Refugee Council of Australia

HOUSE OF REPRESENTATIVES 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

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

RCOA welcomes the establishment of the Administrative Review Tribunal and the abolishment of the Administrative Appeals Tribunal (ART) and the Immigration Assessment Authority (IAA). As we have previously stated, the AAT was heavily politicised, experienced massive backlogs and undermined public confidence in the merits review process. The IAA established a review system that was neither fair nor efficient – in nine years the IAA has still not reviewed all applicants through the 'fast track process'. In many instances, it has had its decisions overturned by the Federal Courts. Both bodies had failed in their duties to provide a fair and effective review of asylum applications that ensures that those who fear persecution are not returned to harm. We hope that the new ART will address these issues and believe that the proposed legislation will go a long way in ensure a fair and independent merits review system.

However, we are also concerned that many of the procedural elements of the AAT regarding migration and refugee cases are maintained in the new ART, due to the exemptions outlined in the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2023 (Consequential and Transitional Provisions Bill).* It is disappointing that the new and improved provisions in the new *Administrative Review Tribunal Bill 2023 (ART Bill)* do not apply to refugee and migration cases under the *Migration Act 1958 (Cth).* Indeed, maintaining a separate set of procedures for migration and refugee cases will lead to further inefficiencies, appeals and potentially, the denial of refugee protection leading to refoulement.

We recommend that the procedures in the new *ART Bill* apply equally to migration and refugee cases, and that the separate set of procedures under the *Migration Act 1958* be removed from the *Consequential and Transitional Provisions Bill.*

1 Welcome features of the ART Bill

1.1 We welcome the introduction of the ART and hope that its inception will bring much-needed reform to the review of refugee and migration decisions. The previous AAT was ineffective, inefficient, highly politicised and had undermined public perception of a fair and competent merits review process.

Suite 4A6, 410 Elizabeth Street
Surry Hills NSW 2010 Australia
Phone: +61 (02) 9211-9333 • admin@refugeecouncil.org.au
Web: www.refugeecouncil.org.au • Twitter: @OzRefugeeCounc
Incorporated in ACT • ABN 87 956 673 083

1.2 The *ART Bill* has many positive features which we have advocated for, including independent merit-based appointment and re-appointment of members, length of terms and the re-introduction of the Administrative Review Council.

1.3 We also welcome the Government's recent announcement to increase the number of decision makers at the merits review stage in order to address the ongoing backlog of cases. These increases should continue into the new ART and be reviewed regularly to ensure that the refugee caseload is being managed effectively.

Recommendation 1 Regularly review refugee caseload to ensure sufficient resourcing

The ART should regularly review the refugee caseload to ensure there are sufficient staffing arrangements and resources to address the current caseload.

2 A welcome end to an era of 'Fast Track'

2.1 The Fast Track process, including the Immigration Assessment Authority (IAA) created a system which was neither fair nor fast. Despite being introduced as a quicker way to assess approximately 30,000 people seeking asylum, the process has still not finished after nine years since it was introduced. The IAA did not conduct proper or fair reviews of people's claims, but only reviewed the initial decision 'on the papers', without a formal hearing. This resulted in the IAA upholding the majority of the Department of Home Affair's initial decision, as shown by data compiled by the Kaldor Centre for International Refugee Law submitted to this inquiry.

2.2 The IAA was also subject to numerous appeals, of which approximately 37% of appeals to the federal courts were successful, resulting in decisions being remitted back to the IAA. Any potential efficiency gains at the merits review stage were quickly lost in the subsequent appeals to the federal courts, which caused significant backlogs for the judicial process. Lessons from the fast-track process show why efficiency measures at the merits review stage rarely result in long term benefits, as most of the expedited processes are subsequently appealed to the federal courts, causing further delays. A better way to achieve effective and efficient reviews of refugee and migration cases is to ensure that the merits stage is fair, well-resourced and has competent decision-makers. This in turn will lead to fewer appeals and a more effective review process. These lessons from the failed Fast Track process should be considered regarding any efficiency measures for migration and refugee cases in the new ART, as discussed below.

