



AN UNFAIR AND DANGEROUS PROCESS:

**A LEGAL ANALYSIS OF THE MINISTERIAL
DEADLINE TO APPLY FOR ASYLUM AND
USE OF EXECUTIVE POWER IN THE
LEGACY CASELOAD**

AN ACADEMICS FOR REFUGEES REPORT

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ACRONYMS

AAT	Administrative Appeals Tribunal
DIBP	Department of Immigration and Border Protection
IAA	Immigration Assessment Authority
PAIS	Primary Application Information Service
RACS	Refugee Advice and Casework Service (Sydney)
RSD	Refugee status determination
SHEV	Safe Haven Enterprise Visa
TPV	Temporary Protection Visa
UMA	Unauthorised Maritime Arrival
UNHCR	United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

In May 2017, the Immigration Minister Peter Dutton announced that approximately 30,500 asylum seekers living in the Australian community had until 1 October 2017 – a period of roughly four months – to lodge their full applications for asylum to the Department of Immigration and Border Protection (DIBP). He said that any person who failed to lodge their application for asylum before the non-negotiable deadline would be considered to have forfeited their asylum claim. As Minister Dutton put it, anyone who failed to file their asylum application by 1 October 2017 would be 'subject to removal from Australia, prohibited from applying for any Australian visa, cut from government income support and banned from re-entering Australia'.¹

This report demonstrates the **manifest unfairness** of the Ministerial deadline to apply for asylum for people subject to the Fast Track Assessment process and its ongoing dangerous consequences. It represents a key aspect in the ongoing punitive treatment of asylum seekers who, by the arbitrary nature of the dates of their arrival, happen to belong to what is called the 'Legacy Caseload'. Specifically, this report shows that the imposition of the deadline is **unfair and dangerous** for five key reasons:

1. The imposition of the deadline was **discriminatory** in nature and constituted an arbitrary use of executive power. It only applied to people arriving in Australia by boat without authorisation between August 2012 and January 2014 and unfairly characterised this group of asylum seekers as illegitimate.
2. The imposition of the deadline was **unnecessary and unjustified**. The Government's claim that asylum seekers have 'refused' to apply for protection prior to the imposition of the deadline was **inaccurate and misleading**. Such a characterisation intentionally omitted details of a Government-imposed prohibition on certain asylum applications being made for a period of more than two years, which was only fully lifted for all affected asylum seekers at the end of 2016.
3. The operation of the arbitrary deadline denies some asylum seekers the ability to have their claims assessed at all. **This directly breaches international human rights law** and will endanger the lives of those seeking protection.

4. The Government has denied asylum seekers forced to meet deadline the opportunity to present the fullest and most accurate version of their claim, as a result of the **failure to provide the necessary legal and interpreting assistance**.
5. The deadline further **exacerbates the discriminatory** effects of the Fast Track Assessment process, which subjects an arbitrarily-determined group of asylum seekers to a **separate and inferior decision-making process**. These asylum seekers will also have limited or no rights to appeal solely on the basis of their mode of arrival in Australia.

Critically, the enforcement of the deadline will have a severe impact on some of the most vulnerable members of the so-called 'Legacy Caseload': those who are not connected with support and legal services, who suffer from ongoing trauma or mental illness, or who, due to language and other barriers, have not been able to file a claim for protection.

This report finds that **the imposition and operation of the deadline breaches fundamental obligations owed by Australia under international law, including the prohibition on sending people back to places of persecution (the norm of *non-refoulement*), the right to equality before the law, and the right to a fair hearing.**

Firstly, the 'lodge or leave' terms of the deadline, such that those falling foul of it may be deported without any determination of their protection claim, breaches the most fundamental obligation owed by Australia under international refugee law: the prohibition on sending people back to places where they may face persecution. The entire Refugee Convention turns on respect for this principle. The deadline should not be enforced in this manner against any asylum seeker who did not file before 1 October 2017.

Secondly, the report finds that the legal issues and harms associated with the deadline are **ongoing**. These harms will carry through to the assessment and determination of the asylum claims made by members of the Legacy Caseload. The effects of the deadline going forward will be exacerbated by the systemic deficiencies of the Fast Track Assessment process.

Finally, this report concludes that there are **grave concerns about the validity and correctness** of any negative refugee status determination (RSD) decisions made under the Fast Track Assessment process. In particular, this process may be in breach of some of the most fundamental requirements for procedural fairness, including by denying people the right to a hearing.

