



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

15 July 2021

Dear Committee Secretary

We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Reference Committee to the inquiry into the *Courts and Tribunals Legislation Amendment (2021 Measure No. 1) Bill 2021* (the **Inquiry**).

We work exclusively with people seeking asylum many of whom rely upon the integrity and independence of the merits review bodies, the Administrative Appeals Tribunal (the **AAT**) and the Immigration Assessment Authority (the **IAA**), to provide *de novo*, independent determination of the merits of their cases, in accordance with the law. We also act for people seeking asylum seeking judicial review of protection visa refusal or cancellation decisions in the appellate jurisdiction of the Federal Court, as is relevant to some provisions in this Bill.

While the stated purpose of this omnibus Bill is to make administrative amendments to improve the operation of particular Courts and Tribunals, in our submission some provisions will do the opposite, and have substantive negative impacts on the affected bodies. Our submission highlights our particular concerns regarding provisions in three parts of the Bill which threaten already poor safeguarding of robust, independent appointment processes to the AAT (Part 8 of this Bill) and which weaken already poor accountability of the IAA (Part 10 of the Bill). Part 15 of the Bill relating to the appellate jurisdiction of the Federal Court, will reduce the transparency of court decision making, contrary to the public interest and also adversely impact on the right to access to justice, especially for self-represented litigants in refugee matters who will be disproportionately impacted by this Bill.

In considering the impact of these provisions on people seeking asylum, it is necessary to recall that many people seeking asylum lack legal representation, have low levels of legal literacy, often lack English language skills, typically live in abject poverty and frequently have significant vulnerabilities, including poor mental and physical health or disabilities.

We are concerned that provisions in this Bill will further impugn the independence and integrity of the AAT, and inappropriately shield reviewers of the IAA from legal accountability as public servants, while seeking to cement the pretence that the IAA is a legitimate merits review body. More generally, these changes will erode the quality and reliability of refugee determination processes, resulting in more refugees not being recognised when they should be, and consequently facing *refoulement* to situations of persecution in breach of Australia's international obligations. This is a high risk given the systemic barriers many people seeking asylum already face in putting their cases forward, for the reasons highlighted above.

We would welcome the opportunity to appear before the Committee.

Kon Karapanagiotidis OAM
CEO Asylum Seeker Resource Centre

1. Introduction

1.1 The Asylum Seeker Resource Centre

- 1.1.1 Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is a place and part of a movement. We are Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey.
- 1.1.2 The ASRC's Human Rights Law Program (HRLP) has provided legal assistance and advocacy to refugees and people seeking asylum over the past fifteen years. We work directly with individuals and their families fleeing persecution. The HRLP exists to provide access to justice through legal representation at all stages of the application process and our submission is based on our longstanding and comprehensive work with refugees and people seeking asylum in Australia. We welcome the opportunity to provide this submission to the Committee.

1.2 Summary of recommendations

- 1.2.1 We recommend that the Committee:

Recommendation 1: Reject proposed amendments to s7(2)(c) and s 7(3)(b) of the AAT Act from the Bill to remove the role of the Governor General in AAT appointment processes and replace them with the Minister. This will remove the scrutiny of the Governor General from AAT appointment processes and give direct power to the Minister to appoint persons to the AAT who do not meet qualification requirements to be appointed as Deputy Presidents, Senior Members or Members of the Tribunal.

Recommendation 2: Reject proposed amendments to s 60 of the AAT Act from the Bill to grant High Court judge privileges and immunities to IAA reviewers. IAA reviewers are public servants and have been appointed and carried out their functions as public servants, that is part of the Executive, since the IAA's unwelcome inception. Immunity from accountability as public servants should not be extended to IAA reviewers. A judicial character cannot be retrofitted to this inherently flawed body which was explicitly created to deny applicants basic procedural fairness and to implement government policy to deter future boat arrivals.

Recommendation 3: Reject proposed amendment to s 28(5) of the *Federal Court of Australia Act 1976* (Cth), (the **Federal Court Act**), which would allow the Federal Court to provide short form judgments, rather than proper reasoned and detailed judgments, in appellate jurisdiction cases which do not raise questions of general principle, reducing transparency of Federal Court decision making and disproportionately, adversely, impacting unrepresented litigants seeking review of refugee decisions.

