Senate Legal and Constitutional Affairs Committee Inquiry - Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

Introduction

The Refugee and Immigration National Community Law Coalition (RAINCLC) is a national network of not-for-profit immigration and refugee law specialist community legal centres. As an umbrella body, we contribute to national consultative processes and aim to promote cohesive and fair legislation, policy and procedure in Australian refugee, migration and citizenship frameworks. Our organisations provide legal advice and representation to people seeking asylum, refugees and migrants, including those facing particular vulnerabilities such as women on temporary visas experiencing family violence and people in immigration detention.

We welcome the opportunity from the Senate Legal and Constitutional Affairs Legislation Committee to provide a submission regarding the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024. Our submission draws on our extensive experience representing applicants before the Administrative Appeals Tribunal and witnessing the challenges that refugees and people seeking asylum face in obtaining fair and just merits review outcomes.

The establishment of the Administrative Review Tribunal (ART) is a pivotal opportunity for urgent and critical reform, presenting a chance to remedy long-standing defects that impaired the Tribunal's provision of fair and timely decision-making. However, the RAINCLC is concerned that the Bill undermines the Tribunals' objectives and compounds the additional challenges that refugees, people seeking asylum and migrants face in accessing justice including language barriers, experiences of trauma and immigration detention.

The Bill proposes to amend the *Migration Act 1958* (Cth) (Migration Act) to provide that the ART must not review a migration or protection review application that does not comply with strict lodgement requirements, including short deadlines, the provision of prescribed information and documents, and the payment of fees. We are particularly concerned regarding the impact on people in immigration detention who only have seven days to comply with these onerous requirements. The Bill must be amended to ensure that the ART fulfills its objectives to provide an independent review mechanism that is fair, accessible and responsive to the diverse needs of parties to proceedings.

Recommendations

- **Recommendation 1: Amend subsection 347(2) to provide people in immigration detention with 28 days to seek review.**
- **Recommendation 2:**
  - **Amend subsection 347(2) to remove 'prescribed information and prescribed documents'.**
  - **Remove subsection 348(3)(b).**
- **Recommendation 3: Remove subsections 347(3), 348(3)(c) and 336P(2)(i)(ib).**
- **Recommendation 4:**
  - **Remove subsections 348(2) and (3) from the Bill.**
  - **Alternatively, amend section 348 to provide the ART with a discretionary power to review an application if the requirements in section 347 are not met.**

Unfair timeframes for people in immigration detention

The Bill seeks to amend provisions in the Migration Act, which are yet to commence and were introduced by the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth), to replace existing provisions relating to applications for review of migration and protection decisions by the ART. The Bill will further amend proposed sections 347 and 348 to provide that an application to the ART is only 'properly made' where it is:

- made within the specified period; and
- accompanied by the prescribed information (if any) and the prescribed documents (if any).

The timeframe for an application to be made and for the prescribed information and documents to be provided is seven days for people in immigration detention, and 28 days otherwise.[1]

The RAINCLC has previously raised its concerns with the Committee regarding the very short timeframe for people in immigration detention to submit an application within seven days.[2] It is troubling that this provision remains unchanged from what is currently provided in proposed section 347 of the Migration Act,[3] and that the Bill seeks to impose further requirements upon people in immigration detention that must be met within seven days for an application to be deemed as valid.

In our experience, this is a wholly insufficient timeframe for an applicant to:

- read a complex legal decision that is often in a language they are not fluent in;
- understand the contents of the decision;
- recognise the timeframe to lodge an appeal; and
- contact a legal service provider for advice or assistance.

