RACS REFUGEE ADVICE & CASEWORK SERVICE

25 January 2017

Committee Secretary
Senate Legal and Constitutional Affairs Committee

By Online Lodgement

Dear Committee Secretary

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

The Refugee Advice & Casework Service ("**RACS**") is a specialised refugee community legal centre which has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the *Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016* (Cth) ("**Bill**"). Our submissions focus on those provisions of the Bill that affect our clients.

Case examples used in these submissions are drawn from RACS' almost 30 years of legal experience in assisting people seeking safety in Australia.

1. Summary

The Bill proposes to merge Parts 5 and 7 of the *Migration Act 1958* (Cth) ("**Act**") into one consolidated part. Currently, Parts 5 and 7 of the Act contain the codes of procedure for review of decisions by the former Migration Review Tribunal ("**MRT**") and the former Refugee Review Tribunal ("**RRT**") respectively. The Bill is said to complement the schedules to the *Tribunals Amalgamation Act 2015* (Cth), which abolished the MRT and RRT and consolidated their respective functions into a newly established Migration and Refugee Division of the Administrative Appeals Tribunal ("**Tribunal**"). The stated objective of the Bill is to consolidate Parts 5 and 7 of the Act into a single part which contains a code of procedure for the review of both migration and protection decisions by the Tribunal.

We note that the Bill contains a number of proposed amendments that are largely technical and / or procedural in nature, designed to facilitate the consolidation of Parts 5 and 7. However, the Bill also proposes a number of substantive changes to the review procedures and the "fast track" provisions. We submit that these substantive changes will adversely impact a number of our clients and compromise certain existing procedural fairness safeguards.

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2. Impact of the Bill

a. Consolidation of Parts 5 and 7 of the Act

Proposed new section 359A(4)(aa) – Information and invitation given in writing by Tribunal

In its current form, section 359A of the Act sets out the information that the Tribunal is required to give to an applicant. It also requires that the Tribunal invite the applicant to "comment or respond" to that information.

Subsection 359A(4) excludes certain information from the operation of section 359A; that is, it sets out the kinds of information that the Tribunal is *not* required to give to the applicant or invite the applicant to "comment or respond" to.

The Bill proposes to introduce a new subparagraph 359(4)(aa), which would exclude from the operation of section 359A information "that was included, or referred to, in the written statement of the decision that is under review".

The stated rationale for this proposed amendment is that "the applicant should already be aware of such information and it would hinder the efficient conduct of the review if the Tribunal is required to give to the applicant, and invite comment on, information that the applicant should already be aware of."[1]

If passed, the proposed amendment would adversely impact a number of our clients and it would give rise to serious issues of procedural fairness.

Under section 359A, the information that the Tribunal is required to give to the applicant (and invite the applicant to comment or respond to) is information that the "Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review." The exception created by the proposed amendment is problematic for a number of reasons, including that the applicant, particularly a self-represented, non-English speaking applicant, may not at the time of the Tribunal hearing, have knowledge of all of the reasons for the initial decision nor access to the relevant information (or a copy thereof) referred to in the initial decision.

Further, the purpose of a merits review is to consider the decision that was in fact made and to therefore consider afresh the information that was referred to or relied upon in that decision. It would be contrary to the principles of natural justice and procedural fairness that the Tribunal would raise a select number of concerns with the applicant, to which the applicant provides satisfactory responses, however the Tribunal refuses the application based on a concern raised in the initial decision made many months prior.

RACS recommends that the Bill be amended to omit the proposed insertion of a new section 359(4)(aa).

Case example 1

Ahmad fears persecution in Pakistan, his country of origin, on the basis of his religion as a Shia Muslim. His application for a protection visa was refused by the Department of Immigration. In the Department's written refusal decision, the decision maker set out, at length, the reasons why he considered it to be safe for Ahmad to relocate to Islamabad. The decision maker also briefly suggested that

[1] Explanatory Memorandum to the *Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016* (Cth) ("**Explanatory Memorandum**"), [63]-[64].

Ahmad could safely relocate to Karachi, but provided no explanation and simply cited a report of the Department of Foreign Affairs and Trade ("**DFAT**") report which is not publically available.

