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NSWCCL SUBMISSION

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

ADMINISTRATIVE REVIEW TRIBUNAL (MISCELLANEOUS MEASURES) BILL 2024

27 September 2024

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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I. Executive Summary

The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs in regard to the *Administrative Review Tribunal (Miscellaneous Measures) Bill 2024* (Cth) (**Bill**).

The NSWCCL supports the Parliament's replacement of the Administrative Appeals Tribunal (**AAT**) with the Administrative Review Tribunal (**ART**) through the *Administrative Review Tribunal Act 2024* (Cth) and related consequential Acts (**Acts**) passed earlier this year.

While the NSWCCL is supportive of many of the proposed amendments in the Miscellaneous Bill, we are concerned by the proposed changes to the *Migration Act 1958* (Cth) ***(Migration Act)***, which if passed would impose separate and unfavourable codes of procedures that obstruct access to justice for a vulnerable and disadvantaged community. Our primary submission is that the Government remove the separation of procedures between migration cases and other cases so that migrants and refugees can benefit from the new ART regime.

The NSWCCL also submits that the Government reconsider the NSWCCL's other recommendations in its response to the *Administrative Review Tribunal Bill 2023* [Provisions] (Cth) and related bills in April of this year. We are of the opinion that several key proposals endorsed in our previous submission were not adequately addressed in the Acts and urge Parliament to incorporate these as further amendments in the Miscellaneous Bill. For instance:

a. Appointees to the ART must not have other governmental affiliations. This can be addressed by mandating that appointees: (i) Do not work as lobbyists; (ii) Have not worked for a government department whose decisions are reviewed by the ART within the last four years; and (iii) are not serving members of the defence force, or currently employed or contracted by the government.
b. The inefficiency and lack of resourcing for the Immigration Assessment Authority (**IAA**) regime must be addressed by stating that the ART:
    i. should regularly review the refugee caseload to ensure there are sufficient staffing arrangements and resources to address the current caseload; and
    ii. review all cases upheld by the IAA. In light of changed country circumstances and the unfairness of the IAA process, all people who have had their cases upheld by the IAA and are still in Australia should have the opportunity to have their application reviewed again through a fair and competent review process.
c. Appropriate resourcing of the ART is required to ensure that decisions are made within 6 months of filing an application.

II. Introduction

The NSWCCL was founded in 1963 and has always sought to further and protect democratic civil rights and liberties by supporting transparency, accountability, consistency and fairness in public processes. To this end, the NSWCCL welcomed a review of the AAT and the subsequent reforms to the Tribunal process in the Acts, which aim to facilitate the just, fair and timely resolution of administrative review matters.

The Australia Institute's damning report 'Cronyism in appointments to the AAT'[1] highlighted the need to reform the AAT, which was no longer able to provide fair and impartial decision-making. A functioning administrative tribunal is an essential element of the separation of powers, providing a check on the government's exercise of its executive powers. With a broad jurisdictional ambit ranging from social

[1] The Australia Institute, 'Cronyism in appointments to the AAT: An empirical analysis' (16 May 2022) <https://australiainstitute.org.au/report/cronyism-in-appointments-to-the-aat/>.

security and veterans' entitlements to migration, the ART will also be a source of justice for several disadvantaged communities.

To achieve the ART's stated objectives, including fairness, justice, efficiency, accessibility and transparency,[2] the NSWCCL recommends further amendments to the new regime which should be implemented through the Miscellaneous Bill.

In the remainder of this submission, we will discuss each of these further amendments in turn. Section III, "Comments on Miscellaneous Bill" will highlight the NSWCCL's position on the amendments proposed in the Miscellaneous Bill, noting that while it is supportive of many of them, it maintains that the Government should remove the separate procedures that only apply to migrant and refugee cases under the *Migration Act* and thereby deprive vulnerable individuals from the increased protections under the ART regime. Section IV, "Further Proposals" will then re-advocate for recommendations previously endorsed by the NSWCCL in its April submission which were not reflected in the Acts, including reducing government affiliations amongst Tribunal members, correcting unfair outcomes and issues of inefficiency under the IAA regime and ensuring the proper resourcing of the ART.

