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Our Ref: CFL010

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Submissions regarding the performance and integrity of Australia's administrative review system

1. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the performance and integrity of Australia's administrative review system (**the Inquiry**).

2. In response to this invitation, we provide the following submissions, addressing each particular of the inquiry in turn below.

3. This submission focuses in particular on the Migration and Refugee Division (**MRD**) and the General Division (**GD**) of the Administrative Appeals Tribunal (**AAT**) in Victoria and our firm's experience of the AAT.

4. Our firm is a leading migration firm in Victoria. We have a diverse practice undertaking both migration and refugee applications, and have lawyers who have appeared before both divisions of the AAT on many occasions. Our managing partner, Carina Ford, is an accredited Immigration Law Specialist and Administrative law specialist and we have three other LIV-accredited immigration law specialists within the firm.

5. The aim of the AAT is to provide an independent process accessible, fair, just, economical, informal and quick. Merits review is important to ensure accountability in relation to administrative decisions as well as give persons aggrieved by such decisions the ability to access such a service. That is why it's vital for applicants to be heard and offered a hearing.

6. We remain supportive of the AAT and acknowledge the difficult circumstances under which it has had to operate since March 2020. In particular, its administrative and support staff continue to offer a service that is accessible, professional and efficient and majority of members are professional, competent and take their role as being a member very seriously and we fully recognise that members make decisions that can be life changing. It operates a user-friendly website which has useful information for lawyers and unrepresented applicants and it has increasingly improved its publication of decisions.

7. We also acknowledge that, for many AAT members since March 2020, they have had to balance a change in how they operate, adapt to home v work life and a change in how to conduct hearings from in-person to remote hearings. The majority of members conduct hearings in a fair, informal and efficient manner and many have a sound knowledge of the area of migration law and the complexities of the caseload.

8. We also fundamentally do not support changing to an Immigration Assessment Authority (**IAA**) model for review which is neither fair, is overly complex, has little or no transparency, has done little to stop appeals to courts and is little more than a rubber stamp process. Our experience is that its prescriptive and codified nature makes it inaccessible to self-represented applicants and that it should not be looked as a viable or desirable alternative. It has also led to dire consequences, in particular in relation to Afghan visa applicants who (had they gone through a process that allowed new information to be accepted, detailed submissions and most importantly access to a hearing) would have led to a far fairer outcome.

9. We do, however, see that there could be improvements made to the AAT particularly in relation to the appointment process, hearing methods and ensuring that the AAT remains independent.

(a) The Administrative Appeals Tribunal, including the selection process for members

10. We raise a number of concerns in respect of the AAT, including accessibility, costs, delays, inconsistency in decision-making, as well as the selection process for members. These concerns are raised for the purpose of assisting in reforming the AAT, not to advocate for it to be replaced with an IAA style body, of which we are not supportive of for reasons outlined at paragraphs 42-47.

Accessibility

11. The COVID-19 pandemic created additional barriers to Review Applicants' access to merits review of their cases. In response to the pandemic, the Tribunal introduced the *COVID-19 Special Measures Practice Direction* on 27 April 2020 to modify the operations and procedures of the AAT.[1] This was amended on 2 March 2021.[2] A number of Members refused to hold video hearings, despite the AAT having functionality to carry out hearings by video, which is commonly done in AAT GD matters.

12. Although the AAT GD does carry out video hearings, we have concerns about the suitability of detention facility rooms where Review Applicants are placed to give evidence. As an example, in a recent GD matter, a Review Applicant was placed in a room with a couch and coffee table, both of which could not be moved, for a GD hearing that was listed for several days. These arrangements are unacceptable as they did not allow the Review Applicant to easily or comfortably access materials or be seated in a way that reflects the seriousness of his review application and the consequences that flow from an adverse decision. It remains also our view that to have access to justice, as we emerge from lockdowns in particular in NSW and Victoria that video hearings should not become the norm as the end user being individual applicants still has a preference in person and that they are better conducted in person.

