



Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

TRIBUNALS AMALGAMATION BILL 2014

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and more than 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Tribunals Amalgamation Bill 2014*. RCOA has previously made a submission on the tribunal amalgamation,¹ in which we highlighted the importance of a fair, independent and expert merits review process for those seeking asylum. RCOA is pleased to note that a number of our concerns have been considered in this new Bill. However, RCOA maintains a number of concerns relating to appointments to the Migration and Refugee Division and increased penalties for failing to comply with the Tribunal. RCOA also wishes to highlight concerns regarding the new review process to be administered by the Immigration Assessment Authority, which was recently introduced through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

1. The need for a strong, fair and impartial refugee claim review process

- 1.1. The Refugee Review Tribunal (RRT) 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 Immigration and Border Protection are reviewable by an independent body. This is especially important in case of refugee claims, when matters of life and death are under consideration. Indeed, the RRT can provide a critical safeguard against forced return to danger by helping to ensure accuracy and fairness in decision-making.
- 1.2. Robust mechanisms for independent merits review mechanisms 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. 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.

2. Independence of the Tribunal

- 2.1. The amalgamation will provide the benefit of the AAT having supervisory jurisdiction over the Migration and Refugee Divisions, with the additional benefit of the AAT being headed by a Federal Court Judge. This additional oversight has the potential to create a stronger culture of robust decision-making and of independence. By removing the Migration and Refugee Division from the Department of Immigration and Border Protection to the Attorney-General's Department, it is hoped that the independence of the merits review process will be further enhanced.

¹ See http://www.refugeecouncil.org.au/r/sub/1407_ReviewTribunals.pdf

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- 2.2. However, under Schedule 1, item 17, the Attorney-General will be required to consult with the Immigration Minister prior to assigning a person to the Migration and Refugee Division as a member, head or deputy head of the Division. RCOA believes there is no reason for the Attorney-General to consult with the Minister for Immigration in this manner. We are concerned that this practice could undermine the independence of the Division and politicise the review process.
- 2.3. As the Administrative Review Council's Better Decisions Report (1995) found, "It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence."² RCOA supports the Administrative Review Council's recommendation that the "selection and appointment process for all tribunal members should be rational, merit-based and transparent."³ We stress the need for appointments to be based on merit and expertise alone.
- 2.4. In addition, RCOA argues that this process should be free of all ministerial involvement, including in relation to the selection or recommendation of appointees. Given that the Tribunal will be tasked with making decisions which may have significant political implications, it is vital that it be seen to be completely independent. Any ministerial involvement may be seen as interference in this independence. Indeed, we believe that 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) would create a conflict of interest.
- 2.5. The public confidence Australians have in their legal institutions rests on an understanding that our processes are robust, fair and independent, particularly when an individual's life, liberty or safety is at stake. As the *Better Decisions Report* (1995) found:
- Applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and make a different decision to that of the relevant government agency where they consider that appropriate.*⁴
- 2.6. RCOA recommends that appointments to the Tribunal be made entirely on merit with specific consideration given to the expertise of the individual. Given the complexity of refugee and migration law, RCOA recommends most refugee matters be heard by qualified members who are well trained in refugee law and understand the complex issues that asylum seekers may experience. RCOA strongly suggests that a Tribunal member also be trained in cross-cultural communication, cultural awareness, the refugee experience and the impacts of torture and trauma, to ensure that they have the requisite skills to assess asylum claims accurately and fairly.

Recommendation 1

RCOA recommends that the requirement for the Attorney-General to consult with the Minister for Immigration be removed and replaced with a legislative provision requiring Tribunal members to have relevant expertise.

3. Penalties for failing to comply with the Tribunal

- 3.1. Under Schedule 1, item 135-144, the maximum penalty for the offences of failing to comply with a summons, failing to be sworn in and answer questions and contempt of the Tribunal has been doubled from six months to 12 months imprisonment. RCOA can see no justification for increasing the penalties in this manner, particularly considering that the new penalties would be out of step with similar provisions for Commonwealth and State courts, tribunals and Royal Commissions. As the Kaldor Centre argues, "it is difficult to justify a higher penalty than that

² Administrative Review Council, *Better Decisions Report* (1995), page 71.