In addition, time is required for the legal service provider to respond to queries for assistance, obtain the necessary information to provide legal advice, and offer substantive assistance with lodging an appeal. **Denying people seeking asylum, refugees and migrants a meaningful opportunity to seek legal advice will continue to have a devastating impact on their ability to engage with the review process due to barriers including literacy and language skills, poor mental health, and isolation from community support, especially for people in immigration detention**. Legal representation is vital for applicants to navigate legally complex matters and effectively engage with the merits review process, particularly given the serious consequences of review such as deportation, permanent family separation and indefinite detention. We refer to the Kaldor Centre's Data Lab evidence which demonstrates the importance of legal representation on success rates at the Tribunal - applicants with legal representation are on average five times more likely to succeed than self-represented applicants.[4]

The Explanatory Memorandum for the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) suggested that shorter lodgement deadlines and review timeframes for people in detention are required to reduce their time spent in detention.[5] However, **in practice these**

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[1] Proposed subsection 347(2).
[2] The Refugee and Immigration National Community Law Coalition (RAINCLC), Submission No 20 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Administrative Review Tribunal Bill 2023 and related bills, 7 March 2024, 12-13.
[3] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 136.
[4] University of NSW, Kaldor Centre, '*Breaking down the data: What the numbers tell us about asylum claims at the AAT*', 28 August 2023, https://www.unsw.edu.au/kaldor-centre/our-resources/kaldor-centre-data-lab/breaking-down-the-data--what-the-numbers-tell-us-about-asylum-cl.
[5] Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth), 12 [70].

short deadlines result in people missing out on their opportunity to seek merits review, and consequently being detained indefinitely for years while they attempt to access judicial review or Ministerial intervention.

Case study

Majok arrived in Australia on a humanitarian visa as a 10-year-old boy with his parents and two siblings (who are now Australian citizens). After living in Australia for 20 years, Majok's humanitarian visa was cancelled on character grounds.

Majok applied for a protection visa which was refused by the Department of Home Affairs. At this time, Majok had been in immigration detention for over two years and had severe depression due to being subjected to harsh conditions in detention and separated from his family. He did not know how to find a lawyer to help him. Majok missed the seven-day deadline to seek review of his Department decision before the Tribunal.

Without access to merits review, Majok has limited options available and has been held in immigration detention for years as it is unsafe for him to be removed to his home country, and he continues to be indefinitely separated from his family.

Extending the deadline for people in immigration detention to seek merits review is especially important to ensure accessibility given the ART's power under section 19 of the *Administrative Review Tribunal Act 2024* (Cth) (ART Act) to extend deadlines has been excluded for migration and protection review decisions under proposed subsection 347(5) in the Migration Act, which unfairly disadvantages migrants and protection applicants.[6] Our recommendation to extend the timeframe for people in immigration detention is especially critical if people will be required to provide prescribed information and documents with their review application.

Recommendation 1: Amend subsection 347(2) to provide people in immigration detention with 28 days to seek review.

New onerous requirements for refugees, people seeking asylum and migrants to provide information and documents

The Bill and its Explanatory Memorandum are silent on what 'prescribed information' and 'prescribed documents' will be required by applicants to lodge a valid review application under proposed sections 347 and 348. Without clarity on what information and documents may be prescribed, the Government has not provided sufficient justification for this provision and one cannot be certain on the extent of the impact on protection and migration applicants. Contrary to the Explanatory Memorandum, these provisions do not "promote clarity and certainty for applicants".[7] However, it is foreseeable that these requirements will impose onerous barriers for people seeking asylum, refugees and migrants to access merits review, especially for people in immigration detention.

Rigid timeframes and lodgement requirements undermine the ART's attempt to provide an accessible review process. Also, refugees and people seeking asylum often face additional barriers to seeking review within the standard 28-day timeframe, including:

[6] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 136.
[7] Explanatory Memorandum, Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (Cth), [42].

- Correspondence being sent to an abusive visa sponsor that did not inform the visa applicant about the refusal;
- The applicant is homeless and has not been able to effectively receive the correspondence;
- They do not understand the Department refusal notification due to language barriers and are unable to access affordable legal assistance in time, especially for people in immigration detention;
- They do not have the funds to pay for merits review (even with a fee reduction);
- They are experiencing serious mental or physical illness; and
- Fraudulent migration agent or legal representation.

