RACS REFUGEE ADVICE & CASEWORK SERVICE

24 August 2018

The Hon Ian David Francis Callinan AC QC
AAT Statutory Review
c/o Attorney-General's Department
3-5 National Circuit, Barton ACT 2600

By email: AATstatutoryreview@ag.gov.au

Dear Mr Callinan,

Statutory Review of the Tribunals Amalgamation Act 2015

The Refugee Advice & Casework Service (**RACS**) is a dedicated refugee legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to provide submissions to the Statutory Review of the *Tribunals Amalgamation Act 2015*. Our comments on this matter are drawn from our extensive practice experience with clients seeking Australia's protection, and particularly in relation to the Migration and Refugee Division (**MRD)** of the Administrative Appeals Tribunal (**the Tribunal**) and the Immigration Assessment Authority (**IAA**).

1. Wait Times for Refugee Cases are Extremely Long

1.1 RACS has become increasingly concerned with an escalation in wait times at the MRD for protection visa reviews. RACS' own experience is that since 2015 it has become increasingly common for applicants at the MRD to be left waiting for a hearing before the Tribunal (and, consequently, a decision on their matter) for two years or longer.

1.2 RACS is concerned at the impact that such prolonged wait times have upon applicants. Applicants for protection visas are often highly vulnerable, and have in many cases been exposed to serious trauma and ongoing physical and psychological harm prior to arriving in Australia. Extended waiting periods for their case to be decided by the Tribunal contributes to a lack of certainty over their status in Australia and, for some clients a fear of being returned.[1] Further, as non-citizens holding temporary bridging visas, these applicants are unable to access certain Australian public services such as subsidised education that are restricted to permanent residents and/or citizens. In addition, long wait times also increase

[1] See, for example, M A Kenny, N Procter, C Grech, 'Mental Health and Legal Representation for Asylum Seekers in the "Legacy Caseload"', *Cosmopolitan Civil Societies Journal* 2016, 8(2), 84 at 87:

"All reports identify ongoing uncertainty relating to visa status as causing significant mental distress (Fleay et al 2013; Doney 2014; Mares 2014; Australian Red Cross 2013, UNHCR 2013). These findings are consistent with research which links delays in the adjudication of an asylum seeker's claims, the resulting uncertainty and fear of a potentially negative outcome with psychological distress above and beyond the impact of pre-existing trauma (Human Rights First 2016)."

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the time before family members can be sponsored and reunited, and also increase the time before citizenship can be applied for, if the initial protection visa is granted.

1.3 Delays in processing of cases at the MRD are also problematic because of the recent cuts to the Status Resolution Support Service (**SRSS**) program - the only publically-funded income support available to people seeking asylum. Without a decision in their review without a reasonable time, people endure prolonged wait times, exhaust any financial resources they may have and may become destitute.[2]

1.4 In the case of MRD applicants, long delays prior to a Tribunal hearing may mean witnesses may become unavailable or the applicant's memory for the events in question may deteriorate naturally over time.

1.5 The extent of the problem with wait times is not fully reflected in the Tribunal's published statistics. As at 31 May 2018, the number of refugee cases in the MRD that were waiting for longer than 9 months was 44% (6,368 cases).[3] However, RACS' experience suggests that a significant subset of that 44% have been waiting for much longer than 9 months, with several refugee cases known to RACS extending 30 months or more from time of lodgment at the MRD to a decision being made.

1.6 RACS encourages the Tribunal to take steps to ensure that such lengthy delays are minimised; either through improved prioritisation of cases, increased resourcing of the MRD, and increased support for Members to process cases in a reasonable timeframe.

2. Our Concerns over Ministerial Criticism of the Tribunal

2.1 We are concerned by a recent increase in Ministerial criticism of MRD decisions that may lead to a reduction in public confidence in the quality of decision making at the Tribunal. RACS' view is that Ministers should be careful not to allege political bias in the decisions by Members appointed by previous governments.

2.2 As an example, we note the comments of former Hon Minister Dutton to 2GB Radio in May 2017 regarding the AAT's decisions:

"When you look at some of the judgments that are made, the sentences that are handed down, it's always interesting to go back to have a look at the appointment of the particular Labor government of the day. Anyway, it's a frustration we live with."[4]

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[2] See Refugee Council of Australia, *How Federal Cuts to Support for People Seeking Asylum Will Affect People, States and Local Communities*, (15 May 2018), available https://www.asylumcircle.com.au/wp-content/uploads/Impact-of-SRSS-Changes-May2018-from-RCOA.pdf

[3] Administrative Appeals Tribunal, *Migration and Refugee Division Caseload Report Financial Year to 31 May 2018*, (online), 31 May 2018 available http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf, p9.

