Refugee Council of Australia

SUBMISSION TO ATTORNEY-GENERAL'S DEPARTMENT

ADMINISTRATIVE REVIEW REFORM

The Refugee Council of Australia (RCOA) and our members welcome the establishment of a new administrative review system. For many years, we have highlighted ongoing concerns with the current Administrative Appeals Tribunal, especially in relation to delays, pollical appointments, consistency in decision making and the lack of transparency.[1] It is imperative that this new review body ensures fairness, transparency, accountability and good decision making, to uphold public confidence in our legal system.

The administrative review system plays a pivotal role in refugee status determination (RSD) for those seeking protection in Australia. It ensures that errors in the high volume of decisions made by the Department of Home Affairs are reviewable by an independent body. This is especially important in cases of refugee claims, when matters of life and death are under consideration. Indeed, the administrative review can provide a critical safeguard against forced return to danger by helping to ensure accuracy and fairness in decision-making. Robust mechanisms for independent merits review are also in the best interests of the Australian Government as they ensure the correct decision is made and help to ensure high-quality and consistent administrative decision making. A proper review system is vital in order for Australia to uphold its obligations under the Refugee Convention. The merits review process also ensures that many broader aspects vital to a healthy democracy are upheld, including affording natural justice, upholding the rule of law and contributing to open and accountable government.

A new administrative review system must remain independent, adequately resourced and appoint members who are highly skilled and qualified to assess refugee status determinations. Unfortunately, this is not the case with the current AAT. The AAT is significantly under resourced, with a backlog of 39,353 refugee cases, and only about 583 cases decided each month. This backlog is not only due to under-resourcing of the AAT, but also due to the lack of expertise from some AAT members. This is due in part to the politicisation of appointments to the AAT, and the lack of appropriate qualifications of some appointees.

The following is our response to the discussion questions, set out according to topic as per the discussion paper.

1 Design

1.1 RCOA and our members believe that the overarching principles for administrative review should be expanded to include accessibility, transparency and dignity. Accessibility includes the need to ensure equity in accessing a fair review, including the use of interpreters, the assistance of legal representatives and culturally appropriate processes. The concept of dignity reflects a human rights-based understanding of the term, and includes the right to a fair hearing and right to an effective remedy.[2] The concept of dignity would also reflect an individualised approach to administrative review, again considering cultural factors, as well as

[1] See Refugee Council of Australia (2022), Submission on the performance and integrity of Australia's administrative review system, https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/
[2] See Australian Human Rights Commission (2018), Submission to the Administrative Appeals Tribunal Statutory Review, https://www.ag.gov.au/sites/default/files/2020-05/australian-human-rights-commission.PDF

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disability and health concerns, including trauma and other mental health experiences that must be considered during the review process.

1.2 ROCA supports the re-establishment of the Administrative Review Council or similar body, as an independent body to ensure accountability and transparency of the review system. Such a body should be sufficiently funded and be able to make recommendations which are implemented.

2 Structure

2.1 We believe that the new administrative review system should be as simplified as possible, to ensure accessibility and aid in the efficiency of the new body. This may involve reducing the number of levels of positions of members.

2.2 A key issue reported by our networks is the lack of clearly defined job descriptions among different levels of staff, resulting in confusion about the difference in roles between members, senior members and others. It is essential that job descriptions and Key Performance Indicators (discussed below) are developed and clearly defined to provide clarity and transparency regarding duties and pay.

2.3 While we do not have a view on the need for the President be a Federal Court judge, it is essential that this person has equivalent standing in the community and has sufficient capacity and time to effectively perform their role.

2.4 We also recommend that members of the review body be appointed to specific divisions (such as a refugee or migration division), rather than being expected to be across the whole range of issues which may be heard. However, we do not recommend members be siloed into specific case types or countries of origin (as discussed below).

