Submission to the
Administrative Review Council Inquiry on Migration

Focus on experiences of LGBTIQA+ protection visa applicants

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About the Forcibly Displaced People Network

The Forcibly Displaced People Network (FDPN) is Australia's only national LGBTIQA+ refugee-led organisation and a peak body working to address LGBTIQA+ displacement. FDPN's work combines advocacy, research, and capacity-building to ensure that policy development and service delivery reflect and meet the needs of LGBTIQA+ people seeking asylum, refugees and migrants from countries outside the global North. For more information visit http://fdpn.org.au/.

List of used acronyms

AAT	Administrative Appeal Tribunal
ART	Administrative Appeal Tribunal
DoHA	Department of Home Affairs
FDPN	Forcibly Displaced People Network
LGBTIQA+	people who are lesbian, gay, bisexual, trans, intersex, queer or asexual
SOGIESC	sexual orientation, gender identity and expression, and sex characteristics
SPP	Special Procedural Provisions

Introduction

The Forcibly Displaced People Network (FDPN) welcomes the opportunity to provide input into the ARC's Migration Inquiry. We particularly welcome the opportunity to reconsider the rationale for the introduction of the Special Procedural Provisions (SPPs) governing the review of protection and migration decisions, including the impact of such provisions in achieving the important objectives of the *Administrative Review Tribunal Act 2024 (Cth)* (ART Act), as set out in the inquiry's terms of reference.

This submission focuses on the provisions and issues addressed in the Issues Paper that are of most importance to FDPN's mission and to our members.

In line with the mission and purpose of our organisation, our submission is strongly focused on issues as they relate to protection decisions. Due to scope and capacity, we concentrate on issues related to Tribunal review, with some recommendations regarding decision-maker training applying to all levels of decision-making. We would however be happy to provide further advice on improving decision-making for LGBTIQA+ protection visa applicants at the departmental level.

A summary of our view is that the SPPs, which operate to 'displace common law procedural fairness or restrict the content of a fair hearing, by complex requirements relating to notice, access to information and opportunities to present a case'[1] do not achieve the objectives of

[1] Administrative Review Council Inquiry, Issues Paper (2025), 13 (Issues Paper)

the *Administrative Review Tribunal Act 2024*. The particular provisions we address below fail to achieve these objectives both because they undermine decision-making that is 'fair and just' as well as undermining and obstructing the Tribunal's capacity to ensure all decisions 'are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permit.'[2] We also note the disproportionate and unjust effect that certain of the SPPs have on protection visa applicants generally, and those making claims on the basis of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) or gender-based violence specifically.

We note the emphasis in the Issues Paper on the 'enormous' caseload facing the migration and protection areas of the ART and the imperative for procedures that support efficiency, alongside fair and just decision-making. In light of these important concerns, we submit that review and reform of the SPPs addressed below will directly support more efficient and timely decision-making. This is because many of the special provisions for migration decisions have operated to increase complexity, limit decision-maker discretion and procedural fairness standards in a manner that has extended decision-making timelines and diminished overall efficiency.

For all applicants, but in particular protection visa applicants, efficient and timely decisions are a fundamental aspect of a high-quality review process.

The specific challenges faced by protection visa applicants, include but are not limited to: language barriers, the challenge of cross-cultural communication, and the experience and ongoing effects of trauma, torture, and persecution.[3] These issues are compounded for LGBTIQA+ applicants, who also face the challenges of disclosure of sexuality and/or gender-based harms, cultural and racialised stereotyping, and the ongoing effects and experiences of stigma and shame and discrimination on the basis of sexual orientation and/or gender-identity and gender expression.[4]

Our recommendations for specialised training and to remove or reform particular SPPs are grounded in well-documented research, which has shown that high-quality, procedurally-fair decision-making at the primary and merits review level is the most efficient and cost-effective approach to the "complexity of visa related decisions".[5]

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[2] ART Act, s 9.

[3] For an overview of this literature, see UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems: Summary Report* (May 2013); Anthea Vogl, *Judging Refugees: Narrative and Oral Testimony in Refugee Status Determination* (Cambridge University Press, 2024) ('*Judging Refugees*') chapter 1; Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005).

