



(02) 8355 7227
ADMIN@RACS.ORG.AU
EORA COUNTRY
30 BOTANY ST, RANDWICK NSW 2031
RACS.ORG.AU | ABN 46 008 173 978

Submission to the Senate Standing Committees on Legal and Constitutional Affairs

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

27 September 2024

Acknowledgment of Country

*We acknowledge the Traditional Owners,
Custodians and Elders of the Gadigal People of
the Eora Nation, past, present, and future, on
whose traditional land we work.*

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Introduction

The Refugee Advice and Casework Service (**RACS**) provides critical free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systemic law reform and policy that treats refugees with justice, dignity and respect, and we make complaints about serious human rights violations to Australian and United Nations bodies.

RACS acts for and assists refugees, people seeking asylum, people that are stateless or displaced, in the community, in immigration detention centres, alternative places of detention and community detention. Our services include supporting people to apply for protection visas, re-apply for temporary visas, apply for work rights and permission to travel, apply for family reunion, lodge appeals and complaints, assist with access to citizenship and challenging government decisions to detain a person.

RACS welcomes this opportunity to contribute to the Senate Standing Committee's inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (**'the Bill'**). RACS has consistently provided input regarding the design and implementation of the legal framework concerning the forthcoming Administrative Review Tribunal (**'ART'**). This input is informed by RACS' experience in routinely advising and assisting non-citizen applicants with challenging government decisions that fundamentally impact their safety from persecution, liberty, freedom from arbitrary and indefinite detention and ability to reunite with their families. The applicants RACS supports (that being refugees, people seeking asylum, displaced persons and the stateless) typically experience structural exclusion and intersecting barriers to accessing justice. Such barriers can include the profound impacts of trauma arising from the experience of persecution, limited English capabilities, complex mental health issues and financial distress. Accordingly, it is critical that any proposed reform to the Administrative Review Tribunal accounts for the profile of some its most vulnerable applicants to ensure that they are equally able to access a fair, just and independent mechanism of merits review.

Our submission draws directly from RACS' experience in supporting clients to navigate the difficulties of accessing merits review in the context of their specific backgrounds. We make several recommendations that would bring the Bill closer in line with the purported objective of the Tribunal with a particular focus on the objective of accessibility.

We would like to extend our gratitude to the following contributors to this submission: Mursal Rahimi and Ahmad Sawan.

Proposed reforms

In preparation for the operation of the Administrative Review Tribunal the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth)* made a number of amendments to the *Migration Act 1958 (Cth)* (**'Migration Act'**). These amendments are due to commence at the same time as the *Administrative Review Tribunal Act 2024 (Cth)* on 14 October 2024.

The Bill then further alters the proposed sections 347 and 348 of the *Migration Act 1958 (Cth)* that were amended by the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth)*. These proposed provisions establish the criteria that must be satisfied for an application to the Tribunal to be made properly,¹ and instructs that the ART must not review the decision if it is not properly made.² It is our submission that the prescription of rigid criteria to make a 'proper application' will have a significantly adverse impact on the accessibility of the Tribunal.

Prescribed information and documents

Proposed section 347(2) of the Bill sets out that for an application to be properly made, it must be accompanied by any prescribed information or documents. This must be provided within seven days after the date of notification if the applicant is in immigration detention,³ or otherwise within 28 days after the date of notification.⁴

As noted above, the applicants supported by RACS experience complex and intersecting barriers that can undermine their ability to adhere to such rigid timeframes. This includes but is not limited to, insecure housing, limited employment opportunities, complex mental and physical health issues, and limited English fluency. Applicants in detention face additional complications when accessing legal supports or even the technology needed to make an application to the Tribunal. This is exacerbated even further in light of the shorter timeframe prescribed for those in detention. Legal service providers like RACS may be limited in our ability to support applicants to make a valid application in circumstances where they do not have access to the prescribed information or documents or are close to the end of the prescribed timeframe to provide the requested information.