13. We invite the AAT to provide clarification on how it intends to conduct hearings in future, and when the AAT intends to fully reopen following the COVID-19 lockdowns in Victoria. Further, we do not support telephone hearings unless it is for directions hearings. One of the biggest issues of telephone hearings is the lack of transparency or ability to assess credibility. None of the parties to the proceeding can see each other which we feel is vital in a hearing involving such serious matters but also ensuring the applicant feels they have been heard. For an applicant an appearance at a Tribunal, can be their first experience dealing with a judicial / review system. It can be life changing and can involve months / years of waiting and in our experience, clients are anxious about the process. Seeing a face, helps to alleviate that anxiety but also ensure it's independent.

14. It is our view that there is no technical reason that, if there is not going to be a full return to in person hearings for some time, that hearings should not be conducted by Microsoft Teams or some other video technology as the default position of the Tribunal. Further, that when safe to do so, there should be a return to in person hearings in states that have been affected by extended lockdowns.

[1] Administrative Appeals Tribunal, *COVID-19 Special Measures Practice Direction – Migration and Refugee Division*, 27 April 2020.

[2] https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/COVID-19-Special-Measures-Practice-Direction-Migration-and-Refugee-Division.pdf.

Delays

15. There are now long delays in the MRD and a huge backlog of cases in the Victorian registry. In our experience, the delay has now reached between two - three years as a standard. These delays relate to the allocation of matters to members, the constitution of matters, listing matters for hearings and the length of time between hearings and decisions. In particular, in Victoria, the AAT was constrained by lockdowns which prevented access to files and thereby allocation of hearings. This was particularly the case last year.

16. The MRD was slow to adapt to moving hearings to another method. Some members were productive during the period between March 2020 to date, but others have not been. Many cases were allocated to members outside of Victoria. We are aware there is a large discrepancy between the number of decisions made by members. Since October 2021, there has been a significant increase in matters being allocated.

17. This is in contrast to the GD, where there is a statutory obligation to make decisions in a timeframe for certain matters (84-day character matters pursuant to ss 500(6L) of the *Migration Act 1958* (Cth)) or, otherwise, in GD matters, Members are guided to make decisions within six weeks of a final hearing.

18. There is no obvious reason why there should be delays between a hearing and the final decision if all material is before the member. We have first-hand experience of some members taking 12 months to make a decision after a final hearing, which in our respectful submission is unproductive and unacceptable.

Inconsistency in decision-making

19. There is inconsistency in the conduct of cases at an administrative level and decision-making level. As an example, the AAT will provide a pre-hearing information form to request availability within the next three months. Where representatives indicate they are available, matters will still not be listed within that timeframe. There is an inconsistency in timeframe with which matters which are allocated to hearing and dealt with: these matters should be triaged to determine which matters should be allocated. Where interpreters are being made available, they are not always available in the same manner as the Review Applicant, i.e. in video hearings the interpreter might be connected to assist via an audio call only.

20. In respect of decision-making, as an example, the MRD has *Guidelines on Vulnerable Persons* to address the needs of those individuals who face particular difficulties in the

review process.[3] The GD, despite dealing with complex character and citizenship matters, does not have equivalent guidelines. These should be introduced in the GD.

Complaints process

21. Where complaints are made to the MRD about conduct of cases by members, the responses invariably do not address the substance of the complaints or deal meaningfully with complaints to create change. It appears that the AAT is a consequence-free environment for Members which is not the fault of those who consider complaints but rather due to the way members are appointed. There should be a complaints process introduced to deal specifically with members that is transparent. For example, it remains unclear how remittals based on apprehended bias and failure to conduct a meaningful hearing are dealt with by the AAT once such decisions are made by the Courts.

Case conferencing and triaging cases

22. From late 2019 to early 2020, the MRD was conducting case conferences/ direction hearings to determine the legal issues and request materials, with a particular focus on employer sponsored matters. This process is similar to the case conferences in the GD, which are beneficial in determining the legal issues in a case. Case conferences should be conducted in the MRD to deal with matters.