This report strongly recommends that the Government must implement the following actions:

1. Allow all members of the Legacy Caseload to lodge an application for asylum. The deadline and its consequences must not be enforced against any asylum seeker who was unable to lodge their application by 1 October.
2. Allow all members of this group to access full merits review of Departmental decisions before the Administrative Appeals Tribunal and reinstate a single refugee status determination process. This is necessary to remove discrimination and ensure the fair processing of claims made by members of the Legacy Caseload.
3. Ensure all asylum seekers have access to adequate resources and facilities to present their claims to protection, including providing Government-funded legal assistance and interpreting assistance.
4. Uphold Australia's international legal obligations, including the prohibition on *refoulement*, and key international human rights principles as they apply to the refugee status determination process.

I. INTRODUCTION

In May 2017, the Immigration Minister Peter Dutton announced that approximately 30,500 asylum seekers living in the Australian community had until 1 October 2017 – a period of roughly four months – to lodge their full applications for asylum to the Department of Immigration and Border Protection (DIBP), and that any person who failed to lodge before the non-negotiable deadline would be considered to have forfeited their claim. As Minister Dutton put it, anyone who failed to lodge their application by the 1 October deadline would be 'subject to removal from Australia, prohibited from applying for any Australian visa, cut from government income support and banned from re-entering Australia'.² As part of this announcement Minister Dutton stated that the 'game is up' for 'fake refugees', who were costing Australian tax payers 'hundreds of millions of dollars a year'.³ Further, he announced that those who fail to meet the deadline would be immediately denied both income support and rental assistance, and only have access to Medicare and a right to work whilst making arrangements to depart.⁴

In stating that any person who fails to lodge before the deadline will be considered to have forfeited their application, the Government has presented the failure to apply by 1 October 2017 as determinative of an applicant's substantive claim to asylum. In the Government's FAQ to asylum seekers who are affected by the deadline, the Department of Immigration and Border Protection sets out that:

*If you do not lodge, you are not an asylum seeker and must return home. As you have had a considerable amount of time to apply, if you choose not to apply, you are not seeking protection in Australia.*⁵

The imposition of a non-negotiable, non-discretionary and blanket deadline to a cohort of asylum seekers – whereby the failure to meet the deadline extinguishes any form of claim – is an exceptionally unfair and dangerous measure. The operation of the deadline, such that those who fail to meet it are deemed to have forfeited their claim, breaches the most fundamental protection of the Refugee Convention: that no one who has a valid claim may be returned to a situation where they face serious harm.⁶ In order to uphold the principle of *non-refoulement*, all claims to asylum must be assessed by a competent authority. The imposition and operation of the deadline means that asylum seekers who have *not* met the deadline will be at risk of being sent to a place where they face persecution. Asylum seekers who managed to meet the deadline may have been compelled to submit applications

without the benefit of legal assistance, or applications which were incomplete or incorrect. Not-for-profit refugee sector organisations urgently upscaled their operations to provide legal help for the clients who otherwise had no access to Government-funded advice. Remarkably, these organisations were able to advise their clients in the context of severe time and resource constraints, as addressed in Section VI. Challenges to filing an application on time for all applicants were compounded by limited or inadequate access to interpretation assistance.

As a result, many asylum seekers affected by the deadline have been placed in the most invidious of positions: they were required to file asylum applications that either may not accurately reflect their claim (due to the limited legal resources and interpreting support) or may not be the fullest and most accurate version of their claims. These applications may form the basis for a refusal of protection. Alternatively, asylum seekers who were not able to file their asylum applications by the deadline may be deemed to have forfeited the need for protection all together.

The Government's assertion that asylum seekers have 'refused' to apply for protection is misleading. It intentionally omits details of the Government-imposed prohibition on applications, which was only fully lifted at the end of 2016. This means that the deadline applies to a group of asylum seekers whom the Government, through the use of executive power, has systematically prohibited from lodging applications for protection.

In responding to this deadline, refugee advocates and community legal centres have worked tirelessly to ensure their clients' claims are filed and raised money to increase their capacity to assist their clients. The Government's deadline was announced in spite of the fact that the majority of the asylum seekers affected no longer have access to Government-funded legal assistance; that many of them were known to be on waiting lists for legal assistance; and in spite of the Government's knowledge that existing community legal services are at, or beyond, capacity. Critically, the deadline will have a severe impact on some of the most vulnerable members of the so-called 'Legacy Caseload': those who are not connected with support and legal services, who suffer from ongoing trauma or mental illness, or who, due to language and other barriers, have not been able to file a claim for protection. The deadline thus represents a key aspect in the ongoing punitive treatment of asylum seekers in Australia, who happen to belong to the Legacy Caseload as a result of the arbitrary dates and mode of their arrival.

