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# **Submission to the Senate Standing Committees on Legal and Constitutional Affairs**

Inquiry into the Administrative Review  
Tribunal and Other Legislation Amendment  
Bill 2025

## **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 and Other Legislation Amendment Bill 2025 (**'the Bill'**). RACS has consistently provided input regarding the design and implementation of the legal framework concerning the 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 in relation to this Bill so that the Tribunal's objectives, with a particular focus on the objective of accessibility, may be achieved.

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

## Proposed reforms

This Bill looks to introduce additional subsections and amend the operation of section 106 of the *Administrative Review Tribunal Act 2024* (Cth) (**'ART Act'**) in expanding the powers of the Tribunal to make a decision without holding a hearing in 'otherwise reasonable' circumstances.

The Bill further seeks to introduce amendments to the *Migration Act 1958* (Cth) (**'Migration Act'**) including a new Division 4A, covering sections 367C through to 367N. These proposed provisions make it mandatory on the Tribunal to consider a reviewable migration decision to be one that is an application to be reviewed on the papers, where the decision is to refuse the grant of a student visa or it is a decision related to a temporary visa.

### Discretion to dispense with hearing

The proposed addition to section 106 of the ART Act provides additional powers to the Tribunal to consider circumstances where it may make a decision on an application for appeal without holding a hearing. Specifically, it allows a discretion for the Tribunal to make a decision in a matter without holding a hearing if

- a) the issues for determination can be determined without a hearing; and
- b) it would be reasonable to do so.<sup>1</sup>

In considering this discretion, the Tribunal must afford parties to the proceeding a reasonable opportunity to provide submissions in relation to the decision to make a decision without holding a hearing and the submissions must be taken into account.<sup>2</sup>

As noted above, the applicants supported by RACS experience complex and intersecting barriers that can undermine their ability to be able to engage substantially to provide a submission for the Tribunal's consideration if it is inclined not to hold a hearing. This includes but is not limited to, insecure housing, financial difficulties, complex mental and physical health issues, and limited English fluency.

Applicants may have limited literacy in their own language, much less in English.<sup>3</sup> Interpreters are funded and readily available on request at oral hearings with no cost to applicants. Written submissions provided to the Tribunal would most likely require applicants to incur significant expenses to translate information to English. This is further complicated where applicants may not speak a written language, or a language where translators are not available.

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<sup>1</sup> Administrative Review Tribunal and Other Legislation Amendment Bill 2025 (Cth) cl 3.

<sup>2</sup> Ibid.

<sup>3</sup> In many cases, this can be a product of their discrimination or persecution.

The provision of written submissions would also require applicants to understand and navigate the kinds of legal arguments the Tribunal are interested in when determining whether the conduct of a hearing is necessary before making a decision. Applicants would also have to have some kind of technological or digital literacy to be able to prepare and provide such submissions to the Tribunal. This adds an additional layer of difficulty for applicants in detention, who may not have stable access to the necessary technology needed to do so and limited access to other legal and social supports. The Kaldor Centre's Data Lab has found that the odds of an applicant succeeding at the Tribunal were 4.4 times higher if they had legal representation.<sup>4</sup> Proposed reforms such as those captured in this Bill risks this gap between represented and unrepresented applicants widening even further.

### **Aida\*: Providing updated claims of protection for a Tribunal hearing**

Aida was a Tribunal applicant who had been in a secret relationship with her girlfriend for over 10 years. Together they came to Australia to live a life of safety, initially arriving on student and tourist visas. Around that time Aida had received legal advice through a fraudulent migration agent that spoke the same language as her. Aida was incorrectly advised by this migration agent that she could apply for a protection visa due to her home being affected by natural disaster in her country. Aida's migration agent applied for a protection visa on her behalf and the application was refused four months later without an interview. The migration agent then assisted Aida to make an appeal to the ART for review of the protection visa refusal.

