



Law Council
OF AUSTRALIA

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Senate Legal and Constitutional Affairs Legislation Committee

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Introduction

1. This submission has been prepared by the Migration Law Committee of the Law Council's Legal Federal Litigation & Disputes Resolution Section (**the Committee**). The Committee is pleased to have the opportunity to provide feedback on the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth) (**the Bill**).
2. The Committee supports harmonisation of procedures across the Administrative Appeals Tribunal (**AAT**) and in particular supports the reformulation of moving the Migration and Refugee Division (**MRD**) as part of the development of the amalgamated AAT as a body that reviews government decisions (rather than being exceptional within the field of administrative review).
3. The Committee, however, does not believe that all aspects of the proposed Bill are consistent with this goal. The role and functions of the MRD remain distinctly separate from the role and functions of the General Division and, in many instances, the proposed changes erode the rights of review applicants to fair hearings and continue to isolate the MRD distinct from - as opposed to harmonised with - the remainder of the Tribunal with which it amalgamated. The Bill seems only to address inconsistencies within the MRD through the partial amalgamation of Part 5 and Part 7 of the *Migration Act 1958* (Cth) (**MA**), in many instances at the cost of procedural fairness to both migration and refugee visa review applicants. It is the Committee's view that harmonisation of procedures in the AAT procedure harmonisation needs to occur across all divisions of the AAT to bring decisions under the MA in line with the AAT General Division.
4. It is noted that this Bill proposes changes to the Immigration Assessment Authority's (**IAA**) procedures in correcting an anomaly in Part 7AA of the MA. Whilst the Committee supports these administrative changes, it is the Committee's view that these changes do not 'harmonise' the IAA and MRD in terms of procedure due to significant divergence in terms of its procedures and, in particular, the level of procedural fairness available.
5. The Committee has not attempted to respond to all aspects of the Bill and has focused on the areas of concern to the Law Council and the Committee.

Right to Representation and s 366A

6. It is the view of the Committee that the changes proposed in the Bill will, in some circumstances, erode the rights of review applicants and provide greater power to the AAT at the disadvantage of review applicants. This is particularly likely to be the case when review applicants are unrepresented or have received only limited representation as a result of the restrictions relating to representation by lawyers at hearings. The Committee submits that this runs contrary to the ATT's stated objective of providing a mechanism of review that is 'accessible, fair, just, economical, formal and quick'.¹
7. The Committee continues to advocate on behalf of review applicants for the right to legal representation at hearings, including the option for legal representatives to

¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A ('*AAT Act*').

appear before the Tribunal. The changes proposed in the Bill highlight the reasons legal representation is important and how difficult it is for unrepresented applicants to navigate their way through the process. For example, a failure to undertake a step can result in the loss of a hearing – a significant outcome which can be avoided in most situations by adequate legal support for the review applicant. Other examples include when a review applicant is disadvantaged by not having access to information held by the Tribunal, or where an important witness may be unable to be called. A right to legal representation throughout the process, including at the hearing, can ensure that the Tribunal's stated objectives of 'accessible, fair, just, economical, formal and quick' outcomes, are met.

8. Section 366A of the *Migration Act 1958* (Cth) (**MA**) has not been harmonised with the *Administrative Appeals Act 1975* (Cth) (**AAT Act**), which in the General Division allows persons to be represented.² In the experience of Committee Members, implementation of s 366A(2) of the MA - which enables a person to assist an applicant during a hearing but not present arguments unless 'exceptional circumstances' arise - varies considerably as a result of the broad discretion that it grants Tribunal Members. By way of example, the Committee is aware that in multiple applicant hearings, one Member has required representatives to sit in the public gallery during a hearing, rather than at the hearing table. This detracts from the support that a representative can provide to the review applicant, isolates the applicant at the hearing table, places the review applicant away from material in the representative's possession, and impedes the representative's capacity to effectively represent or assist the review applicant.
9. With the forthcoming deregulation of migration lawyers from the Migration Agents' Registration Authority, it is likely that more legal practitioners will become involved in migration-related AAT matters. As this occurs, the lack of representation for review applicants in the MRD as opposed to the General Division, will stand out as a legal anomaly and unduly limit procedural fairness in the AAT.
10. The Committee's view is that s 366A(2) should be repealed or alternatively that ss 366A(1)-(2) be removed and replaced with the content of s 32 of the AAT Act. If the alternative is preferred, the second step could be adoption into the MA of s 33(1AB) of the AAT Act which states that a 'party to the proceedings before the Tribunal and any person representing such a party, must use his or her best endeavours to assist the Tribunal to fulfil the objective in Section 2A'.