23. In respect of triaging cases, certain cohorts of matters should be triaged by the Tribunal. For example:

    a. matters remitted by the Courts to be re-determined accordingly to law;
    b. Student visa Review Applicants with Confirmation of enrolments that will cease within a very short period of the AAT remittal decision;
    c. general visa cancellations where the visa would naturally cease while awaiting an outcome on the review application; and
    d. review applications where materials have been provided to assist the AAT in making a decision on the papers, i.e. in employer sponsored matters, student visa cases, where a document had not been provided in time at the Department.
    e. Complex cases that would benefit from a case conference
    f. Separation of family units

[3] The Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons, November 2018, https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Vulnerable-Persons.pdf.*

24. When lodging the review application, this information could easily be collected in the online form to assist the AAT with triaging these cases.

Costs

25. There is a massive disparity between the costs of AAT MRD and GD matters. The costs in the MRD are now $3,000.00 for a Review Applicant (a 50% fee waiver is available for Review Applicants suffering from financial hardship; a 50% fee refund is available where a Review Applicant is successful). The costs in the GD are $962.00 for a Review Applicant (a reduced fee of $100.00 is payable for certain classes of person including those in immigration detention and those suffering from financial hardship). There is a considerable difference in the conduct of matters and it is clearly the case that GD matters are more intensive then MRD matters, running for several days of hearings in the case of character refusal, cancellation or revocation matters in the GD.

26. In respect of the MRD fee increase, this is not acting as a disincentive for Review Applicants to seek merits review of Department decisions. We suggest that MRD fees be reviewed with a view to reducing the fees payable by Review Applicants.

Selection process of members

27. The selection process for members is particularly problematic, and party political appointments have become increasingly common. We reiterate the concerns raised by other bodies, including the Law Council of Australia, that the Federal Government's process of appointing members to the AAT is secretive and potentially undermines public confidence.[4]

28. In the Callinan Report, *Review: section 4 of the Tribunals Amalgamation Act 2015 (CTH)*, dated 19 December 2018,[5] a number of recommendations were made including the merit-based selection of AAT members. We highlight that Measure 6 in the Callinan Report remains to be implemented and should be implemented as a matter of priority:

> Measure 6
> All further appointments, re-appointments or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit (a possible exception is appointment to the Taxation and Commercial Division to which competent accountants might be appointed). This may happen without repeal of s 7(3)(b) of the AAT Act, although repeal is, for certainty, desirable.

[4] Law Council of Australia, *AAT appointments must be transparent and merit-based*, 22 February 2019, https://www.lawcouncil.asn.au/media/media-releases/aat-appointments-must-be-transparent-and-merit-based.
[5] I.D.F. Callinan AC, Review: section 4 of the Tribunals Amalgamation Act 2015 (CTH), 19 December 2018, https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf.

29. The process should involve those seeking to be appointed as an AAT member to respond with a formal Expression of Interest to a public advertisement. From the EOIs, a merit-based selection process should then occur to narrow the candidates to put to the Minister for consideration. Eligible candidates in that group should be made public and the public[6] can object to the appointment with cause, with objections being brought to the attention of the Minister prior to a decision being made. An independent panel should be appointed to review appointments.

30. The Law Institute of Victoria (**LIV**) has requested documents under the *Freedom of Information Act 1982* (Cth) (**FOI**) in respect of AAT members, copies of which have been provided to LIV members. In response to the documents released under FOI, we note the following:

    a. It is particularly concerning that the AAT is not aware of whether each member of the Tribunal holds legal qualifications; and
    b. It is particularly concerning that some AAT members were essentially inactive and did not make decisions when they were paid to be a member. The (often stark) discrepancy between members in terms of productivity needs to be considered. Statistics indicate that some members able to make 300 + decisions per year and others less than 50 (and a handful less than 10).

31. The AAT has a larger issue around the retention and re-appointment of members who are suitably qualified to carry out their statutory task. A number of members who were not re-appointed (many notified at the last minute) were highly skilled members. Many of them now serve on other tribunals such as VCAT and overseas Tribunals and boards such as the HKSARG, Hong Kong. In 2015, of 31 members who could have been re-appointed only 7 members were.[7] In particular, Victoria lost a significant number of highly skilled members experienced in the skilled and refugee sections.

