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

Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Sydney

Contact: Associate Professor Daniel Ghezelbash, d.ghezelbash@unsw.edu.au

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

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 , 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

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1 (Cth) s 9.

2 Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, 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 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, (Oxford University Press, 4th ed, 2021) 379.

6 opened for signature 16 December 1966, 999 UNTS 171 (entered

and its 1967 , 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 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 , as amended by the yet to commence provisions in the 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 .

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 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

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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:

Imposing strict requirements around procedural compliance undermines substantive justice. The stakes could not be higher in the context of protection decision-making.