The explanatory memorandum for the Bill outlines that these provisions seek to provide certainty to the Tribunal and applicants in relation to the requirements to apply for a review of a reviewable migration or protection decision.⁵ We put forward that whatever certainty that is obtained through these provisions is outweighed by the injustice to applicants who

¹ Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 Sch 2 Part 12 Item 115 and 119 (**'ART Bill'**).

² ART Bill Sch 2 Part 12 Item 119 (proposed s 348(2)).

³ ART Bill Sch 2 Part 12 Item 115 (proposed s 347(2)(a)).

⁴ ART Bill Sch 2 Part 12 Item 115 (proposed s 347(2)(b)).

⁵ Explanatory Memorandum, Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (Cth) 228.

may be barred from exercising their right to a fair and accessible merits review due to minor administrative omissions or errors.

Prescribed fees to be paid within a prescribed timeframe

The Bill in proposed section 347(3) seeks to legislate that a fee associated with an application to the ART be paid within a specified timeframe. The prescribed fee for the review of a reviewable migration decision must be paid within seven days after notification of decision if an applicant is in detention,⁶ otherwise within 28 days after the applicant is notified of the decision.⁷ The Migration Regulations will specify when a fee must be paid for reviewable protection decisions.⁸

The potential introduction of legislated time frames by which fees must be paid will bear harshest on some of the most vulnerable applicants before the Tribunal for whom the price of justice and safety would be too expensive.

Reviewable migration decisions

RACS supports applicants with the review of migration decisions at the Tribunal. This can include applications to review a refusal for family visas and visa cancellations or refusals on character grounds. In our experience, applicants face considerable challenges with gathering sufficient funds to cover the cost of an appeal to the Tribunal. Among other factors that can limit an applicant's ability to pay prescribed fees for an application, applicants like those supported by RACS may:

- be in immigration detention with no savings or streams of income;
- experience significant mental and physical health issues associated with a history of torture, trauma or persecution which hinders their ability to work; or
- have been excluded from employment on short term visas that do not grant them the right to work.

Current practice at the AAT, in the absence of legislated timeframes for payment of fees, have afforded applicants some greater flexibility which has allowed them to continue to access merits review.

⁶ ART Bill Sch 2 Part 12 Item 115 (proposed s 347(2)(a) and (3)(a)).

⁷ ART Bill Sch 2 Part 12 Item 115 (proposed s 347(2)(a) and (3)(b)).

⁸ ART Bill Sch 2 Part 12 Item 115 (proposed s 347(3)(b)).

Mustafa: appealing to the Tribunal from immigration detention

Mustafa arrived in Australia in July 2013 by boat.

Mustafa fled his country of origin because he was persecuted by state authorities due to his religious and political beliefs. Mustafa experienced serious harm in his country of origin, such as the execution of his family members. This underscored Mustafa's development and history of mental health issues, including his diagnosis of severe Post-Traumatic Stress Disorder (**PTSD**).

Mustafa applied for a Safe Haven Enterprise Visa (**SHEV**) in 2017. RACS assisted Mustafa with appealing his initial refusal to the Immigration Assessment Authority (**IAA**). His application was remitted with the instruction that he met the criteria to be granted refugee status in Australia. Mustafa's application was then refused in October 2020 on character grounds.

At the time Mustafa's application was refused he had been held in immigration detention for a number of years due to criminal offending which occurred in the context of his mental health issues. Mustafa's physical and mental health deteriorated further in detention, including after an incident in which he was found to be subject to an excessive use of force by detention staff.

Mustafa had the option to appeal his SHEV refusal to the Tribunal, but he had to do so within a short timeframe and pay the cost of the application. As Mustafa was in immigration detention he was eligible for a fee reduction which brought the cost of his application down from \$952 to \$100.

Even with this reduction, Mustafa instructed that the cost of the application was too expensive. Years in immigration detention and a lack of supports in Australia meant he had no savings or financial safety net to rely on. Mustafa was nearing the end of the timeframe in which he could appeal the refusal but still did not have the necessary funds. RACS assisted Mustafa with lodging an application within time to protect his rights to merits review. Mustafa was only able to pay the cost of the application after the timeframe for lodgment had passed, and with the financial support of refugee advocates.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

Winnie: applying for a fee reduction

Winnie arrived in Australia in June 2016 by plane. RACS 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.