II. TO WHOM DID THE DEADLINE APPLY?

As a matter of policy, the deadline applied to asylum seekers who arrived by boat without a valid visa on or after 13 August 2012 but before 1 January 2014, and were not transferred to Nauru or Papua New Guinea under Australia's offshore processing arrangements.⁷ These asylum seekers are also categorised as 'unauthorised maritime arrivals' or UMAs and are subject to the Fast Track Assessment process under the *Migration Act*.⁸ The Government has asserted that in creating the additional category of 'fast track applicant', its aim was to 'include non-citizens who arrived in Australia unauthorised, circumventing regular, lawful migration channels.'⁹

Asylum seekers subject to this definition comprise the so-called 'Legacy Caseload'. This group of people are described by the Coalition Government as representing 'Labor's backlog' of asylum seekers who arrived by boat and who were not sent to Nauru or Papua New Guinea.¹⁰ The term 'Labor's backlog', though, is inaccurate. The arbitrary, stipulated timeframe includes those arriving by boat after Coalition Government was formed in September 2013.¹¹ In announcing the deadline itself, Minister Dutton nonetheless characterised the group as consisting of asylum seekers who came to Australia 'when Labor lost control of our borders'.¹² The discriminatory treatment of this group of asylum seekers has been the basis of a number of policy initiatives since at least 2012, including under Labor's No Advantage policy.

Approximately 30,500 asylum seekers form part of this Legacy Caseload. This group consists of people from a range of countries including Iran (32%), Sri Lanka (19%), and Afghanistan (13%). It also includes approximately 2,500 people who are considered stateless, many of which are likely to be Rohingya people fleeing persecution in Myanmar (Burma).¹³ Afghanistan and Myanmar in particular are considered to be 'major source countries of refugees' by the UNHCR.¹⁴

At the time of the announcement of the deadline in May 2017, approximately 7,500 people were yet to apply for asylum and 23,000 asylum seekers had already lodged their claims.¹⁵ Four days before the deadline fell, the Government reported that 531 people had not yet applied for a visa.¹⁶

On 12 October 2017, Minister Dutton stated that 71 people within the Legacy Caseload had not submitted their asylum applications by the deadline and that these people would be automatically cut off from receiving income support. The

DIBP website now advises asylum seekers who were subject to the deadline that if they did not lodge an application by the deadline, they are 'expected to depart Australia' and are 'barred from applying for any type of visa in Australia'. Otherwise, it states, 'you risk detention and removal from Australia'.¹⁷

Many of these asylum seekers have been living in the community, albeit without a secure status, for up to five years. They have managed to make a home in Australia and are part of their local communities.

III. SIGNIFICANT PRIOR OPPORTUNITY TO LODGE AN APPLICATION?

A key justification of the deadline was that affected asylum seekers had been given 'significant opportunity to lodge an application' for asylum and had failed or refused to do so.¹⁸ In presenting affected asylum seekers as having had 'significant opportunity' to apply for asylum since their arrival, the Government omitted a key part of this story.

For much of the period in question, asylum seekers belonging to the Legacy Caseload were subject to a Government-imposed statutory restriction, which prohibited them from filing an application for protection under any circumstances. **Asylum seekers subject to the statutory prohibition waited for extended periods to be allowed to lodge an application.** For some affected individuals, this included waiting for up to 4 years to be permitted to apply for asylum. The Government prevented some applicants from filing their applications until late 2016, mere months before the deadline was announced.

In order to lodge an application for asylum, those defined as UMAs under the Migration Act were required to wait until the Minister personally lifted a statutory bar and provided individual applicants with written permission to apply for a visa.¹⁹ This permission could only be granted at the Minister's discretion. After the Minister decided to 'lift the bar' for an individual, the Minister then informed that individual via letter that they were 'invited' to apply for either a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV). They could not apply for any other visa. The letter stated that the asylum seeker was 'requested' to lodge their completed application within 28 days of the date that they are assumed to have received the letter.²⁰ In practice, asylum seekers did not require an extension from the Department of this timeframe if they submitted their application within 60 days, and applications submitted beyond this time were still deemed to be valid.

Many applicants were not invited to apply before 2016, which means that members of the Legacy Caseload have been directly prevented from filing their applications by successive Labor and Coalition Immigration Ministers. Indeed, these asylum seekers were initially prevented from lodging their claims from August 2012 under the Labor Government's 'No Advantage' policy,

which sought to ensure that onshore maritime arrivals were not advantaged over those asylum seekers who had not sought to arrive in Australia by boat. As the Refugee Council of Australia has documented:

Most asylum seekers who came to Australia by boat after 13 August 2012 waited for well over three years for the opportunity to lodge a protection application. This is because from August 2012 until the year 2015, refugee status determination (RSD) was suspended for this group.²¹