Recommendation 4: Recommend that the IAA be abolished, or at minimum, entirely re-built to anchor independence of appointments and decision making processes; re-set the current "refusal culture" of the IAA; provide applicants with a right to a hearing; and restore the right of applicants to put forward all relevant information in support of their case by amending relevant sections of Part 7AA of the *Migration Act 1958* (Cth) (the **Migration Act**).

- Introduce a right to hearing/interview at IAA (both at first instance and upon remittal from the Federal Circuit Court (**FCC**)) by amending s473DB.
- Remove restrictions on the provision of new information to the IAA by amending s473FB and Practice Directions which limit the length of submissions to five pages.
- Provide a minimum period of 42 days for provision of written submissions for cases, including those remitted from court to the IAA (via amendment of Practice Direction).

Recommendation 5: Create an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.

Recommendation 6: Invest adequate resources in the AAT including by appointing more relevantly qualified and experienced AAT members to address major case backlogs, streamline procedures and provide funded independent legal assistance for applicants so the Tribunal can more efficiently work to swiftly identify and engage with the key 'live issues' in each case.

2. Weakened AAT appointment process

2.1 Proposed amendment of s 7(2)(c) and s 7(3)(b) of the AAT Act.

Under s 7(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**), a person must not be appointed as a **Deputy President** unless the person:

- (a) is a Judge of the FCA or Family Court of Australia, or
- (b) is enrolled as a legal practitioner of the High Court or the Supreme Court and has been enrolled for at least 5 years, or
- (c) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President.

Under s 7(3) of the AAT Act, a person must not be appointed as a senior member or other member unless the person:

- (a) is enrolled as a legal practitioner (however described) of the High Court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years; or
- (b) in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a senior member or member.

These proposed amendments remove the role of the Governor General in the appointment process in both s7(2)(c) and s7(3)(b) and replaces them with the Minister, thus giving the Minister exclusive power to appoint someone who is otherwise not qualified for the crucial roles of Deputy President, Senior Member and Member of the AAT.

While the Governor General may currently, typically, accept the recommended candidates put forward by the Cabinet, this amendment removes the role of the Governor General in forming an "opinion" to appoint someone who is not otherwise qualified, and thus represents a reduction in the oversight and independence of the appointment process. The proposed amendments leave it entirely up to the Minister to decide whether someone who is not otherwise qualified, can nonetheless, still be appointed to the AAT, including in very senior and influential roles, such as Deputy President.

Recalling that the AAT is an independent statutory body whose role is to undertake independent *de novo* review of the Minister's decisions and arrive at the "correct and preferable decision"¹ in every case, in our submission it is inappropriate for the Minister (in essence the "opposing party" in many

¹ *Drake v Minister for Immigration & Ethnic Affairs* (1979) 46 FLR 409. (3 May 1979) at 589.

AAT decisions) to have any role in appointing members of the AAT. The exclusion of the Minister in the appointment process is also necessary to secure one of the key objectives of the AAT, which is stated in s2A(d) of the AAT Act to (d)promote public trust and confidence in the decision-making of the Tribunal.”

The AAT already has a long and troubled history of being subjected to politicised appointment processes, most notably of former staffers and MPs, and the unjustified non-reappointment of many highly qualified and expert members of integrity, who were unfairly perceived to be less willing to toe the line on government policy, especially in sensitive, politicised areas regarding refugee protection and character-related decisions. This history has not only raised issues regarding the independence of AAT decision making in some instances but has also resulted in the appointment of a significant number of members who lack the necessary experience, qualifications or skills to be competent and efficient in deciding cases and providing reasons to the requisite standard to ensure lawful decision making.

While in recent years there has undoubtedly been an increase in the workload of the AAT, it is also the case that the AAT being burdened with unqualified or insufficiently experienced members has made a significant contribution to the unacceptable case backlogs evident today. More so than in any other area, this applies especially in relation to review of protection visa decisions in the Migration and Refugee Division, where the **average length of time for determination of a protection visa review matter at the AAT is currently an extraordinary 990 days**, or almost three years.

These issues are well documented, including in the statutory review by former High Court justice Ian Callinan (the **Callinan Report**²) into the Government’s 2015 amalgamation of the AAT with the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal. Pointedly, Callinan recommended that: “[a]ll 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.”³ Callinan further urged for “further appointments of, preferably, full-time, appropriately legally qualified, Members”.⁴ He also recommended that “the deficiency of numbers of Members in the MRD be immediately addressed by the appointment of no fewer than 15 to 30 Members, some only of whom should be part-time Members.”⁵

In short, expanding the Minister’s power to appoint unqualified people to the AAT as per this proposed amendment, not only flies in the face of these recommendations but also clearly runs counter to the public interest of prompting the independence and integrity of the AAT.

