



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Representation in Canberra

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Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

23 September 2024

Subject: Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

Dear Committee,

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide comments to the Senate Legal and Constitutional Affairs Legislation Committee in respect of its inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (the Bill) which was introduced into Parliament on 21 August 2024 and referred for inquiry on 12 September 2024.

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

The Bill builds upon the package of legislation introduced by the government with the stated aim of reforming the federal system of administrative review to strengthen decision-making. Importantly, this legislative package included the abolition of the fast-track review body, the Immigration Assessment Authority (IAA), which is scheduled to occur upon commencement of the new Administrative Review Tribunal (the Tribunal), on 14 October 2024. Over a decade, UNHCR has consistently expressed significant [concern](#) that certain efficiencies created by the IAA have come at the expense of key procedural safeguards. The lack of those safeguards ultimately undermined the reliability and accuracy of its decisions and failed to guarantee key rights including protection from *refoulement* under the Refugee Convention. This reality was central to its abolition and the establishment of the ART. Consequently, a heightened risk of *refoulement* has arisen for those who have received a negative outcome or were altogether excluded access. As such, UNHCR urges the government to address the situation of those who may require re-adjudication or access to alternative solutions.

In addition to the review of individual cases adversely affected by the deficiencies of the IAA, this on-going reform presents a valuable opportunity to ensure that processes are strengthened, with the aim of strengthening results.

The stated purpose of the Bill is to support the efficient conduct of the Tribunal and ensure the legislation operates as intended. UNHCR's comments focus specifically on the proposed amendments capable of impacting persons under our mandate made by Part 12 of Schedule 2 relating to the Home Affairs Portfolio. In summary, these proposed amendments stipulate the requirements for a valid application, capable of review, of migration and protection decisions under the *Migration Act 1958* (Migration Act). More explicitly, an application for review must be made within the specified period, being seven days for those in immigration detention, or 28 days otherwise. Within the same time frames, an application must be accompanied by any prescribed information and documents, and the fee must also be paid. Failure to meet these requirements will statutorily preclude the Tribunal from reviewing a decision.

These requirements are a departure from the generally applicable timeframes and available exceptions applied to other jurisdictional areas of the Tribunal. Under the *Administrative Review Tribunal Act 2024* there is greater uniformity (28 days being the standard), and the Tribunal can extend the timeframe for lodgement if it considers it reasonable to do so, even after the timeframe has expired. This limited scope of discretion is stated to be in recognition of the fact that for some people, a 28-day timeframe may be insufficient to secure legal assistance and other necessary support services, or personal circumstances might prevent the making of an application. UNHCR emphasises that this is equally true for applicants seeking review of migration or protection decisions.

The current Bill's explanatory material states the proposed measures – imposing additional lodgement requirements and non-discretionary timeframes, including challenging barriers for those in detention – are justified to “maintain the integrity of the immigration framework and ensure the efficiency and effectiveness of Tribunal review”. In addition, it is said they “promote clarity and certainty for applicants”. The *Administrative Review Tribunal Rules 2024*, made on 18 September 2024, also authorise registrars rather than Members, to ultimately decide whether an application for review is properly made. That is, whether the objectively determinable criteria as outlined above have been satisfied. Similarly, this is intended to “significantly improve the efficiency of the Tribunal in this high-volume jurisdiction”.

Lastly, the Bill retains the prohibition on the Tribunal from reviewing a decision in relation to which the Minister has issued a conclusive certificate under section 339 of the Migration Act. This ordinarily occurs if the Minister believes that it would be contrary to the national interest to change the primary decision or for the primary decision to be reviewed. Thus, persons who have had a conclusive certificate issued will be excluded from accessing the Tribunal.

As noted in previous submissions to earlier parliamentary [inquiries](#) and departmental [consultations](#) in the context of these reforms, UNHCR considers that some provisions that have been introduced, modified, or retained in the migration and protection jurisdictions, fail to adequately incorporate key procedural standards. UNHCR takes this opportunity to again emphasise that the right of an asylum applicant to an effective remedy or to be able to appeal a decision, is a core due process standard in promoting the fairness and integrity of an asylum system and central to protecting the right to seek and enjoy asylum from persecution and the principle of non-refoulement. The remedy needs to be available in practice as well as in law, which means an applicant must, amongst other things, have sufficient time to prepare and lodge an appeal, even if in detention. Through its regular detention monitoring, UNHCR has observed first-hand the impediments for people in detention in accessing asylum processes, support services (including legal representation), and meeting unnecessarily short and inflexible timeframes.

UNHCR remains concerned by a bifurcated system whereby applicants seeking review of migration and protection decisions are afforded diminished procedural standards. It is well recognized that the people within UNHCR's mandate—that is, asylum-seekers, refugees, and stateless persons—are a particularly vulnerable and often marginalized population group in need of protection. Amongst them are persons who have additional vulnerabilities as a result of their age, gender or other characteristics, or as a result of traumatic experiences. Such persons may have specific needs during the asylum procedure and thus measures in legislation and implementing regulations need to be adaptable to accommodate such needs.

While recalling the stated objective of the reform is to establish a new administrative review body that is user-focused, efficient, accessible, independent, and fair, UNHCR considers that measures proposed in the Bill that exclude access, impose onerous requirements and inflexible timeframes, if adopted, would be contrary to the government's overall objective. Moreover, such measures can have dire consequences for those we serve, especially if deprived of their liberty and/or at risk of removal.

It is possible to create an efficient asylum system while maintaining procedural fairness. UNHCR stands ready to assist the government's continued efforts to strengthen its asylum processes to ensure the rights of persons under our mandate are protected. Doing so, Australia may adhere to its international refugee and human rights law obligations, including the right to a fair hearing, an effective remedy, and ultimately the right to not be returned to harm.

Yours sincerely,

Karen Gulick
Deputy Regional Representative