Section 357A

11. The Committee opposes the removal of s 357A(3) of the MA. Whilst the Committee notes that the Explanatory Memorandum (**EM**) sets out a view that this clause is unnecessary given the content of section 2A(b) of the AAT Act,³ the inclusion of s 357A(3) in this division of the MA enhances clarity and streamlines procedure by clearly enshrining that, in relation to the matters that the AAT deals with under this division, it must act in a way that is fair and just.

² See *AAT Act* s 32.

³ Explanatory Memoranda, Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth) 11.

12. The 'Statement of Compatibility with Human Rights' attached to the EM, cites Article 14(1) of the International Covenant on Civil and Political Rights (**ICCPR**).⁴ Article 14(1) relates to the basic natural justice provisions of a 'fair and public hearing by a competent, independent and impartial Tribunal established by law'. Given that, as noted in the EM, the Government is committed to providing a comparable arrangement for the review of decisions under the MA as it does for all administrative decisions, it is the Committee's suggestion that the removal of this sub-section is unnecessary at this point until such time that the Tribunals are fully harmonised.

Section 362A

13. The Committee strongly opposes the removal of s 362A and submits that this provision apply to both refugee and migration review processes. In the Committee's view, it is crucial that review applicants in both Divisions are afforded access to material before the Tribunal. Removal of this provision risks frustrating the Tribunal's stated objective of 'quick' merits review by requiring Tribunal staff to process requests for access to documents through the more laborious provisions of the *Freedom of Information Act 1982* (Cth) (**FOI Act**).
14. In the context of harmonisation, the question arises whether the iteration of this principle is best expressed in Part 5 or Part 7 of the MA. We note that the EM does not suggest that harmonisation is advanced by its removal. Since the Migration Division covers a broader range of decisions than the Refugee Division, the default position should be that harmonisation is promoted through use of Part 5 as the default position to ensure applicants' rights are fully protected.
15. Section 362A, as it is presently expressed, enables an applicant or assistant to 'have access to any written material ... given or produced to the Tribunal for the purposes of the review' up until a decision is made by the Tribunal. Exceptions to disclosure are based upon privacy principles (subsection 362A(2)) and public interest (ss 375A and 376).
16. Procedural fairness requires that unless there is a reason for non-disclosure, in advance of a hearing, an applicant be provided access to the material before the decision-maker that may be referred to in making a decision about the applicant. In particular, refugee decisions, which often have considerable and serious impacts on the lives of applicants, should be made with procedural fairness.
17. In order to put their best case forward, the applicant must be able to consider all information that may be used in a decision which affects them. That was the purpose of this section when it was created and there is no obvious reason why refugee applicants cannot also be provided with a right of access to their personal information through the statutory framework of the MA. Affording access to material is one of the fundamental tenets of merits review procedures that are 'accessible, fair, just, economical, formal and quick'.⁵

⁴ Ibid 42, 47.

⁵ *AAT Act* s 2A.

The Explanatory Memorandum

18. The **EM** suggests that s 362A is unnecessary as ss 359A and 359AA currently oblige a Tribunal to provide adverse information to an applicant for comment.⁶ For the following reasons, the Committee disagrees with that assertion:

- (a) An applicant needs to be in a position to seek advice and prepare for hearing before preparing a case for the Tribunal.
- (b) Access to neutral, negative and positive material is critical. Access to a selection of relevant personal information weighs the process against applicants.
- (c) Processes under ss 359A and 359AA are instituted as part of the Tribunal's consideration of a matter, whereas an applicant needs to prepare evidence and submissions in advance of the Tribunal's consideration of a matter - especially since the Tribunal, in the vast majority of cases, only holds one hearing in a matter. The Tribunal may not allow an applicant additional time to respond to information given under subsection 359A and 359AA.
- (d) Sections 359A and 359AA relate to information, not documents. Without access to all material, an applicant is prevented from properly preparing their case. Proper preparation of a case to be put to the Tribunal assists the Tribunal in its decision-making and its objectives. Correct decisions are desirable in reducing the strain on the courts and in upholding strong administrative decision-making.

19. These points are outlined in more detail below.

Advice

20. As a starting point, s 362A enables a person to seek advice about their case, its prospects of success and what is needed to improve prospects of success. A representative needs to see not only a decision record, but also relevant material, to be able to provide appropriate advice. Critically, prospects of success in this field come down to whether or not a decision-maker is likely to be satisfied of matters (visa criteria or visa cancellation grounds, etc). This involves consideration as to the weight of evidence and the extent of evidence in a particular matter. It also enables correction of oversights and misunderstandings at the primary stage.

Not Only Adverse Material

21. Section 362A is important as it gives applicants access to the materials the Tribunal offers. Conversely, ss 359A and 359AA only oblige the Tribunal to give particulars of adverse information (and exclude certain kinds of adverse information).

22. It is not uncommon for material that is useful to an applicant to be non-adverse and therefore not covered by ss 359A and 359AA.

⁶ Explanatory Memoranda, Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (Cth) 14.

