Conducting Migration and Refugee Reviews

This Direction is given under section 18B of the *Administrative Appeals Tribunal Act 1975.* Other legislative references in this Direction are to sections of the *Migration Act 1958.*

1. About this Direction

1.1 This Direction applies to Administrative Appeals Tribunal (AAT) members and staff dealing with cases in the Migration and Refugee Division. The Direction is intended to facilitate accessible, fair, just, economical, informal, quick and proportionate conduct of reviews for the benefit of applicants and the AAT.

1.2 This Direction has effect from 2 August 2018.

2. Deciding cases as quickly as possible

2.1 Members are to take all reasonable steps to complete cases allocated to them as quickly as possible, including:

(a) on receipt of an application for review, following constitution, quickly identifying the relevant issues in the application

(b) identifying ways to finalise each case in an expeditious manner, including seeking early legal, research or registry support

(c) after constitution, determining whether a decision can be made in the review applicant's favour on the papers without a hearing (sections 360/425)

(d) identifying, as early as possible, any need to invite a person to provide additional information, or any need to invite the review applicant to comment on particular information

(e) if a hearing is considered necessary, booking a hearing for the earliest available time subject to the prescribed period of notice

(f) not postponing or rescheduling hearings without good reason

(g) not extending the time for the provision of further information or comments without good reason

(h) making oral decisions at the conclusion of hearings in appropriate cases.

3. Communicating with applicants and representatives

3.1 There should be no direct contact or communication between review applicants (or representatives) and members other than during a hearing. Contact or communication will be through AAT staff at other times. Case letters are sent by staff, as requested by members.

3.2 Wherever possible, email communication is to be used to send and receive documents.

4. Related applications for review

4.1 Where separate applications for review have been received from more than one family member or closely associated applicants, the AAT will, where practicable and appropriate, seek to conduct hearings together. The AAT will only conduct hearings of such applications together where the applicants have consented to a joint hearing.

4.2 If a review applicant who is included in an application with other family members advises the AAT in writing that he or she no longer wishes to be included in that application and wishes his or her application to be treated separately, the AAT will from that point communicate separately with the review applicant, and arrange any hearings separately.

5. Hearings

Adjournments

5.1 The rescheduling or adjournment of a scheduled hearing at the review applicant's request will only occur where the member is satisfied that there are cogent reasons for granting the adjournment. If an adjournment is not granted, the hearing will proceed on the scheduled hearing date.

5.2 Requests for adjournment of a scheduled hearing will not be granted simply on the basis of the convenience of the review applicant or their representative. Where the AAT has given sufficient advance notice of the hearing, adjournments will not be granted on the basis of a need to gather further evidence unless cogent reasons can be shown. However, all requests for adjournment must be carefully considered and the decision to grant or not grant an adjournment must be made in a manner which is reasonable with genuine consideration of the facts and circumstances of the case.

Children

5.3 In cases involving a review applicant who is a child (that is, under 18 years of age) and who is not represented by a guardian, the member will ensure that the review applicant understands the nature of the process and is able to present his or her own case. Before hearing the evidence of a child, the member will determine whether the child understands the obligation of an oath or affirmation and whether the child is competent to give evidence. Further information is contained in the Guidelines on Vulnerable Persons, which can be found on the AAT website.

Privacy considerations (Migration Act Part 5 cases)

5.4 The AAT should take all reasonable steps to not disclose the identity of persons or relatives or dependants of persons who have made current or past applications for protection visas. (Noting that the Act restricts other bodies from publishing the names of applicants for protection visas.) Members should consider directing that any proceedings involving a person who has made a current or past application for a protection visa be conducted in private (section 365).

5.5 The fact that a case involves personal information may not alone be a basis for conducting a hearing in private. There is a legislative intent that proceedings of the AAT will generally be held in public. There would generally need to be some concern that some degree of harm or prejudice may result. Examples may include cases involving persons who have applied for protection visas, cases involving allegations of children at risk or domestic violence, and cases involving persons who are HIV positive.

5.6 However, where a person's sensitive information is to be discussed at a hearing the member should ask whether the person consents to the information being disclosed to any other persons present, including observers and witnesses. If not, the member should consider discussing those matters with the person in private.

