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Submission to the Inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

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1 Introduction

We thank the Senate Legal and Constitutional Affairs Committee for the opportunity to provide a submission to assist in its scrutiny of the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 ('the Bill').

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

The Kaldor Centre has several concerns about the Bill. Our submission focuses on the proposed amendments to the *Migration Act 1958* (Cth) ('*Migration Act'),* that would impose additional requirements for making a valid application to the Administrative Review Tribunal ('ART') for the review of protection decisions. This includes legislating new requirements for the payment of fees within a prescribed period; requirements to include prescribed information and documents in the application; and new provisions in the *Migration Act* that would render applications invalid if these conditions are not met.

These changes will make it more difficult for Protection visa applicants to access review at the ART. Those with valid claims for protection may miss out on review because of a failure to meet technical procedural criteria, and as a result may be returned to countries where they face persecution or other forms of serious harm, in violation of Australia's non-refoulement obligations.

By creating additional procedural requirements for applications in the protection and migration divisions of the ART, the amendments will also undermine the efforts of the ART reforms to harmonise and unify procedures across its

various jurisdictions, as well as its goal of delivering a fair, accessible and just review system.[1] The government's justification for the amendments is to provide certainty for the Tribunal and applicants in relation to the requirements to apply for review. However, as we discuss in Part 3, as drafted, the amendments are ambiguous and likely to have the opposite effect of causing confusion and uncertainty around the elements required for the making of a valid application before the ART.

2 Additional barriers to accessing review of protection decisions at the ART

As noted in our previous submissions to earlier parliamentary inquiries and departmental consultations,[2] while we welcome many elements of the reforms to Australia's administrative review system and the creation of the new ART, we have serious reservations around the decision to retain separate, more restrictive procedures and requirements in the migration and refugee jurisdictions. In our submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, we provided a detailed overview of historic attempts to codify and limit procedures for migration and protection decision-making, and drew on statistical analysis from the Kaldor Data Lab to demonstrate that there is no evidence that these efforts have reduced legal uncertainty or reduced the number of judicial review applications, but rather the rigidity of these procedures may actively be contributing to inefficiencies.[3] In light of this we recommended that the ART should be established with processes that apply uniformly, but flexibly, across cases, according to the complexity of each matter. This would contribute to both the fairness and efficiency of decision-making at the new tribunal.

The present Bill instead moves in the opposite direction, by imposing additional carve outs and restrictions that would result in procedures in the migration and refugee jurisdictions further deviating from other decision-making areas in the ART. These restrictions would have particularly detrimental impact for protection visa applicants by limiting their ability to access review procedures. As UNHCR notes in their submission to this inquiry:

> 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.[4]

As a signatory to the *International Covenant on Civil and Political Rights*, Australia has an obligation to provide access to effective remedies for violations of rights or freedoms set out in the Covenant.[5] This extends to access to both administrative and judicial review.[6] Similarly, to comply with its obligations under the 1951 *Convention relating to the*

1 *Administrative Review Tribunal Act 2024* (Cth) s 9.
2 Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (*14 December 2023); Kaldor Centre Data Lab, Submission to the Attorney-General's Department responding to the Administrative Review Reform: Issues Paper (May 2023).
3 Ibid.
4 UNHCR, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (23 September 2024) 3.
5 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3); Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 379.
6 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered

Status of Refugees and its 1967 *Protocol*, Australia must ensure that its asylum procedures are both fair and effective and adequately implement the duty of non-refoulement.[7] This includes access to meaningful review of a negative decision.[8]

3 Payment of prescribed fees

The Bill amends sections 347 and 348 of the *Migration Act* to create additional requirements relating to the payment of fees for an application for review to the ART to be 'properly made' and would make explicit that the ART will not have jurisdiction over, and must not review applications that are not properly made.

Section 347 of the *Migration Act*, as amended by the yet to commence provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth),* already includes the requirement that an application be accompanied by the prescribed fee (if any). This reflects the existing requirements for lodging an application for review in the Migration and Refugee division of the Administrative Appeals Tribunal, in section 412(1)(c) of the *Migration Act*.

The Bill would introduce additional requirements in s 347(3)(b) that the fee for a reviewable protection decision must be paid 'within the prescribed period (which may end after the review of the decision)'. Under the current regulations, the fee for reviewable protection decisions are only imposed if the review is unsuccessful, within 7 days after the decision is taken to be received by the applicant.[9] However, by including this new requirement in the *Migration Act,* the amendments open the door for changes to the regulations in the future that could require the payment of fees upfront, with the failure to pay potentially rendering applications invalid.

As currently drafted, the amendments are ambiguous as to whether the failure to pay the prescribed fee within the prescribed period would render an application for the review of a protection decision invalid. The Bills Digest states that for applications for the review of a protection decision, 'failure to pay the fee does not appear to affect whether or not the application was properly made for the purpose of the ART considering the application'.[10] This reading is likely based on the inclusion of the new section 348(3)(c) that specifically stipulates that applications for reviewable migration decisions will only be properly made if the prescribed fee is paid within the prescribed period, and the fact that there is no equivalent explicit statement saying the same for reviewable protection decisions.

However, the proposed s 347(3)(b) makes it clear that an application for the review of a protection decision *must* be accompanied by the prescribed fee and paid within the prescribed period, and section 348(2) provides that if an

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into force 23 March 1976) art 2(3)(b); See also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 379-380.