III. Comments on Miscellaneous Bill

A. *The NSWCCL is supportive of many of the amendments in the Miscellaneous Bill*

The NSWCCL supports many of the proposed amendments to the Acts in the Miscellaneous Bill and commends the Government's efforts in acknowledging the concerns of various human rights and public interest advocacy bodies by promoting consistency and access to justice through the following reforms:

i. Making the timeframes to apply for a review of a deemed decision (i.e. decision taken to be made due to the passage of time) consistent across legislation;
ii. Allowing a decision-maker to substitute a decision with a more favourable outcome once the matter is referred to the guidance and appeal panel;
iii. Providing immunity for nominated Tribunal members issuing post-entry and delayed notification search warrants insofar as this harmonises drafting with other similar functions; and
iv. Removing the three-month time limit to apply for internal and Tribunal review of certain the Social Services decisions.

B. *The NSWCCL seeks further amendments to remove separate procedures for Migration Cases*

The NSWCCL maintains that it is of fundamental importance that procedures in the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) should apply equally to migration and refugee cases under the *Migration Act***.**

The NSWCCL is concerned that the Miscellaneous Bill further embeds oppressive procedures and processes in the Act applicable only to migration cases. The amendments to the *Migration Act* proposed in Part 12 of the Miscellaneous Bill, read with the existing *Migration Act*, are of particular concern, and impose fundamental barriers to applicants in immigration detention exercising rights to review before the ART. In particular:

- **Item 115(2)** of the Miscellaneous Bill proposes amendments to s 348(2) of the *Migration Act,* requiring that any application for review by an applicant in immigration detention be made within 7 days after the applicant is notified of a decision.

  It is unrealistic for any applicant in immigration detention to consider any decision, obtain any advice, and compile their written statement of facts and arguments in support of review within this period. Often, such applicants will require translation of the decision, which itself will

[2] *Administrative Review Tribunal Act 2024* (Cth), s 9.

frequently not be achievable in the proposed timeframe. This requirement will undermine applicants' ability to seek review of erroneous decisions and present their case, which are contrary to principles of natural justice and due process.

NSWCCL considers that, in the interests of fairness and consistency, the ordinary 28 day period for review should apply equally to applicants in immigration detention. Section 347(3) of the *Migration Act* (as amended by the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) (**CTPA**)) should similarly be amended to allow for a 28 day period of review.

- **Item 115(3)** of the Miscellaneous Bill proposes amendments to section 347(3) of the *Migration Act.* Read with Item 11, these amendments have the effect of requiring that applicants in immigration detention pay prescribed fees for review within 7 days, or otherwise lose their right to review. The ART will have no discretion to extend this timeframe.

  As outlined above, the NSWCCL considers that: (i) the usual 28 day period for review should apply equally to applicants in migration decisions; and (ii) any prescribed fees should be payable within this period. The NSWCCL is concerned that imposing a 7 day deadline for payment of prescribed fees by applicants in immigration detention will operate as a practical barrier to access to justice. Such applicants will often be of limited means and require time to arrange payment of fees.

- **Item 119** of the Miscellaneous Bill proposes amendments to s 348(2) of the *Migration Act,* which expressly excludes the ART's jurisdiction to hear applications for review from migration decisions: (i) made out of time; (ii) which are not supported by requisite documentation; or (iii) where payment of the prescribed fee is not effected in the relevant period.

  In contrast to the usual position under s 19 of *ART Act,* Item 119 puts it beyond doubt that the ART will have no discretion to extend timeframes in migration decisions or reviewable protection decisions. This further entrenches the inequality of treatment of applicants in migration cases introduced by s 136 of the *CTPA* and s 347(5) of the *Migration Act.*

  To ensure fairness and consistency, the NSWCCL considers that it is critical that the ART retain the right to grant extensions of time for review of migration decisions.

Further, the Miscellaneous Bill presents an opportunity to rectify instances of unequal treatment of applicants in migration cases retained by the *CTPA*. Most notably:

- Applicants in migration cases should be afforded the same rights to reasons and documents under ss 23 to 27, 55(1)(b), and 268 of *ART Act* held by other applicants.[3]

- Common law principles of natural justice should apply to migration applicants in the same manner as other applicants under the *ART Act.*[4]

- Notification of decisions in migration cases should be made consistently with s 267 of the *ART Act.*[5]

[3] Cf. *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), ss 23, 27B, 32, 41, 45, 48, 49A, 56, 73, 112B, 137S, 151(2B), and 336P ('*CTPA*').

[4] Cf. *CTPA* s 151, which amends s 357A(2) of the *Migration Act 1958* (Cth) to exclude requirements of the common law natural justice hearing rule ('*Migration Act*').

[5] Cf. *CTPA* ss 23, 27B, 32, 41, 45, 48, 49A, 137S, and 296.