6. Hearing arrangements for persons in detention

6.1 The AAT may take evidence from a person in immigration detention in person, by video or by telephone. Options include, in order of preference:

(a) taking evidence in person on AAT premises

(b) taking evidence via video using appropriate videoconferencing facilities, in a suitable location (this may include an immigration detention facility)

(c) taking evidence in person in a suitable location outside of AAT premises

(d) taking evidence in person in a suitable room in an immigration detention centre.

6.2 Where this is not possible or practical, other options for conducting a hearing may be considered, including taking evidence by telephone. Where evidence is taken from the applicant by video or telephone, if the applicant has a representative, that person may participate from the location of the applicant or the member.

6.3 Decisions regarding the appropriate venue or medium for the conduct of a hearing for an applicant who is in immigration detention should be made by the member taking into account advice from staff, consideration of the AAT's policies and all the circumstances of the case, including the following considerations:

(a) whether giving evidence and presenting arguments by video or telephone will provide the applicant a fair hearing, allow fair and effective questioning of the applicant, and enable any necessary assessment of the applicant's credibility

(b) the suitability of taking evidence by video or telephone where it may be necessary to put a large quantity of documents to the applicant

(c) the quality of video or telephone links

(d) the suitability of the room from which an applicant would take part in a hearing by video or telephone (for example, the room should be quiet, and for refugee hearings, private)

(e) the suitability of a location, including an immigration detention centre, for an in person hearing, including the security arrangements in place and particularly in the case of refugee hearings, the privacy of the room

(f) any security risk assessment or other advice provided to the AAT regarding the risks associated with the applicant

(g) any other information available regarding the applicant that may suggest a particular venue or medium is preferable

(h) the ability of the AAT to adequately address any risks posed by the applicant on AAT or other premises

(i) the nature and complexity of the case, including the need for timeliness

(j) the cost implications for the AAT.

7. Security arrangements for persons in detention

7.1 When considering the appropriate security arrangements required for a hearing, consideration should be given to the security risk assessment and any other relevant information, including the information provided about the behaviour leading to the level of risk assessment.

7.2 Where members have any concerns arising from the security risk assessment report, further advice regarding the risk posed by the applicant may be sought, including from the detention service provider, the Department of Home Affairs (Department), or the applicant's representative. Any concerns may also be discussed with the Senior Member, the District Registrar, and/or the Agency Security Adviser.

Hearings held on AAT premises

7.3 Special arrangements for hearings conducted in person on AAT premises may include:

(a) notifying the applicant that they may bring a friend or relative to sit in the hearing with them

(b) giving careful consideration to the selection of hearing attendant and interpreter

(c) holding a pre-hearing briefing with staff selected to provide support during the hearing

(d) requesting that detention service officers accompanying the applicant remain in the hearing room

(e) scheduling the hearing for a person in immigration detention in an appropriate hearing room at a non-peak time

(f) attempting to avoid multiple hearings involving applicants in detention at the same time

(g) placing a first aid officer on standby

(h) requesting that the hearing attendant remain in the hearing room for the duration of the hearing (noting that the hearing attendant cannot provide security services).

7.4 Members should consult with the detention service provider, their Senior Member, the Agency Security Adviser, and the District Registrar before scheduling a hearing for an applicant who is assessed as an 'extreme' risk on AAT premises.

7.5 The member should weigh up the need for persons to be in an environment where they are able to give evidence about sensitive personal matters or about events, which if disclosed could result in harm to the applicant or other persons, against any risk to the member, staff or the general public.

Hearings held offsite

7.6 The following direction is given for hearings where the applicant gives evidence at an offsite location (such as an immigration detention centre or third party videoconference facility) whether in person, by video, or by telephone:

(a) At least one detention service officer preferably should be present during the hearing, or keep the room under observation if a viewing panel is available.

(b) The immigration detention centre must be notified at least 48 hours prior to the hearing if the member wishes to have the detention service officer leave the room during the hearing. Where prior notice has not been given, the member should adjourn the hearing and discuss with immigration detention centre management (or the detention service officer and facility management if at a third party location). Such a discussion should never be held in the presence of the applicant.

(c) If the detention service officer is to leave the room during the hearing, risk mitigation arrangements should be taken including, possibly, observation by the detention services officer through a viewing panel, establishing mobile contact arrangements with detention service officers, or the AAT engaging a security guard who is not connected with the immigration detention centre.

(d) Those involved in the hearing, including any detention service officers, should be advised of the availability of duress alarms or any other local emergency arrangements.