RACS 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. RACS 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. RACS 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, RACS 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.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

The above case studies exemplify how current flexible practises at the Tribunal can enhance access to merits review for marginalised applicants. The introduction of legislated timeframes within which prescribed fees must be paid risks excluding people from merits review of government decision-making where they fail to meet technical procedural criteria.

Reviewable protection decisions

Proposed section 347(3)(b) of the Bill stipulates that a fee for the application for a review of a reviewable protection visa decision must be paid within the prescribed period. At present the *Migration Regulations 1994* instruct that the fee for a reviewable protection decision is only payable within seven days after notification of an unsuccessful review application.⁹

RACS is concerned that the inclusion of this provision establishes the legal architecture for future regulations which could require the payment of fees at the time of lodging applications. This 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.

As explained by the Kaldor Centre in their submission to this inquiry, the proposed legal framework in sections 347 and 348 of the Bill does not clarify whether the payment of a prescribed fee would invalidate a review of a reviewable protection visa refusal:

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 bill 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 new 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 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).

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

¹⁰ Leah Ferris, *Administrative Review Tribunal (Miscellaneous Measures) Bill 2024*, No 9 of 2024-25, 3 September 2024.

The explanatory memorandum for the Bill suggests that these provisions provide certainty for the Tribunal and applicants in relation to the requirements to apply for a review of a reviewable. However, it is clear from the above that the proposed legislation remains ambiguous and can generate confusion between applicants and legal representatives as to what elements are required for the making of a proper application before the Tribunal. To quell this ambiguity, we recommend that the text of section 347(3)(b) be removed from the Bill.

Conclusion

Legislating strict and rigid criteria for applications before the Tribunal increases the risk that applicants will be barred from accessing merits review due to technical errors. This has grave consequences for applicants, whose right to access a review of government decisions that fundamentally impact their life, liberty and safety may be extinguished with little to no recourse.

Applicants seeking the review of migration and protection decisions are already subject to a distinctive and discriminatory code which excludes them from measures in the *Administrative Review Tribunal Act 2024* (Cth) designed to enhance the accessibility and responsiveness of the Tribunal.¹¹ For example, yet to commence provisions of the *Migration Act 1958* (Cth)¹² provide that the power for the Tribunal to extend deadlines would not be applicable to reviewable migration or protection decisions.¹³ The introduction of these additional and arduous procedural requirements in this Bill continues the trend of legislation and policy that disadvantages applicants seeking the review of migration and protection decisions.

This disadvantage is exacerbated in light of the Department of Home Affairs' recent "last in first out" approach to processing protection visa applications. RACS has observed that applications for protection visas have been refused in a turnaround of as little as three weeks, and applicants have not been invited to interviews or requested to provide further information as to their claims for protection. We hold significant concerns as to what procedural fairness is afforded to these applicants. In these circumstances, it is even more important to ensure that people can access a fair, just and responsive form of merits review to fully ventilate their fears of persecution. In the absence of such protections, there is a real danger that people who are at risk of persecution may be sent back to harm and Australia could fall foul of their *non-refoulement* obligations.

The broader ecosystem of merits review in Australia may also suffer if applicants are not given the opportunity to challenge government decision-making. Poor government decision-making at a first instance and merits review level may lead to an increase of judicial review matters in the courts and longer delays. This is fundamentally inconsistent with the goals of the ART in delivering a fair, just, accessible, responsive and transparent independent mechanism of review. Public confidence in the ART as a merits review body may also deteriorate, as these prescribed timeframes and fees might proliferate the idea that the Tribunal may only be accessed by those who can afford the price tag attached to justice and safety.

¹¹ We refer to the previous submissions provided by RACS to this Committee regarding the suite of legislation concerning the Administrative Review Tribunal.

¹² *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) Sch 2 Division 2 s 347(5).

¹³ *Administrative Review Tribunal Act 2024* (Cth) s 19.