,

categories of vulnerable persons are in need of special procedural guarantees.[37] The European Court of Human Rights has recognised the vulnerability of asylum seekers as a group,[38] as well as the specific vulnerability certain groups of asylum seekers, such as children.[39]

The implications of identifying an asylum seeker as 'vulnerable' in the refugee status determination procedures has attracted growing judicial and scholarly attention, particularly within European asylum systems.[40] Some scholars argue classifying asylum seekers as 'vulnerable' is disempowering, framing the vulnerability of asylum seekers as the result of their individual characteristics without addressing the ways in which immigration laws and policies can create or compound vulnerability.[41] Refugee scholars have noted the *Convention on the Rights of Persons with Disabilities* ('*CRPD*')[42] has signalled a 'paradigm shift' because '[r]ather than equating disability with impairment, the *CRPD* frames vulnerability, and indeed disability itself, as the failure or inability to accommodate a person's impairment (whether physical, sensory or mental)',[43] while recognising that much work needs to be done to ensure that laws and policies that affect refugees with disabilities comply with the *CRPD*.[44]

B Australia's Administrative Review System and Asylum Seekers in Vulnerable Situations

In this section, we briefly explain the protection visa assessment process in Australia, focusing on the merits review process undertaken by the MRD of AAT. The MRD of the AAT is responsible for over half of the applications made to

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vulnerable asylum seekers may include victims of torture and sexual violence, certain women, children, the elderly, psychologically disabled persons and stateless persons. The *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) advises that women should have the opportunity to use female interpreters and be interviewed in a gender-sensitive environment. See also *Refugee Protection and Migration Control* (n 28).

37 *Standards for the Reception of Applicants* (n 28). See generally Barbara Mikołajczyk, 'Legal Aid for Applicants for International Protection' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff, 2016) 446 <https://doi.org/10.1163/9789004308664_015>.

38 *MSS* (n 29).

39 See above n 29. See also *Judicial Analysis on Vulnerability* (n 27).

40 *MSS* (n 29); *Tarakhel* (n 29).

41 Krivenko (n 33), noting that in the context of refugee status determination, understanding the impact of societal and official discrimination on certain identity-based groups may be important in determining whether there is a real chance that a person will be persecuted, and assessing the availability of state protection.

42 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

43 Ron McCallum and Hannah Martin, 'Comment: The CRPD and Children with Disabilities' (2013) 20 *Australian International Law Journal* 17, 20. See also Mary Crock, Christine Ernst and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24(4) *International Journal of Refugee Law* 735, 737 <https://doi.org/10.1093/ijrl/ees049>, noting article 1 of the *CRPD* states that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

44 Crock, Ernst and McCallum (n 43) 737.

the AAT. Following the ill-fated amalgamation of the Refugee Review Tribunal ('RRT') and the Migration Review Tribunal ('MRT') with the AAT in 2015[45], the backlog of refugee cases awaiting determination by the AAT grew to almost 40,000 by 2022.[46] In a review of the amalgamation of the AAT published in 2019 ('*Callinan Review*'), Mr Ian Callinan AC, a former Justice of the High Court of Australia, concluded that the MRD of the AAT faced 'many problems', including an obvious lack of resources and members in the MRD to address the growing backlog of applications by asylum seekers.[47] The *Callinan Review* noted that '[m]ost [applicants] are unrepresented and some do not speak English. Conditions in the countries which they have left are not always easy to ascertain and may alter quickly.'[48] The *Callinan Review* focused on the challenges facing decision-makers rather than the 'special difficulties of people who have fled their country to a strange country where they seek asylum'.[49] The report observes that:

> The Member has no one there to assist him or her during a hearing … No 'contradictor' of an applicant seeking review by the AAT in the MRD is permitted. Nor does the Member hearing an application have any lawyer otherwise present to assist in carrying out any kind of helpful role. The Member has to thread a way through a labyrinth of facts, sometimes even confected, ministerial directions, complex legislation, much case law, and international instruments.[50]

Following the *Callinan Review*, the lack of a transparent and accountable recruitment process for Tribunal members and decisions to appoint, sometimes

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45 *Amalgamation Act* (n 4).

46 The cases that come before the MRD are varied. The focus in this article is on vulnerable persons seeking review under part 7 of the *Migration Act* (n 4), which deals with the grant or cancellation of protection visa claims in certain circumstances. The Department of Home Affairs ('Department') witnessed a significant increase in the number of protection visa applications in 2017–18 compared to 2016–17, with notable increases in applications from nationals of Malaysia and China. Following this spike in 2017–18, the number of protection visa applications made is on a downwards trend with 10,564 applications lodged in 2021–22 compared to the 27,931 lodged in 2017–18: see Department of Home Affairs, 'The Administration of the Immigration and Citizenship Programs' (Paper, 9th ed, February 2022) 36 [171] <https://immi.homeaffairs.gov.au/programs-subsite/files/administration-immigration-program-9th-edition.pdf>. See also Abul Rizvi, 'The Exploitation of Migrant Workers' in Chris L Petersen (ed), *Identifying and Managing Risk at Work: Emerging Issues in the Context of Globalisation* (Routledge, 1st ed, 2021) 143.

47 *Callinan Review* (n 12) 164 [10.13]. In 2017, approximately 52% of the total number of applications made to the AAT were made to the MRD: at 151 [8.22]. Callinan was also of the view that addressing some of the problems facing the MRD would require radical reform to migration law, territory that was beyond the remit of his review: at 5 [1.3]. The surge in applications resulted from protection visa applications by asylum seekers who arrived by plane. In November 2023, there was a backlog of over 41,000 refugee matters: Administrative Appeals Tribunal, *AAT Caseload Report: For the Period 1 July 2023 to 31 December 2023* (Report, 2023) <https://web.archive.org/web/20240121035617/https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2023-24.pdf> ('*AAT 2023 Caseload Report*').

48 *Callinan Review* (n 12) 151–2 [8.23].

49 *Sundararaj v Minister for Immigration and Multicultural Affairs* [1999] FCA 76, [5] (Burchett J). See also *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 501 [99] (Kirby J) ('*NAIS*'). Recognising the vulnerable position of asylum seekers can inform how the administrative review process is conducted and the evaluation of evidence. For example, the courts have recognised that when asylum seekers fear being returned to harm, desperation may result in an applicant for refugee status 'yield[ing] to [a] temptation to embroider an account', a possibility that should inform credibility assessments: *Abebe v Commonwealth* (1999) 197 CLR 510, 576–7 [191] (Gummow and Hayne JJ).

50 *Callinan Review* (n 12) 151–2 [8.23]–[8.24] (citations omitted).

to leadership roles, members with strong connections to the Coalition[51] became a lightning rod for public concern about the independence and integrity of the AAT.[52] In March 2022, a Senate Committee inquiry into the performance and integrity of Australia's administrative review system found that refugee cases were taking years to finalise and that the MRD, which is the largest division of the AAT, could not 'address both the significant volume of legacy cases and the continuing number of new applications, without better resourcing and case management'.[53] In submissions to this inquiry, refugee advocates highlighted the difficulties applicants faced giving evidence about traumatic events that 'may have occurred many years ago'[54] as well as the 'very precarious situation'[55] of asylum seekers living in the community, particularly in the context of protracted processing times. The inquiry ultimately concluded that '[s]omething is fundamentally broken in the way the AAT currently operates',[56] before recommending the urgent disassembly of the AAT and re-establishment of a new, federal administrative review system.[57]

Following the election of the Albanese Labor Government in May 2022, the Attorney-General, Mark Dreyfus, announced the AAT would be abolished and replaced by a new administrative review body,[58] with the goal that the new ART have a transparent and merits based appointment process and be 'user-focused, efficient, accessible, independent and fair'.[59] The *Issues Paper* asked, among other questions, how the new administrative body could enhance access for vulnerable applicants and what services would assist parties to fully participate in the review process.[60] While the *Issues Paper* poses this question in general terms, the procedure for merits reviews of migration and refugee matters are dictated by the separate codes of procedure in the *Migration Act*. Accordingly, before consideration can be given to how to enhance support for vulnerable applicants in refugee reviews, it is

51 Debra Wilkinson and Elizabeth Morison, 'Cronyism in Appointments to the AAT: An Empirical Analysis' (Discussion Paper, The Australia Institute, May 2022) <https://australiainstitute.org.au/wp-content/uploads/2022/05/P1167-Cronyism-in-appointments-to-the-AAT-Web21-copy.pdf>.

52 See generally Matthew Groves and Greg Weeks, 'Tribunal Justice and Politics in Australia: The Rise and Fall of the Administrative Appeals Tribunal' (2023) 97(4) *Australian Law Journal* 278 <https://doi.org/10.2139/ssrn.4357544>.

53 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Performance and Integrity of Australia's Administrative Review System* (Interim Report, March 2022) 15–16 [2.27], 72 [5.57], 91 [7.15] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024867/toc_pdf/TheperformanceandintegrityofAustralia'sadministrativereviewsystem.pdf;fileType=application%2Fpdf> ('*Performance and Integrity*'). An increase in protection visa applications resulted in a significant increase in the AAT's workload in the period 2015–16 to 2019–20, with lodgements in 2017–18 and 2018–19 exceeding 36,000, 'approximately double the number lodged in 2015–16': at 16 [2.28]. As at 31 December 2023, the total number of review applications on hand was 67,338, with 56,789 applications in the Migration and Refugee Division: *AAT 2023 Caseload Report* (n 47).

54 *Performance and Integrity* (n 53) 65 [5.25].

55 Ibid 66 [5.29].

56 Ibid 95 [7.47].

57 Ibid 96 [7.56].

58 Dreyfus (n 1).

59 Ibid.

60 *Issues Paper* (n 2) 11, 88.

necessary to briefly set out the legal context in which the MRD undertakes reviews of decisions to refuse to grant protection visas.

The grant of a protection visa is the principal mechanism by which Australia seeks to discharge its duty to avoid refoulement.[61] Australia's protection visa regime has been described as 'enact[ing] Australia's international obligations towards some of the world's most vulnerable citizens'[62] but research has shown that its design and implementation can generate and exacerbate vulnerability: asylum seekers and refugees experience high rates of mental illness and factors such as the nature and length of the refugee status determination process, prolonged uncertainty, delays in processing, immigration detention and separation from family and community, and experiences of discrimination and marginalisation in the community are known to trigger or intensify applicants' poor mental and physical health.[63]

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61 There are three classes of onshore protection visas prescribed by the *Migration Act* (n 4) and the *Migration Regulations 1994* (Cth) ('*Migration Regulations*'), namely permanent protection visas, temporary protection visas ('TPV') and safe haven enterprise visas ('SHEV'): *Migration Act* (n 4) s 35A(1). Applicants are eligible for one of these visas if they are in Australia, found to engage Australia's protection obligations as a refugee or because they are owed complementary protection or because they are members of a family unit of a non-citizen who engages protection obligations and holds a protection visa of the same class applied for by the applicant and they satisfy all other criteria, set out in the *Migration Act* (n 4) and *Migration Regulations* (n 61). Section 65 of the *Migration Act* (n 4) provides additional criteria that the applicant must meet for the grant of the visa, including the health criteria, payment of the visa application charge, and not being barred by sections 40, 91W, 91WA, 91WB, 500A or 501 of the Act. Unauthorised Maritime Arrivals ('UMA') are not eligible to lodge a valid application for a permanent protection visa and are limited to applying for a TPV or a SHEV: *Migration Regulations* (n 61) sch 1 pt 4 reg 104(3)(d). On 13 February 2023, the Labor Government announced that 19,000 people who were on temporary protection visas would become eligible for a permanent resolution of status visa in line with this election commitment: Andrew Giles and Clare O'Neil, 'Delivering a Permanent Pathway for Temporary Protection Visa Holders' (Media Release, 13 February 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/permanent-pathway-for-tpv-holders.aspx>; James Massola, 'Government to Abolish Temporary Protection', *The Sydney Morning Herald* (online, 12 February 2023) <https://www.smh.com.au/politics/federal/government-to-abolish-temporary-protection-visas-20230212-p5cjvt.html>. Individuals who arrived in Australia before 14 February 2023 and held or applied for a TPV or SHEV before 14 February 2023 can now apply for a Resolution of Status Visa (Subclass 851) without needing to have their protection claims reassessed. For a critical overview of Australia's response to asylum seekers who arrived by boat after 2012 and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), see further Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003, 1008 <https://doi.org/10.53637/LQUA4141>.

62 *Miah* (n 26) 102 [146] (McHugh J).

63 See generally Derick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44(3) *Transcultural Psychiatry* 359 <https://doi.org/10.1177/1363461507081637>; Rebecca Blackmore et al, 'The Prevalence of Mental Illness in Refugees and Asylum Seekers: A Systematic Review and Meta-analysis' (2020) 17(9) *PLOS Medicine* e1003337:1–24 <https://doi.org/10.1371/journal.pmed.1003337>; Miriam Posselt et al, 'The Mental Health Status of Asylum Seekers in Middle- to High-Income Countries: A Synthesis of Current Global Evidence' (2020) 134(1) *British Medical Bulletin* 4 <https://doi.org/10.1093/bmb/ldaa010>; *NAIS* (n 49) 501 [99] (Kirby J) (noting delays in processing protection vias applications can also exacerbate vulnerability, particularly where individuals are subject to prolonged detention with the serious consequences that this involves for themselves and their families, anxiety about the future and concern about life itself if they are returned to the country of their nationality).