3 Membership

3.1 Regarding qualifications for members of the review body, RCOA believes that, while a legal qualification is appropriate to ensure competency, legal qualifications alone will not ensure independence and quality of decision making. While a legal qualification (with suitable post-admission experience) may demonstrate suitability for the role of a member, other factors beyond legal qualification may bring further expertise to the role. For example, those who have worked as (non-lawyer) migration agents, or who have experience working for international organisations or non-government organisations in refugee law, may be better placed to be decision makers than those who have legal qualifications but no experience in refugee status determination. Ultimately, the best guarantee of suitability for membership to the review body is the quality of the appointment process, including transparent selection criteria, transparent recruitment processes and the independence of the appointments (discussed below). The issues which have plagued the current AAT are less about the qualifications of members and more about the politicised process that appointed members based on their political affiliations rather than their merit and expertise for the role.

3.2 Conflicts of interest of members should also be properly considered. This is especially important where political conflicts of interest may arise. The current AAT has many members who have had significant roles with political parties, including as Parliamentarians, senior advisors or as candidates for Parliamentary elections. This creates a clear conflict of interest and undermines the independence and impartiality of the tribunal. It is vital that conflicts of interest are disclosed at the time of application, and that members are not appointed where such a conflict of interest may undermine public confidence in the body. Such conflicts of interest protections should be legislated.

3.3 Additional expertise for the role of member is essential. In refugee cases, this is likely to include experience in the refugee status determination process, either as a lawyer, migration agent, or experience in a non-government organisation or international organisation working on

refugee legal issues (such as the United Nations High Commissioner for Refugees or similar). Additional experience should include cultural competency, ability to work with interpreters, and demonstrated understanding of torture and trauma implications.

3.4 We do not recommend that members be assigned as specific country or case experts (e.g. LGBTI/Gender applications). Feedback from our networks is that this can result in rigid decision making that does not adequately consider the unique individual circumstances of applications and may not appropriately reflect changing country of origin conditions. Rather, members in the refugee division should be appointed across all areas of refugee applications. This also helps prevent burnout and compassion fatigue from tribunal members.

3.5 However, while we do not believe members should be appointed as experts, we suggest that external experts should be able to be brought in to assist the review body on certain cases. For example, academic experts on certain countries, or those who have specific expertise on gender-based violence or LGBTI persecution may assist the review member in determining the application. Experts assisting the review body should be required to demonstrate that expertise through their professional work, research and experience, and information about such expertise should be provided to the parties and be transparent. However, the use of experts should not displace the individual experience of applicants, especially as broad country experts will not have knowledge of specific individual circumstances. Experts need to be used carefully, both to assist the review body to come to a proper decision and to understand the importance of individual testimony and circumstances.

3.6 It is also essential that the new review body be adequately resourced with the appropriate number of members in each division, especially in the migration and refugee division where there is currently a 5½ year backlog of applications at the AAT, with this backlog continuing to expand (discussed below).

3.7 RCOA and our members and the networks we consulted support long-term appointment of members in order to uphold the independence and impartiality of the review body. Short term appointments should only be made to address urgent staff shortages and these appointments should still be transparent and merits-based.

4 Appointments and reappointments

4.1 The AAT plays an important role of ensuring fair and impartial decision making, in order to uphold the rule of law. The continued practice of appointing politically aligned members to the Tribunal represents a grave threat to the rule of law. It undermines the public perception of the independence of administrative tribunals, which is essential for them to discharge their function effectively.

4.2 A transparent and merits-based appointment process is vital for an independent review body. The current AAT has lost the confidence of the Australian community and applicants due to the lack of merit-based appointments through a closed application process. It is vital that the new review body establish a system to ensure that all members are appointed on the basis of merit, through an open application process, and assessed against public selection criteria. Such an independent, transparent and merit-based appointment process should be provided for in the legislation.

4.3 We note that s 17D of the *Administrative Appeals Tribunal Act 1975* requires the Minister for Immigration to be consulted before a member is assigned to the Migration and Refugee Division. In our previous submissions, we recommended against this requirement, as it is vital that the AAT must be seen to be completely independent. Allowing the Minister to have influence over the appointment of Tribunal members who will be tasked with reviewing decisions made by the Minister (and the Department headed by the Minister) clearly creates a conflict of interest.