Following the initial three year suspension from 2012 of all refugee status determinations for the group to whom the deadline applies, the Government did begin 'lifting the bar' and allowing applications in July 2015. By February 2016, the Minister had lifted the bar for 12,155 people, though only 8,105 of these people had been sent the required 'invitation-to-apply' letters.²² The Department did not finish 'lifting the bar' for all people in the Legacy Caseload group until late 2016.²³

The imposition of the 1 October 2017 deadline in May 2017 changed this practice of lodging applications for asylum, and required all applications to be lodged by the deadline. However, affected asylum seekers were not given access to Government -funded legal and interpreting assistance that could have enabled them to meet the pressing new deadline. In fact, in recent years the Government has actively abolished funding to lawyers and community legal centres assisting asylum seekers who have arrived in Australia by boat. As will be demonstrated in Section VI of this report, this has made it a near-impossible task for asylum seekers to meet the requirements of this arbitrary change in Government policy.

IV. PROCEDURAL FAIRNESS: THE BARE MINIMUMS

Australian law recognises that in order for a decision to be fair and correct, a person must be afforded certain procedural rights. This is called procedural fairness or 'natural justice'. Procedural fairness is concerned with the quality of the process through which decisions are made. The rules of procedural fairness seek to guarantee fairness and impartiality in government action and to ensure that people are able to 'participate in the making of decisions that affect them'.²⁴ Ensuring the correctness of a decision is all the more important in the case of asylum seekers, where the stakes are high and the consequences of an inaccurate decision involve sending a person back to a place of persecution.

The UNHCR sets out that 'fair and efficient procedures are an essential element in the full and inclusive application of the [Refugee] Convention'.²⁵ Principles, rules or standards governing the structure or process of refugee status determination (RSD) are absent from the 1951 Refugees Convention and the 1967 Protocol.²⁶ However, in order to implement and apply the Refugees Convention's core provisions, each state must have a mechanism to determine refugee status. The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* is the key international source of guidance on RSD procedure, and on the minimum standards under international refugee law for assessing refugee claims.

Recognising that RSD procedures will vary significantly from state to state, the *UNHCR Handbook* stipulates the 'basic requirements', which each signatory state's refugee status determination procedures must meet to ensure fair process and outcomes.²⁷ A number of these requirements are relevant to the imposition of the deadline, including:

- That an applicant's claim is assessed by a competent official who is required to act in accordance with the relevant international law and the principle of non-refoulement;
- That there is a clearly identified, and where possible, central authority with responsibility for determining refugee status in the first instance;
- That the applicant receives 'the necessary guidance as to the procedure to be followed' and the applicant be given 'necessary facilities' including access to interpreting services, to submit his/her case to the authorities; and
- That unsuccessful applicants should be given the opportunity to appeal in accordance with the prevailing system.²⁸

These requirements are to be interpreted as minimum standards. They preserve an extremely broad and open discretion for state signatories to the Convention and do not enshrine strict or high standards of procedural fairness. As outlined in the next section, the process and the deadline that applies to the 'Legacy Caseload' breached even these minimum standards.

Australian law enshrines the right to procedural fairness in relation to government action and decision-making at a high standard. As Matthew Groves explains in regards to Australian domestic law:

[t]he scope of the duty to observe the requirements of procedural fairness is now extremely wide. It is well-settled that the duty extends to virtually every exercise of a statutory power which might have an adverse effect on an individual unless there is a very clear legislative indication to the contrary.²⁹

In the case of Australia, the right to procedural fairness attaches to any decision where an individual's 'rights, interests or legitimate expectations' are affected and there is no express statutory intention to exclude the right to a procedurally fair determination.³⁰ The Australian standard requires that the applicant is afforded a fair hearing, and that that hearing is not affected by actual or apprehended bias.³¹ What a fair hearing requires depends on the statutory context and nature of decision, but an applicant must have adequate notice that the decision is going to be made; disclosure of the case against her or him; and the opportunity to present her or his case.³² Although there is flexibility as to what fairness will require in any circumstances, fundamentally the law requires the avoidance of practical injustice. As Gleeson CJ noted in *Re Minister for Immigration and Multicultural and Indigenous Affairs, Ex Parte Lam*:

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.³³

As the next section outlines, the 'practical injustice' of the deadline is the extent to which it removes the opportunity to present a case for those who did not meet the deadline; and for those who did meet the deadline, its negative effect on an asylum-seeker's ability to present her or his case, and therefore the opportunity to have his or her claim fairly assessed under the Fast Track Assessment process.