Applicants must make a valid application for the protection visa, which is decided by a primary decision-maker, an officer of the Department of Home Affairs ('Department'). In order to be granted the visa, applicants must satisfy the decision maker that they meet the legal criteria for the grant of the visa, by providing 'sufficient evidence to establish the claim'.[64] The UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* recognises that a person fleeing persecution may 'very frequently even [be] without personal documents' and that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and examiner', a shared responsibility which may require the decision-maker to 'use all the means at [their] disposal to produce the necessary evidence in support of the application'.[65] However, the approach to fact-finding articulated in the *Migration Act* instead places the onus firmly on the applicant to establish the claim, expressly providing that the decision-maker does not have any responsibility or obligation to establish, or assist in establishing, the claim.[66]

If unsuccessful before the Department, applicants for a protection visa may generally apply for independent review by the MRD of the AAT. As noted earlier, the MRD of the AAT is a creature of the amalgamation of various Commonwealth tribunals,[67] however, the general procedures in the AAT do not apply to the MRD.[68] The AAT is soon to be dismantled, but the new ART will continue to hear applications for review of protection visa refusals under the *Migration Act*.[69] Where applicants have lodged a valid application, the Tribunal must review the

64 Section 5AAA(2) of *Migration Act* (n 4) makes clear that 'it is the responsibility of the non-citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim', while section 5AAA(4) confirms that 'the Minister does not have any responsibility or obligation to: (a) specify, or assist in specifying, any particulars of the non-citizen's claim; or (b) establish, or assist in establishing, the claim'. Applicants who seek merits review of a negative determination by the Department are subject to section 423A of the Act, which requires the AAT to 'draw an inference unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made'.

65 *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) 43 [196].

66 See *Migration Act* (n 4) ss 5AAA, 423A.

67 *Amalgamation Act* (n 4). In certain respects, the amalgamation of the MRT and the RRT with the AAT was more in form than in substance as the MRD inherited its procedures from the former RRT and MRT. The AAT has been likened to a 'python' who 'ate a huge pig' in the form of the MRT and RRT due to its inability to digest the workload of these tribunals: 'Why Was the AAT Abolished? The Dangers of Witnessing Wills Remotely', *The Law Report* (ABC Radio National, 24 January 2023) 0:09:30 <https://www.abc.net.au/radionational/programs/lawreport/aat-abolished-dangers-of-witnessing-wills-remotely/14134940>. The *Callinan Review* (n 12) noted that migration decisions place 'the heaviest burden upon the AAT' but the MRD was under-resourced: at 30 [2.6], 166 [10.21].

68 *Administrative Appeals Tribunal Act 1975* (Cth) s 24Z ('*AAT Act*').

69 *ART Act* (n 1); *ART Provisions No 1 Act* (n 1).

decision,[70] a process that involves the finding of facts based on the evidence before the Tribunal at the time of its decision and the application of the legal criteria for a protection visa to these facts[71] to reach 'the correct or preferable decision'.[72] With certain exceptions, the *Migration Act* implicitly preserves the applicant's right to be invited to appear before the Tribunal at a hearing in order to have a meaningful opportunity to 'give evidence and present arguments relating to the issues arising in relation to the decision under the review'.[73]

The Tribunal has the power, amongst other things, to affirm, vary, remit or set aside the primary decision.[74] Sir Gerard Brennan AC, the first President of the AAT and former Chief Justice of the High Court, observed that the AAT was armed with 'different powers', 'ordinarily vested in courts, but not ordinarily vested in administrators'[75] including to 'obtain such information as it considers relevant' and compel the production of documents or giving of evidence by witnesses.[76] While the AAT has these so-called 'inquisitorial powers'[77] and 'may get any information that it considers relevant',[78] in practice the onus is on the asylum seeker to establish their claim[79] and 'put forward the evidence the applicant wishes the Tribunal to consider'.[80] Within this legislative context, the Tribunal retains significant discretion about how it conducts proceedings while discharging its duty to act 'according to

70 *Migration Act* (n 4) s 414.

71 Ibid s 418.

72 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J):

> The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

73 *Migration Act* (n 4) s 425. Applicants may give the Tribunal a written statement and written arguments, and may give evidence by telephone, closed circuit television or any other means of communication: at s 429A. Should an applicant be invited to appear at a Tribunal hearing under section 425 but fail to appear, the Tribunal may make their decision on the papers or dismiss the proceedings: at s 426A. Care needs to be taken in exercising this power of dismissal as notification must be in accordance with the rules of section 426B.

74 *Migration Act* (n 4) s 415(2). Section 430(1) also provides that when making a decision, the Tribunal must set out its decision, its reasons for the decision, its findings on any material questions of fact and refer to the evidence or any other material on which the findings of fact were based.

75 Justice FG Brennan, 'Comment: The Anatomy of an Administrative Decision' (1980) 9(1) *Sydney Law Review* 1, 4–5. Brennan was speaking about the pre-amalgamated tribunal, but his remarks are equally applicable to its post-amalgamation form.

76 Ibid 5.

77 See, eg, *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15 *('SZIAI')*. By virtue of the nature of these powers, the Tribunal is often described as 'inquisitorial' but in this context 'inquisitorial' does not carry its 'full ordinary meaning' but 'delimits the nature of the Tribunal's functions', which require the Tribunal 'to "review the decision" which is the subject of a valid application made to the Tribunal under s[ection] 412 of the Act': at 19 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

78 *Migration Act* (n 4) s 424(1).

79 As noted above, the onus is firmly on the applicant to establish their claims – the Tribunal has no responsibility or obligation to assist the applicant in specifying any particulars of their claim or in establishing the claim: *Migration Act* (n 4) s 5AAA.

80 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 621 [84] (Gummow J) ('*SZGUR*').

the substantial justice and the merits of the case'.[81] In keeping with the legislative desire to keep proceedings informal, the Tribunal 'is not bound by technicalities, legal forms or rules of evidence'.[82]

C 'Vulnerable Persons' in the Review Process in MRD

The concept of vulnerability is not defined in the *Migration Act* or by case law. However, the *Guidelines*, which were first published by the RRT and MRT and updated by the MRD of the AAT, recognise that, in cases involving asylum seekers 'whose ability to understand and effectively present their case or fully participate in the review process may be impaired or not developed', the Tribunal may need to adjust its procedures so that applicants can effectively present their case.[83] The *Guidelines* do not define 'vulnerability' but instead list a range of factors, which may impair a person's ability to participate in the review process, including the following: age, physical or psychological abuse, torture and other traumatic experiences, including experiences in immigration detention, sensory impairment, mental illness or emotional disorder, intellectual, developmental and learning disabilities, physical disability, acquired brain injury or older age and frailty.[84] This list is not 'exhaustive' – the *Guidelines* recognise 'other factors, or a combination of factors, may affect an individual's capacity to participate in the review process'.[85]

The *Guidelines* set out a range of possible procedural modifications that the Tribunal may adopt to assist an applicant with an 'undeveloped or impaired' ability to participate in the review process. The objective of the *Guidelines* is to address 'the needs of those individuals who face particular difficulties in the review process'[86] by promoting the use of procedural accommodations to support vulnerable persons to participate in the review process[87] and ensuring 'no applicant is disadvantaged when the [T]ribunal conducts a review'.[88] The *Guidelines* are not legally binding[89] but if the Tribunal does not have adequate regard to the specific vulnerabilities of an individual applicant in conducting the review, the Tribunal's decision may be the subject of an application for judicial review on

81 *Migration Act* (n 4) s 420. The division is 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with' and in applying the division, the Tribunal 'must act in a way that is fair and just': at s 422B. See also *Miah* (n 26).

82 *Migration Act* (n 4) s 420.

83 *Guidelines* (n 8) 3 [6].

84 Ibid 3–4 [7], 20 [91].

85 Ibid 4 [8], 18–19 [78]–[86] (impaired memory), 19–21 [87]–[95] (impairments associated with torture and traumatic events); *1914275 (Migration)* [2021] AATA 1797, [27] (Member Baker); *2012531 (Refugee)* [2021] AATA 4211, [45]–[47] (Member Baker).

86 *Guidelines* (n 8) 3 [2].

87 Ibid 3 [3]. The stated objectives of the *Guidelines* (n 8) are 'to ensure that vulnerable persons are supported during the review process' and 'to ensure that the inherent dignity of vulnerable persons is recognized and respected'.

88 Ibid 4 [10].

89 *SZTSK v Minister for Immigration and Border Protection* [2015] FCA 106, [17] (Jagot J) ('*SZTSK*'); *SZTGF v Minister for Immigration and Border Protection* [2015] FCCA 2485, [37]–[39] (Judge Manousaridis).

the grounds that the Tribunal has not complied with its statutory[90] or common law obligations, such as the duty to act reasonably and in accordance with procedural fairness. Within this context, the *Guidelines*, are 'intended to complement existing legislation, policy and guidance'.[91]

While the *Guidelines* state that it is preferable that identification of vulnerable applicants occur 'as early as possible' so that 'appropriate accommodations are made as soon as practicable',[92] there are no formal procedures for identifying vulnerable persons. The early identification of vulnerable applicants may also be frustrated by significant delays between the lodging of the review application and the scheduling of a hearing.[93] The *Guidelines* note that a 'Member or staff member may form a view that a person is a vulnerable person'.[94] A 2023 President's Direction on prioritising applications in the MRD does not refer to 'vulnerable' applicants but states that the highest priority should be given to applications involving persons in immigration detention, where a question arises as to whether the Tribunal can conduct review, and where 'there are compelling reasons to prioritise the application'.[95] In practice, the onus is on applicants to identify the factors that may affect their ability to participate in the review. An MRD practice direction issued in 2023 sets out the Tribunal's 'requirements and expectations of applicants and representatives' in relation to reviews in the MRD and, under the heading 'Vulnerabilities', states: 'If there are any factors that may affect your ability to participate in the review, such as intellectual, physical, psychosocial or other disability, age-related issues or any other factor of vulnerability, you should inform us of this as early as possible.'[96]

Sometimes the question of whether a person is vulnerable, in the way described by the *Guidelines*, may be difficult to determine because, for example, an unrepresented applicant does not raise any 'factor of vulnerability' that may impact

90 See, eg, *Migration* Act (n 4) ss 424A, 425.

91 *Guidelines* (n 8) 5 [11].

92 Ibid 5 [12].

93 Between 1 July–31 December 2023, 50% of review applications for protection visa refusals at the AAT were finalised within 1,577 days, and 95% of them were finalised within 2,212 days: 'Migration and Refugee Division Processing Times', *Administrative Appeals Tribunal* (Web Page) <https://web.archive.org/web/20240307065401/https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times>. The median average time for refugee applications to be finalised between 1 July–31 December 2023 was 160 weeks: *AAT 2023 Caseload Report* (n 47). The average processing time for a permanent protection visa at the Department was 1,076 days in 2022–23: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Question on Notice No 180* (2022) 2 <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId19-PortfolioId20-QuestionNumber180>.

94 *Guidelines* (n 8) 5 [13].

95 Administrative Appeals Tribunal, 'President's Direction: Prioritising Applications in the Migration and Refugee Division' (22 February 2023) 1 [2.1] <https://web.archive.org/web/20240323033924/https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Presidents-Direction-Prioritising-Applications-in-the-MRD.pdf>.

96 Administrative Appeals Tribunal, 'Practice Direction: Migration and Refugee Division Practice Direction' (22 February 2023) 1 [1.1], 3 [3.7] <https://web.archive.org/web/20240320133952/https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Migration-and-Refugee-Division-Practice-Direction.pdf>. This is issued under section 18B of the *AAT Act* (n 68).

on their ability to participate in the review. However, the duty to inquire exists 'in only strictly limited circumstances' and the Tribunal is generally not required to obtain expert evidence or to obtain further expert evidence to inform itself about the degree to which an applicant's ability to give evidence is impaired.[97] While many asylum seekers will be suffering 'some measure of psychological stress and disorder',[98] a power to acquire information is distinct from a duty to inquire and, as Gleeson CJ stated in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* ('*SGLB*'):

> Many people who appear before administrative tribunals, and many litigants in courts, including some litigants in this Court, suffer from psychological disorders or psychiatric illness. That may affect their capacity to do justice to their case. Fairness does not ordinarily require the court or tribunal to undertake a psychiatric or psychological assessment to investigate the extent to which the person in question may be at a disadvantage; and ordinarily it would be impossible to tell.[99]

As we discuss further in Part IV, this points to the tension in the operating environment of the Tribunal: given the centrality of credibility assessments in refugee decision-making it is important to understand the impact of mental health conditions on a person's ability to give evidence. However, the Tribunal statutory power to acquire a medical report under section 427 of the *Migration Act* 'does not impose any duty or obligation to do so'.[100]

III IMPLICATIONS OF IDENTIFYING VULNERABLE PERSONS FOR REFUGEE DECISION-MAKING

In this section we examine the procedural and substantive implications of identifying an asylum seeker as a 'vulnerable person' during the review process. As we noted earlier, while vulnerability is not defined either in international law or domestic law, the *Guidelines* provide a flexible and broad definition, recognising that '[a] person may be identified as vulnerable at any stage during the review process'.[101] The Tribunal has the power to adapt its ordinary procedures to assist an applicant who might otherwise have been disadvantaged in putting forward their case having regard to its statutory obligation to deal with a review in a 'fair, just, economical,

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97 See discussion in Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230, 265.

98 *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 56, 68 [52] (Branson J).

99 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224, 228 [19] (Gleeson CJ) ('*SGLB*'). The Tribunal does not have a general obligation to acquire information. However, as noted by the High Court in *SZIAI* (n 77) 21 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):

> The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review.

See generally Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33(2) *Sydney Law Review* 177 ('Duty to Inquire').

100 *SGLB* (n 99) 233 [43] (Gummow and Hayne JJ).

101 *Guidelines* (n 8) 5 [12].

informal and quick' manner and in accordance with 'substantial justice and the merits of the case'.[102] What exactly is required in a case involving a vulnerable applicant 'will depend upon the facts and circumstances of the particular case'[103] and 'the statutory framework within which a decision-maker exercises statutory power'.[104] To quote the then Chief Justice James Allsop of the Federal Court of Australia ('FCA'), '[f]airness is normative, evaluative, context specific and relative'.[105]

While the *Guidelines* are often described as dealing with 'procedural' accommodations to support vulnerable persons to participate in the review process, this analysis shows that the identification of a person as 'vulnerable' in the sense described by the *Guidelines* can have significant implications for the evaluation of evidence and the assessment of whether a person is owed protection obligations by Australia. However, there is variation in how Tribunal members understand and respond to vulnerability. Given there is no formal procedure for identifying vulnerability, legal representation can play a vital role in ensuring the Tribunal is informed about how the vulnerability of the applicant may impair their ability to participate in review process and in presenting arguments about whether the applicant meets the refugee or complementary protection criterion.

