



Refugee Council  
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

## **ADMINISTRATIVE REVIEW TRIBUNAL (MISCELLANEOUS MEASURES) BILL 2024**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

We welcome the opportunity to comment on the *Administrative Review Tribunal (Miscellaneous Measures) Bill 2024*. While the Bill aims to address inefficiencies and improve the administrative review system by transitioning from the Administrative Appeals Tribunal (AAT) to the Administrative Review Tribunal (ART), several provisions within the Bill raise significant concerns. These provisions risk perpetuating many of the issues seen in the AAT and undermine the ART's goal of delivering a fair, accessible, and just review mechanism. Our submission highlights critical concerns, including the risk of refoulement, procedural barriers, and the likely increase in court backlogs due to applicants being forced to seek judicial review.

The most serious consequence of the proposed Bill is the heightened risk of refoulement, where individuals seeking asylum are forcibly returned to countries where they may face persecution, torture, or death. By introducing procedural barriers, such as strict time limits and rigid technical requirements for asylum review applications, the Bill increases the likelihood that some individuals will miss critical deadlines or fail to meet minor procedural criteria. As a result, valid claims for protection may never be substantively reviewed, leading to unjust deportations and violations of Australia's international human rights obligations. This is particularly concerning for individuals in immigration detention, who face unique challenges in accessing legal representation and necessary resources.

We urge the Senate Legal and Constitutional Affairs Legislation Committee to reconsider key aspects of the Bill and implement the recommended changes to ensure that the ART functions as a fair, accessible, and just review mechanism. Safeguarding the rights of people seeking asylum and ensuring Australia meets its international legal obligations must remain a priority.

### **1 7-day timelimit for people in immigration detention**

- 1.1 The Bill maintains the 7-day timelimit for people in immigration detention to make a valid application. The proposed s 347(2)(a) provides that if a person is in immigration detention, an application for review of a migration or protection decision must be made within 7 days after the applicant is notified of the decision. In contrast, applicants not in detention have 28 days to make an application for review.
- 1.2 There appears to be no sound policy rationale for this disparity in time limits between detained and non-detained applicants. On the contrary, individuals in detention face significantly greater challenges in preparing and submitting an application for review. These challenges include:

- **Limited Access to Legal Representation:** Detainees often have restricted access to legal counsel due to limitations on internet use and telephone communications within detention facilities.
  - **Insufficient Access to Resources:** The scarcity of computers, printers, and other necessary tools hampers detainees' ability to complete and submit applications promptly.
  - **Restricted Access to Documents:** Detainees may not have access to essential documents needed to support their applications, including personal identification and evidence pertinent to their claims.
  - **Language Barriers:** Many detainees have limited proficiency in English, exacerbated by prolonged detention without access to formal language education.
  - **Lack of Understanding of Legal Processes:** A limited understanding of the Australian legal system and administrative review mechanisms further hinders their ability to navigate the application process effectively.
- 1.3 Individuals in immigration detention are among the most vulnerable and should be provided with additional safeguards to a fair review, rather than limit their access to merits review. Those who have experienced prolonged detention are very likely to suffer from significant mental health issues, including anxiety, depression, post-traumatic stress disorder (PTSD), and other mental health conditions. There is an over-representation of individuals with pre-existing or detention-induced mental health issues compared to the general population, with many asylum seekers entering detention already traumatised by their experiences of persecution and displacement.
- 1.4 People in detention are at a heightened risk of deportation without a thorough review of their protection claims. Missing the statutory 7-day time limit can result in immediate removal to a country where they may face persecution, torture, or even death. This outcome contravenes Australia's obligations under international human rights law, including the principle of non-refoulement enshrined in the *1951 Refugee Convention*.

### **Recommendation 1 Remove the 7-day timelimit for people in immigration detention**

*Proposed s 347(2) of the Migration Act 1958 should be amended to remove the 7-day timelimit for people in immigration detention to make a valid application for review at the ART. Instead, the same timelimit should apply to all applicants.*

*Further, the ART should be given discretion to accept late applications, as is the case with all other applications for review at the ART.*

### **2 Requirement of application fee**

- 2.1 The proposed Section 347(3)(b) of the *Migration Act 1958* stipulates that an application fee must be paid for a review of a protection decision. However, the Bill delegates the specifics of the fee amount, the payment schedule, and any exemptions to subordinate legislation, namely regulations. While the provision allows for flexibility—such as permitting the fee to be paid after the review—the reliance on regulations raises concerns about the stability and accessibility of the review process for protection visa applicants.
- 2.2 Under the current *Migration Regulations*, applicants seeking a review of a protection visa decision are not required to pay an application fee at the time of lodging their application. Instead, if the review is unsuccessful, the applicant is required to pay a fee after the decision

is made. This arrangement acknowledges the financial constraints often faced by people seeking asylum and aims to ensure that upfront costs do not impede access to justice.