V. THE PROCEDURAL UNFAIRNESS OF THE DEADLINE

The serious injustice produced by the deadline is two-fold. Firstly, the finality of the deadline means that certain asylum seekers may be denied any form of refugee status determination and potentially returned to a country of origin in breach of the Refugees Convention guarantee of non-return to circumstances of danger or harm. Secondly, those who applied in compliance with the deadline may have done so in circumstances that did not afford them procedural fairness. They may not have been guaranteed the bare minimum, international law standard of 'guidance as to the procedure to be followed' since asylum seekers affected by the deadline may not have been guaranteed legal or other

necessary assistance to understand the process, adequate access to interpreting services, or sufficient time to present their claim in full to their legal advisers or in their application.

These issues are severely compounded by the fact that these asylum seekers are subject to the 'Fast Track Assessment Process'. The problems associated with the Fast Track Assessment process and how this process interacts with the October deadline are outlined in Sections VII and VIII.

UNHCR ON TIME LIMITS FOR APPLICATIONS

"A fundamental safeguard in some systems, which should, in UNHCR's view, be promoted for all, is the recognition that an asylum-seeker's failure to submit a request within a certain time limit or the non-fulfilment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect its credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles."³⁴

"Formal requirements should not pose an obstacle to the exercise of the right to seek asylum. In particular, an applicant's failure to submit an asylum claim within a certain time-limit should not of itself lead to the claim being excluded from consideration. Legislation which does not impose time-limits for the submission of asylum applications, as is the case in Japan, is clearly best practice."³⁵

VI. RESOURCES AND PROCEDURAL FAIRNESS

International law provides that all people 'shall be equal before the courts and tribunals'.³⁶ The UN Human Rights Council has held that this obliges states to ensure that individuals have 'equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination'.³⁷ For example, the Inter-American Commission for Human Rights has recognised that states are required to provide additional measures to ensure an individual has 'due process before the law'.³⁸ This guarantee is particularly important in the case of undocumented migrants and asylum seekers, who may have a limited knowledge of English and few financial resources. The following section examines two measures of particular importance to ensuring equal access and due process before the law: the provision of legal assistance and provision of interpreting assistance.

Access to Legal Assistance:

International law expressly recognises the relationship between the right to equality before the law and the provision of legal representation and assistance, particularly in the context of a criminal trial.³⁹ The UN Human Rights Council has noted that the 'availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'.⁴⁰ States are thus encouraged – and at times obliged – to provide free legal assistance for individuals in non-criminal trials without 'sufficient means to pay for it' themselves.

The UNHCR has emphasised the importance of access to free legal assistance in the case of asylum seekers:

Asylum-seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counselor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are properly identified. The efficiency of first instance procedures is thereby improved. **In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures. It is also important to guarantee free legal assistance and representation in first instance procedures and against negative decisions.**⁴¹

Limited or no government-funded legal assistance has been made available to asylum seekers affected by the deadline to assist them in making their claims and completing, at a minimum, the 33 page form (Form 866) required to apply for either a TPV or SHEV. In practice, the final written application is much longer than 33 pages and also requires the applicant to make a separate, detailed statement.

The Department informed asylum seekers affected by the deadline that they were entitled to engage the services of a registered migration agent but that applicants 'will have to pay for this yourself'.⁴² Only a small portion of asylum seekers are eligible to receive legal assistance under the government-funded scheme, the Primary Application Information Service (PAIS). In order to qualify, an asylum seeker must be either an unaccompanied minor or a person deemed by the Department to be 'exceptionally vulnerable'. Only a little over one-tenth - approximately 3,500 people out of the total 30,500 – of asylum seekers affected by the deadline were offered legal assistance funded through the PAIS between 2015 and March 2017.⁴³ This PAIS assistance is not available for appeals of an original decision to the Immigration Assessment Authority (IAA).

This lack of government-funded legal assistance has meant that the majority – almost nine-tenths – of asylum seekers affected by the deadline had to rely upon the free legal services offered by community legal centres. These legal centres receive no funding from the Commonwealth Government for assisting asylum seekers, except for the small portion of asylum seekers funded under the PAIS.⁴⁴ Instead, these centres operate largely through philanthropic donations and mobilising volunteers, including lawyers offering pro bono services. Due to such finite resources, community legal centres can only assist a limited number of asylum seekers at any given time. This resulted in long waiting lists of asylum seekers affected by the deadline requesting advice from community legal centres. For example, in October 2016, RACS estimated that it had a 12-month wait list for clients wanting to access their service.⁴⁵

Peak community legal centres offering free legal assistance to asylum seekers affected by the deadline have expressed serious and ongoing concerns about their ability to meet the unprecedented demand for their services.