³ Administrative Review Council, *Better Decisions Report* (1995), page 77.

⁴ Administrative Review Council, *Better Decisions Report* (1995), page 71.

which exists, for example, for similar offences in the Federal Court of Australia.”⁵ We recommends that the existing penalties for failing to comply with the Tribunal remain the same.

- 3.2. RCOA also notes that, following changes to the eligibility criteria for the Immigration Advice and Application Assistance Scheme (IAAAS), asylum seekers will no longer be able to access free government-funded advice and representation at the review stage of the RSD process. Without legal representation, it is likely that many asylum seekers will struggle to understand the merits review system, including the implications of failing to comply with orders of the Tribunal. This is especially significant for those who do not speak English, come from countries with diverse legal systems or who are suffering mental illness as a result of torture or trauma. We believe that it is unjust to increase penalties for failing to comply with the Tribunal while simultaneously denying asylum seekers access to the advice they need to understand and navigate the review process. As such, we recommend that access to the IAAAS be reinstated at the review stage for all asylum seekers.

Recommendation 2

RCOA recommends that promoted amendments related to increasing the penalty for failing to comply with the Tribunal not be passed.

Recommendation 3

RCOA recommends that the Australian Government reinstate access to the Immigration Advice and Application Assistance Scheme at both the primary and review stages of the refugee status determination process and remove eligibility restrictions based on an asylum seeker's mode of arrival in Australia.

4. Introduction of the Immigration Assessment Authority

- 4.1. With the introduction of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, asylum seekers whose claims are rejected by the Department of Immigration will no longer be able to appeal to the RRT. Instead, their claims may be referred to the Immigration Assessment Authority (IAA). The current the Bill provides that the IAA will be an independent office of the Tribunal,⁶ rather than under the new Migration and Refugee Division. RCOA believes that the establishment of a new review body through the IAA, parallel to the Migration and Refugee Division, is significantly at odds with the purpose of amalgamation, which is to “further enhance the efficiency and effectiveness of the Commonwealth merits review jurisdiction and support high quality and consistent Government decision making.”⁷
- 4.2. In addition, the proposed structure and functions of the IAA do not, in RCOA's view, provide an adequate framework for ensuring accuracy and procedural fairness in decision-making. The overriding objective of the IAA, as stated in the Bill, is to provide “a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)”. By contrast, the objective of the RRT under the *Migration Act* is to provide a “mechanism of review that is fair, just, economical, informal and quick”. The RRT is also required to “act according to substantial justice and the merits of the case” – a requirement which does not apply to the IAA. The mixed objectives of the RRT require its decision-makers to strike a balance between efficiency, fairness and accuracy, while the IAA's objectives place a stronger emphasis on speed than fairness.
- 4.3. RCOA is of the view that the IAA does not present an adequate substitute for the RRT. We believe that the introduction of this parallel system of merits review would create a much higher risk of inaccuracy in decision-making and thereby increase the danger of asylum seekers being erroneously returned to situations where they could be subject to persecution or other forms of

⁵ See the Kaldor Centre's brief on the Tribunals Amalgamation Bill, http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_tribunals_bill_final_23.01.2015_1.pdf

⁶ Explanatory Memorandum, para 1021.

⁷ Explanatory Memorandum, para 3.

serious harm. It is RCOA's position that all claims for refugee status should be assessed on their individual merits without prejudice. Given the risks and drawbacks associated with the IAA,⁸ the Government should take this opportunity to forego establishing the IAA and instead seek to have all reviews processed through the new Migration and Refugee Division.

Recommendation 4

RCOA recommends that the Australian Government abandon the introduction of the Immigration Assessment Authority and ensure all asylum seekers have access to merits review through the Refugee Review Tribunal or the proposed Migration and Refugee Division under the amalgamated Tribunal.

⁸ For more information, see section 3 of RCOA's submission on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, <http://www.refugeecouncil.org.au/r/sub/1410-Legacy-Caseload.pdf>