23. It is critical in this regard to note that not all material in support of an applicant's case will come from the applicant. Take for example, a site visit report by the Department of Immigration. Even a report that records evidence against a person will contain other information as well. This information may be significant to the explanation/account given by an applicant. It may add weight to an applicant's account that observations made during a site visit are consistent with the applicant's account of events in some respects and will provide context for negative statements. A section 359A process is the equivalent of selecting the adverse parts of a witness statement and providing only those aspects of the statement to a person for comment.
24. Further, an applicant may not have had access to primary-stage materials for numerous reasons, including where they were represented by a negligent migration agent during the primary application, or where they have not understood what occurred at the primary stage. There is established case law which demonstrates that negligent migration advice cannot be remedied by the courts, which highlights the significance of s 362A in ameliorating the damage done by negligent agents at the primary stage.

Preparation in Advance

25. Access to material is critical for preparation in advance of a hearing and enables preparation to be undertaken with the complete context.
26. FOI processes emphasise the importance of access to documents to good governance, but are not a substitute for s 362A. This is for at least two reasons.
27. Firstly, FOI processes can be slow and often outside the control of the Tribunal. Applicants and representatives are often seeking access to information held by the Department rather than Tribunal file, and it is common practice for the Tribunal to transfer such requests to the Department as the appropriate agency to process the FOI application. This means that hearings can be set when documents have not been provided and result in preparation for hearings that is inadequate or require hearings to be adjourned, as the Department file must be returned to that agency for processing.
28. Secondly, it is only the Tribunal that knows the documents it has sought access to for the purpose of reviewing a decision and therefore an applicant may not be aware which files a Tribunal has obtained access to.

Written Material

29. Sections 359A and 359AA are focused upon information, not documents. A document contains information on many levels and ss 359A and 359AA are not designed to provide all the information.
30. The proposed repeal of s 362A goes to a fundamental matter which the Committee has been long advocating for, namely that applicants should have access to material in advance for the preparation of hearings and that the Tribunal should not use hearings to raise new material. Not ensuring these principles undermines the capacity of the hearing to be a means by which an applicant can present his or her best case.

Section 358A

31. Section 358A of the MA attempts to recreate the current s 423A, but it will only apply to reviewable refugee decisions. The Committee submits that this section does not advance the goal of harmonisation and is unnecessary.
32. Section 423A was inserted into the MA following the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) which commenced on 18 April 2015.
33. The Committee did not support the insertion of this section and continues to take that view. It is a longstanding function at common law that a tribunal has the power to make findings of credibility of an applicant including to make findings where an applicant has raised new claims or presented new evidence which was not before the primary decision maker. The Tribunal's power to make such findings has been repeatedly endorsed by the Courts, and the Committee submits that the Tribunal should be able to undertake this duty without the need for legislation. The proposed change overcomplicates the decision-making process and is likely to result in further judicial review. The removal of the section would allow the accepted common law position to prevail.

Sections 361(1) and 361(2)

34. The Committee notes under the proposed Bill an additional burden is to be placed on review applicants in relation to s 361(2) requiring review applicants to provide written notice of what the applicant wants the Tribunal to obtain in relation to:
 - (a) oral evidence from a persons or person named in the notice;
 - (b) written evidence from a person or persons named in the notice; or
 - (c) other written material in relation to the issues arising in relation to the decision under reviewat least before the start of the day on which the applicant is scheduled to appear.
35. The proposed changes mean that failure to do so may lead the Tribunal to ignore the notice and to thereby deny a review applicant the right to present his or her best case by being unable to present a witness or witnesses.
36. The proposed subsections appear to be introduced to simplify the Tribunal's role, which will be at the expense of the ability of a review applicant to present his or her case. This is particularly so in circumstances where review applicants have consented to an abridged notice period pursuant to reg 4.21 of the *Migration Regulations 1994* (Cth) and in doing so have limited time before the scheduled hearing in which to provide a witness list to the Tribunal.
37. Further, a review applicant is often faced with the situation in a hearing where adverse information or documentation is put to him or her without knowing about this prior to the hearing. Section 361(2) could have serious ramifications for both migration and refugee review applicants, particularly in relation to those unrepresented, it is onerous, complex and not easily understood by review applicants. It is the Committee's view that the procedural items that are highlighted in s 361 could be

instead included in Principal Member Directions of the AAT so that they allow for flexibility in response to developments in Tribunal procedure.

Section 366C

38. The Committee is concerned that the removal of sub-s 366C(1) will mean that review applicants are no longer afforded an opportunity to request an interpreter, which under the proposed amendments can only be provided on the Tribunal's own motion. Without an express power to request an interpreter, an applicant's need for an interpreter may not arise until the date of the hearing. This in turn may result in unnecessary and avoidable adjournments while an interpreter is sourced. The retention of existing subsection 366C(1) will ameliorate such concerns while preserving the Tribunal's discretion whether or not to direct that a review application proceed through an interpreter.