Imposing additional requirements for protection and migration applicants to provide prescribed information and documents within a 28-day timeframe (or seven-day timeframe for those in immigration detention), will unfairly prejudice people from accessing merits review, especially as many people cannot access legal representation within this short timeframe to understand what information and documents must be provided with their application. Consequently, more people will suffer the unjust repercussions of losing the right to seek merits review including indefinite detention, refoulement and permanent family separation. Their only recourse will be to seek judicial review before the High Court of Australia, which is costly and not available for the majority of people, has limited chances of success and will place a further strain on the Court's resources.

Case study

Shanthi is a victim-survivor of family violence and was included as a dependent on her husband's protection visa application. Her husband had control of their finances and migration matters. Shanthi separated from her husband while their protection visa application was being processed by the Department.

Their protection visa application was refused by the Department and the Department notified Shanthi's husband. Shanthi's husband told Shanthi their visa had been refused, but would not provide her with a copy of the Department decision.

Shanthi lodged a review application with the ART within the 28-day deadline, however did not provide a copy of her Department decision (which was a prescribed document) with her review application. The ART refused to review Shanthi's application.

Shanthi could not seek merits review because she had not complied with proposed section 347(2). The strict requirements in sections 347(2) and 348 prevented Shanthi from providing the prescribed document at a later date.

Shanthi's only option was to seek judicial review of her Department decision before the High Court of Australia. She could not access legal representation and pay the High Court fees, and consequently was returned to her home country and faced persecution.

The RAINCLC disagrees with the Government's characterisation of these amendments as reasonable, proportionate and necessary as stated in the Bill's Statement of Compatibility with Human Rights.[8] We refer to the submission of the Kaldor Centre Data Lab to the Committee's previous Inquiry regarding ART legislation, whose research emphasises that the distinctive treatment of applicants in the Migration and

[8] Ibid.

Refugee division for the purpose of efficiency has only created inefficiencies and unjust outcomes.[9] With specific reference to successive pieces of legislation and other measures that have attempted to codify decision-making procedures for decisions made under the Migration Act, the Kaldor Centre Data Lab found that:

> 'the increased codification of migration and refugee procedures has not increased efficiency or fairness, and accordingly it is unlikely to serve the new Tribunal's objectives. Instead, the failure to abolish the separate and rigid migration procedures, including stricter, shorter deadlines and the exclusion of common law natural justice, will perpetuate many of the issues the Migration and Refugee Division is currently facing. It means that many of the benefits of the new more flexible and adaptable procedures at the ART, and associated efficiency gains, will not apply to the Migration and Refugee Division, where they are most needed.'[10]

Recommendation 2:

- **Amend subsection 347(2) to remove 'prescribed information and prescribed documents'.**
- **Remove subsection 348(3)(b).**

Strict timeframes to pay exorbitant application fees

The introduction of subsection s336P(2)(i)(ib) excludes protection and migration applicants from the rights provided under s 98 of the ART Act where the Tribunal has the discretionary power not to dismiss a review application due to non-payment of fees. Additionally, the Bill amends proposed sections 347 and 348 to provide that an application to the ART is only 'properly made' where the prescribed fee is paid within a specified timeframe.[11] The fee for an application for the review of a migration decision must be paid within seven days for those in immigration detention, and 28 days otherwise, for the application to be considered to be properly made.[12]

For protection review applications, the *Migration Regulations 1994* (Cth) (Migration Regulations) will specify when the fee must be paid.[13] Currently, the Migration Regulations prescribe that any fee for review of reviewable protection decisions only becomes payable seven days after notification from the Tribunal of its decision, and that no fee is payable where the Tribunal remits a matter (i.e. when the applicant is successful in their review application).[14] However, the Migration Regulations could be amended at any time to require protection applicants to pay the review fee at the time of lodgement as there is no safeguard in the Bill, Migration Act or other ART legislation to preserve the current position regarding when protection applicants are required to pay their fees.