A A Real and Meaningful Opportunity to Participate in the Hearing

1 Competency and Vulnerability

The *Migration Act* does not contain a specific provision relating to 'competence', requiring the Tribunal to be satisfied that the applicant is able to take part or continue to take part in proceedings.[106] Instead, section 425 requires the Tribunal to invite the applicant to appear before the Tribunal 'to give evidence and present arguments relating to the issues arising in relation to the decision under review',[107] upon which an obligation to hold a hearing has been 'grafted'.[108] A central element of the merits

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102 *Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs* [2006] FCA 1166, [6] (Gyles J) ('*Applicant S296*'), quoting *Migration Act* (n 4) ss 420(1), (2)(b), as at 28 August 2006.

103 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161 [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) ('*SZBEL*').

104 Ibid 160 [26]. What is required to avoid 'practical injustice' will be determined considering the circumstances of the case and the specific vulnerabilities of the applicant.

105 *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212, 215 [7] ('*SZRMQ*').

106 *SGLB* (n 99) 235 [45] (Gummow and Hayne JJ).

107 *Migration Act* (n 4) s 425. Regarding judicial disagreement on interpretation of section 425, see *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 ('*SZFDE*'); *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 ('*SZNVW*'). In *SZNVW* (n 107), Perram J stated at 595 [77]:

> Viewed through that prism it is easy to see how such an obligation has ended up being grafted – not onto the hearing for which the statute does not provide – but on the invitation to that hearing for which it does. This has the consequence … that concepts which really relate to the efficacy of hearings – such as fitness for trial and the ability to comprehend trial process – become transplanted from their origin as such into the alien soil of rules concerned with invitations to hearings.

108 *SZNVW* (n 107) 595 [77] (Perram J). See *SZFDE* (n 107), where Graham J observed at 416 [211] that:

> It is implicit from the terms of s[ection] 425(1) that not only must an appropriate invitation be extended but also it should be followed by a corresponding hearing at which the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review will be afforded to the applicant, subject to the provisions of s[ection] 425(3).

review process is 'a real opportunity [for the applicant] to place before the repository of power such information as is relevant'.[109] As such, '[t]his will require a substantially effective mechanism of communicating oral and written information, both from, and to, the person'.[110] As the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* ('*SCAR*') observed, while section 425 of the *Migration Act* 'is not a code setting out all of the requirements for a fair hearing by the Tribunal',[111] it is 'clear' that 'Parliament has made compliance with s[ection] 425 of the Act a necessary condition and element of a fair hearing by the Tribunal'.[112] Thus, while section 425 does not require the Tribunal to actively assist applicants to formulate their case or make inquiries,[113] it does impose an objective requirement on the Tribunal to provide the applicant with a *real and meaningful invitation* to give evidence and present arguments 'whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation'.[114]

In *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs*, Branson J noted that for an invitation to hearing to be '"meaningful" in the sense discussed by the Full Court in … *SCAR*', then it appeared necessary that 'the applicant should be competent to do that which the Act envisages, namely to give evidence and present arguments relating to the relevant issues'.[115] However, there is 'no single standard of fitness [that] will be appropriate for all cases'.[116] Rather, it will be necessary to assess fitness 'having regard to the particular circumstances of each case including the intended purpose of the hearing before the [T]ribunal and the support and assistance available to the applicant'.[117] Therefore, while the Tribunal is not required to assist the applicant to formulate their case or to make further enquiries, a 'real and meaningful' invitation does impose 'an objective requirement on the Tribunal'[118] to ensure that it 'understood what the [applicant] was saying on issues which arose in relation to the review (whether or not there was an interpreter) and to ensure that the [applicant] understood what the Tribunal was saying on those issues'.[119]

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109 *SZRMQ* (n 105) 215 [9] (Allsop CJ).

110 Ibid.

111 *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553, 561 [35] (Gray, Cooper and Selway JJ) ('*SCAR*').

112 Ibid.

113 Ibid 561 [36]. Further, while the Tribunal is not required to give 'a running commentary upon what it thinks about the evidence that is given', it must provide the applicant with 'sufficient opportunity to give evidence, or make submissions' relating to 'the determinative issues arising in relation to the decision under review': *SZBEL* (n 103) 166 [48], 165 [44] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

114 *SCAR* (n 111) 561 [37] (Gray, Cooper and Selway JJ). In this case, it was common ground that on the day of the Tribunal hearing the applicant was so distressed by the recent death of his father that he sought medical treatment. However, the Tribunal was oblivious of the facts which established that the applicant did not have a full and fair opportunity to present his case.

115 *NAMJ* (n 98) 68 [55] (Branson J).

116 Ibid 69 [58].

117 Ibid.

118 *SCAR* (n 111) 561 [37] (Gray, Cooper and Selway JJ).

119 *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309, 337 [88] (Griffiths and Moshinsky JJ).

The *Guidelines* draw a distinction between two broad categories of applicants, namely vulnerable applicants who are not competent to give evidence, whether temporarily or permanently, and vulnerable applicants who are competent to give evidence but are nevertheless vulnerable.[120] In practice, the distinction between these categories may sometimes be fluid as the impact of the condition on the applicant's ability to give evidence may fluctuate over time in response to treatment or external factors or differ depending on whether the decision-maker is alive to the need to make procedural adjustments to ensure vulnerable applicants can present evidence and arguments. In some cases, the Tribunal may find an applicant is not competent to give evidence and present arguments (for example, in *1807259 (Refugee)*, where the Tribunal found the applicant, who had suffered a 'severe traumatic brain injury', was unable to answer questions or provide evidence on his claims).[121] Significant challenges may arise, however, where it is not immediately clear whether the applicant is competent. Legally it is the applicant who bears the onus of establishing that they are unfit to take part in the hearing.[122] Therefore, it is not enough for applicants to 'assert that their psychological condition deprived them of the "meaningful opportunity" required by s[ection] 425 of the *Migration Act*';[123] they 'must also establish that their condition is such as to deny them the capacity to give an account of their experiences, to present argument[s] in support of their claims, and to understand and respond to the questions put to them'.[124]

Despite the potential difficulties of obtaining expert evidence about the impact of mental health conditions on a person's ability to put forward their claims, the Tribunal is not generally obliged to inquire into whether an applicant's case could be supported by other evidence.[125] Rather, the courts have found that where an applicant is competent to give evidence, 'the hearing required by s[ection] 425 of the Act is not nullified by a mere failure by an applicant to present his case in the

120 *Guidelines* (n 8) 8 [33].

121 In *1807259 (Refugee)* [2019] AATA 6504, the applicant 'sustained an extremely severe traumatic brain injury secondary to a pedestrian vs car motor vehicle accident' and a public guardian was appointed under the *Guardianship Act 1987* (NSW): at 2 [7], 3 [19] (Senior Member Nicholls). The Tribunal held a hearing at which the applicant, his support assistant, a social worker from the hospital, his guardian and a Mandarin interpreter attended. The Tribunal found that the applicant 'was unable to communicate and was not responsive to questioning at the beginning of the hearing', observing '[h]e appeared highly agitated': at 5 [22]. His social worker informed the Tribunal that 'his prolonged attendance in the video hearing would be detrimental to his health and well-being' at which point the Tribunal 'excused any further attendance by the applicant': at 5 [22]. Based on the medical and other evidence, the Tribunal found that the applicant was 'not competent to take an oath or make an affirmation and he [was] unable to answer questions or provide evidence on his claims': at 5 [25]. The Tribunal proceeded to assess his claims on the material before it, affirming the decision to refuse to grant the protection visa application.

122 *NAMJ* (n 98) 71 [68] (Branson J). See also *SZSGB v Minister for Immigration and Citizenship* [2014] FCA 149.

123 *BJB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 116, 125 [43] (Kenny, McKerracher and White JJ) ('*BJB16*'). See also *SZMBU v Minister for Immigration and Citizenship* [2008] FCA 1290, [20] (Gilmour J).

124 *BJB16* (n 123) 125 [43] (Kenny, McKerracher and White JJ). See also *SZNVW* (n 107) 582 [20] (Keane CJ); *SZMSA v Minister for Immigration and Citizenship* [2010] FCA 345, [20]–[25], [32]–[35] (Gilmour J).

125 *SGLB* (n 99) 228 [19] (Gleeson CJ), 233–4 [43] (Gummow and Hayne JJ). See also Groves, 'Duty to Inquire' (n 99) 196.

best possible light'.[126] In cases involving vulnerable albeit competent applicants, the *Guidelines* provide guidance on what procedural modifications might facilitate the applicant's participation. For example, the Tribunal may arrange for the matter to be determined by a member, and an interpreter of a particular gender,[127] assign an experienced case officer to act as 'the primary contact',[128] allow a support person,[129] arrange breaks during the hearing or adjournments,[130] adjourn the hearing on the grounds that medical reports indicated the applicant was not competent to give evidence, and place additional reliance on legal submissions. For example, in *1611949 (Refugee)*, a woman with 'symptoms of generalised anxiety, depression and adjustment disorder' claimed to have a well-founded fear of persecution on multiple grounds, including domestic violence and female genital mutilation.[131] The Tribunal applied the *Guidelines*, including 'giving priority to the matter, encouraging the representative to make submissions, creating an informal setting in the hearing room and allowing extra time to provide additional evidence'.[132]

In cases involving unrepresented applicants, obtaining evidence to resolve questions about the nature and extent of the applicant's vulnerability may be difficult,[133] particularly if the applicant lacks insight into their medical condition[134] or requires assistance to obtain expert evidence. Although the Tribunal has a statutory power to require the Secretary to arrange a medical examination that 'the Tribunal thinks necessary with respect to the review'[135] and to give to the Tribunal the report, it is under no general duty to seek such a medical report,[136] and it is for the applicant to 'put forward the evidence the applicant wishes the Tribunal to consider'.[137] A search of publicly reported cases located only one instance of the Tribunal exercising its statutory power to obtain medical evidence.[138] Narelle Bedford and Robin Creyke suggest that the reticence of a tribunal to exercise its investigative powers can reflect the wider tensions in its operating environment.[139]

126 *SZNVW* (n 107) 583 [22] (Keane CJ).
127 *Guidelines* (n 8) 6 [18], 10 [45], 21 [95].
128 Ibid 6 [20].
129 Ibid 10–11 [45].
130 Ibid.
131 [2020] AATA 318, [57] (Member Marquard).
132 Ibid.
133 *SZMSF v Minister for Immigration and Citizenship* [2010] FCA 585, [17] (Flick J) ('*SZMSF*').
134 *Guidelines* (n 8) 17 [75]. See *2010168 (Refugee)* [2020] AATA 4634, [75] (Member Marquard).
135 *Migration Act* (n 4) s 427(1)(d).
136 *SGLB* (n 99) 228 [17] (Gummow and Hayne JJ); *SZGUR* (n 80) 622 [87] (Gummow J).
137 *SZGUR* (n 80) 621 [84] (Gummow J). See also at 622–3 [88]. See generally Groves, 'Duty to Inquire' (n 99) 188.
138 *2107567 (Refugee)* [2021] AATA 5052, [41]–[42] (Member Creedon). In a case involving an applicant from Fiji with a diagnosis of schizophrenia, the Tribunal requested the Department to organise a psychiatric assessment and report of the applicant pursuant to section 427(1)(d) of the *Migration Act* (n 4). There may be other instances of the Tribunal utilising this power as only a small percentage of the Tribunal decisions are published. For example, in 2022–23 only 5,032 AAT and IAA decisions were published of the 42,862 decisions finalised: Administrative Appeals Tribunal, *Annual Report 2022–23* (Report, 2023) 4, 18 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202223/Administrative-Appeals-Tribunal-Annual-Report-2022%e2%80%9323.pdf>.
139 Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration Inc, 2006) 65 <https://aija.org.au/wp-content/uploads/2017/10/Inquisitorial-

Many asylum seekers are unrepresented and factors, such as the protracted nature of the protection assessment process and the associated uncertainty relating to the outcome, immigration detention, and separation from family and community are known to trigger or intensify applicants' poor mental health.[140] While the Tribunal must act in a way that is fair and just,[141] the environment in which the Tribunal makes its decisions is both 'inherently imperfect'[142] and constantly changing.[143]

Given the limited circumstances in which the Tribunal may have an obligation to seek expert evidence about the impact of a medical condition on the ability of an applicant to give evidence, the role of a diligent legal representative in obtaining medical evidence and making arguments about these issues may be critical.[144] For example, in *1516248 (Refugee)*, the Tribunal adjourned a hearing in 2017 having regard to the applicant's presentation at the hearing and reports from 'a treating clinical psychologist and psychiatrist about the applicant's mental health and capacity to participate in the hearing'.[145] Three further hearings scheduled in 2017 were all 'abandoned because material provided to the Tribunal indicated the applicant was not competent to attend a hearing during this period'.[146] The hearing was ultimately resumed in November 2018 after the Tribunal received a medical report that the applicant had the capacity to give evidence at a hearing. In its decision to affirm the decision under the review, the Tribunal, which was constituted by two Members, stated:

> We are satisfied the applicant had capacity to give evidence and present his case but we acknowledge the applicant is vulnerable because of his mental health issues and the role of the representative in assisting the applicant was crucial. It is also relevant to note that procedures consistent with … [the] *Guidelines* … were adopted by the Tribunal. … [The representative's] …very detailed written and oral submissions … [and] considerable efforts to facilitate the applicant in giving evidence and presenting his case greatly assisted the Tribunal in conducting this review.[147]

Processes-in-Australian-Tribunals-BedfordCreyke-2006.pdf>. See also *Callinan Review* (n 12) 46–7 [4.22], citing Sir Gerard Brennan, 'The AAT: Twenty Years Forward' (Speech, Administrative Appeals Tribunal Twentieth Anniversary Conference, 1 July 1996) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aat2.htm>.