At that time Aida did not feel safe raising claims relating to her sexuality with that migration agent. The migration agent shared the same cultural background as Aida, and regularly serviced people from her community in Australia. She was fearful that information about her sexuality could be made publicly known.

Aida received notification that her hearing date at the Tribunal was scheduled as a part of a mass hearing. After disclosing her sexuality to a stranger Aida was recommended to contact RACS to receive free legal advice about her situation. After contacting RACS, Aida was able to receive comprehensive advice about the protection visa criteria with the assistance of an interpreter. RACS was then able to assist Aida to draft a detailed statement raising her claims around her sexuality. Following submission of the updated statement, Aida was moved off the mass hearing date and was alternatively scheduled to a full three-hour hearing with an interpreter before a Member.

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<sup>4</sup> Mia Bridle, 'Who succeeds at the Administrative Review Tribunal, why, and who decides?' (Web Page, 2023) available at: <<https://www.unsw.edu.au/kaldor-centre/our-resources/kaldor-centre-data-lab/who-succeeds-administrative-appeals-tribunal-why-and-who-decides>>.

At the hearing, Aida was able to explain in detail what had happened to her and her true fears of returning to her country of origin because of her sexuality. At the hearing the Member accepted Aida's claims and the justifications around reasonableness of delay in raising the new claims. The Member set aside the original decision to refuse and remitted the decision back to the Department of Home Affairs on the grounds that Aida met the definition of a refugee.

Without access to free independent legal support, interpreting services, and a full opportunity to ventilate her claims for protection Aida would not have had the chance to engage meaningfully with the Tribunal and explain her fears of harm. Aida would have been at greater risk of refoulement to a country where she faced persecution.

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

Stories like Aida's emphasise the importance of access to legal services, procedural fairness, and a full refugee status determination process in order to obtain the protection and safety she required. It was particularly important for Aida to be able to speak with a Member of the Tribunal as she received incorrect legal advice from a fraudulent migration agent and her protection visa application was refused without being invited to an interview. We often see at RACS that measures taken by the Department of Home Affairs to increase efficiency in application processing can lead to decisions being made without an interview. In these circumstances there is an even greater need for applicants to have access to an oral hearing at the Tribunal to thoroughly explore their claims for protection and avoid the risk of refoulement.

While written submissions are offered in the Bill as a safeguard against the inappropriate exercise of this discretion, this is insufficient owing to the practical difficulties experienced by the applicants supported by RACS outlined above. These difficulties significantly compromise their ability to meaningfully engage with this exception. RACS also holds concern that there are very few limits to the exercise of the proposed discretion to dispense with oral hearings. Outside the nebulous qualification of "reasonableness" there is little guidance as to what circumstances are appropriate for the making of a decision to dispense with an oral hearing or how decision-makers should take into account the written submissions made by applicants. This, coupled with the inaccessibility of the safeguard constraining the exercise of this discretion, is serious cause for concern.

The explanatory memorandum for the Bill outlines that these provisions seek to provide greater flexibility to the Tribunal in its procedures while also allowing for appropriate safeguards to be in place to make it compatible with the Tribunal's obligations to allow applicants to present their case.<sup>5</sup> We put forward that there are ways in which efficiency

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

in managing visa appeals can be improved by making use of the existing legal framework and increasing the funding of specialist legal services.

Per section 106 of the ART Act, Tribunal Members are already empowered with the ability to dispense with hearings. In particular, the Tribunal's ability to dispense with hearings where a decision is in favour of the applicant. RACS has supported applicants who have had their hearings dismissed given that a positive decision could be made on the basis of written submissions and evidence provided prior to a hearing. An increase in the funding of independent and specialist legal services could support applicants to better prepare such submissions and evidence. Dispensing with hearings in circumstances where a decision is in favour of the applicant frees Tribunal resources which can then be dedicated to ensuring that applicants with complex cases have the benefit of a full opportunity in an oral hearing to ventilate their claims for protection. Whatever efficiency that may be gained through this propose Bill is far outweighed by the injustice to applicants who may be excluded from accessing safety from persecution due to an inability to navigate complex legal systems alone.

