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Office of the President

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Our ref: HS/MLCC

Dr James Popple
Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email: [redacted]

Dear Dr Popple

AAT – Draft Migration and Refugee Division Practice Direction

Thank you for the opportunity to provide feedback on the AAT's Draft Migration and Refugee Division Practice Direction (**draft PD**). The Queensland Law Society (**QLS**) appreciates being consulted on this important document.

This response has been compiled by the QLS Migration Law Consulting Committee, whose members have substantial expertise in this area.

The LCA has identified the proposed clause 3.1 and clauses 9.1 to 9.3 of the draft PD as potentially problematic. QLS is also concerned about those clauses, as well as several other matters.

3.1 Statement of facts, issues and contentions

QLS submits that it is not workable or reasonable to require applicants to provide a statement of facts, issues and contentions (**SFIC**) within 14 days of lodging an application for review. This is significantly more onerous than the requirements in the General Division and we do not consider it justifiable.

There are a number of key issues with this requirement:

- 14 days is not a sufficient amount of time for legal practitioners to properly consider the matter and prepare the SFIC, particularly if they are newly instructed (ie were not involved in the matter at the departmental stage;

- The SFIC will need to be prepared in most instances without the benefit of critical supporting information for the client, such as medical or psychologist reports (which can take months to obtain) and information obtained through Freedom of Information (**FOI**) processes. The draft PD recognises in clause 3.5 that FOI applications will be made after lodging an application. Current FOI processing times for the Department of Home Affairs are substantially delayed.

- A 14 day requirement will be particularly burdensome for applicants who are being supported by community legal centres, such as the Refugee and Immigration Legal Service (**RAILS**), who will not be able to comply with such a requirement without significant additional funding. The requirement could otherwise act as a deterrent to community legal centres (and others with limited resources, including those acting pro bono) in assisting clients to lodge valid review applications in the AAT. This is because the centre would need to satisfy itself that they had the resources both to lodge the valid review application and to comply with the upcoming 14 day deadline in order to offer appropriate support to a client. This is particularly problematic because the Tribunal is unable to extend the review application deadline where a client fails to apply for review due to being unable to secure appropriate assistance.

- The timeframe will have a disproportionate impact on highly vulnerable persons (such as persons with a disability, severe mental illness or cognitive impairment, or persons currently in prison or immigration detention). This client cohort already has difficulty in accessing appropriate legal representation and in assisting appointed legal practitioners to gather evidence and information. In the case of persons in correctional facilities or in immigration detention, there are limitations in terms of access to both in-person and telephone appointments with legal practitioners.

- Where the SFIC is prepared and filed within 14 days of the date of lodgement of the application, it is likely to be well out of date by the time the matter is heard (given that current processing times mean that the hearing is between one to two years after date of lodgement). This means that a new statement will be required closer to the date of the hearing, which will result in additional costs to the client.

- Related to this, it is also important to bear in mind that many applicants are vulnerable and have suffered trauma. Each time they are asked to convey their story may cause further trauma, while also exposing them to potential attacks on their credibility if their description at the time of the hearing differs from the SFIC.

In the General Division, the SFIC is typically due two to three months prior to the hearing. QLS submits the Migration and Refugee Division (**MRD**) should be more closely aligned with the General Division on this point.

Consequences for non-compliance

The requirement to lodge the SFIC is described as mandatory, however this requirement is not based on a legislative requirement, and there is no indication of what will occur if the requirement is not complied with.

This is the case with a number of mandatory clauses throughout the draft PD.

Case management hearings

QLS considers that there is insufficient guidance in the draft PD regarding case management hearings.

It is not clear what kind of matters may be discussed at the case management hearing. Our members have reported instances of applicants being questioned at such hearings about facts that may be contentious in the matter, for example questions about name/identity, home country and identity documentation. Unrepresented applicants are particularly vulnerable to such questioning if very clear boundaries are not set.

The PD should make it clear that any case management hearing should be limited to procedural matters for progressing the matter only and cannot interrogate facts in question. Within these clear boundaries, QLS considers that such hearings could be beneficial to applicants and representatives particularly if the Tribunal were able to indicate which matters were already accepted by the Tribunal (for example, for family violence provisions matters the Tribunal could use a case management hearing to confirm that it accepted evidence on genuineness on the papers and this aspect of the matter did not need to be addressed in the lead up to or during the hearing). QLS considers that such hearings should be held remotely where the applicant is represented, to most efficiently utilise representative's time.

9.1 – 9.3 Hearings

QLS agrees that more detail is required about matters that will be taken into consideration when deciding the mode of hearing.

Matters related to trauma, domestic violence, significant psychiatric disorders or cognitive impairment or other disabilities, for example, ought to be taken into account.

We also submit that the draft PD should provide guidance on highly vulnerable applicants giving evidence at hearing. There may be instances where it is not appropriate for a Tribunal Member to question a person suffering from a psychotic mental illness or significant cognitive impairment, for example. We suggest that, to the extent that there is any inconsistency, the Tribunal's Guidelines on Vulnerable Persons should be preferred to the PD.

9.9 – Lodging evidence and submissions prior to the hearing

The draft PD proposes to mandate that evidence and submissions must be lodged seven days before the hearing. We are not aware of the legislative basis for this and do not consider that it will always be necessary or appropriate. We note that matters may be rescheduled if material is filed late, which may be a disproportionate response.

Additional issue in the MRD

We would be grateful if the Law Council would also raise with the AAT a concerning issue relating to the AAT's website and MRD forms. Members have reported instances where a person who was not the applicant or authorised representative was able to withdraw an

application from the MRD via an online withdrawal form (https://forms.aat.gov.au/servlet/SmartForm.html?formCode=Withdrawal-MRD).

This online withdrawal form places review applicants at serious risk. In its current form, it allows anyone to impersonate a review applicant and to withdraw a case without any authentication whatsoever of the identity of the person who lodged it.

This online withdrawal form does not require a login and can be completed by providing the AAT file number and the review applicant's name and date of birth. In at least one instance in early 2022, the withdrawal form was lodged and accepted by the AAT without the Tribunal taking any steps to authenticate the identity of the person who lodged the withdrawal form (and despite the review applicant informing the Tribunal on several occasions that they had not withdrawn their application). It was only as a consequence of litigation in the FCFCOA that the withdrawal was acknowledged to have been invalid because it was not submitted by the review applicant or an authorised agent. The case was then remitted to the AAT.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Kara Thomson
President