[4] Emma Ryan, 'Lawyers unleash on Dutton visa debacle', *Lawyers Weekly*, (online), 14 June 2017, <https://www.lawyersweekly.com.au/biglaw/21288-lawyers-unleash-on-dutton-visa-debacle>

2.3 We echo the concerns expressed in the Law Council of Australia's public response to these comments.[5] RACS considers that such public statements serve to undermine public confidence in the Tribunal, and potentially compromise the perceived independence of the Tribunal.

3. Independence of Tribunal Appointments

3.1 As Tribunal members are appointed to fixed terms of up to seven years, they are required to seek periodic reappointment by the government of the day as those terms expire.[6] The appointees are selected by the Commonwealth Attorney-General, and the appointment process allows broad discretion to the Attorney-General with limited transparency or requirements for consultation with independent bodies.

3.2 RACS views the current appointment process as lacking in rigour. Reform to the appointment process is an opportunity to build public confidence in the Tribunal's decision making.

3.3 While RACS does not recommend any particular model for such reform, we recommend a useful starting point would be found in the 2016 document prepared by the Council of Australasian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide*.[7] The suggestions of the Guide, including a transparent and public process, the explicit exclusion of certain considerations such as political purposes and memberships from the appointments process, and nomination of candidates by an independent assessment panel prior to Ministerial decision-making, would help to mitigate perverse outcomes and increase public confidence in the appointments process.

3.4 We recommend that a transparent and consultative process be used consistently for all AAT Member appointments and re-appointments and IAA Reviewer appointments and re-appointments.

4. The Immigration Assessment Authority

4.1 The Immigration Assessment Authority (**IAA**) is established under Part 7AA of the *Migration Act 1958* (Cth) and operates as "an independent authority within the Migration and Refugee Division of the Administrative Appeals Tribunal".[8] The IAA shares a number of features with the broader MRD; most obviously, its functions of conducting merits review of applications for certain kinds of protection visas in Australia, resulting in the application of similar underlying laws regarding protection visas.

4.2 However, significant distinctions do exist between the IAA and the MRD of the Tribunal, as the IAA offers only a heavily curtailed and inadequate form of review

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[5] Law Council of Australia, *Minister's comments attacking independence of tribunal were unfortunate, should not be repeated*, (17 May 2017), available https://www.lawcouncil.asn.au/media/media-releases/minister-s-comments-attacking-independence-of-tribunal-were-unfortunate--should-not-be-repeated

[6] *Administrative Appeals Tribunal Act 1975* (Cth), ss6-8.

[7] Council of Australian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide*, (August 2016) [online] available http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments_COATBestPracticeGuide-2016-Final-web-interactive.pdf

[8] See Immigration Assessment Authority, *IPS Agency Plan*, (10 May 2016), available http://www.iaa.gov.au/about/access-to-information/ips-agency-plan

designed for so-called "fast-track" applicants; largely persons who arrived in Australia between 13 August 2012 and 1 January 2014 by boat and, when permitted, applied for Temporary Protection Visas or Safe Haven Enterprise Visas in Australia.

4.3 The IAA's governing law and procedures are arbitrary and unjust. RACS considers that the IAA and its legislated truncated form of review should be abolished and its current and prospective caseload transferred to the MRD.

4.4 It bears note that RACS has raised serious concerns over the IAA and its method of review since prior to its inception. In comment upon the legislation establishing the IAA, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, RACS' submitted that:

> *The nature of the review process for those who are given access to the new Immigration Assessment Authority (IAA) is deeply flawed. Fast track applicants have no right to a hearing, no right to comment on adverse information arising at the Department stage and no right to put forward new information except where it is considered that there are exceptional circumstances. The proposed fast track framework increases the risk that Australia will return asylum seekers to a country where they face persecution due to the inadequacy of the merits review process.*[9]

4.5 The fears articulated then have largely been realised.

Structure and purpose of the IAA

4.6 As noted above, the IAA is governed by Part 7AA of the *Migration Act*; by contrast, non-fast-track Protection visa application reviews are governed by Part 7 of the *Migration Act*.[10] Under section 420 of the *Migration Act*, reviews under Part 7 in the MRD are required to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and to act "according to the substantial justice and merits of the case."

4.7 The corresponding provision for the IAA is section 473FA, which requires, in contrast, that it "pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review) [of Part 7AA]." Conspicuously, and unlike the MRD, the IAA is not directed toward fairness or justice in its decision-making, nor is it required by statute to act according to the substantial justice and merits of the case.[11]

Lack of procedural safeguards

4.8 In pursuit of these statutory objectives of economy and speed, the IAA's procedure strips away vital procedural safeguards. Part 7AA radically confines the obligations upon the IAA to observe rules of natural justice, by way of an exhaustive statement of the natural justice hearing rule applicable to the IAA.[12] This in almost all cases excludes the IAA from an obligation to invite an applicant