### Concerns About Delegated Legislation

- 2.3 By delegating critical details about when application fees must be paid to regulations, the Bill leaves these provisions susceptible to change without the need for parliamentary scrutiny. Future governments or ministers could amend the regulations to mandate that fees be paid at the time of application, which could deter individuals from seeking a review due to immediate financial constraints.
- 2.4 Legislating the existing regulations, which only require application fees for protection matters upon unsuccessful review decisions, would provide greater stability and predictability. It would ensure that any changes to these critical aspects undergo appropriate legislative scrutiny and debate, thereby safeguarding against abrupt or unjust alterations.

### International and Domestic Legal Considerations

- 2.5 Australia is a signatory to various international treaties that emphasise the importance of fair and accessible legal processes for asylum seekers and refugees, such as the *1951 Refugee Convention* and the *International Covenant on Civil and Political Rights*. Imposing financial hurdles that impede access to legal remedies may be inconsistent with these obligations.
- 2.6 The rule of law and principles of natural justice underpin the Australian legal system. Ensuring that individuals have reasonable access to challenge administrative decisions is essential for maintaining the integrity of the system. Financial barriers that prevent individuals from seeking a review can undermine these principles.

### **Recommendation 2 Legislate Application Fee Provisions**

*Amend the Bill to include specific provisions regarding the application fee payment timeframe, and conditions under which fees may be waived or deferred. By embedding these details in the primary legislation, any future amendments would require parliamentary approval, ensuring transparency and accountability.*

*Such legislation should retain the current practice of requiring fees for protection applications to be paid only after an unsuccessful review, preventing upfront costs from deterring applicants.*

### **3 Restrictions on the ART's Ability to Review Decisions**

- 3.1 The proposed restrictions on the ART's ability to review decisions, as outlined in Section 348(2), risk undermining the fundamental principles of justice by prioritising procedural compliance over substantive fairness. Such an approach disproportionately affects vulnerable applicants and may lead to unjust outcomes, including the potential return of individuals to situations of harm.
- 3.2 The proposed Section 348(2) of the Migration Act 1958 introduces a significant limitation on the Administrative Review Tribunal's (ART) capacity to review decisions. Specifically, it stipulates that the ART cannot proceed to review a decision unless the application is "properly made." This encompasses compliance with strict procedural requirements, such as:
  - **Timeliness:** The application must be lodged within the specified timeframe (as outlined in Section 347(2)(a) and discussed in Section 1 above).
  - **Provision of Required Information and Documents:** The applicant must supply all relevant information and documents as prescribed by regulations under subsection 347(2).

- 3.3 By imposing these conditions, the Bill effectively prevents the ART from reviewing decisions when applications fail to meet technical requirements set out in subordinate legislation. This raises substantial concerns about access to justice and the potential for procedural technicalities to deny applicants a substantive review of their cases.
- 3.4 The proposed provision mandates strict adherence to procedural requirements. Any deviation, no matter how minor or inadvertent, could render an application invalid, thereby precluding the ART from considering the merits of the case. This rigid approach fails to account for genuine mistakes or misunderstandings that may occur, particularly among applicants unfamiliar with complex legal processes.

### **Delegation to Regulations**

- 3.5 By delegating critical procedural requirements to regulations, the Bill allows for the possibility that future changes could further tighten these technical requirements without parliamentary oversight. This could lead to increased barriers over time, making it progressively more difficult for applicants to access a review.

### **Overemphasis on Technicalities**

- 3.6 An overemphasis on procedural compliance shifts the focus away from the substantive justice of cases. Applications may be dismissed on minor procedural grounds—such as incorrect application forms, missing documents, or minor delays—without any consideration of the underlying merits or the validity of the applicants' claims.
- 3.7 Dismissing applications based on technicalities risks unjust outcomes, particularly in matters as serious as protection visa decisions. Applicants may have compelling reasons for seeking review, including fears of persecution or threats to their safety, which go unheard due to procedural barriers.
- 3.8 The inability to have a case reviewed because of procedural non-compliance undermines the right to a fair hearing. Access to justice is a fundamental principle of the legal system, and procedural hurdles should not obstruct individuals from having their cases heard and decided on their merits.
- 3.9 While procedural requirements can promote administrative efficiency, they must be balanced against the need for fairness and justice. Excessive rigidity can lead to inefficiencies in the long term, as denied applicants may seek redress through alternative, potentially more resource-intensive, legal avenues (discussed below).