[4] Lotte Wolff and Brandy Cochrane, 'Queer Legibility and the Refugee Status Determination Process' (2025) 28(1–2) *Sexualities* 97; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *Journal of Refugee Studies* 195. Dawson (2019) 'Past and present: from misunderstanding sexuality to misunderstanding gender identity in Australian refugee claims' *Australian Journal of Politics and History* 65(4):600–619.

[5] Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review

This submission is structured as follows:

- Section A addresses our recommendation for specialised training, in response to the Issues Paper's invitation for suggestions for systemic improvements and reform of primary and ART decision-making.
- Section B provides our submissions on the reform of specific SPPs raised for discussion in the Issues Paper.

Section A: Recommendations relating to overall improvement of primary and ART review decision-making for LGBTIQA+ protection visa applicants

The Provision of Specialised Training for Decision-Makers determining Protection Visa Claims on the Basis of Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC)

Refugee status determination at the primary and review stage in Australia is not sufficiently responsive to claims made by LGBTIQA+ applicants, or on the basis of SOGIESC more broadly. Despite engagement and efforts to improve protection visa decision-making, people applying for asylum because of SOGIESC continue to face serious challenges at the Departmental level and before the ART, some of which could be significantly ameliorated through decision-making training and further recommendations listed below.

A primary and ongoing challenge is that decision-makers often show bias or rely on stereotypes originating from Western understandings of sexuality, gender and variations in sex characteristics.[6] These stereotypes and bias negatively affect the conduct of hearings and questioning, the assessment of credibility, and applicants' experience of decision-making processes and the oral hearing in particular. Inappropriate, stigmatising or re-traumatising questioning, alongside inappropriate requests for particular kinds of evidence function as barriers to both an applicant's ability to safely present their testimony, and to the fair, non-discriminatory assessment of LGBTIQA+ protection visa claims.

Applicants making claims related to SOGIESC also experience bias or stigma from interpreters, and/or are provided with interpreters who are unable to accurately translate aspects of their identity or details of the claim being made. Country of Origin (COI) information routinely does not include sufficient or meaningful detail or evidence about the experiences of harm, persecution and discrimination against LGBTIQA+ communities in an applicant's country of origin. COI frequently collapses all LGBTIQA+ people into a single category, providing no evidence or information on the diverse and differential experiences of

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Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (January 2024) 12, cited in the Issues Paper at 14.

[6] See Joint NGO Report on behalf of the Australian NGO Coalition, Australia's 4th Universal Periodic Review – 2025-26, p 9: https://www.hrlc.org.au/app/uploads/2025/10/1-Joint-NGO-Submission-on-behalf-of-the-Australian-NGO-Coalition-Domestic-Publication.pdf

those making claims on the basis of either sexuality, gender identity/expression or sex characteristics and intersectionality of such claims.

While the Department of Home Affairs (DoHA) has issued best practice guidelines for handling SOGIESC-related protection claims, as lawyers and advocates have observed, these guidelines are non-binding and inconsistently implemented.[7] Because of this, the system continues to fail many LGBTIQA+ asylum seekers, despite Australia's official acceptance of SOGIESC-based claims.

As such, and based on the *Roadmap for Action: Achieving Asylum and Migration Justice for LGBTIQA+ Forcibly Displaced People*,[8] we recommend:

i. **Mandating periodic comprehensive training on SOGIESC protection claims across all stages of refugee status determination (RSD) for all RSD decision makers, co-designed with and delivered by LGBTIQA+ refugee-led organisations.**
ii. **Mandating training for NAATI accredited interpreters on working with LGBTIQA+ forcibly displaced people in refugee status determination processes.**
iii. **Conducting annual reviews of the Procedural Advice Manual (PAM) and any ART guidelines on assessment of SOGIESC protection claims across all stages of RSD**
iv. **Ensuring that multi-source and inclusive, fit-for-purpose country reports are used to assess protection claims based on SOGIESC grounds, and providing guidance where such reports are lacking.**
v. **Requiring all protection visa applicants raising SOGIESC-based claims to be interviewed in person, with decision records acknowledging the challenges of providing evidence in support of SOGIESC-based claims.**

Section B: Recommendations relating to reform of the SPPs

Access to review and limits on review powers

As noted in the Issues Paper, applications for review of migration and protection decisions must generally be lodged within 28 days of notification. We strongly support the extension and reform of existing exceptions to this rule, including that the shorter timelines that apply to visa refusal and cancellation on character grounds (9 days) and applications for review for applicants in detention (14 days) to be brought into alignment with the general time limit of 28 days, with discretion to extend deadlines where fairness requires.