[9] Refugee Advice and Casework Service, Submission No 134 to Senate Legal and Constitutional Affairs Committee *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, [1.8].
[10] *Migration Act 1958* (Cth)
[11] See for example, *Minister for Immigration and Citizenship v Li* [2013] HCA 18.
[12] *Migration Act 1958* (Cth), s473DA.

to an interview before a Department decision can be affirmed, and to a substantial extent confines the nature of IAA review to the same material that was before the primary decision-maker. As such, the IAA generally:

- does not hold interviews;[13]
- does not seek new information from a fast track review applicant;[14] and
- is not permitted to consider new information provided by the fast track review applicant, other than in accordance with section 473DD, which amongst other requirements, includes a requirement that the IAA is satisfied that there are exceptional circumstances to justify considering new information.[15]

4.9 The restriction on the IAA's consideration of new information renders the review process inadequate and profoundly limits the scope for genuine de novo review of Departmental decisions. It is RACS' experience that some reasons for which further information may arise at the merits review stage for refugee cases include:

- That an applicant, after receiving professional advice by a lawyer or registered migration agent, has then become aware of the issues in dispute, and has therefore provided additional evidence;
- That the applicant was not given procedural fairness by the primary decision-maker, in that the primary decision maker did not make their concerns about certain evidence clear prior to making a decision; and
- That the applicant's abilities to present their case was insufficient, given various circumstances, for example, a limited understanding of English, a limited understanding of the law that applies, a limited ability to organise their evidence in a logical manner, limited literacy in any language, or various mental and/or physical health conditions whether diagnosed or undiagnosed.

4.10 Interviews and hearings are important because a central issue in many applications for protection can be the credibility of the applicant's evidence. The failure of the IAA to hold hearings leads to a heavy reliance on audio recordings of interviews with the Department of Home Affairs as a means of assessing the nature of the applicants' evidence; a dynamic that is particularly problematic both due to the audio-only nature of the recordings, and the frequently problematic interviewing practices by Department officers.[16]

4.11 Applicants before the IAA should be given an opportunity to address adverse information that could be used as a reason for making a negative decision regardless of whether the information was before the primary decision-maker or arose at the review stage. Applicants should also be told if the reason for affirming the decision will be a different reason to that used to refuse the visa at the primary

[13] *Migration Act 1958* (Cth), s473DB(1)(b).
[14] *Migration Act 1958* (Cth), s473DC(2); 473DB(1)(a).
[15] *Migration Act 1958* (Cth), s473DB(1)(a).
[16] For examples of one set of serious issues with the Department's interviewing procedures [in this case, with LGBTQIA applicants], see Robert Burton-Bradley, "Not gay enough: the bizarre hoops asylum seekers have to leap through", *Sydney Morning Herald* (online), 8 December 2017, available: https://www.smh.com.au/lifestyle/not-gay-enough-the-bizarre-hoops-asylum-seekers-have-to-leap-through-20171128-gzu1vq.html

RACS encounters other problematic interviewing techniques from Departmental case officers, including using hand gestures to tell applicants to stop, unfamiliarity with country information, lack of understanding of cultural backgrounds and communication practices, failure to account for the impacts of trauma, failure to adequately explore relevant issues, or failure to understand the legal rules that apply.

decision.[17] It is particularly important for there to be procedural safeguards in the process of reviewing refugee decisions, as applicants at the primary stage are sometimes not provided with a proper opportunity to address concerns by the Departmental officer which means that the review stage may be the only opportunity to correct misunderstandings or provide further explanation. However, under the limited review framework at the IAA, applicants are often denied the opportunity to be invited to respond to adverse information, unless there is new information that the IAA considers is relevant and wishes to use as part of the reason to affirm the decision being reviewed.[18] This has profoundly negative implications for the quality of the review decisions and the fairness of the process.

Practice Direction Provides for Inappropriate Limitations on Submissions

4.12 The IAA is given the power under s473FB of the *Migration Act* to issue "Practice Directions". The current practice direction limits submissions to the IAA to "no longer than 5 pages", providing a 21 day time limit to provide the submission calculated inflexibly from the date of referral from the Department of Home Affairs, and notes that "We may return longer submissions or submissions that do not comply with these requirements".[19] RACS considers that these directions inappropriately attempt to limit the ability of applicants and their authorised representatives to advocate at the IAA, and are contrary to a just process.

Please do not hesitate to contact us for further information or clarification.

Sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Mitchell Skipsey Solicitor	Simon Bruck Acting Principal Solicitor	Tanya Jackson-Vaughan Executive Director

[17] *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12, 70-72.
[18] *Migration Act 1958* (Cth), s473DE.
[19] Immigration Assessment Authority, *Practice Direction for Applicants, Representatives and Authorised Recipients*, 6 February 2017, available http://www.iaa.gov.au/IAA/media/IAA/Files/Practice%20Directions/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf, par. 3-4, par 21-22. Note also, *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12, 101-107.