(e) The security arrangements in the proposed venue should be considered and should ensure that there is capacity to respond to an emergency.

(f) It may also be appropriate to consider whether the venue provides sufficient space and separation for the parties, and in the case of extreme risk, whether seating is fixed or there are loose objects that should be removed from the room.

(g) Members should consult with the detention service provider, their Senior Member, the Agency Security Adviser, and the District Registrar before scheduling a hearing for an applicant who is assessed as an 'extreme' risk at another location.

8. Assessing criteria in dispute

Protection visa refusals

8.1 Generally, in reviewing a decision to refuse the grant of a protection visa, members should address only those elements of the criteria for a protection visa that are necessary to resolve the application for review.

Other decisions

8.2 As a general rule, where the Minister for Immigration (Minister) or delegate has made an adverse decision on particular criteria or issues, the AAT should restrict its review to those matters.

8.3 One exception is bridging visa (detention) cases, where the AAT generally deals with all issues to decide whether or not a visa can be granted.

9. Dealing with new protection claims or evidence

9.1 For the purposes of section 423A, when considering whether the AAT is satisfied that the applicant has a reasonable explanation of why the claim or evidence was not raised before, a 'reasonable explanation' may include, but is not limited to (Migration Amendment (Protection and Other Measures) Bill 2014 - Addendum to the Explanatory Memorandum p4):

(a) no reasonable opportunity to present the claim, e.g. interpreting or translating error made in the primary stage of the application

(b) a change in the country situation affecting human rights occurred after the primary decision was made

(c) new information relevant to the application became available, e.g. new documentary evidence of identity was forthcoming from the authorities in the home country

(d) a change in personal circumstances allowing presentation of new claims, e.g. a new relationship (spouse or child) with a person who has protection claims in their own right

(e) being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate persecution claims.

10. Failure by protection visa applicants to produce identity documents

10.1 The consequences of non-compliance with a request to produce identity documents under section 91W do not apply if the AAT is satisfied that the applicant has a reasonable explanation for not complying with the request or producing a bogus document, and the applicant either produces documentary evidence of identity, nationality, citizenship or has taken reasonable steps to do so.

10.2 'Reasonable explanation' may include the circumstances of some stateless people (Migration Amendment (Protection and Other Measures) Bill 2014 - Addendum to the Explanatory Memorandum p1).

10.3 'Reasonable steps' may include (Addendum p1):

(a) contacting family and friends in their home country to obtain existing documentary evidence

(b) obtaining documentary evidence of identity, nationality or citizenship from the authorities of their home country where the applicant is claiming harm from a non-State actor (for example, an organised criminal group)

(c) obtaining documentary evidence of identity, nationality or citizenship from a safe third country where they may have previously resided for a period of time.

10.4 The relevant factors to be considered when determining whether the applicant has met the 'reasonable steps' threshold include: the potential detriment to be caused to the applicant or another person in attempting to obtain the evidence; and undue financial burden to the applicant or another person (Addendum p1).

11. Extensions of time to prescribed periods – response to s 359/424 or s 359A/424A

11.1 If the member decides under subsection 359B(4)/424B(4) to extend the time for responding to a subsection 359(2)/424(2) request or a section 359A/424A invitation, the review applicant should be advised in writing of the extension (for the prescribed further period).

12. Adjourning the review when information is put orally under s 359AA/424AA

12.1 Sections 359AA and 424AA do not provide a minimum or maximum period for adjournment. In light of the requirement that the AAT act in a way that is fair and just, members should allow a minimum period that is reasonable in the circumstances of the particular case, bearing in mind that they first have to be of the view that the request for more time is reasonable.

12.2 In considering whether a request for additional time is reasonable, members should take into account a range of factors, including: the applicant's interests, capacity and particular circumstances; the nature and complexities of the case; whether the information that the applicant requests more time to comment on or respond to is information that he or she should have been prepared to deal with in the first place; whether or not the applicant has a representative or assistant; what additional time is sought; what difficulty there may be for the applicant in obtaining evidence or information to enable comment on or a response to the information; whether the comment or response is to be made orally or in writing; the particular circumstances of the case; and the requirement to act in a way that is fair and just.

12.3 If the AAT considers that it is not reasonable to give the applicant additional time to comment or respond, it should explain in its decision why an adjournment was not granted.