- Applicants in migration decisions should have equivalent rights to financial and legal assistance under s 294 of the *ART Act* as other applicants.[6]

Whilst the changes proposed by the *ART Act* are a positive step forward, the current Act maintains an onerous regime for review that applies only to applicants in migration cases. Such unequal treatment is contrary to principles of equality and non-discrimination outlined in Articles 2.1, 14 and 26 of the *International Covenant on Civil and Political Rights.* In summary, the NSWCCL proposes that the Miscellaneous Bill be amended to:

- *First*, apply the usual 28 day review period to applications in immigration detention, rather than the 7 day period proposed in the Miscellaneous Bill and s 347(3) of the *Migration Act.*

- *Secondly,* extend the ART's usual discretion to extend timeframes for review and the payment of fees to migration cases.

- *Thirdly*, provide that applicants in migration cases have equivalent rights under the *ART Act* to those held by other applicants.

These are straightforward amendments, which will go a considerable way to facilitating fairness, consistency and accountability in administrative decision-making.

IV. Further proposals

The NSWCCL also strongly encourages the Government to use the Miscellaneous Bill as an opportunity to reconsider the proposals that we outlined in our previous submission of April this year, which were not reflected in the Acts.

A. Appointee affiliations

The NSWCCL reiterates its support for the recommendations of the Australia Institute aimed at reducing governmental affiliation amongst Tribunal members or the risk of 'Cronyism,' which were not reflected in the Acts.

'Cronyism' has the potential to undermine the integrity and effectiveness of the ART. This is demonstrated by the negative impact of "political appointments" on the operation of the AAT, which became an increasingly politicised body. In 2022, the Australia Institute conducted the largest and most comprehensive domestic study of the practice of cronyism in relation to appointments to a government agency.[7] While only 4% of appointments to the AAT were political in 1996-98, this steadily grew from 2013.[8] During the Abbott-Turnbull governments of 2013-2016, 23% of appointments to the AAT were political. This rose to 35% in 2016-19 and reached its peak in 2019-22, where 40% of appointments to the AAT were political.[9]

Political appointees are less likely to have legal qualifications than non-political appointees, yet are more likely to be appointed as Senior Members. From 1996-2022, the research of the Australia Institute found that 23% of political appointees were appointed as Senior Members, compared to only 9% of

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6 Cf. *CTPA* s 120 and s 336P(2)(l) of the *Migration Act*, which exclude the provisions regarding applications for financial and legal assistance in s 294 applying to applications for financial and legal assistance.

7 Submission 19, The Australia Institute, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023, 3 (*'Australia Institute Submission'*).

8 Ibid 4.

9 Ibid.

non-political appointees.[10] Furthermore, whereas only 1% of non-political appointees lacked legal qualifications to be Senior Member, 26% of political appointments lacked legal qualifications.[11]

This is problematic, given that Senior Members were responsible for providing leadership on legal matters in the AAT.[12] The importance of accurate decision-making is particularly acute given that public administrative bodies (such as the AAT and ART) are responsible for "life-changing decisions."[13] Political appointments can have a material impact on the outcome of these cases, with the Kaldor Centre for International Refugee Law reporting that in protection visa matters, an applicant is 25% more likely to success before a tribunal member appointed by the Labour government as compared to Coalition appointed members.[14]

Furthermore, governmental affiliations and a lack of political independence amongst the members of the Tribunal also undermines public confidence and trust in the Tribunal's ability to reach a fair and just decision on its merits.[15]

Therefore, it is important to introduce safeguards in the Act to protect the political independence of the ART's appointees. As such, the NSWCCL supports the recommendations of The Australia Institute that all appointees to the ART:

i. do not work as lobbyists;
ii. have not worked for a government department whose decisions are reviewed by the ART within the last four years; and
iii. are not serving members of the defence force, or currently employed or contracted by the government.[16]

B. Reforming the regime for migration and refugee cases

The NSWCCL welcomed the dissolution of the IAA, which has now been executed by the Acts. In summary, the IAA "[favoured] expediency over procedural fairness and just decision-making."[17]

First, the 'fast-track process' established for the IAA involved merits reviews on the papers without a formal hearing with the applicant. The time saved using this shortened process was far outweighed by the high rates of successful judicial reviews. The average time it took to carry out the judicial review process consequently ballooned to more than 2-3 years.[18]

Second, the short cuts taken to improve efficiency also undermined the fairness of the process. Decisions made on the papers were clearly insufficient, as evidenced by the Kaldor Centre Data Lab's finding that "[f]rom 2015 to 2023, 37% of judicial review applications relating to IAA decisions were successful, generally resulting in the cases being remitted back to the IAA for reconsideration."[19]

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10 Ibid 5.

