Asylum Seeker Resource Centre - October 2024

Senate Legal and Constitutional Affairs Legislation Committee Inquiry

Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

Introduction

Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey. Our services include legal, casework, housing, medical, education, employment and emergency relief. Based on what we witness through our service delivery, we advocate for change with refugees to ensure their human rights are upheld.

The ASRC welcomes the opportunity from the Senate Legal and Constitutional Affairs Legislation Committee to provide a submission regarding the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (the Bill). The ASRC's legal team, the Human Rights Law Program, has considerable experience representing applicants before the Administrative Appeals Tribunal and witnessing the challenges that refugees and people seeking asylum face in accessing a fair and transparent merits review process.

The establishment of the Administrative Review Tribunal (ART) provides a critical opportunity for urgent reform to remedy long-standing defects that impaired the Tribunal's function and inhibited provision of fair, just and timely outcomes. Non-citizens in Australia face complex and intersectional barristers to access to justice, and their interactions with the justice system can have severe consequences including prolonged and indefinite detention, refoulement to persecution, and permanent family separation. The law is complex, and applicants are often unrepresented. Reform must increase accessibility, clarity and fairness for people in these situations rather than compounding disadvantage.

Concerningly, the Bill undermines the Tribunal's 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. The ASRC is 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 proposed subsection 347(2) of the Migration Act to provide people in immigration detention with 28 days to seek review.

Recommendation 2:

- **Amend proposed subsection 347(2) of the Migration Act to remove 'prescribed information and prescribed documents'.**
- **Remove proposed subsection 348(3)(b) from the Migration Act.**

Recommendation 3: Remove proposed subsections 347(3), 348(3)(c) and 336P(2)(i)(ib) from the Migration Act.

Recommendation 4:

- **Remove proposed subsections 348(2) and (3) from the Migration Act.**
- **Alternatively, amend proposed section 348 of the Migration Act 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 ASRC 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 a person to obtain legal advice and engage with the review process. 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 seek review 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. The ASRC refers 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**

[1] Proposed subsection 347(2).
[2] Asylum Seeker Resource Centre, Submission No 19 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Administrative Review Tribunal Bill 2023 and related bills, 7 March 2024, 15.
[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].

these 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] The ASRC's 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 proposed subsection 347(2) of the Migration Act 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

[6] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) sch 2 item 136.

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 immigration detention, language barriers, insecure housing and employment, serious mental or physical illness, and other unforeseen circumstances (e.g. fraudulent migration agent or legal representation).

Imposing additional requirements for refugees, people seeking asylum and migrants 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.

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

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 ASRC 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] The ASRC refers 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 Refugee division has created inefficiencies and unfair outcomes:

> '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.'[9]

Recommendation 2:

- **Amend proposed subsection 347(2) of the Migration Act to remove 'prescribed information and prescribed documents'.**
- **Remove proposed subsection 348(3)(b) from the Migration Act.**

Strict timeframes to pay exorbitant application fees

The introduction of subsection s336P(2)(i)(ib) excludes refugees, people seeking asylum and migrants 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 must include the payment of a prescribed fee within a specified timeframe.[10] The fee for a review application 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.[11]

[8] Ibid.
[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] Proposed subsections 347(3) and 348(3)(c).
[11] Proposed subsections 347(3)(a) and 348(3)(c).

For protection review applications, the *Migration Regulations 1994* (Cth) (Migration Regulations) specify when the fee must be paid.[12] 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).[13] 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 Refugee Division is $3,496 (an exorbitant amount, which the ASRC has previously urged the Committee requires urgent review).[14] The ASRC reiterates 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.

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".[15] 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.[16] The ASRC

[12] Proposed subsection 347(3)(b).
[13] *Migration Regulations 1994* (Cth), r 4.31B(2), (3).
[14] Asylum Seeker Resource Centre, Submission No 19 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Administrative Review Tribunal Bill 2023 and related bills, 7 March 2024, 20.
[15] Explanatory Memorandum, Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (Cth), [42].
[16] 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].

echoes 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".[17]

Recommendation 3: Remove proposed subsections 347(3), 348(3)(c) and 336P(2)(i)(ib) from the Migration Act.

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.

The ASRC regularly assists 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.

[17] Ibid [207].

Case study

The ASRC 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.

The ASRC 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".[18] However, people can apply for a bridging visa when they have unlawful status, including when they have applied for judicial review before the Courts of a Tribunal no-jurisdiction decision regarding late lodgement. Therefore, this explanation does not justify excluding 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 proposed subsections 348(2) and (3) from the Migration Act.**
- **Alternatively, amend proposed section 348 of the Migration Act to provide the ART with a discretionary power to review an application if the requirements in section 347 are not met.**

Conclusion

Over the years the framework for migration and refugee administrative review has been stripped of many procedural safeguards for applicants. The establishment of a new review body provides an opportunity for migration and refugee review to be once again included under a consistent framework across all administrative review, with appropriate benchmarks for procedural fairness.

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

Concerningly, the Bill continues to unfairly disadvantage 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. The ASRC cautions 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.