At the time of the Minister Dutton's announcement of the 1 October 2017 deadline, many of the approximately 7,500 asylum seekers yet to file their applications seeking

asylum were on waiting lists for legal assistance from community legal centres. This fact further demonstrates the inaccuracy of Minister Dutton's characterisation of these asylum seekers as 'refusing' to submit their claims up until that time. Moreover, the government has dismissed concerns about the lack of available legal assistance on two bases: first, the remaining asylum seekers do not require legal assistance to lodge their claims; and second, that the government has provided Protection Application Information and Guides in multiple languages on their website. Such a response is unsatisfactory and demonstrates a disregard for the minimum standards stipulated by the UNHCR.

The unfairness of the lack of government-funded legal assistance is compounded by the non-discretionary operation of the deadline. The Government announcement and official FAQs for applicants made clear that an inability to access legal assistance did not constitute grounds for an extension of the deadline. Under the headings 'My migration agent has said they will not be able to help me until after 1 October' and 'I can't get to a pro-bono (free) migration agent', the DIBP FAQ document stated that 'There are no grounds to provide an extension' and 'You must still lodge before 1 October 2017'.⁴⁶ The imposition of a non-discretionary deadline makes it highly likely that some asylum seekers simply were not able to access legal assistance prior to submitting their claims. This is in addition to the 71 asylum seekers who did not submit a claim before 1 October 2017.⁴⁷

UNHCR ON LEGAL ASSISTANCE

At all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel. Where free legal aid is available, asylum-seekers should have access to it in case of need.⁴⁸

Interpreting Assistance:

It is clear that the above UNHCR Guidelines provide that an applicant should be given 'necessary facilities' including access to interpreting services, to submit his/her case to the authorities. The UNHCR's Procedural Standards for Refugee Status Determination under UNHCR's Mandate also state that an asylum seeker 'should have access to the services of trained and qualified interpreters at all stages

of the RSD process'.⁴⁹ This minimum standard reflects the importance of ensuring that a person's claim is translated in an accurate, professional and impartial manner.

Interpreting assistance is essential to guaranteeing a person's right to be heard and to equal access to a court. The UN Human Rights Council has recognised that ensuring an individual's right to equal access to a court, as enshrined in article 14 of the ICCPR, may in exceptional circumstances require states to provide the free assistance of an interpreter to 'an indigent party who could not participate in the proceedings on equal terms'. Without interpreting services, it can be difficult for asylum seekers who may have with limited or no knowledge of English to ensure that their written claim is a factually accurate version of their claim to asylum. Access to free professional interpreting assistance thus provides a foundation for a fair hearing and affects the quality of the final decision.

Asylum seekers subject to the Fast Track Assessment process and deadline are required to complete their claims in English and provide certified English translations of any documents in support of their claims.⁵⁰ If they fail to complete their applications in English, the application will be invalid. While asylum seekers who are subject to the deadline were told that they may engage the services of a translator to assist them in completing their applications, the government initially did not provide them with any free interpreting assistance.

Presently, the Australian government Translating and Interpreting Service (TIS) offers fee-for-service assistance for people who do not speak English and charges \$110 for one hour of standard telephone interpreting.⁵¹ This cost is prohibitive for asylum seekers with limited financial resources, who were affected by the deadline and were not granted adequate interpreting assistance. **As a result, the imposition to the 1 October 2017 deadline has meant that these asylum seekers may not have been able to complete the required forms at all; or may have submitted applications that are incomplete, incorrect or do not provide a clear or full account of their claims to protection.**

VII. WHAT IS THE FAST TRACK ASSESSMENT PROCESS?

The Fast Track Assessment process was first introduced in Australia by the Coalition government in December 2014.⁵² It permits the Minister of Immigration to allow an asylum seeker to apply for one of two temporary protection visas if the Minister thinks it is in the 'public interest' to do so.⁵³ These visas are either a Temporary Protection Visa (TPV) (class 866) or a Safe Haven Enterprise Visa (SHEV) (class 790). To apply for either a TPV or a SHEV, an asylum seeker must lodge an application that comprises of a minimum of 33 pages, including 184 questions, alongside the requirement of a detailed written statement, which is the basis for assessing each asylum seeker's claim.⁵⁴ The Fast Track Assessment process created a new, separate and inferior decision-making process for asylum seekers who arrived without authorisation by boat. For most people subject to the Fast Track Assessment process, this process consists of an initial decision by the Department, which, if negative, may be reviewed by a newly-created authority, the Immigration Assessment Authority (IAA), which sits within the Australian Administrative Tribunal (AAT). Yet, unlike the AAT, the IAA only conducts 'on the papers' merits review, meaning that a person will not be called for another interview or present his or her claim in person. The IAA also has less independence than other divisions in the AAT, as IAA members are appointed as public servants rather than as statutory decision-makers and are thus at greater risk of political interference.⁵⁵