11 Ibid.

12 Ibid.

13 Ibid 6.

14 Submission 11, UNSW, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 ('*UNSW Submission*').

15 Law Council of Australia, 'Australians deserve an independent and adequately resources administrative review system' (Web page, 30 June 2022) <https://lawcouncil.au/media/media-releases/australians-deserve-an-independent-and-adequately-resourced-administrative-review-system>.

16 Australia Institute Submission, 1-2, [6].

17 Submission 30, RACS, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023.

18 UNSW Submission.

19 UNSW Submission.

In light of the above, the NSWCCL urges the government to reconsider the Refugee Council of Australia's recommendations regarding the proper treatment of migration and refugee cases, namely that the ART:

i. should regularly review the refugee caseload to ensure there are sufficient staffing arrangements and resources to address the current caseload; and
ii. review all cases upheld by the IAA. In light of changed country circumstances and the unfairness of the IAA process, all people who have had their cases upheld by the IAA and are still in Australia should have the opportunity to have their application reviewed again through a fair and competent review process.

Reviewing the caseload

The NSWCCL commends the Federal Government's decision to abolish the IAA, however, it must take a step further to implement measures which ensure that the ART is well-resourced to handle migration and refugee cases. The lesson to take away from the IAA is that, in the words of the Refugee Council of Australia, "[a] better way to achieve effective and efficient reviews ... is to ensure that the merits stage is fair, well-resourced and has competent decision-makers,"[20] which in turn prevents consistent appeals.

Accordingly, the NSWCCL calls for a legislative requirement that the Minister periodically reviews refugee caseloads to ensure that staffing arrangements and resourcing is sufficient.

Re-hearing IAA matters

Moreover, the Government must take measures to correct the potentially unfair outcomes decided by the IAA cases. As mentioned above, the IAA's decisions were subject to frequent, successful appeals, and even the sitting government has acknowledged that "the existing fast track assessment process under the auspices of the IAA and the limitation of appeal rights does not provide a fair, thorough and robust assessment process for persons seeking asylum."[21]

Therefore, there is a high chance that many individuals previously denied protection under the IAA regime indeed have valid claims for protection. To correct these unfair outcomes, ensure procedural fairness and account for political changes in countries of origin which may have changed for the worse, the Miscellaneous Bill should include an amendment allowing people still in Australia who have had their cases upheld by the IAA to be heard again.[22]

C. Appropriate resourcing for the ART to Ensure Consistent Turn-around Times

The Government must ensure the ART is appropriately resourced and that there is continuous improvement of its operation, to ensure it can achieve its intended purpose of being "user-focused, efficient, accessible, independent and fair."[23]

There should be a regular review of all caseloads to ensure there is sufficient staffing arrangements and resources to address current and expected caseloads.

The NSWCCL also urges the Government to reconsider the Law Council of Australia's recommendations in relation to amending the Act to provide for an independent review after three to

[20] Submission 25, Refugee Council Australia, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 ('*RCA Submission*').

[21] Paul Erickson, *ALP National Platform 2021: as adopted at the 2021 Special Platform Conference* (March 2021) 124, [16] < https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>.

[22] RCA Submission.

[23] Attorney-General's Department, 'A new system of federal administrative review' (2024) <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

five years.[24] Most State and Territory civil and administrative law tribunals are reviewed independently, either at a single time or periodically.[25] A formal review would provide a formal opportunity to determine if the ART is meeting its stated purpose.

NSWCCL also advocates for proper resourcing for the ART to ensure that decisions are made within 6 months of filing an application.

We trust this submission will be useful to the committee.

Yours sincerely,

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Submission 28, Law Council of Australia, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023.

[25] See *ACT Civil and Administrative Tribunal Act 2008* (ACT); *Civil and Administrative Tribunal Act 2013* (NSW); *Northern Territory Civil and Administrative Tribunal Act 201*4 (NT); *Queensland Civil and Administrative Tribunal Act 2009* (Qld); *South Australian Civil and Administrative Tribunal Act* 2013 (SA); *State Administrative Tribunal Act 2004* (WA); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas); *Victorian Civil and Administrative Tribunal Act 1998* (Vic).