2.2 Proposed amendment of s60 of the AAT Act

Section 60 of the AAT Act provides that: Members, ADR practitioners and officers of the Tribunal have, in the performance of their duties, the same protection and immunity as a Justice of the High Court. This Bill adds s 60(1)(c) to extend statutory immunity to IAA reviewers also.

While the Explanatory Memorandum states that the purpose of this amendment is to bring IAA reviewers into parity with other AAT members, ADR practitioners and officers, there are many relevant differences between AAT members and IAA reviewers, which do not justify such parity.

² I.D.F Callinan, AO, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* Available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F6813071%22;src1=sm1>.

³ Ibid. Page 9.

⁴ Ibid. Page 6.

⁵ Ibid. Page 5

First and foremost, under s 473JE(1), IAA Reviewers are not independent decision makers, but rather public servants engaged under the *Public Service Act 1999* (Cth). They are part of the Executive and therefore responsible for implementing Government policy. IAA reviewers cannot be retrofitted or transformed into independent decision makers akin to judicial officers, as they have already been appointed through a government selection process and since the IAA's inception in 2015, have performed their decision making roles as public servants, and therefore cannot be said to be independent decision makers as claimed on the Government's website.⁶

Aside from their lack of independence, there are other features that distinguish IAA reviews from people afforded statutory immunity under the AAT Act. Unlike AAT members, who take an oath of office,⁷ are statutorily required to declare conflicts of interest,⁸ enjoy independence of remuneration⁹ and have fixed term appointments,¹⁰ IAA reviewers serve at the pleasure of the executive and do not need to even have legal qualifications. Many, if not most of them, are former Department officers.

This proposed amendment would reduce the already low level of accountability of the IAA by preventing aggrieved persons from bringing legal actions against reviewers of the IAA for public misfeasance, even where they have acted in bad faith.¹¹

In addition, the IAA was established as part of a suite of measures aimed at achieving a very clear political purpose of deterring future people seeking asylum from arriving in Australia by sea. The IAA was established specifically to provide substandard merits review to the so-called "Fast Track" cohort. This intent is evidenced by the statutory provisions explicitly exempting the IAA from affording applicants their basic legal rights, including to procedural fairness.¹²

Unlike those who seek review of protection visa refusals at the AAT, those "Fast Track" applicants referred by the Department to the IAA receive no opportunity for hearing or interview¹³ (except in the most exceptional and discretionary circumstances) and are prohibited from providing any new information to the IAA unless within very narrow and specific criteria.¹⁴ In addition, even written submissions are limited to five pages, in English,¹⁵ with no assistance for translation available, making it utterly impossible for many applicants to engage in any way with the IAA review process. Consequently, many IAA decision are made without any applicant input at all.

It is hardly surprising that this combination of intrinsically unfair features of the IAA process has resulted in the **IAA's refusal rate being a staggering 94% in 2019-2021**,¹⁶ likely even higher in 2020-2021 for which figures are not yet publicly available. It is also not surprising that this process results in a **very high proportion of unlawful decisions made by the IAA**. Out of 1813 court appeals finalised between 2018-2020, **some 40% of appeals against IAA decisions were**

⁶ While the President of the AAT and the Division Head of the Migration and Refugee Division of the AAT are responsible for the overall operation and administration of the IAA, IAA reviewers remain public servants. See <https://www.iaa.gov.au/about>.

⁷ See s10(b) of the *AAT Act, 1975* (Cth).

⁸ *Ibid*, s14.

⁹ *Ibid*, s 9.

¹⁰ *Ibid*, s 8

¹¹ See for example, *Rajski v Powell* (1987) 11 NSWLR 522 at 528

¹² See s 473DA of the Migration Act

¹³ See s473DB of the Migration Act.

¹⁴ See s473DD of the Migration Act.

¹⁵ See IAA Practice Direction Issued 1 May 2020, at para 27, available at

<https://www.iaa.gov.au/IAA/media/IAA/Files/Practice%20Directions/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf>.