140 Silove, Austin and Steel (n 63); Blackmore et al (n 63); Posselt et al (n 63).

141 *Migration Act* (n 4) s 422B(3).

142 *SGLB* (n 99) 245 [73(7)] (Kirby J). Kirby J further observed that:

> Many factors may explain why applicants present with the appearance of poor credibility. These include: mistrust of authority; defects in perception and memory; cultural differences; the effects of fear; the effects of physical and psychological trauma; communication and translation deficiencies; poor experience elsewhere with governmental officials; and a belief that the interests of the applicants or their children may be advanced by saying what they believe officials want to hear. The tribunal must be firmly told – if necessary by this court – that the process is one for arriving at the best possible understanding of the facts in an inherently imperfect environment. It is not to punish or disadvantage vulnerable people because they have made false or inconsistent statements, or are believed to have done so.

143 Steven Rares, 'Is Access to Justice a Right or a Service?' (2015) 89(11) *Australian Law Journal* 777.

144 *Guidance Note* (n 5) 10 [40].

145 [2019] AATA 4304, [9] (Deputy President Redfern and Member Baker). The published decision record contains redactions; the applicant's specific mental illness is not identified.

146 Ibid [11].

147 Ibid [13]–[14].

In practice, applicants without legal representation may face difficulties making arguments about the procedural and/or substantive implications of their vulnerability for the determination of their protection claims.[148] While the Tribunal acts 'under practical constraints',[149] as Kirby J noted in his dissenting judgment in *SGLB*, conditions, such as mental illness, are 'not within matters of general knowledge or matters of which even an expert and experienced body, such as the Tribunal, could take notice without proof'.[150] For example, in *1516248 (Refugee)*, the applicant's legal representative played a critical role in providing submissions about procedural accommodations, communicating with the Tribunal on behalf of the vulnerable applicant, and assisting the applicant to participate in the review process,[151] including through arranging for the provision of contemporaneous expert evidence about the impact of any medical condition. Such expert evidence may be key to the consideration of specific issues, such as non-attendance at appointments, which could otherwise be the subject of adverse credibility findings.[152]

2 Adjournments

While the Tribunal may adjust its procedures to support applicants who are identified as vulnerable, unrepresented applicants may lack awareness of how to

148 For example, in *2010168 (Refugee)* (n 134), the applicant was a Liberian citizen who had migrated to Australia as the dependant on his mother's refugee visa in 2004 and who had experienced trauma himself as a former child soldier. Following the mandatory cancellation of his visa, he applied for a protection visa and the Tribunal affirmed the decision to refuse to grant him a protection visa: at [192]. Throughout the review proceedings, the applicant, who, as an adult had been diagnosed with schizophrenia, was in immigration detention and unrepresented. In considering whether the applicant had a well-founded fear of persecution for reasons of his membership of a particular social group of persons with mental health issues, the Tribunal found, based on a psychiatrist's report from 2019, that the applicant had been diagnosed with '[s]chizophrenia in remission' noting that he had missed about 30 mental health appointments in the years that he had been in immigration detention: at [124], [140], [146] (Member Marquard). In light of evidence before it, the Tribunal was not satisfied that 'the applicant display[ed] symptoms of severe mental illness or would do so in the reasonably foreseeable future': at [164]. It further found that there was no evidence that his medication (Quetiapine and Seroquel) was unavailable in Liberia: at [159]. The Tribunal cited country information, which indicated that less than one percent of Liberians have access to appropriate mental health services, the mental health system was fragile and underfunded, with only one psychiatrist in Liberia, that severe mental illness is highly stigmatised among Liberians and that untreated mentally ill persons are likely to suffer from extreme abuse: at [150]. It accepted that the health system in Liberia was severely underfunded and access to mental health services was limited: at [155].

149 *SGLB* (n 99) 248 [84].

150 Ibid 250 [90].

151 *1516248 (Refugee)* (n 145) [3] (Deputy President Redfern and Member Baker).

152 See, eg, *Plaintiff S183/2021 v Minister for Home Affairs* (2022) 178 ALD 289. In this case, a question arose about whether a delegate of Minister's decision to make an adverse credibility finding based on the applicant's failure to attend a scheduled interview was affected by unreasonableness. Gordon J concluded that it was unreasonable for the delegate to rely on the plaintiff's failure to provide further information and to attend an interview as supporting the conclusion that her claims were not credible, in circumstances where there was evidence that this was explicable in the context of her current circumstances and mental health condition. As Gordon J noted at 299 [47], this was because:

> On the face of the emails sent by the plaintiff … the plaintiff: was homeless; was not fluent in English; … [wrote that] 'I am really suffering mentally' … [and] ha[ve] no phone and no money; and did not understand that the delegate was offering to reschedule the interview in Sydney.

request procedural accommodations. Determining whether to grant or refuse a request for an adjournment may require consideration of what is known about the vulnerability of the applicant. For example, an adjournment may be sought on one or more of the following grounds: an applicant is temporarily unfit to give evidence or requires time for medical treatment to improve their mental or physical state or to obtain further medical evidence about their fitness to participate[153] or to obtain legal representation.[154] The Tribunal may fall into error if a decision to refuse an adjournment request can be impugned as a breach of procedural fairness or legally unreasonable.[155] As noted earlier, section 427(6) of the *Migration Act* makes clear that there is no entitlement to legal representation.[156] However, consideration of the known vulnerabilities of an applicant will be important in determining how to respond to a request to adjourn a hearing so that the applicant may seek legal assistance. For example, in *CZR20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[157] an adjournment was sought by a third party on behalf of the applicant on the grounds that the applicant, who had mental health issues and could not read or write, required time to secure pro bono representation.[158] The Tribunal declined to adjourn the matter. On judicial review,

153 See, eg, *1404642 (Refugee)* [2015] AATA 3468. The matter was adjourned to enable the applicant, a Sri Lankan national (represented), to seek medical evidence: at [26] (Member Thwaites). Following the adjournment medical reports were provided that indicated that the applicant suffered from the symptoms of anxiety, depression, and post-traumatic stress disorder ('PTSD'): at [24]. The Tribunal declined a request for a further adjournment on medical grounds and proceeded with the hearing: at [26]. In its decision, the Tribunal noted it had adapted its procedures in accordance with the guidance in the *Guidelines* (n 8): at [28].

154 While the request or need for an adjournment might arise at any point during the proceedings, here we focus on adjournments, which have a direct nexus with the applicant's ability to give evidence and present arguments under section 425 of the *Migration Act* (n 4).

155 There may be multiple grounds of judicial review that are open in such circumstances.

156 *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, 295–6 [69]–[71] (French and Lee JJ) ('*WABZ*'). In determining whether procedural fairness required that a legal aid solicitor be able to appear for the applicant at the hearing, the court identified four relevant considerations: (1) '[t]he applicant's capacity to understand the nature of the proceedings and the issues for determination'; (2) '[t]he applicant's ability to understand and communicate effectively in the language used by the' AAT; (3) '[t]he legal and factual complexity of the case'; and (4) '[t]he importance of the decision to the applicant's liberty or welfare': at 295 [69]. French and Lee JJ considered that '[i]n most cases before the Tribunal, the relevant factors will favour the view that representation should be permitted as an aspect of procedural fairness': at 295–6 [71]. In reaching this conclusion, their Honours considered the 'cultural and linguistic divide' faced by the non-English speaking applicant and that the outcome of a protection visa assessment 'may affect life, liberty and future welfare in a variety of ways', while also acknowledging that the complex legal questions that can arise in such cases have provoked debates within the Australian judiciary and internationally and may raise 'issues of construction and application to the facts' that are unlikely to be adequately addressed by an unrepresented applicant: at 295–6 [71]. Their Honours noted that 'the use of an interpreter, even a very good one, does not completely overcome deficiencies in understanding' and that '[t]here are some issues or legal concepts to be addressed by the Tribunal which may have no equivalent in the language or cultural background of an applicant': at 295 [71]. *WABZ* (n 156) was decided before the introduction of section 422B of the *Migration Act* (n 4), which provides that part 7 is taken to be an exhaustive statement of the hearing rule and therefore must be treated with caution: *AFD16* (n 26) 36 [114] (Perry J); S*ZEQH v Minister for Immigration and Citizenship* (2008) 172 FCR 127, 135–7 [25]–[30] (Dowsett J).

157 (2021) 357 FLR 133 ('*CZR20*').

158 Ibid.

it was common ground that 'people who suffer from severe mental disabilities are to be treated differently when requesting an adjournment from others who do not suffer from such a disability'.[159] The Court found the decision to refuse to grant the adjournment was legally unreasonable[160] as given the already available evidence about the applicant's mental health, the Tribunal ought to have appreciated that the applicant's lack of representation at the hearing would place him 'in such a position of substantial disadvantage so as to render the conduct of a hearing unfair'.[161]

Even where an applicant is represented and an adjournment is sought on the basis that the applicant is temporarily experiencing symptoms of physical or mental illness that may be controlled or resolved with treatment, there is limited guidance on the question of how long the hearing should be adjourned for and at what point the statutory obligation to complete the review must be discharged.[162] As Matthew Groves has observed, '[j]ust as fairness may require a hearing, it may also require adjournment of a hearing'.[163] However, adjournments also prolong proceedings, and the Tribunal must consider its statutory duty to deal with a review in a 'fair, just, economical, informal and quick' manner and in accordance with 'substantial justice and the merits of the case'.[164] Requests to adjourn proceedings to enable the applicant to access legal assistance must be carefully considered in the context of the serious consequences of the Tribunal's decision, the complexity of legal and factual issues, and – in matters involving vulnerable persons – the nature and extent of the applicant's impairment.[165]

B Vulnerability and the Tribunal's Approach to Fact-Finding

In this section, we consider how the Tribunal's assessment of an applicant's vulnerability can impact on its approach to fact-finding. The outcome of many, if not most, cases will turn on the Tribunal's assessment of the credibility of the applicant's claims.[166] The MRD's *Guidelines on the Assessment of Credibility*

159 Ibid 137 [18] (Judge Egan).

160 Ibid 137 [18], 144 [29].

161 Ibid 137 [18].

162 In assessing whether the Tribunal has discharged its obligations to provide procedural fairness, the courts may have regard to whether the applicant was represented: see, eg, *SZOGP v Minister for Immigration and Citizenship* (2010) 244 FLR 129, 155 [57] (Smith FM) ('*SZOGP*').

163 Matthew Groves, 'Do Administrative Tribunals Have to Be Satisfied of the Competence of Parties before Them?' (2013) 20(1) *Psychiatry, Psychology and Law* 133, 142 <https://doi.org/10.1080/13218719.2011.633321>.

164 See above n 102.

165 See, eg, *SZRVA v Minister for Immigration and Border Protection* [2019] FCA 630, [45] (Flick J) ('*SZRVA*'); *CZR20* (n 157). There is no statutory entitlement to legal representation before the Tribunal and nor will the fact that the applicant appeared before the Tribunal without representation, without more, result in a breach of procedural fairness: see *Applicant S296* (n 102) [6] (Gyles J).

166 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222, 248 [91] (Kirby J): 'Many, perhaps most, claims to refugee status involve examination of the truthfulness of the factual assertions of the applicant. Many turn on the assessment of credibility first by the delegate of the Minister and, if review is sought, by the Tribunal.' See also Administrative Appeals Tribunal, Migration and Refugee Division, *Guidelines on the Assessment of Credibility* (July 2015) 3 [4] <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf> ('*Credibility Guidelines*'). See generally Audrey Macklin, 'Truth

advise that credibility findings 'should be based on relevant and material facts'.[167] But credibility assessments may be undertaken in an 'evidentiary void' where there is little (or no) evidence to corroborate an applicant's claim[168] or to assess 'when it is appropriate to accept that trauma, anxiety and fear have influenced an applicant's behaviour and when they have not'.[169] Jill Hunter et al argue that it is in cases involving psychologically vulnerable applicants, where questions arise about the credibility of asylum seeker's claims, 'that the use of mental health expertise is of most potential benefit'.[170] However, there is a disconnect between what may be desirable in terms of maximising an applicant's ability to meaningfully participate in the review process and what the Tribunal is required to do to discharge its legal obligations. This disconnect is particularly marked in complex cases where the applicant is unrepresented and there is a lack of relevant and probative evidence about the nature and extent of the applicant's vulnerability. As Flick J has observed,

> difficult questions may arise … where a claimant may nevertheless be 'fit' to participate in a hearing before the Tribunal but where [their] physical and emotional condition is nevertheless a matter to be taken into account by the Tribunal, particularly when assessing credibility.[171]

The *Guidelines* recognise that where 'the applicant's mental health may have impacted on the presentation of evidence' this should inform the Tribunal's approach to fact-finding. There is a significant body of research concerning the impacts that torture, trauma, and various psychological and psychiatric conditions can have on the ability of asylum seekers to give evidence and present arguments in support of their protection claims. However, as noted earlier, the Tribunal generally will not have a duty to inquire into the applicant's mental state.[172] For example, in *MZYRX v Minister for Immigration and Citizenship*, Whelan FM commented that while 'it may have been prudent' for the reviewer to attempt to ascertain whether the applicant's ability to understand and respond to questions 'was compromised

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and Consequences: Credibility Determination in the Refugee Context' (Conference Paper, International Association of Refugee Law Judges, 1998) <http://refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf>; Rebecca Dowd et al, 'Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal' (2018) 30(1) *International Journal of Refugee Law* 71 <https://doi.org/10.1093/ijrl/eey017>.

167 *Credibility Guidelines* (n 166) 3 [9].