4.4 Reappointment processes should likewise be open, transparent and based on merit. Consideration of re-appointments should be decided in accordance to clear Key Performance Indicators, which include both efficiency of decision making and quality of decision making. A key indicator for the quality of decision making should include the number of decisions which are overturned or upheld on judicial review. Reappointments should not be automatic and should be required to go through an independent assessment process. Likewise, members should not be eligible for reappointment until their last year in the role. It may be appropriate to extend a member's term by a few weeks, where it is necessary to allow them to finalise certain complex matters.

4.5 To assist with assessment of reappointments, it is imperative that statistics on individual member decisions are publicly available. To this end, we endorse the submission of the Kaldor Centre for International Refugee Law, which provides comprehensive reasons on why data should be collected and made publicly available.

5 Performance management and removal of members

5.1 Performance of members should be assessed at regular intervals against clear KPIs, as discussed above. Where members repeatedly fail to adhere to KPIs, termination of appointment should be possible. The current process of members remaining on the AAT while not being assigned cases is not appropriate.

5.2 Termination of employment should also be possible where members have engaged in conduct giving rise to a conflict of interest, where such conflict may undermine public confidence in the independence of the review body. This may include public campaigning for a political party or group, affiliation with certain groups (e.g. anti-immigration groups), or where they also continue to practise in an area in which they are also a member (e.g. migration law).

6 Making an application

6.1 Procedural requirements should be harmonised across all matters and the separate codes of procedure for the Migration and Refugee Division should be removed. The application of separate procedural rules for Migration and Refugee matters has caused delays at the AAT. By removing the separate procedures, members would have the power to, for example, hold directions hearings to ensure greater efficiency in the Migration and Refugee Division.

6.2 RCOA views the current fees in migration and protection visa review applications as inappropriate and unfair. There is no rationale for the Migration and Refugee Division fees to be higher than any other division. RCOA supports the Law Council of Australia's recommendations in the Performance and integrity of Australia's administrative review system submission that:

- Fees imposed on persons applying for review in non-protection migration matters should be reduced to at least as low as the standard fee (a baseline of $920) and subject to the same waiver provision as applies in those standard matters (i.e. reducible to $100 with the waiver decision itself being merits reviewable); and
- No fees should be payable by persons in immigration detention or prison or whom the AAT is satisfied is experiencing financial hardship, consistent with the approach of the Federal Courts.[3]

6.3 The time limit for making an application should be consistent across all matters and there should be greater flexibility around granting extensions of time for people who are unable to submit their applications within the time limit – for example, for people who are in immigration

[3] Law Council of Australia (2021), *Performance and integrity of Australia's administrative review system*, 25, https://www.lawcouncil.asn.au/resources/submissions/performance-and-integrity-of-australias-administrative-review-system.

detention or prison, or who may be experiencing homelessness, or mental and physical distress.

7 Case Management, Directions and Conferencing

7.1 RCOA supports case management where it will improve efficiency and quality of decision making. As above, we oppose any measure to fast track or expedite cases without a fair hearing.

7.2 Feedback from our members highlights that video and/or teleconferencing is usually not an appropriate method for a hearing, especially where interpreters are required. Such technology should only be used at the request of the applicant.

8 Information provision and protection

8.1 All information used in the decision-making process should be provided to the applicant. It is an essential element of a fair trial and the right to be heard to be able to view and respond to all adverse information.

8.2 RCOA supports the use of pseudonyms and closed hearings where disclosure of applications may harm the applicant, or their family. Likewise, public cases may be redacted or summarised in order to protect the identity of the applicant and their family. It is vital that the interests of the applicant are considered before publishing any identifying information.

9 Resolving a matter

9.1 RCOA does not support fast-tracking or streamlining applications based on country recognition rates. A key element of administrative review is the importance of individual consideration of cases and the right to be heard (as above). Powers to manage 'frivolous' applications should be exercised with caution, based on experience from the fast-track assessment process which excluded individuals who made 'manifestly unfounded' claims for protection from seeking independent review.[4] In practice, this system denied procedural fairness, creating real risks of refoulement (returning people to harm), and increased inefficiency.