### **Recommendation 1:**

*Remove Part 1 of Schedule 1 of the Bill.*

### **Mandatory on the papers assessment**

The Bill also seeks to amend the Migration Act such that the Tribunal would be required to make decisions in relation to certain kinds of reviewable migration decisions on the papers without conducting an oral hearing.

Proposed section 367C sets out that the scope of this amendment would apply to:

- a) a decision to refuse to grant a student visa; or
- b) a decision relating to a prescribed temporary visa.

RACS holds serious concern at this attempt to infringe on the right of applicants to an oral hearing. While applicants have an opportunity to provide written submissions to the Tribunal in support of their appeal, the issues outlined above with this model remain pertinent. Applicants seeking the review of a reviewable migration decision are likely to experience multiple barriers which would complicate their ability to engage with the Tribunal; barriers which would be magnified under a mandatory on the papers assessment process.

While in its current form, the Bill would not apply to protection or permanent visas we hold concern that the provisions are written in a manner that could empower the Minister with an essentially unfettered power to designate any temporary visa as an application to be reviewed on the papers. This is particularly concerning should the Minister designate bridging visas as such an application to be reviewed without a hearing.

RACS frequently supports people who hold and apply for temporary bridging visas while awaiting a legal process. Without the protection of this temporary bridging visa, individuals may be at risk of being detained and removed from Australia as required under sections 189 and 198 of the Migration Act. Decisions around the review of decisions to refuse temporary visas, such as a bridging visa, can thus become an issue with serious implications for an individual's liberty and freedoms.

### **Eric\*: appealing a bridging visa refusal**

Eric first arrived in Australia in 2010 from a Pacific Island as a child, dependent on his parent's temporary visa. Eric's parent applied for a Protection visa on his behalf without his knowledge, consent or understanding of what this meant. Eric attended an interview with the Department of Home Affairs in relation to this application and was instructed by his parent on how to participate in this interview. As a child, Eric naturally followed the advice of his parent.

The application was refused shortly after, but Eric was not made aware of this refusal nor his visa status by his parent. Instead, his parent told him that he was now able to remain in Australia permanently.

Eric fled his family home and ceased contact with his family a few months after the visa refusal, as he had been subject to child sexual abuse from his parent since the age of four. Eric experienced homelessness while completing the rest of his education, relying on charitable and community support for food and temporary accommodation.

Eric proceeded to become an active and contributing member of his local community. He obtained a driver's license, started a construction company registered with an Australian Business Number, was an essential worker during COVID-19 lockdowns and lodged tax returns for himself and his business everywhere. Eric faced no issues when engaging with Australian Government services, not any reason to question his belief that he was lawfully residing in Australia. Throughout his adult life, Eric also came to realise his sexuality as a gay man and began participating in the LGTBQIA+ community.

In 2024 Eric willingly assisted the police with their enquiries about another person on his jobsite. The police ran a visa check for Eric and discovered he did not hold a visa. They reported him to Australian Border Force who subsequently detained him. Eric had to receive medical treatment for shock upon learning of his visa status.

For three months Eric tried endlessly to obtain a visa to be released from detention. Eric felt unsafe in detention due to his sexuality and he feared being outed, as this would have caused him serious mental, emotional and physical harm. Eric put his trust into an established migration firm where he was assisted by a fraudulent migration agent. Eric paid over \$40,000 to this agent without knowing he was not qualified nor registered to be advising him on his visa status. The agent began demanding sexual favours of Eric and threatening to out him to other people in detention if he did not comply.

Once Eric was unable to pay the fraudulent agent any further, he contacted RACS who assisted him with a bridging visa application. This application was refused and subsequently affirmed by the Tribunal. Eric struggled to engage with the visa process due to his declining mental health after the significant trauma he had experienced when being taken advantage of. RACS supported Eric with judicial review of the Tribunal's decision, and the matter was remitted to the Tribunal.