168 Hunter et al (n 8) 476.

169 Ibid 485.

170 Ibid. Hunter et al also question whether the *Guidelines* (n 8) 'mask the complexity of understanding the *actual* impact of psychological and psychiatric trauma' by providing guidance on procedures to accommodate vulnerable applicants that do not address the 'difficulty of diagnosing PTSD and appreciating its manifestations in practice'.

171 *SZMSF* (n 133) 5–6 [17] (Flick J). In quoting *Applicant S296* (n 102) [6] (Gyles J), Flick J continued at [18] (emphasis omitted):

> Where a claimant is 'unfit' to participate effectively in a hearing before the Tribunal, it may be that the Tribunal should adjourn or postpone the hearing until a later date … But … '[t]here will be circumstances where the incapacity of an applicant is such that the review by the Tribunal simply must take place without the benefit of oral evidence or oral contribution from the applicant' …

172 See above n 125.

either by his intellectual capacity or by a developmental disorder',[173] there was no duty to make such inquiries as it was for the applicant to establish that he was unfit to participate in the hearing. Nor did the available evidence demonstrate that 'the unreliability of his answers was solely a function of his mental state'.[174]

The assessment of credibility is notoriously fraught terrain. The Tribunal 'must be sensitive to the difficulties often faced by applicants and should give the benefit of the doubt to those who are generally credible, but unable to substantiate all of their claims'[175] and, if a finding that a past event did not occur is not made with sufficient confidence, the Tribunal may need to consider that it is possible that the event might have occurred when determining whether the applicant has a well-founded fear of persecution.[176] While each case will turn on its particular facts and circumstances, in some cases the Tribunal, having regard to the *Guidelines*, which draw upon research about the impact of trauma on memory, has concluded that it is unable to confidently find the applicant's claims are not credible.[177] For example, in *1611949 (Refugee)*, the Tribunal was prepared to accept that the applicant (who had been diagnosed with depression and adjustment disorder) could not remember whether her sister had died one week or six months after having undergone genital mutilation.[178] In *2010192 (Refugee)*, the Tribunal had regard to the *Guidelines* in light of 'evidence about the applicant's mental health and his cultural sensitivity to talking about matters relating to sexual orientation' before concluding that the applicant had provided a reasonable explanation for his delay in raising a claim as he had 'only recently come to terms with his sexuality'.[179] However, in other cases there may be a lack of evidence from mental health professionals[180] or the available evidence about the applicant's mental health may not resolve the Tribunal's concerns about the credibility of the claims.[181]

Whether the Tribunal reaches the requisite state of satisfaction about the credibility of the applicant's claims is, however, a matter for the Tribunal[182] having regard to judicial guidance on a need for 'fairness and a reasonable approach' to its fact-finding task.[183] As discussed earlier, although the Tribunal has a range

173 (2012) 131 ALD 101, 122 [94].

174 Ibid 118 [67].

175 *SZLVZ v Minister for Immigration and Citizenship* [2008] FCA 1816, 9 [25] (Middleton J).

176 *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 240 [62]–[65] (Sackville J, North J agreeing at 253 [129]). However, it is also clear that if the AAT does not have any doubt about its findings, then there is no requirement for it to ask '[w]hat if I am wrong?': at 255 [140] (Kenny J).

177 See, eg, *1611949 (Refugee)* (n 131) [67], [70] (Member Marquard). See also *1510996 (Refugee)* [2017] AATA 2210, [22] (Senior Member Dragovic).

178 *1611949 (Refugee)* (n 131) [57] (Member Marquard).

179 *2010192 (Refugee)* [2021] AATA 1044, [180], [184] (Member Marquad).

180 *1712797 (Refugee)* [2022] AATA 649.

181 *1603070 (Refugee)* [2020] AATA 974.

182 The courts have recognised the need for 'special considerations' of 'problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia': *Sivalingam v Minister for Immigration and Multicultural Affairs* [1998] FCA 1167, 13 (O'Connor, Branson and Marshall JJ). See generally *Credibility Guidelines* (n 166); Dowd et al (n 166).

183 *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83, 92–3 [24]–[28] (Kenny, Griffiths and Mortimer JJ).

of investigative powers, the Tribunal generally will not have a duty to inquire into the applicant's mental state and its impact on the applicant's ability to give evidence and present arguments.[184] While expert evidence can play a critical role in assisting the Tribunal to understand the nature and extent of the applicant's specific vulnerabilities, in practice, obtaining such evidence may be difficult, particularly in cases involving unrepresented applicants.[185] Furthermore, the factors that may impair a person's ability to participate in the hearing may not be apparent to the Tribunal on the evidence before it. As a result, credibility assessments may be made in circumstances where there is a lack of expert evidence about the impact of the applicant's mental state on their ability to give evidence.[186] The protection visa assessment system is overburdened in multiple ways, which impacts on, amongst other things, the ability of applicants to obtain expert reports, a complex and labour-intensive exercise. Asylum seekers face financial and practical barriers obtaining expert evidence from appropriately qualified experts or may not provide such evidence because they are unaware of its potential relevance to the review.[187] While applicants may rely on non-specialist evidence, the risk for the applicant is that the Tribunal might not attach as much weight to the evidence, with all its attendant consequences for the applicant. Even where it is apparent to the Tribunal that the applicant is suffering from, or likely suffering from, a mental illness, without expert evidence, the Tribunal may not appreciate the impact of this condition on their ability to participate in the hearing[188] or for the assessment of claims. Furthermore, where expert evidence is obtained, concerns may arise about its quality,[189] limitations,[190] or the Tribunal's ability to interpret its content.[191]

C The Impact of Vulnerability on Assessing whether a Person Is Owed Protection Obligations

The factors that lead a tribunal to identify an applicant as a vulnerable person may sometimes give rise to a protection claim or inform the Tribunal's reasoning about whether the harm feared reaches the requisite threshold of 'serious harm' or 'significant harm'. Individuals who suffer from mental illness may face official or societal discrimination, including stigma, social ostracism, harassment, and

184 *SGLB* (n 99).

185 See *1511476 (Refugee)* [2018] AATA 3139. See also Hunter et al (n 8) 485, 495.

186 See, eg, *1315134 (Refugee)* [2015] AATA 3975, [31] (Member Lovibond).

187 Law Council of Australia, The Justice Project, *Final Report: Asylum Seekers* (Report, August 2018) <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Asylum%20Seekers%20%28Part%201%29.pdf> ('*Asylum Seekers*').

188 *SGLB* (n 99) 250 [89]–[90] (Kirby J). See also *MZXTT v Minister for Immigration and Citizenship* [2008] FMCA 1007, [37] (Riley FM).

189 *SGLB* (n 99) 248–9 [83]–[87] (Kirby J).

190 See, eg, *2017148 (Refugee)* [2022] AAT 3918, [21] (Deputy President Dragovic). The psychologist's report confirmed the applicant was suffering from depression but was unable was unable to confirm symptoms for anxiety or other disorders because of the language barrier.

191 Hunter et al (n 8) 495. Research has found that 'decision-makers were prone to disregard clinical reports and psychologists were prone to misunderstand the limitations and obligations of their task from the decision-makers' perspective': Hunter, Pearson and Roque (n 8) 338.

violence.[192] Where there is country information before the Tribunal[193] which reveals that people with mental illness face societal or official discrimination, then the Tribunal may be required to address whether an applicant would be at risk of serious harm or significant harm for reasons relating to their membership of a particular social of people with mental illness.[194] In some cases a question may arise about whether an applicant who suffers from mental illness would be at elevated risk of attracting the adverse attention of the authorities or non-state actors[195] for reason of their imputed political opinion.[196]

In assessing whether the harm feared rises to the requisite level of 'serious harm', the Tribunal must have regard to what is known about the particular vulnerabilities of the applicant.[197] In some cases the Tribunal's identification of the applicant as a vulnerable person informs its assessment of whether there is a 'real chance' the

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192 It is well-established that a person who suffers from mental illness may be a member of a particular social group, one of the five refugee grounds. For example, in *1926228 (Refugee)* [2019] AATA 5263, the Tribunal concluded that the applicant was owed protection for being a member of a particular social group of 'persons suffering from mental illness in Sierra Leone' as the harm feared would occur as a consequence of common and ongoing prejudicial attitudes towards persons with mental illness due to superstitious perceptions about the mentally ill: at [38] (Member Flood). See also *2005215 (Refugee)* [2020] AATA 6034, [198] (Member Marquard); *1724342 (Refugee)* [2018] AATA 4963, [62] (Member McAdam); *1816428 (Refugee)* [2018] AATA 3090, [42] (Member Hardy). However, the persecution must be for one or more of the five refugee grounds in the refugee definition: *CSV15 v Minister for Immigration and Border Protection* [2018] FCA 699, [30]–[31] (Collier J). In the context of complementary protection claims: see at [34].

193 *Ministerial Direction No 84: Consideration of Protection Visa Applications* (24 June 2019), which was issued under section 499 of the *Migration Act* (n 4), states that:

> Where the Department of Foreign Affairs and Trade has prepared [a] country information assessment expressly for protection status determination purposes, and that assessment is available to the decision maker, the decision maker must take into account that assessment, where relevant, in making their decision. The decision maker is not precluded from considering other relevant information about the country.

194 See, eg, *BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 124. See also *AJZ17 v Minister for Home Affairs* [2019] FCA 1485, [46]–[48] (Moshinsky J). In the latter case, the Court found that the Tribunal did not give proper consideration to whether the Kenyan criminal laws would be implemented or enforced in a discriminatory manner with respect to people with a mental illness.

195 For example, in *1512102 (Refugee)* [2018] AATA 1302 (Member Burns), the Tribunal considered the case of a young Tamil asylum seeker from Sri Lanka with a diagnosed mental illness. When the applicant appeared before the Tribunal accompanied by his representative and a psychologist, he was non-responsive: at [16]. After reviewing the medical evidence, the Tribunal concluded that he was not competent to give evidence and was suffering from 'significant vulnerability due to his poor mental health': at [43]. The Tribunal accepted that the applicant would be identified as a failed asylum seeker who departed Sri Lanka in breach of the *Immigrants and Emigrants Act 1948* (Sri Lanka) and that, having regard to his 'serious mental health problems' it was likely he would be held for a longer period of time than other failed asylum seekers subject to these laws, and that there was a real risk that he would be subject cruel inhuman or degrading treatment or punishment: at [47]–[48]. See also *2101907 (Refugee)* [2021] AATA 1460, [120].

196 See, eg, *1605781 (Refugee)* [2018] AATA 4998.

197 *SZTEQ v Minister for Immigration and Border Protection* (2015) 229 FCR 497, 533 [144], 535 [155] (Robertson, Griffiths and Mortimer JJ) ('*SZTEQ*'); *AGA16 v Minister for Immigration and Border Protection* [2018] FCA 628, [35] (Moshinsky J). See James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 198 <https://doi.org/10.1017/CBO9780511998300> (relevant to human rights analysis of individuated vulnerabilities). See also *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) 85 [7].

applicant will face harm and, if so, whether that harm rises to the requisite level of serious harm or significant harm.[198] For example, in a case involving an Iraqi applicant the Tribunal found that on return the applicant would be in 'an exceptionally vulnerable position' and therefore at greater risk 'of exposure to regular acts of societal discrimination'.[199] The Tribunal concluded that there was a real chance that the applicant would be subject to 'a high level of stigmatisation, discrimination and isolation as a result of his psychological ailments and mental health issues', the cumulative effect of which was, having regard to his particular circumstances, 'likely to entail severe psychological harm' amounting to serious harm.[200] In another case the Tribunal noted the *Guidelines* recognise that 'children experience harm differently' before concluding that 'the emotional and psychological harm' that the two child applicants may experience would not impact on them 'in such a way that it would lead to serious or significant harm'.[201]

While the outcome will turn on the individual circumstances of the particular case, it is not sufficient for the Tribunal to simply assert it has taken into account the vulnerabilities of the applicant; for example, it is necessary to give due consideration to the applicant's personal circumstances in assessing whether gender-based violence, including sexual harassment, would amount to serious harm.[202] With respect to the complementary protection criteria, the mental health of an applicant may be relevant to the assessment of whether the harm amounts to significant harm[203] and, if it arises, the question of whether it is reasonable for an applicant to relocate to another part of the country where there is no appreciable risk they will face significant harm.

198 See, eg, *2010192 (Refugee)* (n 179).

199 *1731457 (Refugee)* [2020] AATA 2361, [79] (Senior Member Roushan).

200 Ibid.

201 *1609041 (Refugee)* [2018] AATA 576, [31] (Senior Member Dragovic).

202 *AGA16* (n 197) 13 [35] (Moshinsky J), citing *SZTEQ* (n 197) 522 [144], 534–5 [151] (Robertson, Griffiths and Mortimer JJ). The Tribunal has applied *AGA16* (n 197) in numerous cases: see, eg, *2005215 (Refugee)* (n 192) [184] (Member Marquard) (where the Tribunal found notwithstanding some progress in the development of mental health services in Ethiopia, having regard to the vulnerabilities of the applicant who had left Ethiopia as a child in traumatic circumstances and, as an adult suffered from significant mental illness, there was a real chance the applicant would face of serious harm for reasons of his membership of a particular social group of persons with mental illness); *1702393 (Refugee)* [2021] AATA 3565, [46] (Member Burns); *1707034 (Refugee)* [2021] AATA 3252, [46]–[47] (Member Cullen); *2101907 (Refugee)* (n 195) [114]–[115] (Member Marquard); *1714509 (Refugee)* [2021] AATA 659, [74]–[75] (Member Burford); *1714037 (Refugee)* [2021] AATA 883, [139] (Member Marquard); *1717702 (Refugee)* [2021] AATA 1425, [86]–[87] (Member Marquard).

203 With respect to the complementary protection, the definition of significant harm can encompass mental as well as physical harm however such harm must fall within the relevant statutory definition of significant harm in sections 5 and 36(2A) of the *Migration Act* (n 4). The complementary protection criteria does not protect non-citizens from mental harm that might occur as a consequence of being required to leave Australia: *SZRSN v Minister for Immigration and Citizenship* [2013] FCA 751; *GLD18 v Minister for Home Affairs* [2020] FCAFC 2, [35]–[36] (Allsop CJ and Mortimer J).