In Ahmad's written submissions to the Tribunal, Ahmad explained in detail why it was not safe for him to relocate to Islamabad, however, he did not address the Department's claim regarding relocation to Karachi.

Under the proposed new section 359(4)(aa) of the Act, the Tribunal would not be required to put to Ahmad the evidence in the DFAT report, which is not publicly available, suggesting that Ahmad could safely relocate to Karachi nor would it be required to inform Ahmad that his case may be refused on this basis.

The Tribunal affirmed the refusal decision, noting that although there was a real change he could be killed if he returned to is home area, he could relocate to Karachi. Ahmad was never directly asked what problems he would face in Karachi by the Tribunal nor was he told by the Tribunal that relocation to Karachi, not Islamabad, was a reason that his case may have been refused.

Proposed repeal and replacement of section 361 – Applicant may request Tribunal to obtain evidence – most reviewable decisions

The Bill proposes to repeal section 361 of the Act and replace it with a new section 361. RACS supports the removal of the 7 day requirement in current subsections 361(2) and 361(2A), however, the proposed drafting for section 361(2) is problematic.

If passed, proposed section 361(2) would provide that a notice given by the applicant to the Tribunal, requesting the Tribunal to obtain certain oral, written or other evidence, will have "no effect" unless it is received before the applicant's hearing day. To deem a notice to have "no effect" is an unnecessary and arbitrary removal of the Tribunal's discretion to consider notices in circumstances where it may be reasonable, appropriate and even necessary to call a witness to the stand on the day of the Tribunal hearing. RACS submits that in order to afford natural justice and procedural fairness to applicants (particularly those who are self-represented), the Tribunal must have the discretion to have regard to a notice given under proposed section 361(1) on the day of the applicant's hearing, especially considering that under the proposed drafting of section 361(3), the Tribunal will not be compelled to comply with the notice.

RACS recommends that the Bill be amended so as to give the Tribunal the discretion to have regard to notices given under proposed subsection 361(1) up to and including the day on which the applicant is scheduled to appear before the Tribunal.

Proposed repeal of section 362A – Applicant entitled to have access to written material before Tribunal

The Bill proposes to repeal section 362A of the Act, which provides that an applicant is entitled to have access to any written material (or a copy thereo) given or produced to the Tribunal for the purposes of the review.

The stated rationale for this proposed amendment is that the Tribunal already has an obligation under section 359A to provide information to the applicant that the "Tribunal considers would be the reason, or part of the reason, for *affirming* the decision (sic) that is under review" (emphasis added).[2] The Explanatory

[2] Explanatory Memorandum, [71]-[74].

Memorandum also refers to the Tribunal's obligation under section 359AA to orally provide particulars to the applicant of any such information.

However, the scope of sections 359A and 359AA are significantly narrower than that of section 362A, which concerns *all* materials before the Tribunal, not just information that goes to the reason(s) for affirming the decision. RACS therefore submits that sections 359A and 359AA are not an adequate or appropriate substitution for section 362A.

If passed, the proposed amendment would adversely impact and unfairly prejudice a number of our clients, and would give rise to serious issues of procedural fairness. In order to afford procedural fairness to the applicant, it is fundamental that he / she has the ability to access the materials given or produced to the Tribunal for the purpose of the review.

RACS recommends that the Bill be amended to omit the proposed repeal of section 362A.

Case example 2

Siva, a Tamil protection visa applicant, was refused by the Department on the basis that there was not a real chance he would be harmed on return to Sri Lanka as he did not have a significant profile within the Liberation Tigers of Tamil Ellam ("**LTTE**"). Siva had been forced to provide administrative support for the LTTE but did not have a military role. Siva based his claim of his fear of harm in Sri Lanka on the fact that the Sri Lankan authorities would harm or imprison him on the basis of his links to the LTTE.

Many years after the end of the war Siva had been shot in his torso in an armed robbery. Siva did not provide details of this armed robbery or his injuries as he did not relate to his claims.