Asylum seekers subject to the Fast Track Assessment process do not have an automatic right to review by the IAA. It is the Department that determines and automatically refers applications for review to the IAA. Some people – deemed 'excluded fast track review applicants' – are prohibited from having their case reviewed by the IAA. This includes cases where, for example, the Department has decided that a person's claim is 'manifestly unfounded' or that they relied on 'bogus documents' in their original claim.⁵⁶ In addition, the Minister has unprecedented power to intervene in the process and to 'correct' a decision of

the Department if the Minister deems the original decision to be 'contrary to the national interests'. These Ministerial decisions, issued as a 'conclusive certificate', are not subject to review.⁵⁷ Under the Fast Track Assessment process, then, it is possible for a person's future to rest entirely with a single decision-maker.⁵⁸ As this report illustrates, the exercise of such a high degree of non-reviewable power, especially for applicants affected by the deadline, is dangerous and unfair.

International human rights law does not permit policies that are deliberately discriminatory either in their nature or in their effect. The Fast Track Application process is discriminatory in that it subjects a select group of asylum seekers to an expedited and inferior decision-making process with limited review, purely on the basis of their mode of arrival in Australia.⁵⁹ It also operates retrospectively, applying to people who arrived in Australia prior to the establishment of the Fast Track Application process itself.

VIII. COMPOUNDING UNFAIRNESS: THE EFFECTS OF THE FAST TRACK ASSESSMENT PROCESS AND THE IMMIGRATION ASSESSMENT AUTHORITY (IAA)

In explaining the rationale for the introduction of the Fast Track Assessment process reforms, then Immigration Minister Scott Morrison stated:

The government is of the view that a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia's protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. **It limits the government's capacity to address and remove those found to have unmeritorious claims quickly ... The government has no truck with people who want to game the system. A new approach is warranted in the Australian context.** The fast-track assessment process ... will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority—to be known as the IAA.⁶⁰

Yet, around the time of the introduction of the Fast Track Assessment process, the Parliamentary Joint Committee on Human Rights noted that while 'administratively efficient processes are generally desirable, it is unclear whether the ... fast track process will ensure that genuine claims for protection are identified and, in the case of the fast-track review process, that it is capable of ensuring that the true and correct decision is arrived at'.⁶¹ This is of particular concern given that an expedited process with only limited avenues for review heightens the risk of Australia returning a person to a place of persecution and the 'irreversible nature of the harm that may result'.⁶²

Under all asylum decision-making processes, the accuracy and detail in original applications are of great importance, since each refugee's claim is judged against the criteria of consistency and consistency is tested against the applicant's original claim and any new or additional claims submitted by an applicant on review. **Under the Fast Track Assessment process, there is significantly more pressure on applicants to articulate the fullest and most accurate version of the claim in the first instance, since applicants no longer have access to full merits review of the Department's original decision.** New information

or additional details in a claim cannot be admitted to the IAA unless there are exceptional circumstances, and the IAA is satisfied that the new information was not known to the applicant or could not have been provided to the Department at the time of the applicant's original hearing.⁶³ In heightening the pressure on asylum seekers to complete their applications by the 1 October 2017 at all costs, the imposition of the 1 October 2017 deadline on asylum seekers subject to the Fast Track Application process may exacerbate the discriminatory effects of the IAA's inferior review mechanisms when compared with the usual asylum decision-making review process conducted by the AAT.

In practice, the IAA has overwhelmingly affirmed Departmental decisions. As of 31 July 2017, the IAA had made 1,604 decisions, 82% of which affirmed the initial decision. In comparison, approximately 51% of decisions by the former MRT/RRT of non-fast track applicant decisions were affirmed.⁶⁴ This significant difference indicates that the different nature of the two decision-making processes substantially affects the outcome of decisions. In practice, a less robust merits review process is likely to give rise to applicants seeking increased judicial review in superior courts. This has been the case in the UK and has actually increased the length and cost of legal processes, rather than making them more efficient.

These statistics confirm earlier concerns of legal experts that the IAA process is 'dangerous, unnecessary and undesirable'.⁶⁵ As an ANU Migration Law Program Senate Submission notes, the 'diminution and/or removal of merits review processes ... increases the risk of inaccurate decision-making in relation to the protection claims of "asylum legacy caseload" applicants, and thereby increases the potential for the refolement of refugees to a place of persecution'.⁶⁶ One key limitation of the IAA 'on the paper' process is that it prevents a decision-maker from re-examining a person's credibility and thus the IAA defers heavily to negative credibility assessments made by the Department. This strong deference to the Department impinges upon the independence of the IAA review process and significantly increases the likelihood of errors in decision-making.