32. Following the media reporting on the action, or, rather, inaction, of AAT members, we have recently seen an increase in matters being listed for hearings via video conference and telephone conference.[8] Although this is welcome, it demonstrates that the AAT could have continued to deal with matters throughout the extended lockdowns in Victoria via these platforms.

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[6] This process is also followed for Registered migration agents on the OMARA portal. See here: https://portal.mara.gov.au/applicant-for-registration/.

[77] The Australian (Chris Merritt), Glitch Besets Tribunal Mergers, 22 January 2016, 23.

[8] See Australian Financial Review, *Liberal-aligned AAT members' productivity laid bare*, 11 October 2021, https://www.afr.com/rear-window/liberal-aligned-aat-members-productivity-laid-bare-20211011-p58z0h; The Sydney Morning Herald, *Senators tell AAT it can't keep secret the names of its slow workers*, 1 October 2021, https://www.smh.com.au/politics/federal/senators-tell-aat-it-can-t-keep-secret-the-names-of-its-slow-workers-20210930-p58w3r html; The Age, *Government tribunal paid some members in years they did no work*, 25 October 2021, https://www.theage.com.au/politics/federal/government-tribunal-paid-some-members-in-years-they-did-no-work-20211024-p592le html?ref=rss&utm_medium=rss&utm_source=rss_feed.

33. There needs to be a perception of separation of powers in order to maintain public confidence in the integrity and independence of the AAT. It is essential that a transparent appointment process based on merit in introduced.

34. We highlight that there are a number of AAT members who are either actively running for pre-selection for a political party in upcoming elections, campaigning for election to government for a political party, have been appointed to government as well as political appointments for former government members and staffers. It doesn't necessarily mean that if someone has such association, they may not be appropriate, its though the manner in which they are appointed and the sheer number of them that detracts from many of the worthwhile appointments within that cohort and leads to the Tribunal open to criticism about independence.

35. Where AAT members are running for pre-selection or campaigning for election to any level of government or appointed to government at any level, these members should be required to stand down from their AAT appointment or at the very least take leave. There is an unacceptable conflict of interest in running for political office while at the same time acting as an independent Tribunal member. It would, for example, be unthinkable for a sitting Judge or Magistrate to be running for office and at the same time still sitting on the bench.

36. The Guidelines should deal with notification of an intention or run, or campaign, and provide a mechanism to reallocating cases prior to the AAT member standing down. Guidelines should be put in place to set out process for AAT members who decide to run for pre-selection or campaign for election to any level of government or are appointed to government at any level.

(c) Whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established

37. The Administrative Review Council (**ARC**) was established in 1976 as a key element of the administrative review system. The functions and powers of the ARC were set out in s 51 of the *Administrative Appeals Tribunal Act 1975* (Cth). The ARC consisted of the President, the Commonwealth Ombudsman, the Present of the Australian Human Rights Commission, the Present of the Australian Law Reform Commission, the Australian Information Commissioner and at least three, and not more than 11, other members.

38. The Australian Government abolished the Administrative Review Council in 2015 as part of the fourth phase of the Smaller Government Reform Agenda. The Attorney-General's Department was to manage the residual functions. This was upon recommendation from The National Commission of Audit in 2014 that the ARC be consolidated within the Attorney-General's Department.

39. The concern with the ARC was that, before it was abolished, it was failing to fulfil its functions including by providing oversight and preparing and releasing reports. The Callinan Report recommended that the ARC should be reinstated and constituted in accordance with Part V of the *Administrative Appeals Tribunal Act 1975* (Cth). We support this recommendation. Funding would need to be allocated to it to ensure it can meet its functions.

(d) Any related matter

Expansion of Ministerial powers

40. We are increasingly concerned about the expansion of personal Ministerial powers and the lack of administrative oversight of these powers. These powers relate to granting, refusing or cancelling visas where there is no merits review of those decisions. These powers are often non-compellable and not subject to the rules of natural justice.