By this stage, Eric had come to trust the free legal services provided by RACS and felt able to engage in the visa process again. He prepared thoroughly for the Tribunal hearing, feeling as though this could be his last and most important opportunity to put forward his claims. During this hearing, Eric confidently put forward all of his information about his upbringing, his experiences of child sexual assault and resultant homelessness, and how he had come to establish himself in the Australian community believing himself to be a lawful resident. Eric was given an opportunity to clarify and correct information that had been provided to the Department by the fraudulent migration agent on his behalf, and advocate for himself to be released from detention due to the risk of harm he faced in there as a gay man and his dedication to comply with mandatory 'no work' conditions in the community.

The Tribunal accepted Eric's evidence and remitted his application for a bridging visa to the Department. Eric was released from immigration detention the next day. Since his release, Eric has expressed that this was the first time in his life he felt like someone truly listened to him, understood him, and accepted his story and past traumas.

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

The above case study illustrates the multiple, complex and intersecting challenges experienced by the clients supported by RACS. These challenges make it incredibly difficult to navigate legal processes that have a fundamental impact on their rights and liberties and necessitates greater flexibility and accessibility by decision-making bodies like the Tribunal. Instead, Bills like the one currently before this Committee places them at greater risk of being marginalised.

There is no evidence to suggest that the removal of an oral hearing has a positive causative impact in reducing backlogs or increasing efficiency in processing appeals. The mandatory on the papers assessment set out in this Bill is reminiscent of the methods of the Immigration Assessment Authority, which has since been abolished in recognition of its procedural unfairness.<sup>6</sup> The Immigration Assessment Authority aimed to deal with the large caseload of fast-track applicants by favouring expediency over procedural fairness and just decision-making.<sup>7</sup> Indeed the legislation establishing the review body noted that its objectives were simply to be 'efficient and quick'<sup>8</sup> and not 'fair, just, economical, informal and quick' like the AAT (which was available for non-fast-track applicants).<sup>9</sup> To give effect to this objective, the IAA conducted 'on the papers' reviews of existing material without inviting fast-track applicants to a hearing and implemented incredibly high thresholds to justify the provision of new evidence.<sup>10</sup>

Research conducted by the Kaldor Centre Data Lab confirms that any efficiency garnered by these measures at the IAA was reversed by the significant potential that decision-making was infected by judicial error:

'the very high rates at which cases are successful at judicial review in the Federal Courts has led to significant delays. From 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. On average, the judicial review process takes more than 2-3 years. Any time saving generated by shortened procedures at the IAA stage is almost certainly more than negated by the delays caused by the high rates of judicial review of these cases. When the system is considered holistically, the 'fast track' process has not led to any efficiency gains, but rather caused significant additional delays.'<sup>11</sup>

<sup>6</sup> Explanatory Memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) [54-56].

<sup>7</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

<sup>8</sup> *Migration Act 1958* (Cth) s 473A.

<sup>9</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

<sup>10</sup> Immigration Assessment Authority, 'The Review Process' (31 March 2023) accessible here: <<https://www.iaa.gov.au/the-review-process/faqs/new-information>>.

<sup>11</sup> 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, 5-6].

We submit that similar risks are involved here in mandating on the papers assessments of reviewable migration decisions

**Recommendation 2:**

*Remove Part 2 of Schedule 1 of the Bill.*

*In the alternative, we urge that the proposed section 367C(2)(b) be omitted from the Bill.*

## Conclusion

This Bill introduces amendments that would allow the Tribunal to dispense with oral hearings in circumstances deemed reasonable, and mandates that certain reviewable migration decisions must be assessed on the papers without a hearing. These proposed reforms risk entrenching a system that prioritises perceived administrative efficiency over fairness, transparency and justice. Removing or restricting the right to an oral hearing will have a disproportionate impact on vulnerable applicants, including individuals who have experienced displacement, serious traumas, forms of exploitation or family violence.

RACS urges the Committee oppose this Bill, and in particular adopt the recommendations provided in this submission.