9.2 However, 'manifestly well-founded' cases could be fast-tracked to improve efficiency as the same risks of refoulement do not apply, an approach that has been successfully implemented in other jurisdictions. Likewise, cases should be able to resolved 'on the papers' without a hearing where a member decides in favour of the applicant.

10 Decisions and appeals

10.1 RCOA emphasises the need to provide written decisions, to ensure transparency and the rule of law. This ensures that a body of case law can develop, and that applicants may be able to receive additional legal advice as to their judicial review options.

10.2 Short decisions in writing may be made where the decision is favourable to the client and not complex.

10.3 Decisions should be made as soon as practicable, especially considering that many applicants may be experiencing detention, prison, homelessness and other physical and mental trauma. Timeliness of decisions should form part of a member's KPI (discussed above).

[4] On the problematic and unclear 'manifestly unfounded' test see Mary Anne Kenny (2014), *Submission to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.

11 Supporting parties with their matter

11.1 RCOA supports legal representation being available as a right in the new administrative review body. There should not be a requirement to seek leave to appear with representation. Further, funding should be reinstated for legal advice and representation.

11.2 Funded legal representation ensures fairness, accessibility and efficiency. In 2014, funding for the Immigration Advice and Application Assistance Scheme was cut. Long delays were caused as people seeking asylum sought help from underfunded specialist legal centres, which were overwhelmed with demand at the same time as their funding was cut. Full representation was mainly replaced by legal clinics, which impacted the quality of the applications prepared and created real risks of refoulement.

11.3 Since then, most people who have come to Australia without a valid visa, most significantly people seeking asylum, have not been able to access free government-funded advice and representation when lodging an application for protection or before the IAA. Those with a valid visa do not have access to government-funded representation at the merits review process.

11.4 The absence of a lawyer makes it more difficult for applicants to articulate the claims and increases the chances of protection claims being missed and a person being returned to torture or serious harm. Expert trauma-informed legal representation can help applicants navigate the administrative review process in a way which protects their information and assists them to participate in dispute resolution and hearings (e.g. by helping prepare expert medical reports or ensuring interpreting is provided).

11.5 Legal representation protects the safety and interests of applicants who have experienced or are at risk of trauma or abuse. Since funding was cut and demand reached unprecedented levels, there have been fewer legal representatives attending hearings of the IAA or AAT, leaving many vulnerable people to navigate these systems without help. This is especially significant for those who do not speak English, come from countries with different legal systems or who are suffering mental illness as a result of torture or trauma.

11.6 We refer to the Kaldor Centre's Data Lab evidence which shows the major impact of legal representation on success rates at the AAT.[5] According to the data obtained by the Kaldor Centre, the odds of an applicant succeeding at the AAT is five times higher (5.27, 95% CI [4.66, 5.97]) if the applicant has representation of a lawyer or migration agent, controlling for all other variables (including the individual decision-maker, the country of origin of the applicant and the political party appointing the decision-maker).

11.7 The discussion paper lacks engagement with the issue of interpreters, except to mention interpreters as a 'support service'. RCOA and our members view the provision of interpreters as essential to the right to be heard.[6] The ability of people seeking asylum to present their case would otherwise be unfairly limited. We emphasise the need for funding qualified interpreters at the new administrative review body. The AAT Interpreting Policy committed to arranging and paying for an interpreter if an applicant was determined to require the assistance of an interpreter at a hearing, in particular for reviews of migration and protection decisions.[7]

11.8 Not only is the provision of interpreting of fundamental importance but the way decision-makers manage interpreters also impacts access to justice. Decision makers need to assess whether a person needs an interpreter, manage how interpreters participate in hearings and have a strong awareness of how interpreting can impact communication at the hearing when they are

