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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

Inquiry into the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Victoria Legal Aid (VLA) welcomes the opportunity to comment on the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the Bill).

The Bill purports to harmonise the procedures adopted by the different arms of the Administrative Appeals Tribunal (Tribunal) and the Immigration Assessment Authority (IAA) when considering applications for merits review of adverse migration decisions. VLA is concerned by several changes made by the Bill which, if enacted, would water down substantive rights without any compelling 'harmonisation' rationale. Some of the changes are also likely to increase the risk of successful legal challenge with decisions being subject to judicial review and then remitted back to the Tribunal, creating inefficiency and delay. This letter provides a technical analysis of the operation of these changes and makes recommendations to preserve procedural rights which are currently afforded to applicants.

VLA's submission draws on our practice experience providing legal assistance to people seeking judicial review of decisions made by the Tribunal and the IAA. In the 2015/16 financial year, VLA's Legal Help phone line responded to 2,299 matters. VLA also provided legal advice to clients in migration law matters on 1,497 occasions, minor assistance in 264 cases, and a substantive grant of legal assistance in 65 cases. We also provided 266 duty lawyer services.

Substantial justice and the merits of the case – Schedule 1 (Item 47)

This item repeals sections 353(b) and 420(b) of the *Migration Act 1958* (Cth) (Migration Act). The proposed amendment removes the express requirement under the Migration Act that the Tribunal must 'act according to substantial justice and the merits of the case'. The Explanatory Memorandum to the Bill states that it would be 'redundant to preserve current

paragraph 353(b)… and 420(b)' because the Tribunal will ultimately be subject to s 2A(b) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).[1] In our view, this is an inaccurate assessment.

Section 2A(b) of the AAT Act does not replicate the repealed sections. Rather, it requires that the Tribunal 'must pursue the objective of providing a mechanism for review that… is fair, just, economical, informal and quick'. Although there is some overlap between the two phrases, the balance of ss 353(b) and 420(b) is on justice, while s 2A(b) reflects a greater efficiency motive.

The High Court has treated the content of section 2A(b) of the AAT Act[2] as being different to ss 353(b) and 420(b) but part of a complementary set of requirements which ensure reasonable and fair decision-making by the Tribunal on review.[3]

This change in focus and language in respect of the Tribunal's conduct may materially affect the safeguards currently provided to Applicants including by ensuring that the Tribunal conducts its review focused on the substantial justice of the case.

Recommendation 1: Remove Item 47 from Schedule 1

Access to written material – Schedule 1 (Item 61)

This item repeals a free-standing right under section 362A of the Migration Act for Applicants to access the written material before the Tribunal for the purposes of its review.[4]

This amendment would remove an Applicant's right to be aware of and access the totality of the (non-protected) material before the Tribunal. This will include material which may not fall within s 362A, but is nonetheless material which: (a) will be viewed by the Tribunal; and (b) which the Tribunal may, in some cases, have a duty to disclose.[5] Without an express right to access the material before the Tribunal, Applicants will not be in a position to 'know what they do not know'.

This change would undermine the transparency of the Tribunal's decision-making generally and impede an Applicant's awareness of whether or not they have been denied procedural fairness in relation to a document before the Tribunal at the time of the review.

Recommendation 2: Remove Item 61 from Schedule 1

[1] At 10 [51].
[2] Note this section historically appeared as s 353(1) of the Migration Act before its repeal by the Tribunals Amalgamation Act 2015.
[3] See *Minister for Immigration and Citizenship v Li* [2013] HCA 18, French CJ (at [13]-[15]) and Gageler J at [97]. It is also noteworthy that the content of s 353(2)(b) was not repealed when s 353(1) was in 2015.
[4] The Tribunal is still obligated to provide to Applicants the material 'which it considers would be the reason, or part of the reason, for affirming the decision under review': see s359A of the Migration Act.
[5] See, for example, *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 where at [12] the High Court held that an analog of s 359A was not engaged, but (at [21]) held that the Tribunal nevertheless had an obligation to disclose the material to the Applicant.

Provision of interpreters – Schedule 1 (Item 71)

This item substitutes the content of section 336C of the Migration Act. Section 336C requires the Tribunal to provide interpreters if a person giving evidence before it is not 'sufficiently proficient in English' and asks for an interpreter or if the Tribunal considers for itself that the person is not sufficiently proficient. The substituted provision removes the obligation and instead confers an apparent discretion on the Tribunal to decide whether or not to provide an interpreter if a person is not proficient in English. In our view this is a significant and ill-conceived reform, it is also at odds with an undisputed line of Federal Court authority.[6]

Item 71 creates the possibility that the Tribunal will (a) consider whether it will decline to engage an interpreter even where a person giving evidence before it is not proficient in English; and (b) that it may in fact decide not to engage an interpreter despite the person before it having insufficient English to participate in the hearing. Concerningly, the Explanatory Memorandum suggests that the 'Tribunal's consideration and decision to appoint an interpreter… will also take into account the Tribunal's existing responsibility under section 2A of the AAT Act to pursue the object of providing a mechanism for review that is fair, just, economical and quick'.[7] This contemplates that cost or time efficiency may inform the question of whether an interpreter should be appointed to assist a person, including an applicant, giving evidence when they do not have a sufficient proficiency in English.

