Immigration Advice and Rights Centre

30 September 2024

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms Dunstone,

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

The Immigration Advice and Rights Centre (**IARC**) welcomes the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry into the *Administrative Review Tribunal (Miscellaneous Measures) Bill 2024* (**the Bill**).

IARC is a community legal centre (**CLC**) providing free legal advice and assistance to people throughout New South Wales. IARC is the only CLC in NSW that advises on all immigration, refugee, and citizenship matters. We provide advice in relation to migrant worker exploitation, immigration and domestic violence, Family visas, Refugee and Humanitarian visas, visa cancellations, and Australian citizenship. IARC has assisted clients with applications to the Migration & Refugee Division of the Administrative Appeals Tribunal (**AAT**). We have also assisted clients with character-related decisions reviewed in the General Division of the AAT. IARC's vision is for Australia's immigration system to be fair, just, and accessible. We leverage our experience and expertise to influence positive change through law reform and community development.

The focus of our submission is limited to the proposed amendments to the *Migration Act 1958* (Cth) (**Act**), which are outlined in Part 12 of Schedule 2 to the Bill.

Item 115 of Part 12 – subsections 347(2) & (3) - time to seek review/prescribed information or documents and fees

The Bill seeks to establish the requirements for making a review application - including the timeframe to make the application and any prescribed information/documents and fees that must be accompanied for the application to be valid. The timeframe identified in the bill is seven days following notification for people in immigration detention and 28 days for all others.

People held in immigration detention often face significant obstacles with accessing the resources and assistance necessary to seek merits review - including access to lawyers. Many, of course, also face challenges with their mental health, the ability to use technology and a proficiency in the English language to understand the reasons for a visa outcome and the necessary steps and time limits to seek review.

There is no good reason, in our view, to give people in immigration detention significantly fewer days to seek review than those in the community. The practical outcome of this approach is that people in

immigration detention will be more likely to miss the review deadline and be compelled to seek judicial review of a decision or make an unmeritorious visa application – both of which will unnecessarily add to the existing backlog of cases before the Courts and Tribunal.

We **recommend** revising the proposed subsection 347(2) to the *Act* to remove the discrepancy in review timeframes between applicants in immigration detention and those in the community. To make the merits review system fairer and more accessible, applicants in immigration detention should also have 28 days to seek merits review.

Item 119 of Part 12 – subsections 348(2) & (3) – when an application is "properly made"

The Bill establishes new subsection 348(3) which sets out four requirements to be satisfied for an application to the ART to be considered "properly made". Failure to comply with these requirements will preclude the ART from reviewing a decision.[1] The four requirements include:

- compliance with the time limits;
- providing any information/documents that may be prescribed;
- payment of any fee withing a specified period; and
- the application being made by the correct review applicant.

The proposed amendments present a missed opportunity for the ART to live up to the laudable promise of being a user-focused, efficient, accessible, independent, and fair Tribunal. The Bill, instead, allows for the real likelihood that people will miss out on merits review because of a technical error or their inability to comply with the requirements within the strict time limit.

We note that identifying the correct review applicant can be complex and requires an intimate understanding of the Act. Some applications for review, for example, will be invalid if made by the visa applicant instead of a sponsor or an Australian relative.[2] It is also not clear why it ought to be validity requirement for the review applicant to provide information/documents which are presumably already held by the Department or can be provided to the Tribunal at any time before a decision is made. This additional requirement unnecessarily complicates the review process.

In addition to our concern that the ART will not be able to extend the time limit to seek review, we are concerned that vulnerable people will be denied access to the ART because they will not be able to pay the prescribed fee within the strict time limits. The fee associated with seeking review of a migration decision, which at the time of writing is $3496 or $1748 with a waiver in cases of financial hardship,[3] is a significant

[1] See proposed subsection 348(2)
[2] See Patel (Migration) [2017] AATA 1302
[3] Administrative Appeals Tribunal, *Fees* (n.d.), accessed September 25, 2024, from Fees | Administrative Appeals Tribunal (aat.gov.au).

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obstacle to lodging a "properly made" application for many. This is particularly the case for people held in immigration detention who are unable to work and Victim Survivors of Domestic, Family and Sexual Violence (**DFSV**). Due to the coercive control inherent in DFSV, many victim-survivors lack control over their personal finances, making even the reduced application fee difficult to afford. Without the Tribunal's discretion in such cases, failure to pay the fee on time would render their application not reviewable by the ART. The Committee should **recommend** the availability of a complete waiver of the payment of the application fee in cases of significant financial hardship.

We **recommend** that the new section 348 of the *Migration Act* be applied flexibly to ensure that people seeking review of migration and protection decisions are not unfairly excluded from the merits review process. A more flexible approach to making applications would ensure the merits review process is accessible and fair to all applicants, as well as efficient and effective for the Government.

Yours sincerely,

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