[7] Refugee Advice and Casework Service. (2024). Submission to the Australian Human Rights Commission: Current and Emerging Threats to Trans and Gender Diverse Human Rights: https://www.racs.org.au/advocacy/tgd-rights

[8] Australian Coalition For LGBTIQA+ Asylum And Migration Justice, *Roadmap for Action: Achieving Asylum and Migration Justice for LGBTIQA+ Forcibly Displaced People* (2025) https://www.fdpn.org.au/wp-content/uploads/2025/06/1-Roadmap-for-action-LGBTIQA-asylum-and-migration-digital.pdf

It is counterintuitive that applicants in detention, often with extremely limited access to means of communication, support networks, legal advice and family members, should be subject to a shorter timeframe in which to apply for review.

Visa refusal and cancellations are serious decisions that have far-reaching effects on applicants' rights and interests. These decisions should be subject to the same access to review and timelines for lodging an application of 28 days, as in other ART areas.

We also submit that a provision for an extension of time be introduced for the making of migration and protection reviewable decisions. The barriers faced by LGBTIQA+ protection visa applicants as discussed above demonstrate the importance of decision-maker discretion in considering timeline extensions where appropriate and in line with the ART Act objectives.

For LGBTIQA+ protection visa applicants in particular who may lack free and quality legal advice, support networks, language skills and face significant physical and mental health challenges, the absence of a discretion for timeline extension undermines the ART's ability to make fair and just decisions, and its accessibility to diverse applicants – as core aspects of its objectives.

Discretionary power to extend the time for lodging an application for ART review should allow for consideration of the specific barriers to accessing review faced by protection visa applicants and people held in immigration detention.

Fairness in review

Visa and immigration decisions are serious administrative law decisions, due to their significant impact on an individual's rights, liberties, security, livelihood, and future. We emphasise that decisions regarding protection visa applicants in particular are decisions that may and frequently do have life or death consequences, and that the specific challenges that LGBTIQA+ claimants face within the RSD process heighten the risk of *refoulement* to conditions of serious harm and persecution.

Due to the nature of protection decision-making, protection visa applicants should have at least as good an opportunity to be heard and know the case against them as in other areas of the ART.

Limitation on requirement to disclose adverse information

Based on the above, we submit that insofar as section 359A reduces or limits the kinds of information required to be disclosed, it should be reformed so that disclosure requirements are aligned with those in section 55 of the ART Act.

Insofar as s 359A enhances disclosure obligations, (including but not limited to obligations to ensure an applicant understands why information is relevant to the review and its

consequences for the review) these additional procedural fairness safeguards and standards should be preserved.

Applicant's request for access to written material before the ART

Based again on the gravity and seriousness of visa and immigration decision-making, and especially of protection visa decision-making, we support the position outlined in section 3.28 of the Issues Paper, namely that "applicants in the migration and protection jurisdictional areas should be entitled to automatic disclosure of a reasons statement and bundle of T-documents in the same manner as applicants in other jurisdictional areas, subject only to the generally applicable provisions limiting disclosure…".

Automatic provision of relevant documents and written material would bring practice in line with the rest of the ART procedure (as per s 23 of the Act). This would enhance efficiency in the making of decisions and achieved a reduced administrative load, due to the removal of the additional application process for documents, processing and determining applications under the current Act.

Reform of the SPPs is particularly important as a means of achieving just and fair decisions for protection visa applicants and non-protection applicants alike, who may not have the benefit of legal advice or assistance, creating a further barrier to their accessing information and their right to know all credible, relevant and significant information against them.

Exhaustive statement of the natural justice hearing rule

The natural justice standard applied to the applicants in the migration and protection area should be aligned with natural justice principles operating under s 55 of the ART Act with relevant common law interpretation, and cease to be governed by the separate, exhaustive statement of natural justice as expressed in the Migration Act.