The Bill's proposed amendments, which prevent the ART from reviewing a migration application where fees are not paid within the strict timeframe (as short as seven days for people in immigration detention), undermine the objectives of the ART, particularly regarding accessibility and responsiveness to the diverse needs of parties to proceedings. The current fee for lodging a review in the Migration and

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[9] Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), 25 January 2024, 7-12.
[10] Ibid, 12.
[11] Proposed subsection 347(3) and 348(3)(c).
[12] Proposed subsection 347(3)(a).
[13] Proposed subsection 347(3)(b).
[14] *Migration Regulations 1994* (Cth), r 4.31B(2), (3).

Refugee Division is $3,496 (an exorbitant amount, which we have previously urged the Committee requires urgent review).[15] We reiterate the Law Council of Australia's concerns that these fees are disproportionately high and pose a severe restriction on access to justice for people seeking asylum, refugees and migrants. **Plainly, it will be impossible for people in detention to pay this fee within seven days given their vulnerabilities, including lack of work rights, unlawful status and isolation from support networks. This provision will effectively prevent all migration review applications (and potentially protection review applications) from people in immigration detention.**

Also, migrants, refugees and people seeking asylum in the community would struggle to pay the high fee within 28 days, particularly as many do not have work rights and have insecure visa status, which would prevent them from obtaining a loan from a reputable financial institution. These circumstances are likely to expose migrants, refugees and people seeking asylum to unscrupulous money lenders and exploitative workplaces in order for them to pay the review fee within a short period of time.

We have witnessed clients struggle to pay review fees and place themselves in extremely vulnerable situations, including people who are victim-survivors of domestic, family and sexual violence use their emergency funds from the Australian Red Cross, sell their motor vehicle (which they were also using for a home), pawn family heirlooms and other personal items and enter payday loans, in order to access merits review.

Case study

Winnie arrived in Australia in June 2016 by plane. A RAINCLC Member assisted Winnie to apply for protection in late 2016 as a woman who had experienced severe domestic violence perpetrated by her former husband. Winnie's visa was granted in 2017, but she feared for her children who were still at risk of harm.

The RAINCLC Member assisted Winnie with sponsoring her children on child visas. Winnie applied for a child visa for her son Samuel in 2020. This application was refused in June 2024. Winnie had 21 days from the date after she was notified about the decision to appeal it to the Tribunal and pay the $3,496 fee. A RAINCLC Member was ready to assist Winnie with lodging her appeal in time, but she was struggling to gather the money to pay for this fee.

Winnie had only been casually employed and was living paycheck to paycheck to support herself and her children. The RAINCLC Member assisted Winnie with urgently applying for a fee reduction of 50% of the cost of the application. Winnie continued to struggle to put together the funds needed. On the final day of her 21 days to appeal Winnie was able to pay half of the prescribed fee for the application. She was able to do this only after borrowing money from a friend. She had not yet received a determination about whether her application for a fee reduction was approved.

On the day after the prescribed timeframe for her appeal had passed, the RAINCLC Member received correspondence from the Tribunal that her application for the fee reduction was granted. If Winnie was subject to a strict timeframe by which she had to pay the full cost of the appeal (as is proposed in this Bill) her application for review may have been invalidated and she may have lost the chance to appeal her son's child visa refusal.

[15] The Refugee and Immigration National Community Law Coalition (RAINCLC), Submission No 20 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Administrative Review Tribunal Bill 2023 and related bills, 7 March 2024, 16.