D Assessing the Impact of the Vulnerable Persons Guidelines on Tribunal Decision-Making

The *Guidelines* promise that the Tribunal's procedures are 'designed to provide a review process which is fair and just, and to ensure that applicants can fully put their case to the [T]ribunal without the assistance of a legal practitioner or migration agent if they so choose'.[204] A review of published Tribunal decisions reveals the Tribunal has decided to apply the *Guidelines* in a wide range of circumstances, most commonly where the applicant has a mental health condition (72 of 85 cases). For example, the Tribunal has applied the *Guidelines* in cases involving applicants with a severe anxiety disorder consistent with generalised anxiety disorder, major depressive disorders, a diagnosis of post-traumatic stress disorder, and a diagnosis of schizophrenia.[205] The Tribunal also applied the *Guidelines* in five cases involving child applicants[206] and elderly applicants with cognitive impairments.[207] We also identified cases where the Tribunal decision to apply the *Guidelines* was informed by a constellation of factors such as where the applicant was described as 'simple' and 'reserved' with self-reported mental health issues,[208] lacking education,[209] or had past experience of torture or trauma including domestic or family violence.[210] The Tribunal decision to apply the *Guidelines* has also been informed by the fact an applicant was in immigration detention,[211] had experienced a prolonged period of detention in prison[212] and was experiencing mental health issues combined with other factors such as the passage of time.[213] In some cases, the Tribunal applied the *Guidelines* where the applicant was unrepresented and the evidence before the Tribunal indicated that the applicant

204 *Guidelines* (n 8) 6 [23].

205 See, eg, *2010168 (Refugee)* (n 134) [75] (Member Marquard); *1827752 (Refugee)* [2022] AATA 4563; *1704438 (Refugee)* [2017] AATA 1688 (diagnosis of PTSD); *1315134 (Refugee)* (n 186) [32].

206 See, eg, *1609913 (Refugee)* [2018] AATA 781. The Tribunal found 'that the applicant … is a child who may not be able to fully comprehend the context of the review and may not have developed the capacity or the knowledge to understand the wider implications for him of the review' and therefore applied the *Guidelines* (n 8): at [37] (Member Meyer). See also *1609041 (Refugee)* (n 201); *1820874 (Refugee)* [2022] AATA 3923. In *1820874 (Refugee)* (n 206), the Tribunal noted as the applicants were children it reappraised 'the Tribunal's Guidelines on Vulnerable Persons including, but not limited to, paragraphs 66 to 86' and also conducted 'a preliminary hearing with the applicant's legal representative to discuss how to approach the combined hearings. During this discussion, it was agreed that the applicants would be provided regular breaks': at [14] (Deputy President Dragovic).

207 See, eg, *1811016 (Refugee)* [2022] AATA 4783.

208 *1509890 (Refugee)* [2019] AATA 1311, [26] (Member Marquard) (the Tribunal had 'regard to the … *Guidelines on Vulnerable Persons*, in light of the first named applicant's evidence that she has had mental health issues, although no medical reports ha[d] been provided').

209 See, eg, *1611949 (Refugee)* (n 131).

210 *1711073 (Refugee)* [2021] AATA 4216, [56] (Member Marquard); *1905471 (Refugee)* [2019] AATA 4601 (victim of family violence in immigration detention at the time of review); *1602770 (Refugee)* [2018] AATA 5233, [30], [63] (Member Marquard). In the latter case, the Tribunal had regard to the applicant's evidence about domestic violence and the mental health problems she has experienced as a result in conducting the hearing and evaluating the evidence, noting that a report from a clinical psychologist stated she was referred for anxiety and depression and received a diagnosis 'for post-traumatic stress disorder consistent with her reported history': at [63].

211 *1929841 (Refugee)* [2020] AATA 4244, [66] (Member Marquard).

212 *2108056 (Refugee)* [2021] AATA 4645.

213 *1510996 (Refugee)* (n 177) [18] (Senior Member Dragovic); *1715980 (Refugee)* [2019] AATA 1228.

was a vulnerable person.[214] However, it is clear that the *Guidelines* are not intended to apply to every applicant[215] but where an applicant faces particular difficulties participating in the review process. While the *Guidelines* are not legally binding, conducting a hearing without appropriate recognition of the specific difficulties that some people may have giving evidence may mean that an applicant is deprived of a 'proper opportunity' to provide evidence.[216]

The identification of an applicant as 'vulnerable' can have significant implications for the conduct of the review, including the evaluation of evidence, and, in some circumstances, the Tribunal's assessment of whether the applicant meets the statutory criteria. In some respects, the procedural accommodations recommended by the *Guidelines* go beyond the more limited requirements of procedural fairness: for example, taking evidence from family members or close friends when a vulnerable person is unable to give coherent evidence[217] or referring the applicant to mental health professionals.[218] While there is no legal requirement to apply the *Guidelines*,[219] the Tribunal must, however, comply with section 425 of the *Migration Act*, inviting the applicant to appear to give evidence and present arguments relating to the issues in relation to the decision under review.[220] In so doing, it must provide applicants with 'a real and meaningful invitation' to give such evidence and present arguments.[221] But, as we have shown, that does not mean

214 *2010168 (Refugee)* (n 134) [75] (Member Marquard) (the applicant was unrepresented and although no submissions were made on the issue of vulnerability, the Tribunal stated it applied the *Guidelines* (n 8) 'in relation to competency' because the applicant had a diagnosis of schizophrenia).

215 *CVO17 v Minister for Immigration and Border Protection* [2019] FCA 1612, [49] (Lee J) (where the Court did not accept the submission that the applicant should have been recognised as a vulnerable person within the meaning of the *Guidelines* (n 8)); *SZTSK* (n 89) [17] (Jagot J) ('[t]he mere fact that the Tribunal published the guidelines does not mean that the possibility of the guidelines being relevant to an applicant for review must be considered in each and every case'). See also *1606196 (Refugee)* [2017] AATA 1350, [18]–[19] (Member Baker), where the Tribunal considered, but ultimately rejected submissions that the applicant, who was represented, should be treated as a 'vulnerable person' in accordance with the *Guidelines* (n 8).

216 For example, in *Applicants M16/2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 46, Gray J found that there was a denial of procedural fairness in a matter where a female applicant had stated in her protection visa application there were 'secret matters of sensitive issues' and she would prefer a female case officer, and a medical report also stated there was information she was only prepared to reveal to a female case officer. This opportunity was not provided before the Department or at the hearing before the (male) Tribunal member, and the Tribunal also refused to provide time for post hearing submissions. Gray J found the Tribunal denied the applicant procedural fairness as the 'Tribunal failed to afford the first applicant a proper opportunity to provide further information, when the Tribunal was aware she capable of providing information that might have been relevant to her claim' and could have made a difference to the outcome: at 59 [50]. In reaching this conclusion, Gray J noted that gender guidelines released in 1996 by the Minister recognised appropriate ways in which 'to deal with the difficulties some people have in expressing themselves publicly' because of gender and cultural norms: at 59 [49]. In this context, Gray J found the Tribunal had failed to comply with its statutory obligation to afford the female applicant a proper hearing, resulting in a breach of procedural fairness.

217 *Guidelines* (n 8) 10 [45].

218 Ibid 16 [67].

219 *SZUZK v Minister for Immigration and Border Protection* [2016] FCA 498, [22] (Bromwich J).

220 See, eg, *SZUZK v Minister for Immigration and Border Protection* [2015] FCCA 2760.

221 *SCAR* (n 111) 561 [37] (Gray, Cooper and Selway JJ).

that section 425 requires the Tribunal to actively assist applicants to put their case or make enquiries to 'identify what that case might be'.[222]

Even where the *Guidelines* are applied, the procedural adjustments made by the Tribunal may not overcome the disadvantage faced by applicants without access to legal representation[223] or mental health professionals, who can attest to the nature and impact of their mental health condition on their ability to give evidence. While the Tribunal in a protection visa matter is focused on taking evidence from the review applicant, an effective legal representative can perform a critical role in addressing the legal issues that may arise in the determination of the review and ensuring that 'an application accurately and thoroughly represents the applicant's claims'.[224] Unlike the Tribunal, a representative has an obligation to act in the best interests of their client and may take an active role in facilitating appropriate referrals to medical and other professionals. At the merits review stage, legal representatives can play a critical role in making submissions on complex legal issues, arranging for the provision of expert evidence or conducting complex country research (for example, in cases involving claims of statelessness on nationality laws in other jurisdictions) and identifying procedural adjustments that, if adopted by the Tribunal, may support the applicant to give evidence.

IV ACCESS TO LEGAL REPRESENTATION FOR VULNERABLE PERSONS

A The Situation of Vulnerable Applicants without Representation

The UNHCR has described access to legal assistance as 'paramount' to a fair asylum procedure,[225] while acknowledging such assistance is particularly 'critical' in appeals involving vulnerable persons with an impaired ability to put forward evidence in support of their claims.[226] In certain circumstances, asylum seekers in Australia may be able to access free legal assistance from legal aid or community legal centres ('CLCs').[227] Asylum seekers who apply for a protection visa in Australia do not have the right to legal representation at the primary decision-

222 Ibid 561 [36].

223 *Asylum Seekers* (n 187) 26.

224 *Guidance Note* (n 5) 10 [40].

225 *Handbook on Procedures and Criteria for Determining Refugee Status* (n 20) 251 [44].

226 See *Guidance Note* (n 5) 10 [40]. Many refugee scholars argue that legal assistance is 'a crucial element of a fair and efficient justice system founded on the rule of law [for all asylum seekers]' without which 'there is a real risk that refugees will be sent back to persecution and other serious forms of harm, such as torture and death': Jane McAdam, 'Australia and Asylum Seekers' (2013) 25(3) *International Journal of Refugee Law* 435, 442–3 <https://doi.org/10.1093/ijrl/eet044>.

227 In October 2023, Minister for Immigration, Citizenship and Multicultural Affairs, Andrew Giles, Attorney-General, Mark Dreyfus, and Minister for Home Affairs, Clare O'Neil, announced funding of 'over $48 million to boost essential legal assistance services to support applicants through the [refugee status determination] process', which will 'provide support to vulnerable visa applicants': Andrew Giles, Mark Dreyfus and Clare O'Neil, 'Restoring Integrity to Our Protection System' (Media Release, 5 October 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/restoring-integrity-protection-system.aspx>.

making level, the merits review stage,[228] or on judicial review.[229] Whereas section 32 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') permits legal representation, it does not apply to reviews undertaken by the MRD.[230]

At the primary decision-making stage, 2016 Departmental guidance stated that if a protection visa applicant is 'exceptionally vulnerable' this may trigger a referral to immigration advice services.[231] While the term 'exceptionally vulnerable' was not defined, the Departmental guidance indicated that a relevant factor is whether the person's ability to engage in the protection process is impaired (for example) as a result of intellectual or cognitive disability, incapacitating health conditions, mental illness, or experiences of torture and trauma.[232] In contrast, individuals who need physical assistance to complete their application due to (for example) illiteracy, lack of English skills or vision impairment, would not normally be regarded as exceptionally vulnerable.[233] However, Departmental procedures in

228 *SZQTU v Minister for Immigration and Border Protection* (2020) 354 FLR 239, 250 [37]–[39] (Judge Dowdy) ('*SZQTU*'). However, arguably in some circumstances the right to a fair hearing may require that the applicant have an opportunity to acquire representation or that the AAT permit the representative to provide submissions.

229 At the primary and merits review stage, applicants may access immigration assistance, which includes advising an applicant about an application or representing an applicant in relation to the application before a court or a 'review authority': *Migration Act* (n 4) s 276. See also at sub-s (2A). See also *SZRVA* (n 165); *NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30.

230 *AAT Act* (n 68) s 24Z.

231 In 2014, federal funding of legal representation for asylum seekers who arrived by boat was replaced with a more limited government funded Primary Application Information Service ('PAIS') scheme that provided 'exceptionally vulnerable' applicants who arrived without a valid visa on or after April 2015 with free migration assistance during the primary stage of their protection visa application, before closing to new applications on 30 June 2017: see Department of Immigration and Border Protection, 'The Primary Application Information Service' (Fact Sheet, May 2016) 1–2 <https://www.asrc.org.au/wp-content/uploads/2016/12/PAIS-Fact-Sheet-May-2016.pdf>. Adult unauthorised arrivals must not have previously made a valid application for a protection visa or engaged a registered migration agent for protection visa assistance at the time of assessment, and the Department must consider that they are *exceptionally vulnerable* and that it is in the best interests of the government that their claim be presented: at 2 (emphasis added). See also Victorian Refugee Health Network, 'Additional Guidance on PAIS Eligibility Criteria and Assessment Process' (November 2015) <https://web.archive.org/web/20160322225905/https://refugeehealthnetwork.org.au/wp-content/uploads/Circulated_2015_November_Additional-guidance-on-PAIS-operational-policy-process.pdf>. The following cases involve illegal maritime arrivals who were assessed by the Department as exceptionally vulnerable and subsequently refused protection visas by the IAA: *DSU16 v Minister for Immigration and Border Protection* [2019] FCA 128, [33] (Steward J); *FQD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 313, [76]–[77] (Katzmann J); *EBC16 v Minister for Immigration and Border Protection* [2018] FCA 210, [3] (O'Callaghan J).

232 Victorian Refugee Health Network (n 231) 3. No publicly available information on the numbers or characteristics of the applicants who accessed the PAIS scheme or who received assistance under the Immigration Advice and Assistance Scheme on the basis of being identified as 'exceptionally vulnerable' was identified.