This reform will encourage:

- Real confusion for the Tribunal about how to exercise this discretion, given the Tribunal's longstanding awareness that the ability to communicate is fundamental to a person's opportunity to give evidence in relation to the issues on review.
- Risk that a person before the Tribunal will have one of her or his fundamental rights to be heard undermined in order to save money or time in the performance of the Tribunal's functions or for some other reason.
- Situations where the Tribunal fails to perform its statutory task to conduct a review and fulfill the invitation to an Applicant to attend a hearing, by declining an interpreter on the mistaken assumption that this decision is one they can make because of the terms of s 366C.
- In circumstances where interpreters are refused, inefficiency and delay because decisions made refusing an interpreter will likely be set aside on an application for judicial review and then remitted back to the Tribunal.

Recommendation 3: Remove Item 71 from Schedule 1

Obligation to respond – Schedule 2 (Items 1 to 12)

These items combine to remove the phrase 'or respond to' from s 359A(1)(c) of the Migration Act. As it stands, this provision, along with ss 359C(2) and 360, set up a two-step

[6] See especially, *Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507 [20]-[21] (Kenny J).
[7] At 17[95].

process. First, the Tribunal must invite an Applicant to comment or respond to information which it considers would be the reason, or part of the reason, for affirming the decision under review. Second, if the Applicant does comment or respond to that information, they must be invited to attend a hearing under s 360 of the Migration Act if the Tribunal is unable to make a decision favorable to the applicant, on the papers. If they do not comment or respond, the obligation to invite the Applicant to a hearing does not apply and a decision can be made without further inquiry.

The Explanatory Memorandum to the Bill states that the purpose of this amendment is to overcome the effect of the Federal Court decision in *Minister for Immigration and Citizenship v Saba Bros Tiling Pty Ltd* [2011] FCA 233. In that case, the Court held that an Applicant will have 'responded' to the invitation to comment or respond to the adverse information if they make any reply at all, even by acknowledging that they have been provided with the invitation and ask to make submissions at an oral hearing. A mere reply permits an application to retain the benefit of the obligation to be invited to an oral hearing.

By removing the phrase 'respond to', the Bill intends to force an applicant given a notice under s 359A to 'grapple with the issues contained in the information' before the Tribunal is obliged to invite them to an oral hearing.[8] This reform will significantly disadvantage self-represented, non-English speaking Applicants. The intended reform purports to require a person to:

- understand the requirement to comment (undefined as it is, and remains, under the new provisions);
- appreciate the content of the adverse information to such an extent that they are able to substantively engage or grapple with it;
- grapple with the adverse information; and
- provide a comment, which can be required to be given in writing (s 359B), that demonstrates substantive engagement or a grappling with the adverse information.

In our view, this reform is ill-adapted to its intention. Moreover, if the intention is achieved, it will adversely impact the most disadvantaged cohort of applicants seeking review before the Tribunal on important matters; potentially locking them out of the one forum (oral hearing) in which (subject to adequate provision of an interpreter) they will be able to best advance their application for review.

Recommendation 4: Remove Items 1 to 12 from Schedule 2

Reviewing decisions together – Schedule 2 (Item 28)

This item inserts s 473DG into the Migration Act. The provision provides that the IAA may review fast-track decisions together, even if the original decisions were not made together by the original decision maker. It appears that this reform is specifically designed so that family members' applications can be bundled and determined at the same time. The reform would also enable the IAA to compare protection visa applications made by family members for potential inconsistencies. It is unclear, however, how or whether the IAA's awareness of these

[8] See the Explanatory Memorandum at 23 [201].

inconsistencies will be brought to the applicants' attention for comment. It is unclear whether the very limited scope of information which must be brought to an applicant's attention by the IAA under Part 7AA would include notice of these potential inconsistencies.

In our view, given the instability which already accompanies the Fast Track reviews conducted by the IAA and the lack of existing case law clarifying the way the key parts of the scheme are intended to operate, Parliament should be cautious about further amending the scheme in ways that create further complexity and uncertainty.

Recommendation 5: Remove Item 28 from Schedule 2

If you have any queries about the contents of this letter please do not hesitate to contact me

Yours faithfully

DAN NICHOLSON
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