The relevant country information before the Tribunal noted that Tamil people associated with the LTTE who have injuries may be imputed to have been a LTTE combatant. Since the report which contained this information is not publicly accessible, Siva did not realise that he should provide the information about his gun shot wounds to the Tribunal. Accordingly, Siva's claim of being an imputed LTTE combatant was not considered by the Tribunal.

The report that contained the information on the relationship between injuries and imputed LTTE combatants was not relied upon by the Tribunal under sections 359A and 359AA and so the Tribunal was not required to provide this information to Siva.

<u>Proposed repeal and replacement of section 366C – Interpreters</u>

The Bill proposes to repeal and replace section 366C of the Act with the text of section 427(7). The proposed new section 366C provides that the Tribunal *may* direct for communication with a person appearing before the Tribunal to be made through an interpreter if that person "is not proficient in English".

This is a considerable change from the position in current section 366C of the Act, which provides that a person appearing before the Tribunal may request an interpreter and that the Tribunal *must* comply with such request unless it considers that the person is sufficiently proficient in English. Current section 366C also provides that the Tribunal *must* (as opposed to *may*) appoint an

interpreter if it considers that the person is not sufficiently proficient in English, regardless of whether the person has requested an interpreter or not.

If passed, the proposed amendment would adversely impact a number of our clients and would give rise to serious issues of procedural fairness. The replacement of section 366C with the text of section 427(7) would significantly alter the nature of the Tribunal's obligation to provide an interpreter from one that is mandatory to one that is merely discretionary, and it would also remove the right of a person appearing before the Tribunal to request an interpreter. This would give rise to serious issues of procedural fairness, particularly in circumstances where it is not immediately clear to the Tribunal that the applicant is *not* sufficiently proficient in English.

RACS recommends that the Bill be amended to omit the proposed repeal of section 366C and instead extend its operation to "reviewable refugee decisions", in addition to "reviewable migration decisions".

Case example 3

A 17 year old Hazara boy, Khaled, made a protection visa application. One of the requirements of his Bridging Visa is that he attend an Australian school. Throughout the application protection visa application process, including at the interview with the Department, Khaled used an interpreter because, despite being able to maintain a conversational level of English, he found much of the legal terminology to be very technical and difficult to understand. He also felt that he was unable to explain many cultural concepts in English.

The Department refused Khaled's application and Khaled appealed to the Tribunal. Under the proposed drafting of section 366C, Khaled would not be entitled to request an interpreter. It is very burdensome and confusing for Khaled to interpret and respond to questions from the Tribunal in English. Accordingly, even though Khaled appears to understand the concepts and claims being discussed at the hearing, he misunderstands and fails to accurately respond to key contentions and adverse information. The Tribunal affirms the Department's decision to refuse Khaled's visa.

<u>Proposed repeal of section 357A(3) – "Tribunal must act in a way that is fair and just"</u>

The Bill proposes to repeal section 357A(3) of the Act, which provides that "the Tribunal *must act* in a way that is fair and just" (emphasis added).

The stated rationale for this proposed amendment is that section 357A(3) is redundant because, under section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) ("**AAT Act**"), "the Tribunal must pursue the *objective* of providing a mechanism of review that is … fair, just, economical and quick" (emphasis added).[3] However, the two provisions are not the same. Section 357A(3) imposes a higher threshold on the Tribunal, in that it requires the Tribunal to act in a way that is fair and just, whereas section 2A requires that the Tribunal merely pursue the *objective* of providing a review mechanism that is fair and just.

RACS recommends that the Bill be amended to omit the proposed repeal of section 357A(3).

<u>Proposed repeal of section 353(b) – Tribunal "shall act according to the substantial justice and merits of the case"</u>

[3] Explanatory Memorandum, [55]-[57].

The Bill proposes to repeal section 353(b) of the Act, which provides that the Tribunal "*shall act* according to substantial justice and the merits of the case" (emphasis added).

The stated rationale for this proposed amendment is that section 353(b) is redundant because, under section 2A of the AAT Act, "the Tribunal *must pursue the objective* of providing a mechanism of review that is … fair, just, economical and quick" (emphasis added).[4] However, the two provisions are not the same. Section 353(b) imposes a higher threshold on the Tribunal, in that it requires the Tribunal to act according to substantial justice and the merits of the case, whereas section 2A requires that the Tribunal merely pursue the objective of providing a review mechanism that is fair and just. Further, section 2A makes no reference to the "merits of the case" which, under section 353(b), the Tribunal is required to consider in reviewing a decision.