The Government's justification for these changes is that the new process will 'discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims'.⁶⁷ Instead, the denial of merits review for so-called 'excluded fast track review applicants' and the very limited review process for non-excluded fast track applicants has created a process that excessively prioritises efficiency over the correctness and fairness of decision-

making. The Fast Track Assessment process has diminished the legitimate scrutiny of government decision-making, resulting in limited accountability of executive power and increasing the risk of returning refugees to places where they face persecution.

SNAPSHOT OF IMMIGRATION ASSESSMENT AUTHORITY DECISIONS (2016 – 2017)

In 2016-2017, 87% of IAA decisions concerned people seeking asylum from one of four countries of origin: Sri Lanka (50%), Iran (18%), Afghanistan (10%) and Iraq (9%). Within this cohort, applicants from Iran has the highest likelihood of having their decisions remitted by the IAA to the Department for reconsideration (with 31% of applicants having their decision favourably reviewed), while applicants from Sri Lanka had the lowest chance of having their decisions reviewed in their favour (with only 11% of decisions remitted). For applicants from Afghanistan and Iraq (with a 24% or 23% chance respectively of a favourable review decision), the IAA affirmed that three out of every four applicants were not refugees and that they did invoke Australia's complementary protection obligations under international law. In effect, this meant that 247 people from Iraq and Afghanistan were liable for deportation back to countries where they claimed to be at risk of harm.

For example, in a 2017 IAA decision, the IAA decision-maker accepted that it was unsafe for a Hazara man to return to his home region in the Jaghori District in Ghazni Province, as it was one of 'the most volatile provinces in Afghanistan in terms of attacks on defence forces, international forces and civilians, due to the activities of the Taliban and other insurgent groups present in Pashtun majority districts'. Nonetheless, the IAA decision-maker held that the Hazara man was not a refugee as he could relocate instead to Kabul, the capital city currently mostly under government control. While the decision-maker accepted that attacks from the Taliban still did occur in Kabul, the decision-maker stated that these had become 'infrequent'.⁶⁸ In another similar negative decision, the IAA decision-maker found that a Hazara man from Afghanistan could take 'reasonable steps to modify his behaviour', such as giving up his past profession of a driver, as a way of reducing his risk of harm.⁶⁹

The IAA, like the Migration and Refugee Division of the AAT, does not publicly release all of its decisions.⁷⁰ This makes it difficult to scrutinise the IAA's reasoning in affirming Departmental decisions. Some IAA decisions have been subject to judicial review by superior courts, most commonly the Federal Circuit Court of Australia (FCCA). The overwhelming majority of these appeals do not succeed, as it can be difficult to establish that a requisite error of law occurred.⁷¹

IX. ONGOING HARMS

This report finds **that the imposition and operation of the deadline breaches fundamental obligations owed by Australia under international law, including the prohibition on sending people back to places of persecution (the norm of *non-refoulement*), the right to equality before the law, and the right to a fair hearing.**

Firstly, the 'lodge or leave' terms of the deadline, such that those falling foul of it may be deported without any determination of their protection claim, breaches the most fundamental obligation owed by Australia under international refugee law: the prohibition on sending people back to places where they may face persecution. The entire Refugee Convention turns on respect for this principle. The deadline should not be enforced in this manner against any asylum seeker who did not file before 1 October 2017.

Secondly, the report finds that the legal issues and harms associated with the deadline are ongoing. These harms will carry through to the assessment and determination of the asylum claims made by members of the Legacy Caseload. The effects of the deadline going forward will be exacerbated by the systemic deficiencies of the Fast Track Assessment process.

Finally, this report concludes that there are grave concerns about the validity and correctness of any negative refugee status determination (RSD) decisions made under the Fast Track Assessment process. In particular, this process may be in breach of some of the most fundamental requirements for procedural fairness, including by denying people the right to a hearing.

X. RECOMMENDATIONS

This report strongly recommends that the Government must implement the following actions:

1. Allow all members of the Legacy Caseload to lodge an application for asylum. The deadline and its consequences must not be enforced against any asylum seeker who was unable to lodge their application by 1 October.
2. Allow all members of this group to access full merits review of Departmental decisions before the Administrative Appeals Tribunal and reinstate a single refugee status determination process. This is necessary to remove discrimination and ensure the fair processing of claims made by members of the Legacy Caseload.
3. Ensure all asylum seekers have access to adequate resources and facilities to present their claims to protection, including providing Government-funded legal assistance and interpreting assistance.
4. Uphold Australia's international legal obligations, including the prohibition on refoulement, and key international human rights principles as they apply to the refugee status determination process.

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