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Administrative Administration Tribunal
Legislation Harmonisation Project Secretariat
Courts, Tribunals and Administrative Law Branch
Attorney-General's Department

Administrative Appeals Tribunal Legislation Harmonisation Project - Non-government stakeholder consultation submission

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

Key Message

FECCA believes that harmonisation of the Administrative Appeals Tribunal (AAT) procedures can be a positive step in enhancing the fairness, flexibility, transparency and accessibility of the migration and refugee review process. FECCA asserts that these principles of fairness, flexibility, transparency and accessibility should underpin any amendments to the Tribunal's arrangements as they relate to: applications; the acceptance and provision of information; the rules governing procedural fairness; case management and the delivery of oral decisions. Further the Tribunal should maintain as overarching principles justice and the preservation of the dignity of the individual.

The Tribunal's enabling legislation states its objectives as being 'accessible, fair, just, economical, informal and quick' review. FECCA maintains that these principles are of equal priority and that the former three ought not be subjugated in service of the latter. The Act further imposes upon the Tribunal a requirement that as a review mechanism it 'is proportionate to the importance and complexity of the matter'. The decisions of the Migration and Refugee Division (MRD) are among the Tribunal's most consequential, in many cases having a conclusive effect on an applicant's living, working and family arrangements. Further, the matrix of legislative, regulatory and policy considerations to which an applicant must have regard are becoming increasingly complex, with at least 16 separate pieces of legislation making countless amendments to the Migration Act in the preceding 24 months alone.

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In recognition of the complexity and finality of the Division's work, the Tribunal should structure its procedures so as to provide a compensatory balance in favour of the applicant. The need for such an exercise in counter-balancing is exacerbated by the vulnerability of the applicants. Questions of language, culture and economics will often be interposed with the effects of extraordinary trauma. In the interests of reaching the best decision possible, the Tribunal ought commit to ensuring that an applicant's vulnerability factors are prevented from negatively impacting upon access to the Tribunal's corrective jurisdiction.

Traditionally the Department of Immigration (the decision maker) in migration and refugee matters have not been represented at hearings in review of those decisions. This recognises the enormously disproportionate resources available to decision makers in this area as well as the need to curtail the impact of the inherently stressful processes to which vulnerable peoples are subjected. The Tribunal is to be congratulated for the sensitivity with which it has generally conducted these hearings to date. The Department should resist any suggested amendments which limit the Tribunal's ability to regulate its own procedures in the interests of imbalance correction.

The Application Process.

It is imperative that the processes for making applications to the MRD of the AAT be as flexible as possible. Formality should be avoided and procedural errors should not serve to invalidate an application without an applicant being granted adequate opportunity to correct the error. The Tribunal should allow for the making of applications orally, either by telephone or in person as is permissible with applications to the Social Services Division (SSD). The Tribunal should consider updating its website to include instructional videos in languages beyond the six that are available to assist unrepresented applicant's understanding of procedural requirements. For this purpose the videos available should address the details of the application itself and attempt to explain the formal requirements rather than simply indicating that such requirements exist. This is particularly relevant in the context of the numbers of unrepresented applicants before the MRD division.

Rules Governing the AAT Receiving and Giving Documents

In compliance with the goal of arriving at the best decision, the Tribunal's arrangements must ensure that it can receive the most up to date documents and information. Further, it is essential that applicants have access to all of the information provided to the Tribunal and to any information and documents available to the decision maker when making the initial decision. This includes both adverse and beneficial material. In order for an applicant to present an application that responds to information before the decision maker and that allows the Tribunal to form a complete picture of the applicant's circumstances, the applicant must be provided with all information relevant to decisions concerning that application prior to any hearing.

Powers To Require The Decision-Maker To Investigate Or Take Action And To Require Persons To Provide Information Or Documents

In recognition of the imbalance of power and of the asymmetry of resources between decision makers and applicants, the Tribunal should be empowered to require decision-makers to investigate claims made by an applicant which do not appear to have been investigated, or investigated to a satisfactory extent, in circumstances where it is reasonable to do so. Whilst it would normally be incumbent upon an applicant to provide any material upon which he or she seeks to rely, there may be circumstances where the decision maker's resources and expertise make it more appropriate for the decision maker to conduct its own enquiries. The results of these enquiries should then be made available to the Tribunal and the applicant prior to any hearing.

Availability of Pre-Hearing Case Management Processes and Procedures

FECCA is supportive of any provisions that seek to de-formalise the Tribunal's processes. Case management which allows members to clarify and refine the issues in dispute and make directions to guide applicants' understanding of the Tribunal's requirements can only serve to assist with the goal of 'accessible, fair, just, economical, informal and quick' review.

Rules Governing Procedural Fairness

Given the Act's reference to proportionality in the context of importance and complexity and given the impact of the MRD's decisions and the intricacies of the legislative and regulatory scheme, the Division should prioritise procedural fairness. This includes: access to all information concerning the application; adequate time to respond to any information relevant to the application; the ability for an applicant to submit information any time prior to a decision; an ability to request translators and interpreters at any time during the process and ensuring relevant enquiries have been made.

Rules Relating to Oral Decisions

FECCA supports the delivery of oral judgements but stresses that in doing so it is imperative that appropriate language services are available to ensure that the decisions of the Tribunal are fully understood, both in language and effect. Any decision given orally should also be accompanied by a written statement to be furnished upon the applicant within seven days, whether or not such a statement is requested by the applicant.

A written decision of the MRD given to an applicant should be supplied in both English and the preferred language of the applicant. The work of the Division is, by necessity, concerned with persons of often limited or no English skills. This, the numbers of unrepresented applicants and the impact of judgements mean the Tribunal must ensure its decisions are understood by affected persons.

Conclusion

FECCA supports the Harmonisation Project's attempts to develop a standard set of practices and procedures across its Divisions. The Department should take this opportunity to recognise that the Migration and Refugee Division's subject matter is amongst the Tribunal's most difficult. If to harmonise the processes would reduce the degree of procedural fairness afforded an applicant, or impose further burden upon an applicant it should be avoided to that extent. In all circumstances the Project should remain conscious of the complexities of the subject matter and the vulnerability of the applicants. Further, it should continue to prioritise the dignity of the individual and the goal of arriving at the best decision. The project should in all cases retain these principles at its forefront when structuring the procedures by which the Division is governed. The Project has now a unique opportunity to enhance the extent to which the procedures of the MRD are accessible, fair, just, economical, informal and quick.