12.4 If additional time for comment or response is granted, the applicant may, at his or her option, choose to comment or respond orally or in writing. If the comment or response is to be given orally, a further hearing time will need to be arranged to receive the response. The applicant may indicate that he or she does not wish to be heard further but requires the additional time to provide further documents. If this is the case, the

AAT should still formally adjourn the review, and following the adjournment, should write to the applicant confirming arrangements for the provision of the applicant's comment or response.

13. Written submissions from the Secretary

13.1 Inviting the Secretary of the Department (Secretary) to make a written submission should be carefully considered by the presiding member. The Department takes such requests seriously and may invest substantial resources into developing and providing a formal response. It is desirable that any request to the Secretary be handled at senior level.

13.2 Circumstances where inviting a written submission may be considered include:

(a) where the possible waiver of the health criteria is being considered

(b) where the AAT wishes to invite the Department to comment on independent expert opinion about a particular issue

(c) where issues relating to character are being considered.

Inviting a written submission on health waiver consideration

13.3 When considering the possible exercise of a waiver of the health requirement under PIC 4007(2), the AAT may invite the Secretary to provide a written submission. It is recommended that the AAT consider inviting a submission in the following circumstances:

(a) where there is a significant increase in the cost estimate for health care and community services in the further Medical Officer of the Commonwealth (MOC) opinion obtained by the AAT from that in the MOC opinion considered by the delegate

(b) where significant further material in relation to the waiver which has not previously been considered by the Department is before the AAT

(c) where there is no material before the AAT that reflects the Department's original decision in relation to the exercise of the waiver

(d) where the visa application is for a subclass 846 (State/Territory Sponsored Regional Established Business in Australia), subclass 855 (Labour Agreement), subclass 856 (Employer Nomination Scheme) or subclass 857 (Regional Sponsored Migration Scheme) visa and it is possible to consult with a participating State or Territory on whether a health waiver should be exercised (i.e. a State or Territory specified by the Minister in writing which has agreed to health waiver arrangements being available).

14. Oral decisions

14.1 The AAT can make oral decisions and may provide oral or written reasons for the decision. Members are encouraged to make oral decisions and provide oral reasons whenever they are able to do so.

14.2 While there is no legislative requirement to do so, in all cases where the AAT makes an oral decision (whether the reasons are given orally or in writing), the AAT must

give a written record of the decision to both the review applicant and the Department on the day of the oral decision.

14.3 If a member makes an oral decision with oral reasons and the applicant makes a written request for the statement in writing within 14 days, the member must reduce the statement to writing and give it to the applicant and the Secretary within 14 days of receiving the request. The written statement must conform to the oral reasons but expression and readability can be improved on in the written version (e.g. adjusting grammar for clarity or removing unnecessary repetition, without changing the meaning).

14.4 If a member makes an oral decision with written reasons to follow, the written statement is to be given to the applicant and the Secretary within 14 days of the oral decision.

15. Statements of decisions and reasons

15.1 Written statements of decision and reasons should be of consistent format and style. A statement of decision and reasons should be easy to understand and written in a plain English style.

15.2 Decisions should be as concise as possible in addressing the legislative requirements for a statement of reasons. The findings on material questions of fact and references to the evidence (including to any oral evidence) on which such findings are based should be succinctly stated. It is generally unnecessary and undesirable to copy verbatim into decisions material that exists on AAT or Department files.

Restricting publication

15.3 The AAT may give written directions restricting the publication of information if the member considers it to be in the public interest to do so (sections 378 and 440). In considering such a direction, members should have regard to any views expressed by persons involved in the case, and any case law or other guidance to determine whether it is in the public interest to restrict publication.

15.4 The fact that a case involves personal information may not alone be a basis for restricting publication in the public interest. There would generally need to be some concern that some degree of harm or prejudice may result. Examples may include cases involving persons who have applied for protection visas, cases involving allegations of children at risk or domestic violence, cases involving persons who are HIV positive, publication of medical details, or personal identification details which may lead to identity fraud.

15.5 Protection visa decisions selected for publication are edited to remove identifying information, and there is no need for members to give directions to restrict such information in these decisions. For other decisions which identify a person as a past or current protection visa applicant, the member should consider whether it is in the public interest to issue a direction under section 378 that information or evidence that would identify the person, or any relative or dependant of that person is not to be published.