### **Contrary to ART's key objectives**

- 3.10 New provisions introduced into the *Administrative Review Tribunal Act 2024* set out the key objective of an independent mechanism of review that “is accessible and responsive to the diverse needs of parties to proceedings”.<sup>1</sup> However, the proposed amendments go against this principle.
- 3.11 Many applicants, particularly people seeking asylum, may lack the legal knowledge or resources to navigate complex procedural requirements. Language barriers, limited education, and cultural differences can exacerbate these challenges, increasing the likelihood of procedural errors.

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<sup>1</sup> Administrative Review Tribunal Act 2024 s 9(c).

- 3.12 Applicants with disabilities may face additional hurdles in complying with technical requirements. For instance, cognitive impairments, mental health conditions, or physical disabilities can impede their ability to understand and fulfill procedural obligations without appropriate support.
- 3.13 The stringent procedural requirements may inadvertently discriminate against vulnerable groups, contravening principles of equality before the law. This could result in systemic inequities, where only those with sufficient resources or legal assistance can effectively access the review process.

### **International Human Rights Obligations**

- 3.14 Australia is a party to international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), which enshrine the right to a fair trial and effective remedy. Procedural barriers that prevent access to a substantive review may contravene these obligations.
- 3.15 In the context of asylum seekers and refugees, denying review may result in individuals being returned to countries where they face persecution, violating the principle of non-refoulement under the 1951 Refugee Convention.

### **Recommendation 3 Allow ART to exercise discretion when accepting applications**

*Amend the Bill to provide the ART with the discretion to accept and review applications that may not fully comply with procedural requirements if it is in the interests of justice to do so. This is consistent with all other types of cases before the ART. When considering whether to accept applications which may not meet the strict requirements, the ART should consider factors such as the applicant's vulnerability, reasons for non-compliance, and the potential consequences of not reviewing the decision.*

### **Recommendation 4 Provide Clear and Accessible Guidance**

*The ART should ensure that application forms and procedures are straightforward and available in multiple languages.*

### **Recommendation 5 Limit the Scope of Procedural Bars**

*Legislation should be amended to limit the circumstances under which applications can be dismissed solely on procedural grounds, especially when substantive rights are at stake. Such amendments may allow for a grace period or the opportunity to rectify procedural defects without dismissing the application outright.*

## **4 Proposed amendments undermine efforts to increase efficiency and reduce backlog**

- 4.1 The proposed amendments are presented as solutions to address the significant backlog of cases before the AAT and its successor, the ART. While the intention is to improve efficiency, these amendments may inadvertently undermine key principles of the ART, including fair and just decisions.<sup>2</sup> By imposing stricter procedural requirements and limiting the ART's ability to review decisions, applicants may find themselves compelled to seek judicial review in higher courts, such as the Federal Court or the High Court of Australia.

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<sup>2</sup> Administrative Review Tribunal Act 2024 s 9(a).

- 4.2 When the ART is restricted from reviewing decisions due to technical non-compliance—such as missing documents, minor procedural errors, or stringent time limits—applicants are left with limited options. The inability to have their cases heard at the tribunal level forces them to pursue judicial review to challenge the administrative decisions affecting them. This shift places additional pressure on the court system, which is already managing its own caseloads and resource constraints.
- 4.3 Judicial review processes are inherently more complex, time-consuming, and costly than tribunal reviews. Applicants who might have resolved their matters efficiently through the ART are now faced with navigating the formalities of the court system. This not only delays the resolution of individual cases but also increases legal costs for applicants and the government. The cumulative effect contributes to longer wait times for hearings and decisions, exacerbating the very inefficiencies the amendments aim to address.
- 4.4 The influx of cases to the Federal Courts and the High Court can lead to significant backlogs, straining judicial resources. Courts may struggle to allocate sufficient time and judges to hear the increased number of cases promptly. This can result in a bottleneck effect, where delays become systemic, affecting not only migration and protection visa cases but also other matters awaiting judicial consideration.
- 4.5 One of the primary goals of establishing the ART is to provide a fair, accessible, and efficient mechanism for reviewing administrative decisions. By creating procedural barriers that prevent applicants from accessing tribunal review, the amendments undermine this objective. The consequent diversion of cases to the courts contradicts the aim of reducing backlogs and improving efficiency within the administrative review system.