233 Ibid 4. Both migration advice and application assistance are offered to minors for whom the Minister is guardian under the *Immigration (Guardianship of Children) Act 1946* (Cth) in relation to any visa and up to the merits review stage. As at 30 June 2021, there were 156 minors receiving services in the Unaccompanied Humanitarian Minors Program: Department of Home Affairs, *2020–21 Annual Report* (Report, 2021) 101 <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/home-affairs-annual-report-2020-21.pdf>.

relation to identifying exceptionally vulnerable applicants are opaque: primary decisions are not published and no published statistics could be located on the number of applicants who had been identified by the Department as 'exceptionally vulnerable' at the primary stage.

At the merits review stage, cases involving vulnerable applicants can be particularly challenging when the vulnerable person is unrepresented: effective legal representation is desirable to '[facilitate] the most efficient identification and resolution of complex issues'[234] and safeguard against the risk of refoulement. An applicant in a part 7 review is not entitled to be represented before the Tribunal by another person.[235] The restrictions on representation in refugee matters have been described as 'discriminat[ing] against protection visa applicants'[236] as, in contrast, applicants for reviews undertaken under part 5 of the *Migration Act* of decisions to refuse migration visas are entitled, pursuant to section 366A, to have an 'assistant' present and, in 'exceptional circumstances', this person can present arguments to the Tribunal.[237] However, while effective legal representation can 'improve access to justice for vulnerable parties and enhance the effectiveness and efficiency of the review process',[238] there is no statutory power that enables the Tribunal to refer a review applicant in a proceeding in a parts 5 or 7 review to a pro bono representative or to appoint a legal representative.[239] There is also no statutory provision to appoint a guardian ad litem ('GAL') in a part 7 review.[240]

The longstanding position of the Law Council of Australia and many other advocacy bodies is that all asylum seekers should have access to publicly funded legal and migration advice as this guards against the risk of refoulement and promotes access to justice and the rule of law.[241] Asylum claims can vary significantly in complexity. On the one hand, it has been suggested that the Tribunal is entangled in a

234 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry* (Report No 72, 5 September 2014) vol 1, 371 ('*Access to Justice Arrangements*').

235 *Migration Act* (n 4) s 427(6)(a). See below Part III(A)(2) for discussion on this provision.

236 *SZOVP v Minister for Immigration [No 2]* [2011] FMCA 442, [70] (Driver FM). The 'reason why protection visa applicants are treated differently from other visa applicants in the legislation in relation to representation at hearings is not clear': at [72].

237 *Migration Act* (n 4) s 366A.

238 *Issues Paper* (n 2) 84 (noting that '[t]he AAT and the parties are generally assisted by representatives – whether lawyers, disability advocates, migration agents or tax agents – who provide capable representation').

239 *SZQTU* (n 228) 250 [38]–[39] (Judge Dowdy).

240 See generally *Issues Paper* (n 2) 88.

241 Law Council of Australia, *Asylum Seeker Policy* (Policy Statement, 28 October 2014) <https://lawcouncil.au/publicassets/406c7bd7-e1d6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>. It is the Law Council of Australia's position that asylum seekers should also have full access to a legal adviser of their choice in relation to decisions around detention, including for criminal matters arising in a detention environment. See also Asher Hirsch et al, Refugee Council of Australia, Submission No 16 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Performance and Integrity of Australia's Administrative Review System*; Andrew & Renata Kaldor Centre for International Refugee Law, 'Do People Seeking Asylum Receive Legal Assistance?' (Fact Sheet, May 2020) <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-09-factsheet/2023-09-Factsheet_Legal-Assistance_final.pdf>; Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, 2019).

'creeping legalism',[242] which threatens to frustrate its objective of providing fair and quick justice that is 'proportionate to the importance and complexity of the matter'.[243] Historically, 'concerns about the overall quality of representation in tribunals'[244] have also been cited in support of a more restrictive approach to representation in the *Migration Act*,[245] and cases involving unscrupulous agents underscore the importance of having robust mechanisms to identify and respond to such practice.[246] However, diligent legal representatives can play a critical role in facilitating access to justice and studies consistently demonstrate that asylum seekers who are represented before the Tribunal are more likely to succeed.[247] While asylum seekers may seek judicial review of the Tribunal's decision[248] this is an arid process focusing on whether the Tribunal's decision is affected by jurisdictional error,[249] not the merits of the claims. If the Tribunal decision is found to be affected by jurisdictional error, the applicant will find themselves 'back where [they] started'[250] as the matter will be remitted to the Tribunal for reconsideration according to the law. In this respect, the FCA in *WABZ*

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242 *Access to Justice Arrangements* (n 234) 13, 345, 364. The report advocates for creating restrictions on representation (and a parallel increase in support for self-represented litigants). However, it acknowledges submissions (such as from the Law Society of South Australia, the New South Wales Bar Society, the Tasmanian Law Society, Australian Lawyers Alliance, etc) that the 'creeping legalism' of tribunals cannot be solely attributed to the increased presence of lawyers. See also Robin Creyke, 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *Australian Institute of Administrative Law Forum* 54, 69.

243 *AAT Act* (n 68) s 2A(c).

244 *Issues Paper* (n 2) 85.

245 See Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1992, 2622 (Gerard Hand, Minister for Immigration. Local Government and Ethnic Affairs).

246 See, eg, *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 ('*DUA16*').

247 Daniel Ghezelbash, 'How Refugees Succeed in Visa Reviews: New Research Reveals the Factors that Matter', *The Conversation* (online, 10 March 2020) <https://theconversation.com/how-refugees-succeed-in-visa-reviews-new-research-reveals-the-factors-that-matter-131763>; Hirsch et al (n 241); Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip Schrag, 'Russian Roulette: Disparities in Asylum Adjudication' (2007) 60(2) *Stanford Law Review* 295, 296. See also Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals: Report to the Lord Chancellor* (Report, July 1989) <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/effectiveness_of_representation_at_tribunals.pdf>; *Issues Paper* (n 2) 84. Published data on representation and the outcomes of the reviews would be a useful resource. Tribunal decisions published from May 2022 now state whether an applicant was represented at the time of decision.

248 Judicial review for jurisdictional error is constitutionally entrenched: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

249 In the 2022–23 financial year, 79% of litigants in migration matters at the Federal Circuit Court were unrepresented: Federal Circuit and Family Court of Australia, *Annual Reports 2022–23* (Report, 2023) 97 <https://www.fcfcoa.gov.au/sites/default/files/2023-11/FCFCOA%20Annual%20Report%202022-23.pdf> ('*FCFCA 2022–23 Annual Report*'). It is not stated what percentage of these litigants were asylum seekers, but the report describes a pro bono scheme, similar to that which operates in Federal Court, as 'essential'. The distinction between judicial review and merits review is often lost on unrepresented applicants; the courts regularly observe that what is sought by an unrepresented applicant is 'impermissible merits review' in the form of an opportunity to put forward new evidence and challenge factual findings made by the Tribunal: *DCI16 v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1284, [8] (O'Callaghan J). Very few applications for judicial review succeed. In 2020–21 the number of appeals allowed by the courts represented only 2.3% of decisions made by the AAT and IAA: *Performance and Integrity* (n 53) 17.

250 Commonwealth Administrative Review Committee, *Report* (Parliamentary Paper No 144, August 1971) 9 [20] <https://nla.gov.au/nla.obj-1928610510/view?partId=nla.obj-1933534037#page/n0/mode/1up>.

v Minister for Immigration and Multicultural and Indigenous Affairs has observed that '[a]lthough an unrepresented non-English speaking applicant in judicial review proceedings is at a crippling disadvantage, the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effect upon the eventual outcome'.[251]

Legal representation is particularly important in complex matters involving psychologically vulnerable applicants.[252] As noted earlier, the MRD of AAT is continuing to face an 'intimidating backlog',[253] with applicants waiting years for matters to be listed for hearing. Within this backlog, the complexity of matters varies significantly: not all cases involving unrepresented applicants will involve vulnerable applicants or complex legal issues. The *Callinan Review* recommended the establishment of 'a Counsel Assisting in the MRD, who as a qualified and experienced lawyer, could appear as an advocate, as required, in the public interest'.[254] It was not suggested that the Counsel Assisting would not be required in every case – clearly such an approach would have profound resource implications – but Mr Callinan was of the view that the presence of a Counsel Assisting would be of assistance 'in difficult and complex cases', including those involving 'unrepresented applicants'.[255] However, the 'public interest' is distinct from the interest of the applicant,[256] and a Counsel Assisting appearing in 'the public interest' could add further complexity and cost to the review process without improving access to justice for vulnerable applicants without representation. In contrast, a diligent legal representative can play an important role in ameliorating the difficulties vulnerable persons face participating in the review proceedings, particularly in relation to trust and disclosure of sensitive claims and obtaining expert evidence about the impact of any medical condition on the applicant's ability to give evidence.

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251 *WABZ* (n 156) 295 [69] (French and Lee JJ).

252 *Guidance Note* (n 5).

253 *Callinan Review* (n 12) 5 [1.3]. In the current environment, where there are backlogs of approximately 26,801 refugee applications before the Department, 41,616 refugee applications before the AAT and 16,362 migration applications before the Federal Circuit and Family Court of Australia ('FCFCA'), the position that all asylum seekers have access to independent legal assistance across all stages of the determination process, from screening to merits and judicial review as well as access to a legal advisor of their choice, is one that has no realistic prospect of implementation in the immediate future. The significant number of pending refugee applications at the department, tribunal and court level exist within wider systemic backlogs, with approximately 880,000 pending visa applications before the Department and 56,789 migration and refugee applications currently before the Tribunal: Department of Home Affairs, *Monthly Update: Onshore Protection (Subclass 866) Visa Processing* (Report, 2022) 4 <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-december-2022.pdf>; *AAT 2023 Caseload Report* (n 47); David Aidone, 'The Government Has Revealed the Progress Made in Tackling the 'Massive' Visa Backlog. What Happens Next?', *SBS News* (online, 13 October 2022) <https://www.sbs.com.au/news/article/the-government-has-revealed-the-progress-made-in-tackling-the-massive-visa-backlog-what-happens-next/25l9ul8bv>; *FCFCA 2022–23 Annual Report* (n 249) 97.

254 *Callinan Review* (n 12) 20 [1.29].

255 Ibid. Mr Callinan suggests that '[c]ounsel would not be there as a contradictor but as a vigilant lawyer whose presence and purpose would be of value to both parties as well as the Member'.

256 It is apparent that the public interest (eg, in the non-disclosure of certain information to the applicant because it is covered by a section 438 certificate) may not always align with the interests of the applicant: see generally Linda Pearson, 'Tribunals and the Public Interest' (2021) 101 *Australian Institute of Administrative Law Forum* 32.

B The Tribunal's Referral Powers in Cases Involving Vulnerable Applicants

1 Referrals to Legal Representation in Matters before the Tribunal

As noted above, the Tribunal has no legislative power under the *AAT Act* or the *Migration Act* to refer an applicant to a pro bono representative or to appoint a legal representative or litigation guardian for a vulnerable person whose ability to give evidence to the Tribunal is impaired. While in other divisions an applicant may obtain one-off advice from a duty solicitor from legal aid on Tribunal premises,[257] no such service exists in the MRD. Indeed, the more vulnerable an applicant is the greater difficulty they may encounter securing legal assistance, particularly if they are in immigration detention.[258] While the Tribunal has various fact sheets for self-represented applicants about free legal assistance and the review process generally, these are offered in only a select number of languages beyond English and the free legal services applicants are directed to have limited resources for the provision of free advice and assistance, particularly where a hearing has already been scheduled.[259] Even if a vulnerable person manages to contact a free legal service, they may struggle to communicate why urgent assistance is required or the service may not have the resources to assist.

In contrast to the Tribunal, the FCA and Federal Circuit and Family Court of Australia ('FCFCA') have the power to refer a party in an existing proceeding to a lawyer for pro bono assistance.[260] The FCA and FCFCA may take into account any matter it considers appropriate, such as the party's means and capacity to otherwise obtain legal assistance, and the nature and complexity of the proceeding.[261] A party cannot apply to either the FCA or the FCFCA for a referral,[262] but may raise it during a directions hearing. If a lawyer agrees to accept a referral, they must provide legal assistance in accordance with the referral certificate issued by the court.[263] Because the FCA and the FCFCA do not publish annual statistics on pro bono referrals, it is difficult to assess the impact of the scheme, however, it is the

257 Administrative Appeals Tribunal, *Guide to Social Services and Related Jurisdiction: For the Assistance of Parties to First and Second Review of Centrelink Decisions* (February 2017) 21 [10.3] <https://web.archive.org/web/20240323034409/https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Guide-to-Social-Services-and-Related-Jurisdiction.pdf>.

258 See, eg, *CZR20* (n 157).

259 'Migration and Refugee Reviews', *Administrative Appeals Tribunal* (Web Page) <https://web.archive.org/web/20240317175053/https://www.aat.gov.au/resources/fact-sheets/migration-and-refugee-reviews>; 'Help with Your Migration or Refugee Review: New South Wales', *Administrative Appeals Tribunal* (Web Page) <https://web.archive.org/web/20240323033600/https://www.aat.gov.au/help-with-your-migration-or-refugee-review/help-with-your-migration-or-refugee-review-new-sou>.

260 *Federal Court Rules 2011* (Cth) r 4.12 ('*FCR*'); *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 12.01 ('*FCFCAR*').

261 *FCR* (n 260) r 4.12(2); *FCFCAR* (n 260) r 12.01(2).

262 *FCR* (n 260) r 4.13*; FCFCAR* (n 260) r 12.02.