[7] Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', Global Consultations on International Protection, EC/GC/01/12, 31 May 2001.

[8] Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32(1) *International Journal of Refugee Law* 1, 12.

[9] *Migration Regulations 1994* (Cth) reg 4.31B.

[10] Parliament of Australia, *Bills Digest* (Digest No. 9 2024, 3 September 2024).

application is not properly made, the ART must not review the decision. Taken together, these provisions could be read to render applications for review of protection decisions invalid where there is a failure to pay the fee within the prescribed period, even in the absence of an explicit provision equivalent to s 347(3)(b).

As the Refugee Advice and Casework Service notes in their submission to this inquiry, the requirement of the payment of fees at the time of application

> would pose an unreasonable and unjust barrier to people seeking safety in Australia. In our submission and in our case studies we have set out the characteristics of the applicants supported by RACS which would severely complicate their practical ability to adhere to the payment of fees, and even more so where there is a strict timeframe. Invalidating an application for review due to a failure to pay a fee poses the significant risk that people with valid claims for protection may be returned to a country where they could experience persecution.[11]

We recommend that the Bill be amended to address this ambiguity and ensure that a failure to pay any prescribed fees does not impact the validity of applications for the review of protection decisions. The best approach would be to simply remove the text of section 347(3)(b) from the Bill. In the alternative, s 347(3)(b) could be amended to explicitly state that in the case of reviewable protection decisions, any prescribed fee will only be required to be paid after the review of the decision, and only if the matter is not remitted, leaving the prescription of the exact fee and time period for payment following the decision to be specified in the regulations. This would safeguard against the future possibility of the regulations being amended to require the upfront payment of fees, and a situation where the failure to pay these fees would make an application invalid.

4 Providing prescribed information or prescribed documents

The Bill also includes amendments imposing additional requirements with respect to the need to include prescribed information or prescribed documents for an application to be properly made.

Section 347(2)(c) of the *Migration Act*, as amended by the yet to commence provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth),* already provides for the requirement that an application must include the prescribed information (if any); and be accompanied by the prescribed documents (if any). The present Bill adds additional requirements requiring that information and documents be provided within the strict time frames for lodging applications. It further makes it clear, through amendments to s 348(3)(b), that an application is properly made, if and only if, any information and documents prescribed under s347(2) for the application are provided with the period specified in that subsection.

As with the provisions relating to the payment of fees, these amendments would allow the government to set additional requirements in relation to the prescribed information and documents through regulations, without the need for parliamentary scrutiny. As noted in the submission by the Refugee Council of Australia, this ‘could lead to increased

[11] Refugee Advice and Casework Service, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024.

barriers over time, making it progressively more difficult for applicants to access review.'[12]

5 Time limits

We continue to hold concerns in relation to the imposition of short inflexible time limits for lodging applications for the review of protection decisions. These are discussed in depth in our earlier submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs.[13] The Bill will further exacerbate those concerns, requiring applicants to not only lodge their applications within strict time frames from when they are notified of the decision, but to also include any prescribed information or prescribed documents. As the Refugee Council of Australia notes in their submission:

> 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.[14]

Many will face difficulties in obtaining legal assistance within the strict time periods, particularly those in immigration detention, who must lodge their applications and prescribed documents and information within 7 days of being notified of a decision.

As Professor Mary Crock has noted:

> [T]he inflexibility of time limits undermines the ability of the tribunal to deliver effective and efficient justice for applicants. If the tribunal is denied jurisdiction to hear a case, applicants must either apply for judicial review in the Federal Court or they must seek an exercise of the Minister's 'non-reviewable, non-compellable' discretion (see s 351 of the *Migration Act*). With the backlog in judicial review applications and the overwhelming number of ministerial appeals, it is difficult to see the wisdom in this constraint on the new ART.[15]

The same concerns apply to the other restrictions which the Bill would introduce discussed above. Where the tribunal is denied jurisdiction to hear a case on the grounds that fee has not been paid, or that prescribed documents or information have not been provided, the only recourse for the applicant will be to seek judicial review or ministerial discretion, creating greater backlogs in other parts of the system.

6 The need for a more flexible approach

The proposed amendments to the *Migration Act* set out in the Bill undermine the stated goal of the ART to provide an independent mechanism of review that 'is accessible and responsive to the diverse needs of parties to proceedings'.[16]

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[12] Refugee Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024.
[13] Kaldor Centre Data Lab (n 2).
[14] Refugee Council of Australia (n 11).
[15] Mary Crock, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (23 September 2024).
[16] *Administrative Review Tribunal Act 2024* (Cth) s 9(c).

Imposing strict requirements around procedural compliance undermines substantive justice. The stakes could not be higher in the context of protection decision-making. Where a valid protection claim is not correctly identified, the applicant may be returned to a place where they face persecution or other forms of serious harm. In this context, applications for review should not be dismissed on minor technical procedural grounds, such as minor delays, missing information or documents, or a failure to pay fees.

In this regard we endorse recommendation 3, 4 and 5 in the submission from the Refugee Council of Australia on the need for more discretion for the ART to accept and review applications which may not fully comply with procedural requirements if it is in the interest of justice to do so; the need for clear and accessible guidance for applicants; and limits on the scope of procedural bars.