41. Problematically, the Minister has personal powers to, in effect, replace the decision of the AAT with adverse decisions, i.e. s 133C and 501A of the *Migration Act 1958* (Cth). The unique power of the Minister to replace a decision of the AAT is antithetical to the purpose and independence in administrative decision making and review. It is farcical to have a process to seek that the Minister would revoke their own personal decision to replace a decision of the AAT, i.e. s 133F and 501C of the *Migration Act 1958* (Cth).

42. It also makes it difficult for members where a case becomes highlighted in the media or criticised by the executive to do their job properly or not feel the pressure when making difficult decisions. The very essence of the AAT is that it is meant to be independent. Members should not be singled out due a decision the executive may disagree with. Often members are making decisions that impact people's lives including Australian citizens, children, whether a person remains in detention, will be refouled, may never be able to return to Australia and members have the benefit of being able to hear and assess evidence. They need to be able to do this freely without political pressure.

Lack of administrative oversight of detention

43. There is a lack of administrative oversight of detention. It is our view that the AAT would be an appropriate body to be able to review a person's detention.

Immigration Assessment Authority

44. The IAA is not a model that should be adopted to review Part 5 and Part 7 reviewable decisions. IAA reviewers are not independent decision-makers, they are public servants engaged under the *Public Service Act 1999* (Cth). The IAA was introduced with the purpose of excluding Excluded fast track review applicants from accessing merits

review.[9] The role of the IAA is to undertake limited merits review of fast-track reviewable decision on the papers. This is not a model that should be replicated, and it is not a solution for the concerns raised herein with the AAT.

45. What is missing from the IAA is fairness. It assumes that all applicants have had adequate opportunity to put their case forward before the Department of Home Affairs and therefore denies an applicant the opportunity to put forward further evidence at review unless there are exceptional circumstances to do so. The legislation itself requires the IAA to be efficient, quick and free of bias. There is no right to hearing and limited opportunity for an applicant to attend an interview. It is also not independent in its appointments, as IAA reviewers are public servants with little information shared to the public about their qualifications or backgrounds. It has created a rubber stamp process of Department decisions which has led to an increase in appeals to the courts as a result.

46. Further, submissions are limited to 5 x A4 pages and given there is no hearing, many applicants are unable to articulate the complexities of a refused decision and it renders the process meaningless.

47. The lack of fairness is best expressed in relation to Afghanistan applications for SHEV / TPV applications at the IAA compared to the Protection (subclass 866) visa applications.

48. In the period from 1 July 2015 to 30 September 2021, the IAA dealt with 637 cases for Afghan nationals. 17% of those applications were remitted to the Department for re-consideration. 82% were affirmed. In the same period, overall the IAA affirmed 89% of cases (a total of 9,594).[10]

49. In the AAT, based on statistics available for financial year 2021, the AAT set aside 75% of decision for Protection visas lodged by Afghan nationals. For the Protection visa review cohort more broadly for that same period, only 6% of decisions are set aside.[11] This set-aside rate for Protection visa review applications for Afghan nationals has maintained at 75% for the first quarter of financial year 2022, being 7% for the cohort

[9] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014,* Explanatory Memorandum, at p. 8, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5346_ems_a065619e-f31e-4284-a33e-382152222022/upload_pdf/14209b01EM.pdf;fileType=application%2Fpdf.

[10] Immigration Assessment Authority, Immigration Assessment Authority Caseload Report, https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2021-22.pdf.

[11] Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial year to 30 June 2021,* https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2020-21.pdf.

more broadly.[12] Further, it is up on 64% for financial year 2020,[13] being 7% for the cohort more broadly, and 65% for financial year 2019,[14] being 9% for the cohort more broadly, for Protection visa review applications for Afghan nationals.

Conclusion

50. The Victorian experience with the AAT is different to other jurisdictions given the prolonged lockdowns during the COVID-19 pandemic. These matters are raised to assist in reforming and improving the AAT, not replacing it with a body similar to the IAA, which is a wholly inadequate process.

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[12] Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial year to 31 October 2021*, https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2021-22.pdf.
[13] Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial year to 30 June 2020,* https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2019-20.pdf.
[14] Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial year to 30 June 2019,* https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2018-19.pdf.