¹⁶ See AAT Annual Report, section on IAA at p.68 available at:

<https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201920/AAT-Annual-Report-2019-20.pdf>.

successful, with IAA decisions either set aside or cases remitted to the IAA for reconsideration according to law due to errors of law in the decisions.¹⁷

In short, the IAA provides not only deeply unfair and likely incorrect outcomes, it also fails to meet even the minimal threshold of lawful decision making in almost half of its cases. In our submission the IAA is a deeply flawed body which has no place in Australian law. It should not be bestowed with any privileges or immunities which may create the impression that it is akin to a credible legal merits review body or anything other than a public service provided extended arm of the Government, implementing Government policy to deter future asylum seekers arriving by sea.

Our key concern is that this amendment to grant IAA reviewers statutory immunity may be a preparatory step or prelude to a wider suite of reforms which may involve a plan to expand the jurisdiction of the IAA to assess a wider range of protection visa decisions, to relieve the AAT's current and continuing backlog issues.

We understand that the Department currently has around 24,000 protection visa applications at hand, which have not yet been decided. Most of these relate to people who arrived by plane and sought asylum from 2016 onwards. A significant proportion of these will likely be refused, especially given the Department now proceeds with refusals without offering an interview, to a higher proportion of protection visa applicants. Under current law, those applicants refused by the Department will be able to seek review of those decisions before the AAT, and they will then join the long backlog queue at the AAT, causing even further delay and dysfunction in the refugee determination process.

In our submission the solution is to fix the root causes of delays at the AAT and work through the backlog in a concerted way, and not expansion of the jurisdiction of the IAA. The latter would simply result in further erosion of the reliability of the refugee determination process, increasing the number of incorrect decisions and resulting in more people who should have been found to be refugees needing to resort to costly, protracted court appeals or face *refoulement* to situations of persecution.

What is needed is a major boost to the number and quality of AAT members through an independent appointment process guaranteeing that only those who are suitably qualified and experienced are appointed. Streamlined procedures accompanied by Government funded independent legal assistance to applicants, would also help to make decision making much more efficient, without sacrificing fairness. In our submission the main tool to manage efficient processing of a large caseload and minimise any potential for abuse of our refugee determination system is to properly resource the system so that it can deliver efficiency AND fairness. Aside from increasing the likelihood of achieving accurate identification of refugees owed protection obligations, fairness is also needed to help reduce the need for applicant reliance on protracted and costly judicial review processes for such a high proportion of cases, as is currently the case. It is a false economy to sacrifice the fairness of merits review in the name of achieving efficiency, as is the case with the current IAA model. Again, proper resourcing and credible independent appointment processes are key to this strategy, as is providing government funding for independent legal representation to assist applicants, and to also assist the Tribunal to swiftly identify and address relevant issues in contest in cases, enabling efficient AND fair processing of the AAT's backlog and future pipeline workload.

The statistics indicating that 40% of IAA cases are decided unlawfully, raises major concerns about the integrity of the current IAA process and most worryingly, the significant numbers of people owed protection obligations who are not currently being accurately identified by the IAA. This lack of integrity of the IAA process, causes more appeals, delays, expense for the Government and harmful legal, social

¹⁷ Ibid, p.68.

and economic limbo for applicants. Worst of all, it is likely causing *refoulement* of people to situations of persecution or serious harm in breach of Australia's international obligations

If the IAA is to be retained in any form, (which we submit it should not be), the foundations of the IAA must be entirely re-built to anchor independence of appointments and decision making processes; re-set the current "refusal culture" of the IAA; provide applicants with a right to a hearing; and restore the right of applicants to put forward all relevant information in support of their case. Expanding the jurisdiction of the IAA in its current form would bring our refugee determination process into even greater disrepute and further reduce public confidence in the reliability of the outcomes of IAA decisions. The better option is to make a proper investment in the AAT so that it can perform its statutory functions efficiently and fairly by bolstering its independence, appointing more and properly qualified and experienced members, streamlining procedures while also providing independent legal representation to applicants to also assist the Tribunal to progress cases swiftly and fairly.

2.3 Proposed amendment of s60 of the AAT Act

This provision would allow the Federal Court to give reasons in short form for a decision dismissing an appeal if the Court is unanimously of the opinion that the appeal does not raise any question of general principle. This would mean that appellants would not receive a judgement containing proper reasons, addressing the grounds raised, when their cases are dismissed. The absence of a proper judgement containing the reasons of the judge for refusing the appeal would make it virtually impossible for the appellant to then exercise their legal right to seek further appeal of their case to either the Full Federal Court or the High Court. This provision should therefore be understood to be not only a measure to reduce court workload, but also a measure which will reduce migration appeals to the Full Federal Court or High Court.