RACS recommends that the Bill be amended to omit the proposed repeal of section 353(b).

Retrospectivity of amendments – procedural fairness

The Bill provides that the proposed amendments in Schedule 1 (other than those in items 107 to 112) will apply in relation to a review of a decision whether the application was made before, on or after the commencement day of the Bill. In other words, the drafting of the Bill has the effect that the relevant provisions, if passed, would apply retrospectively to protection visa applicants whose applications have not been finally determined.

RACS supports the principle that migration laws should be prospective and transparent, and we consider that it is a fundamental principle of the rule of law that the government in all its actions be bound by rules that are fixed and certain. This position would be offended by the passage of the proposed amendments which are intended to have retrospective effect.

RACS recommends that the Bill should only apply to applications made on or after the commencement of the Bill.

Case example 4

Rana, a 22 year old Libyan woman, appealed the Department's refusal of her protection visa application to the Tribunal. Before the passage of the Bill, Rana requested an interpreter under current section 366C to provide translation assistance at the Tribunal hearing. Item 123 of Schedule 1 of the Bill specifies that if, before the commencement day, the Tribunal considered that a person was sufficiently proficient in English then that person will be taken to be sufficiently proficient for the purpose of the new section 366C. However, this does not deal with the situation where someone, like Rana, who has requested an interpreter *before* the passage of the Bill and, specifically, whether that request (and the Tribunal's obligation to provide an interpreter) remains on foot after the passage of the Bill. Would Rana's request for an interpreter be required to be considered by the Tribunal?

[4] Explanatory Memorandum, [51].

b. Amendments to Part 7AA of the Act

Proposed new Subdivision D, section 473DG

The Bill proposes to insert a new Subdivision D with one provision, section 473DG, which would provide the Immigration Assessment Authority ("**IAA**") with discretion to review two or more fast track reviewable decisions under section 473CC. This discretion would apply whether or not the decisions were referred to the IAA together by the Minister pursuant to proposed new section 473CA(2), which would allow the Minister to refer two or more decisions to the IAA where those decisions relate to applicants of the same family unit.

It is not clear from the proposed wording of section 473DG whether the two or more fast track reviewable decisions would be required to be related to one another, as in the case of a family unit. RACS submits that it would offend the principles of natural justice and procedural fairness if the IAA were to be given the ability to review two or more decisions together unless they were members of the same family.

RACS recommends that proposed new section 473DG be amended to clarify that the IAA's power to review two or more decisions together is restricted to decisions that are related to the same family unit.

Proposed section 473HEA – Giving documents by Immigration Assessment Authority – decisions referred and reviewed together

The Bill proposes to insert a new section 473HEA, which would provide that, where two or more fast track reviewable decisions have been referred to the IAA together by the Minister under proposed new section 473CA(2) and the decisions are reviewed together by the IAA, then documents given by the IAA to any of the applicants are taken to be given to each of those applicants.

Presently, however, the IAA cannot give a document to a minor and must instead give that document to someone who is at least 18 years old. The Bill seeks to circumvent this requirement in the context of proposed section 473HEA by introducing proposed new sections 473HA(2A) and 473HB(2A), which would provide that a document *can* be given by the IAA to a minor where that minor is party of a family unit.

RACS is opposed to the proposed circumvention of the requirement that a document *not* be given to a minor in the context of the proposed new section 473HEA. If passed, the application of section 473HEA in practice could result in an important document being given by the IAA to a 15 year old who is a member of a family unit, whose decisions are being considered together under proposed section 473CA(2). Receipt of the document by the 15 year old would be taken to constitute receipt by all of the applicants, that is, each member of the family unit.

RACS recommends that the Bill be amended to omit the proposed new sections 473HA(2A) and 473HB(2A).

Please do not hesitate to contact us for further information or clarification.

Sincerely,
REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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