Section 359A(1)(c)

39. The Committee is of the view that it is not necessary to remove the words 'responds to'. According to the EM this change:

'addresses the decisions of the Federal Court in Minister for Immigration and Citizenship v Saba Bros Tiling Pty Ltd [2011] FCA 233 [(Saba Bros)], where it was found that a response does not require substantive remarks or observations, but requires merely an answer or reply of any sort to the information in the invitation.

The amendment will ensure the Tribunal may proceed to make a decision on the review pursuant to subsection 359C(2), without inviting the applicant to a hearing, if the applicant chooses to reply in any form, even if the reply does not substantively engage with the issues contained in the invitation. That is, the applicant will need to comment on the substantive information, otherwise the Tribunal may proceed to make a decision on the review on the papers under subsection 359C(2).⁷

40. The EM suggests review applicants should be aware of the issues at hand at primary stage. Even if that is the case, and the applicant also has sufficient awareness of AAT procedure to know that a s 359A invitation requires a substantive response (which is often not the case), the Tribunal is not limited to only those issues raised at the primary stage when hearing the review. Given the complexities of the legislation, review applicants may not fully understand the loss of their right to a hearing simply because they failed to respond to the Notice in accordance with this section.

41. It is the Committee's submission that the removal of the words "respond to" is unnecessary and prejudices Review Applicant's rights. The interpretation by the Federal Court in *Saba Bros* should prevail.

⁷ Ibid 34.

Section 476(2)

42. The amendment to this item adds a new paragraph 476(2)(e) at the end of subsection 476(2), to provide that a decision of the Tribunal to dismiss an application under paragraph 362B(1A)(b) of the MA will not be reviewable by the Federal Circuit Court.
43. This change will mean that failure to appear at a hearing leading to dismissal of the matter will not be reviewable if the review applicant fails to apply for reinstatement within the specified period. This is not appropriate as it is at the discretion of the Tribunal to proceed to dismiss and such discretion may be unreasonable or inappropriately exercised in some circumstances. Limiting review to the High Court will prevent some applicants from seeking review where errors were made and/or may lead to an increase in applications lodged through the High Court in its original jurisdiction. The Committee submits that it is preferable to have an alternate path for judicial review through the Federal Circuit Court (as currently exists in migration matters) than only through the High Court's original jurisdiction.
44. Since it was introduced, the power to dismiss applications has seen instances where review applicants do not fully understand the implications of such an application or understand that an application for re-instatement can be made. It is the Committee's view that the amendment to this section is unnecessary and likely to be costly and unnecessarily impinge on limited judicial resources.

Section 350A

45. According to the EM, the proposed s 350A:

"provides that where a non-citizen makes a review application to a review body in relation to a reviewable refugee decision, which is determined by the Tribunal, and then the non-citizen makes a further review application to the Tribunal in relation to a reviewable refugee decision, the Tribunal is not required to consider any information considered in the earlier application, and may have regard to, and take to be correct, any decision made by the review body about or because of that information".⁸

46. This change is likely to see an increase in judicial interpretation and there is no explanation in the EM as to why this change is necessary. It also is unclear whether this change will capture matters remitted from the Courts due to jurisdictional error or whether these matters are considered a new application. It is clearly questionable how the Tribunal can be undertaking its role if it is not obliged to consider previous refugee review material. This seems counterproductive, open to error and possibly allows the Tribunal to simply accept the previous Tribunal's findings even where there may be errors or changed circumstances.

Conclusion

47. The Migration Law Committee notes that there are a high number of unrepresented persons appearing before these Tribunals. These persons are likely to have limited knowledge of the procedures and processes required before the hearing date under

⁸ Ibid 29-30.

the new amendments and may therefore lose their rights to a hearing. The Committee notes the new powers given to the Tribunal and the opting out of informing the Applicant how to prepare for his/her case by putting the onus on the Applicant to provide appropriate notices about witnesses, may be contrary to article 14 of the ICCPR which states that 'everyone shall be entitled to a fair and public hearing'.

48. Under the amendment proposed in the Bill, the powers of the Tribunal and Tribunal Members are substantially increased, to the extent that review applicants may be prevented from putting their best case forward by limiting access to information, requiring notices of witnesses and not allowing the review applicant to respond to a "s 359A Request".
49. The original view that the Tribunal was semi-inquisitorial has been diminished by the reduction of the rights of the applicant and the increased powers of the Member and the Tribunal. The Committee submits that a review of the procedures of the MRD is necessary and that such review should result in ensuring that the MRD is brought in line with the General Division.

Contact

50. The Committee would welcome the opportunity to discuss the submission further. Please contact Mr Erskine Rodan OAM, Chair, Migration Law Committee at info@erskinerodan.com.au in the first instance.