[5] Kaldor Centre Data Lab, https://www.kaldorcentre.unsw.edu.au/kaldor-centre-data-lab.
[6] Hon. Justice Melissa Perry and Kristen Zornada (2015), *Working with Interpreters: Judicial Perspectives* https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20150313.
[7] Administrative Appeals Tribunal (2020), *Interpreting at the AAT*, https://www.aat.gov.au/AAT/media/AAT/Files/Policies/AAT-Interpreter-Policy.pdf.

making a decision.[8] This is indicated by the *Recommended National Standards for Working with Interpreters in Courts and Tribunal Settings,* which has been endorsed by the Federal Court of Australia and recognised in the AAT Interpreting Policy.[9]

11.9 RCOA and our members support the use of litigation guardians where the applicant is a minor (or otherwise does not have legal capacity to provide instructions), as is the practice in the courts.

11.10 We also emphasise the need to provide accessibility to all applicants, regardless of disability, language, or other criteria (as per our recommendation to add 'accessibility' as a key principle for the review body). This should be legislated.

12 Other matters

12.1 We reiterate our ongoing concern about the Immigration Assessment Authority (IAA), which we have expressed since it was established.[10] The IAA is inherently unfair, discriminatory and contrary to our obligations under the *Refugee Convention*. The lack of a proper review at the IAA has meant that it is very likely that people with valid fears of persecution have been sent back to harm.

12.2 We call on the Labor Government to implement the commitment in their party's 2021 National Platform to abolish the IAA.[11]

12.3 On addressing backlogs, we reiterate our calls made in our submission to the Parliamentary review of the AAT.[12] It is essential that the new body is appropriately resourced in order to uphold the integrity of Australia review system. Ongoing backlogs will undermine public confidence in the refugee status determination process. The AAT currently has a backlog of 39,353 cases, with an average of 583 cases decided per month. At this rate, it will take over 67 months (5½ years) to finalise the existing caseload. This does not include the additional applications, which outnumber the number of decisions at an average rate of 256 per month. In other words, the AAT is receiving 256 more applications per month than it is deciding.[13]

12.4 This is a completely dysfunctional review system and contributes to significant distress and uncertainty for applicants. Failure to address these delays leaves these people in a very precarious situation. For many, their visa status will preclude them from access to Medicare and many will have no work rights. Changes to government policy regarding income support mean that it is unlikely they will receive government support while they are waiting for a decision, risking destitution. Delays also reduce the likelihood of claims with little merit being dealt with promptly and fairly. The prompt resolution of cases, both those with merit and those without, is vital to a well-managed and just asylum process.

12.5 While we acknowledge the high number of applications from countries where there is a very low success rate for a protection application, this does not justify fast-tracking certain cohorts

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[8] Laura Smith-Khan (2017), *Different in the Same Way? Language, Diversity and Refugee Credibility*, https://academic.oup.com/ijrl/article-abstract/29/3/389/4583661?redirectedFrom=fulltext.
[9] Judicial Council on Cultural Diversity (2022), *Recommended National Standards for Working with Interpreters in Courts and Tribunal Settings* https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf; Federal Court of Australia (2023), *Practice Note: Working with Interpreters (GPN-INTERP),* https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-interpret.
[10] See Refugee Council of Australia (2022), *Submission on the performance and integrity of Australia's administrative review system*, https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/.
[11] Available at www.alp.org.au/about/national-platform/
[12] See Refugee Council of Australia (2022), *Submission on the performance and integrity of Australia's administrative review system*, https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/
[13] Statistics available at https://www.aat.gov.au/about-the-aat/corporate-information/statistics

at the expense of denying procedural fairness. A better solution is to address delays by increasing case processing capacity to sustainable levels.

12.6 However, these delays are not only caused by a lack of resourcing for the MRD but also due to the politicisation of appointments, especially where members appointed to the MRD do not have legal qualifications or expertise in refugee law. We believe the appointment of independent, qualified and expert decision makers at the MRD will significantly improve the ongoing backlog.[14]

[14] For a detailed discussion on the cause and solution to backlogs within RSD systems, see Brian Barbour (2018), *Refugee Status Determination Backlog Prevention and Reduction,* https://www.refworld.org/docid/5b1a38374.html.