While we appreciate the Federal Court's heavy workload burden we submit that providing detailed, reasoned judgments is an intrinsic and inherent aspect of the provision of justice which should not be curtailed. Rather, the solution to this issue of court workload is the proper resourcing of our Courts so that they are able to fulfil their crucial constitutional and statutory functions to provide people with access to justice, which includes requirements of transparency in decision making through providing judgements.

We are concerned that this provision masks the underlying issues at stake and will have a disproportionate impact on unrepresented litigants appealing migration decisions, who are most likely to fall into the category of persons receiving only short form judgments under this Bill. This is because **the vast majority, some 88% of self-represented litigants in the appellate jurisdiction of the Federal Court, are appealing migration decisions.**¹⁸ Therefore, this provision to remove the right to a proper court judgement targets people appealing migration decisions, a significant proportion of which relate to protection visa or refugee status appeals.¹⁹

These statistics give pause for thought regarding why people seeking review of migration decisions are so overrepresented as unrepresented appellants in the Federal Court. In our submission, the reason for this is the poor quality of merits decision making at the Department level and at the IAA, combined with the lack of available legal representation at both the merits and judicial review stages. We regularly see people who have had no access to legal assistance to help them articulate their initial claims for protection or to provide them with assistance for any interview, hearing, or with written

¹⁸ Federal Court Annual Report 2019-2020, at p32, available at https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf.

¹⁹ Unfortunately the Court's annual report does not provide a breakdown of the proportion of appeals relating to protection visa decisions, however it is anecdotally a high proportion.

submissions or further evidence, in support of their cases at the merits stage. It is then typically impossible to cure these defects at the judicial review stage, due to limits on the court's jurisdiction as well as the very limited free legal representation available by Legal Aid, ourselves, or pro bono representation via Justice Connect referrals. In essence, problems with the poor quality of decision making at the primary and merits review stages, are then palmed up to the Court, which due to the restrictive nature of judicial review, can only address these issues in a very limited way through costly and protracted proceedings which cannot properly remedy poor merits review decision making.

The problem of the workload of the Court in relation to refugee decision making would be best addressed through improving the quality of merits-level decision making at primary and review stages. This provision to remove the right to a court judgement in appeals assessed to raise no question of general principle, which will specifically impact unrepresented migration appeals in the Federal Court, will only paper over these deeper problems and cause further injustice to appellants who are then unable to seek further review of appeals dismissed by the Federal Court, having access only to a short form judgement.

The right to appear for oneself is enshrined in Australian legislation.²⁰ The High Court of Australia has also upheld the right of people to represent themselves in court,²¹ which is also reflected in the provision for self-represented litigants in the Federal Court Rules²² and the Federal Court's processes, which provides some limited provision for appointment of pro bono counsel (in cases raising significant legal issues and for those in immigration detention) and the Federal Court's website which provides general information to assist unrepresented litigants. In our submission this provision to provide only short form judgments is a step backwards from commitments to ensure access to justice, including for unrepresented litigants in the appellate jurisdiction of the Federal Court, and will result in further injustice to a group who already face the most weighty systemic barriers to their access to justice at all stages of the refugee determination process. This provision is also contrary to the public interest of ensuring that the justice system at all levels operates transparently and is adequately resourced so it can give proper consideration to all matters brought before it to ensure that the process and standard of justice is not compromised.

3. Conclusion

Contrary to the Explanatory Memorandum stating that this Bill contains only "administrative" changes, several provisions of this Bill will have substantive and negative impacts on the integrity and functioning of courts and tribunals, as highlighted specifically in this submission.

We urge the Committee to recommend that amendments to s 7(2)b), s 7(3)(c) and s 60 of the AAT Act be rejected, alongside s 28(5) of the Federal Court of Australia Act. Beyond this, we hope the Committee will also delve into some of the root causes these proposed amendments mask and that consideration be given to our recommendations to address these, especially in relation to the need to provide adequate resources to improve both the quality and efficiency of decision making at the primary and merits review stages of the refugee determination process, and for the Federal Court to be properly resourced so it can continue to provide reasoned detailed judgments to all appellants.

²⁰ Judiciary Act 1903 (Cth), s 78.

²¹ Collins v The Queen (1975) 133 CLR 120; Cachia v Hanes (1994) 179 CLR 403.

²² Rule 4.01(1) of the Federal Court Rules 2011 (Cth).