The Government has stated that the Bill's amendments "are proportionate, because there is a high volume of applications for review of reviewable migration and protection matters and it is necessary to have certainty as to when a valid application has been made".[16] However, as observed by the Law Council of Australia, review application fees are not an appropriate or effective way to address the backlog of administrative appeals, and it will likely result in an increase in unrepresented applicants, as people will be less able to afford legal assistance after paying the application fee.[17] We echo the Law Council of Australia's recommendation that "the non-payment of fees should not be used to determine the jurisdiction of the Tribunal to dispose of a matter. Where a fee has not been paid, whether due to the fault of a representative or applicant, the new administrative review body should provide a period for the applicants to rectify the fault, rather than automatically determining an application to be invalid".[18]

Recommendation 3: Remove subsections 347(3), 348(3)(c) and 336P(2)(i)(ib).

Extensions of deadlines for refugees, people seeking asylum and migrants

Proposed subsections 348(2) and (3) provide strict requirements for protection and migration review applications, and if they are not met, there is no discretion for the Tribunal to permit an application, including in compelling and exceptional circumstances. Consequently, meritorious cases will often be excluded from being heard by the Tribunal.

The ability for the ART to extend deadlines under section 19 of the ART Bill has been excluded for reviewable migration and protection decisions under subsection 347(5) in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) (yet to come into effect), which unfairly disadvantages migrants and protection applicants. As mentioned above, refugees and people seeking asylum often face additional barriers to seeking review within the standard 28-day timeframe, including language barriers, insecure housing and employment, serious mental or physical illness, and other unforeseen circumstances (e.g. fraudulent migration agent or legal representation), and should have the ability to request an extension of their deadline to seek review.

RAINCLC members regularly assist protection visa applicants who have missed their AAT deadline to seek review for very legitimate and unforeseen circumstances, and suffer the unjust consequences of losing the right to seek merits review. Their only recourse is to seek judicial review before the High Court of Australia, which is costly and not available for the majority of people, and has limited chances of success.

Case study

A RAINCLC member represented Kamal who missed his deadline to seek review before the AAT by one day due to a miscalculation of the timeframe because of how the 28-day deadline is calculated (by including the date of notification). Kamal's Department decision regarding his Protection visa refusal was clearly affected by error, however he could not seek merits review.

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[16] Explanatory Memorandum, Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (Cth), [42].
[17] Law Council of Australia, Submission No 28 to Standing Committee on Social Policy and Legal Affairs, Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), 25 January 2024, 51 [209].
[18] Ibid [207].

The RAINCLC member represented Kamal before the High Court of Australia, and his matter was successful and remitted to the Department. Had Kamal not been able to access legal representation (including payment of the High Court fees), he would have been returned to his home country and faced persecution. A remedy came at significant public cost and after delay, causing harm and distress.

The Government has stated that the Bill's amendments are "necessary to have certainty as to when a valid application has been made, as this triggers the entitlement to a bridging visa".[19] However, people can apply for a bridging visa when they have unlawful status, including where they have applied for judicial review before the Courts of a Tribunal no-jurisdiction decision regarding late lodgement. Therefore, this justification is not a compelling rationale to exclude protection and migration applicants from seeking an extension of their deadlines.

The Tribunal must have the flexibility to hear review applications in circumstances where applicants have compelling reasons for not complying with lodgement requirements in order to uphold its objectives of being a fair and accessible review body that is responsive to the diverse needs of parties to proceedings.

Recommendation 4:

- **Remove subsections 348(2) and (3) from the Bill.**
- **Alternatively, amend section 348 to provide the ART with a discretionary power to review an application if the requirements in section 347 are not met.**

Conclusion

RAINCLC welcomes the establishment of the ART as an opportunity for migration and refugee review to be included under a consistent framework across all administrative review. However, we are concerned that the Bill unfairly disadvantages refugees, people seeking asylum and migrants from accessing merits review by imposing inflexible lodgement requirements, which prevents the Tribunal from fulfilling its objectives to provide a just and accessible review process. We caution the Government against this approach and replicating past mistakes where purported efficiency was prioritised over just processes and outcomes, which led to devastating consequences including refoulement, permanent family separation and indefinite detention.

[19] Explanatory Memorandum, Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (Cth), [42].