263 *FCR* (n 260) r 4.14, *FCFCAR* (n 260) r 12.03. If a lawyer does not accept a FCA referral within 28 days, it will cease to have effect: *FCR* (n 260) r 4.17(a). For FCA proceedings, a lawyer may only cease to provide assistance prior to the completion of the work in the referral certificate with the party's written agreement or with a Registrar's permission: *FCR* (n 260) r 4.15(1). For FCFCA proceedings, a lawyer may only cease to provide assistance by filing a notice of withdrawal in accordance with rule 9.03 of the *FCFCAR* (n 260): *FCFCAR* (n 260) r 12.04.

policy of the FCA that litigants in immigration detention are 'referred for pro bono legal assistance'[264] and pro bono certificates have been utilised in migration matters involving applicants in immigration detention,[265] children,[266] or cases that raised novel or complex legal issues.[267]

One option is for Tribunal members tasked with conducting review of refugee decisions under the *Migration Act* to be given the power to refer an applicant to a pro bono lawyer or, if appropriately resourced, Legal Aid or CLCs. Such a power should be used sparingly and with a view to supporting vulnerable applicants who would otherwise be disadvantaged in the review. There may be value in developing a referral protocol whereby the Tribunal may, upon its own initiative or on the request of a vulnerable applicant or a person making representations on their behalf and with the consent of the applicant, refer that person to a pro bono representative. One option that could be considered is giving an experienced panel of Tribunal members the responsibility of approving requests to make a referral to a legal representative. Concerns may be raised that the appointment of a legal representative may increase the complexity and duration of the review or about the variation in the quality of legal representation.[268] Such concerns could be addressed through the practice directions and the establishment of a panel of experienced immigration lawyers able to accept pro bono referrals in existing review proceedings.

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264 Federal Court of Australia, *Practice Note MIG-1: Migration Practice Note*, 7 March 2022, para 5.2 <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/mig-1/MIG-1.pdf>. A Law Council report on access to justice acknowledges that migration appeals give rise to a greater need for pro bono representation and mentions, but does not discuss, the FCFCA referral scheme: Law Council of Australia, The Justice Project, *Final Report: Courts and Tribunals* (Report, August 2018) 34–6 <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>. The report contends that self-representation is 'particularly high' in refugee matters and that the growing numbers of self-represented litigants places an 'enormous strain on the court' and reduces the 'overall efficiency of the justice system': at 20. The report notes, '[t]o assist self-represented litigants, the Federal Circuit Court has established a pro bono scheme and a Legal Aid duty lawyer scheme for directions lists in Melbourne'. A review of the annual reports of the FCFCA, reveals a lack of data about the use of pro bono referral certificates. To the extent that pro bono schemes are discussed in current academic literature, the focus is upon the motives of individual lawyers: see, eg, Francesca Bartlett and Monica Taylor, 'Pro Bono Lawyering: Personal Motives and Institutionalised Practice' (2016) 19(2) *Legal Ethics* 260 <https://doi.org/10.1080/1460728x.2016.1247632>.

265 See, eg, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810. However, representation subsequently withdrew: at [16] (Kerr J). See also *Bristowe v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 12. In 2022–23, the FCA worked with national and state Bar Associations to arrange pro bono referrals for unrepresented litigants in immigration detention, although where legal representation is not available the hearing may proceed by remote access technology or in person: Federal Court of Australia, *Annual Report 2022–23* (Report, 19 September 2023) 33 <https://www.fedcourt.gov.au/digital-law-library/annual-reports/2022-23/FCA-annual-report-2022-23.pdf>.

266 See, eg, *FMN17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 274 FCR 612.

267 See, eg, *EGH19 v Minister for Home Affairs* [2020] FCA 692, [5] (Griffiths J).

268 See, eg, *DUA16* (n 246).

2 Referrals of Questions of Law to the FCA

Unlike other divisions of the AAT, the MRD has no power to refer questions of law to the FCA pursuant to section 45 of the *AAT Act*.[269] Section 45 of the *AAT Act* provides that the Tribunal may, with the agreement of the President, 'refer a question of law arising in a proceeding before the Tribunal to the Federal Court of Australia for decision'.[270] This referral may be the Tribunal's own initiative, or it may occur at the request of a party to the proceeding.[271] Where a referral has been made but the FCA has not determined the question, the Tribunal cannot make a decision about the matter and, when the FCA does make a decision, the Tribunal cannot proceed or make a decision in a manner that is inconsistent with the FCA's opinion on the question of law.[272] However, there are cases where the resolution of a question of law arising in a proceeding before the MRD of the AAT will have implications for a large cohort of applicants.[273] In such cases, it is in the interests of the applicants that any legal controversy about the jurisdiction of the Tribunal or the interpretation and application of legal criteria to a commonly occurring factual scenario be finally resolved by the courts as expeditiously as possible.

3 The Appointment of a GAL

Some of the most challenging cases that come before the Tribunal are those where a question arises about whether the applicant has capacity to give evidence and present arguments in support of the application without additional support. As discussed earlier, in part 5 reviews an applicant who appears before the Tribunal is entitled to have an assistant present who the Tribunal may permit to present arguments to the Tribunal if the Tribunal is satisfied that there are 'exceptional circumstances' that justify this allowance.[274] However, there is no equivalent entitlement for an applicant in a part 7 review to have an assistant present at the hearing. When the applicant is a minor, the Tribunal may allow parents or guardians to give evidence on their behalf[275] or take evidence from witnesses, who may be

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269 *AAT Act* (n 68) s 43C.

270 Ibid s 45. See, eg, *Re Lower and Comcare* (2003) 74 ALD 547, 556 (Deputy President Forgie). See also Matthew Sier, 'Does Section 45 of the *Administrative Appeals Tribunal Act 1975* (Cth) Breach Chapter III of the *Australian Constitution*?' (2014) 26(1) *Bond Law Review* 27 <https://doi.org/10.53300/001c.5619>. Under section 44(1) of the *AAT Act* (n 68), a party of a proceeding may appeal to the Federal Court on a question of law from a Tribunal decision.

271 *AAT Act* (n 68) s 45(1).

272 Ibid s 45(3).

273 For example, the resolution of a question of law may arise about whether an applicant was validly notified of the primary decision may determine whether the Tribunal has jurisdiction to conduct reviews in a significant number of similar cases: *DFQ17 v Minister for Immigration and Border Protection* (2019) 270 FCR 492.

274 What constitutes exceptional circumstances is a matter to be determined on a case-by-case basis but a case involving a vulnerable applicant may be such a case. Section 366A of the *Migration Act* (n 4) 'gives an applicant the right to appear with assistance at a hearing held at a time appointed by the Tribunal. It does not provide an absolute right requiring the Tribunal to fix the hearing at a time convenient for a visa applicant's assistant': *Rathor v Minister for Immigration* [2014] FCCA 10, [34] (Judge Driver).

275 See, eg, *1820874 (Refugee)* (n 206) [6] (Member Dragovic) (a directions hearing was held with the applicant's representative to discuss 'procedural matters, including the presence of non-disclosure

friends or family members. The Tribunal has no specific statutory power under the *AAT Act*[276] to appoint a representative or GAL to act in the best interests of a person who lacks capacity to conduct the legal proceedings themselves.[277] Furthermore, as noted above, section 24Z of the *AAT Act* provides section 33(1)(a) does not apply to proceedings in the MRD.

The *Issues Paper* asked whether the new federal administrative body should have the power to appoint a 'litigation guardian [to conduct] legal proceedings on behalf of a person who, as a result of a legal disability, is unable to understand the nature and possible consequences of the proceedings or to provide adequate instruction' and, if so, what the requirements and process for appointing a litigation guardian should be.[278] The *Issues Paper* notes that currently the process of appointing a guardian differs in each state and territory but that some states, such as New South Wales, are home to administrative tribunals with a statutory power to appoint a GAL.[279] Legal Aid New South Wales has expressed concern that in areas, such as protection visa matters and visa cancellation matters, the Tribunal is sometimes left 'not knowing what to do where the applicant is unrepresented and appears to lack capacity' as well acknowledging that, if the applicant has a lawyer,

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certificates and how to approach the then forthcoming hearing, noting the ages of the applicants and their mental health status'). See also *1609913 (Refugee)* (n 206) [37], [50] (Member Meyer).

276 *Issues Paper* (n 2) 88. See further *Re Klewer and National Disability Insurance Agency* (2019) 80 AAR 500, 507 [42]–[43] (Deputy President Pascoe). The Deputy President made an order for the matter to be held in abeyance until a GAL was appointed, reasoning that 'to proceed in the absence of a GAL being appointed to protect the best interests of the Applicant and to ensure that his voice is properly heard' could result in a denial of procedural fairness: at 507 [43]. The Tribunal found that section 33 of the *AAT Act* (n 68) enables the Tribunal to appoint a GAL, reasoning it had such a power as a matter of implication arising from the power in section 33(1)(a) to determine its own procedure and in light of the objectives in section 2A of the *AAT Act* (n 68): at 508–9 [48]–[54]. However a FCA judge expressed the view that 'there is a real question as to whether the Tribunal has the power to appoint a litigation representative', noting that 'the question of whether the Tribunal has the power to act as it has is a significant one': *Klewers v National Disability Insurance Agency* [2020] FCA 161, [10]–[11] (Perram J). In any event, section 24Z of the *AAT Act* (n 68) provides that section 33(1)(a) does not apply to proceedings in the MRD. See also Matthew Paterson, 'A Question of Capacity: Does the AAT Have the Power to Appoint Litigation Guardians?' (2020) 27(2) *Australian Journal of Administrative Law* 114, arguing that there is no power in the *AAT Act* (n 68) or the *Administrative Appeals Tribunal Regulation 2015* (Cth), and that such a power cannot be implied from section 33 of the *AAT Act* (n 68).

277 See generally *Issues Paper* (n 2) 88. This contrasts with other tribunals, such as the New South Wales Civil and Administrative Tribunal ('NCAT'), which has a power under section 45(4) of the *Civil and Administrative Tribunal Act 2013* (NSW) to appoint a person to act as GAL for a party or to represent a party to proceedings as well as a power to appoint a representative: at s 45(3). If an application is made and the NCAT is satisfied that the person does require the appointment of a guardian, and an individual does not have someone (eg, a family member or friend) who can be a guardian, the New South Wales Public Guardian will normally be appointed. For example, in *Re NQK* [2020] NSWCATGD 39, a guardianship order was sought by NQK's legal representative in relation to immigration matters. NQK, a 31-year-old Albanian national, had been in immigration detention since he first arrived in Australia as an UMA in 2013 and had been diagnosed with major depression and a modest cognitive impairment and was malnourished. The NCAT found that these impairments restricted NQK's major life activities to such an extent that it was appropriate to appoint a guardian to make decisions regarding his healthcare and in relation to legal matters, with the effect that the New South Wales Public Guardian may provide instructions to legal representatives to make submissions in his best interests.

278 *Issues Paper* (n 2) 88.

279 Ibid.

the lawyer may be 'in a difficult position if there are questions about their client's capacity to give instructions'.[280]

How decision-makers conduct the review and evaluate evidence in cases where legal questions arise about the competency of the applicant to give evidence and present arguments for the purpose of section 425 of the *Migration Act* is a complex area, overdue for analysis. A review of published cases indicates that the Tribunal does encounter cases where it appears that the condition of the applicant 'is such as to deny them the capacity to give an account of their experiences, to present argument[s] in support of their claims, and to understand and respond to the questions put to them'.[281] For example, the Tribunal adjourned a hearing to enable an application for a guardianship order to be made to the New South Wales Civil and Administrative Tribunal by the applicant's son in circumstances where there was evidence from a forensic psychologist that applicant's current cognitive impairment meant that she would not have 'the requisite capacity to understand the nature of the proceedings in sufficient detail, respond appropriately to the questions put to her, nor would she be able to follow the proceedings or understand the processes of the Tribunal hearing'.[282] Two other published matters involved a Public Guardian with a legal services function to make decisions in all visa related matters.[283] However, there is no formal guidance on the approach the Tribunal should adopt in such cases, including what steps should be taken to facilitate support that, wherever possible, is provided in a way that 'enables the person to exercise choice and control in relation to the proceedings and participate in their own capacity'.[284]

To date, there has been no research on the role of guardians in refugee matters at the merits review stage. While it is beyond the scope of this article to consider this issue of appointing a litigation guardian, we note the importance of further research and consultation with stakeholders. Since the entry into force of the *CRPD*, scholars have identified that much work needs to be done to ensure that laws and policies that affect asylum seekers and refugees with disabilities comply with the *CRPD*, particularly the 'paradigm shift' envisaged by article 12 of the *CRPD* to 'recognise people with disabilities as persons before the law and their right to make choices for themselves'.[285] Giving the Tribunal the power to refer an applicant to legal assistance has the benefit of enabling the Tribunal to ensure that an applicant who may require

280 Legal Aid New South Wales, Submission No 13 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Performance and Integrity of Australia's Administrative Review System* (30 November 2021) 5. Legal Aid New South Wales has proposed the appointment of a GAL for applicants in the AAT in a framework similar to that adopted by the NCAT: at 3.

281 See above n 124.

282 *1725786 (Refugee)* [2021] AATA 1857, [10] (Senior Member Roushan).

283 *1725786 (Refugee)* (n 282); *1907296 (Refugee)* [2021] AATA 5179.

284 *Issues Paper* (n 2) 89.

285 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, May 2014) 53 [3.2]. See also Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Supported Decision-Making and Guardianship: Proposals for Reform* (Roundtable, 16 May 2022) <https://disability.royalcommission.gov.au/system/files/2022-10/Roundtable%20-%20Supported%20decision-making%20and%20guardianship%20-%20Proposals%20for%20reform.pdf>.

procedural adjustments and additional support to understand and fully participate in the review process has the benefit of effective legal representation. This may assist in facilitating access to justice in a particular case.

V CONCLUSION

This article has explored how identification of asylum seekers as 'vulnerable' may impact upon the conduct and outcome of merits review proceedings. The *Guidelines* can potentially provide decision-makers with helpful guidance on how procedural adjustment that may assist extremely vulnerable persons to participate in the review process. However, in complex cases, legal representation may have a vital role to play in supporting vulnerable applicants to understand and effectively participate in reviews of refugee decisions. The establishment of procedures whereby decision-makers in refugee matters could, amongst other things, refer a vulnerable applicant to a legal practitioner could support asylum seekers to effectively participate in the merits review process.