We strongly agree that current and previous separate statements of the limits of natural justice rule for certain divisions of the AAT have created immense complications for the process of review in the AAT. We also agree that they have had 'substantial resource implications for AAT members and staff.' We note that alongside diminishing overall procedural fairness and justice, these burdens (resource and otherwise) have been mirrored within judicial review caseloads, the profession, and for applicants subject to the unnecessarily complex alternative regime.

New Claims and Raising new claims on review

It is well-documented that the delayed or late disclosure of experiences of harm, persecution and torture is common among refugees and people who are forcibly displaced, due the effects of trauma, shame, the challenges of communicating across culture and to government authorities and/or other serious health or mental health challenges.

Delayed or late disclosure of serious harm and persecution is more common still among refugees making claims on the basis of sexual orientation and gender identity, gender

expression, and gender-based harms including sexual assault. Evidence has repeatedly shown that such delayed disclosure is a common feature of such claims due to applicants' experiences of distrust of authorities, discrimination, stigma and shame, as well as the effects of trauma.

The current s 367A of the Migration Act requires protection visa applicants raise all claims when making an initial application for a primary decision, and creates the requirement that decision-makers draw an inference unfavourable to the credibility of the claim or evidence if the ART 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-maker.

The provision directly contradicts and undermines accepted and well-documented evidence about the incidence and reasons for delayed disclosure among protection visa applicants.[9] Further, it conflicts with well-established psychological expertise and advice that delayed disclosure is not a basis for or evidence of a lack of credibility or the genuineness of an applicant's claim – particularly for LGBTIQA+ and claimants who have experienced gender-based violence or sexual assault.

The existing section 367A severely undermines fair, just and efficient protection visa decision-making before the ART. It adds unfair substantive and administrative hurdles for claimants, legal advocates and decision-makers alike, increasing the time and resources required to review both substantive claims and the probative value and significance of new evidence.

CASE STUDY: *Raising New Claims of Review and SOGIESC Claimants*

Samina[10], a lesbian woman in her late thirties, arrived in Australia in 2013 from a country in Central Asia. She fled her country of origin due to persecution and violence linked to her membership of a religious minority, and due to sexual violence inflicted on her because of her sexuality.

A community legal service provided free legal assistance to help her lodge a protection visa application. At her first meeting with a lawyer, Samina did not disclose her sexuality or the sexual violence she experienced. As a result, these claims were not included in her application and were not raised at her departmental interview. Samina had lived without disclosing her sexuality for most of her life. She did not see any clear indication that the legal service was LGBTIQA+ inclusive. She expected judgement and feared negative consequences if she disclosed. The lawyer also brought a male intern into the meeting to observe, which reduced Samina's sense of privacy and safety. The setting did not support disclosure, so

[9] see especially Jane Herlihy and Stuart Turner, 'Should Discrepant Accounts given by Asylum Seekers Be Taken as Proof of Deceit?' (2006) 16(2) *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 81; Jane Herlihy and Stuart W Turner, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171.

[10] This case study is based on a real matter. We changed names and other identifying details to protect the person's privacy.

Samina spoke only about religious persecution in her statement of claims. The Department did not accept her fear as well-founded and refused her application.

After the refusal, Samina was referred to a specialist refugee legal service with a dedicated LGBTIQA+ protection visa program. With a trained lawyer, she raised sexuality-related claims in her appeal to the then-AAT. She explained why she could not disclose earlier, including fear, shame, distrust of authority, and the unsafe first interview setting. In 2017, the then-AAT accepted her claims and granted her refugee status.

This case study shows that late disclosure can occur because a person fears judgement, cannot trust the setting, or does not feel safe to speak. Samina's experience shows how s 367A can deny justice by allowing decision-makers to treat new claims on review with suspicion unless a person provides a "reasonable explanation", even when the reasons for delayed disclosure are due to trauma, stigma, and safety rather than dishonesty. It also shows how s 367A can increase delay, cost, and harm for applicants.

Section 367A has a manifestly unjust, disproportionate and negative impact on claimants who have experienced gender-based violence or harm on the basis of their sexuality or gender orientation or expression, or sex characteristics. We submit it should be repealed.

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Thank you for the opportunity to provide a submission and engage in the ARC Migration Inquiry's review process. We consent to the publication of this submission.

Sincerely,

Forcibly Displaced People Network

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