Sensitive and other personal information

15.6 Members are required always to consider carefully the necessity of including detailed personal information in their decisions. Members are not to include unique personal identifiers in written reasons for decisions unless the information is essential to support the decision. In many cases, there may be no need to specifically use unique personal identifiers such as: the names of relatives, dates of birth, anniversary dates, the names of schools children attend, bank or loan account numbers, tax file numbers, passport numbers, licence numbers, motor vehicle registration numbers, email addresses, telephone numbers, employers, the particular medical conditions that resulted in a binding adverse health assessment, or the full addresses of persons involved. There may be no need to specify the visa categories of relatives, especially if they are refugee or humanitarian visas.

15.7 The following is to be used by members as a guide to removing or anonymising personal information in reasons for a decision:

(a) *Names* – The names of spouses, partners, children and other family members should only be used if necessary to the decision. It may be sufficient to state: 'Ms Singh travelled with her partner, children and mother'.

(b) *Protection visa applications* – Reference to refugee claims or protection visa applications or grants should only be made if this information is of a critical nature to the decision. This includes reference to residents in refugee camps. It may be sufficient to state: 'The applicant's fiancé arrived in Australia on a permanent visa in 2012'.

(c) *Residential addresses and telephone contact details* – The full current or past residential address of a party or witness should be omitted if it has no relevance to the case. In many matters before the AAT where the address is of relevance, it may be sufficient to use only the town or suburb. For example: 'In 2012, Mr Singh conducted his business transactions while living in premises located in Shepparton'. Similarly, telephone numbers, email addresses and facsimile numbers should not be used or, if necessary, partially obscured. For example: '9xxx xx12'.

(d) *Dates and anniversaries* – Dates of birth should not be set out in full. It will usually be sufficient to state, for example, that 'the applicant was born in 2003'. Similarly, refer only to the year for anniversary dates, for example, 'the parties married in 1999'.

(e) *Unique numbers* – Unique numbers such as bank account numbers, loan accounts, credit cards, licences, passports, Medicare cards, tax file numbers, vehicle registration numbers or student identification numbers should not be set out in full in any circumstances. If it is necessary for the purposes of the decision to identify, for example, a motor vehicle registration number, it may be sufficient to obscure some of the numbers as follows: 'AXX 6XX' or 'VX XX XXX'.

(f) *Other sensitive information* – Particular care should be taken also in relation to:

- information of a sensitive nature, such as information about sexuality, mental or physical health (for example, reference to issues such as diagnosed depression, dementia, suicide, HIV/AIDS, addictions, cancer, tuberculosis, fertility treatment, abortion or miscarriage should not be included where it is

not essential. Medical details of a less personal nature can be included, for example, if the applicant suffered a broken limb)

- information relating to children
- information concerning domestic or family violence
- details of the criminal history of an applicant or their relative.

16. Referrals for ministerial intervention

16.1 Members should have regard to the ministerial guidelines when considering whether or not a case should be drawn to the attention of the Minister. When a member considers that a case should be brought to the Minister's attention, the member may refer the case to the Department. The member's views will be brought to the Minister's attention by the Department under the guidelines.

16.2 The member may refer a case to the Department on the basis that the member considers that there are facts or circumstances warranting further investigation by the Department before referral to the Minister.

16.3 The circumstances which the member considers warrant the case being brought to the Minister's attention should be set out in the member's statement of decision and reasons and may also be set out in the referral letter to the Department.

16.4 If an applicant requests a member to refer a case to the Department and the member decides not to do so, the member should refer to the request in the statement of decision and reasons and note that the applicant may make a request directly to the Minister.

16.5 If the AAT has no jurisdiction to conduct a review, the Minister has no power under section 351 or section 417 to intervene. In such circumstances, the case should not be referred to the Department.

Applications lodged to facilitate a request to the Minister

16.6 In cases where an applicant concedes they do not meet the criteria for a visa and indicates that the purpose of the application is to seek referral to the Minister, the applicant should be asked whether they consent to the matter being determined on the papers in light of any written evidence or submissions the applicant wishes to make. The member will then assess the available material in deciding whether to refer a matter to the Minister.

16.7 If the applicant does not consent to the matter being determined on the papers, there being no need for oral evidence in relation to the visa criteria, the member will determine whether to receive oral evidence at a hearing. If the member determines not to take oral evidence, the hearing may be limited to oral submissions only.

Justice David Thomas
President

1 August 2018