2.3 There is no solution for those who were previously refused protection under the IAA, of which there are about 8,000 people. These people only have the very limited judicial review processes (which focus on the legality of the decision, rather than the merits of the decision) or Ministerial Intervention under s 351 of the *Migration Act*, which is experiencing significant backlog and process issues. The Australian Labor Party has previously acknowledged that "The existing fast track assessment process under the auspices of the Immigration Assessment Authority and the limitation of appeal rights does not provide a fair, thorough and robust assessment process for persons seeking asylum."[1] As such, there is a very high chance that many people previously refused under the Fast Track process are indeed refugees which strong claims for protection.

2.4 It is imperative that the Government introduce policy to ensure those previously refused protection under the Fast Track process have a chance to be heard again, especially

[1] ALP National Platform 2021.

considering the flaws in the review process at the IAA. Further, people in this group have been in Australia for over a decade, and circumstances in their countries of origin have also changed significantly for the worse (e.g. Taliban takeover of Afghanistan, Iranian crackdown on political dissidents, military coup in Myanmar and the economic and political unrest in Sri Lanka). These people must be afforded a fresh review which is fair and ensures that no one who is a refugee will be returned to harm.

Recommendation 2 Review all cases upheld by the IAA

In light of changed country circumstances and the unfairness of the IAA process, all people who have had their cases upheld by the IAA and are still in Australia should have the opportunity to have their application reviewed again through a fair and competent review process.

3 Concerns with *Consequential and Transitional Provisions Bill*

3.1 Our main concerns with these bills relate to the separate code of procedures for migration and refugee cases, introduced by amendments to the *Migration Act* in the *Consequential and Transitional Provisions Bill.* These measures are justified by reference to efficiency and addressing the backlogs in the refugee and migration caseload. However, as mentioned above, any perceived efficiency gains achieved by reducing fairness and access to merits review will only result in further appeals to the federal courts, which create additional backlogs in the judicial system.

3.2 For example, the proposed section 347(5) of the amended *Migration Act* prohibits a Member from extending the deadline for an application, in contrast to all other cases before the ART Bill. If a person is denied access to merits review at the ART because they missed the very tight application timelines (seven days if a person is in detention or otherwise 28 days), then they are excluded from merits review and instead will have to seek review in the federal courts.

3.3 There are many justified reasons why a person seeking asylum may miss this application deadline, including because they did not understand the letter they received, low levels of English and experiencing symptoms associated with torture or trauma. Most applicants do not have access to legal advice to assist them with an appeal application.

3.4 Rather than ensuring a fair and effective review of decisions and preventing further backlog at the federal courts, this separate code of procedures for migration and refugee cases will do the opposite. In turn, more cases will be appealed to the federal courts, resulting in further delays (and longer timelines for people to remain in the community without access to a substantive visa).

3.5 As such, we recommend that all separate provisions relating to migration and refugee decisions be removed from the *Consequential and Transitional Provisions Bill*, and the standard provisions as outlined in the *ART Bill* should apply.

Recommendation 3 Remove the separate code of procedure for migration and refugee cases

All separate provisions relating to migration and refugee decisions should be removed from the Consequential and Transitional Provisions Bill, and the standard provisions as outlined in the ART Bill should apply.

3.6 A further concern we have is the unfair exclusion of legal representation for migration and refugee cases, in contrast to all other cases at the ART. Section 66 of the *ART Bill* provides for legal representation before the Tribunal. However, Clause 366A of the *Consequential and Transitional Provisions Bill* overrides this right for migration and refugee cases, instead providing that:

(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.

(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.

(3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.

3.7 Statistics of AAT decisions (see Kaldor Centre for International Refugee Law submission to this inquiry) show the importance of legal assistance before the Tribunal, with those who have legal assistance having more than five times higher chance of success at the AAT. People seeking asylum are often unaware of the legal requirements of their appeal and often need assistance to explain their case in a way that is understandable to a decision-maker. While we believe that applicants should also be heard directly themselves, legal representation (rather than just assistance) is very important for matters such as these, especially where getting it wrong can have grave or even deadly consequences for the applicant.

3.8 As such, we recommend that Clause 366A of the *Consequential and Transitional Provisions Bill* be amended to provide the same rights to legal representation as under the *ART Bill.*

Recommendation 4 Remove restrictions on legal representation

Clause 366A of the Consequential and Transitional Provisions Bill should be amended to provide the same rights to legal representation as under the ART Bill.

3.9 Finally, we have had the opportunity to read submissions to this inquiry by the Asylum Seeker Resource Centre (ASRC) and the Kaldor Centre for International Refugee Law and endorse their submissions in full.