Chapter 3

Key Issues – Schedule 1

3.1 This chapter discusses the key issues raised in submissions and evidence in respect of Schedule 1. The chapter concludes with the committee's view on Schedule 1 of the Bill.

Key issues identified by submitters and witnesses

3.2 The committee received relatively few submissions which addressed Schedule 1 of the Bill. Apart from the department's submission, which covered all three schedules, only three substantive submissions were received in relation to Schedule 1. These submissions opposed the amendments contained in Schedule 1. The Law Council also commented on Schedule 1 at the public hearing.

3.3 Witnesses noted key differences between the practices of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) when compared to the practices typical of court proceedings in Australia.[1] Whereas it is usual for judgements to be pronounced in open court, the committee heard that this is not the usual practice in the RRT and the MRT due to their significant caseload.[2] In these tribunals, whilst oral evidence is heard and witnesses are questioned as part of the tribunal process, tribunal members typically do not pronounce their decision orally in hearings.[3] Instead tribunal members prepare a written decision which is recorded by the tribunal member and then subsequently faxed or mailed by the registry office of the tribunal to both the applicant and the department.[4]

3.4 The Law Council noted the difference as:

> The judges actually announce the judgement; that is the difference. This [a tribunal decision] is only getting recorded onto a system.[5]

3.5 In the absence of a public pronouncement of a decision, correctly notifying the applicant and the department of a decision is critical, especially as the nature and timing of those decisions can have significant consequences for applicants including their legal status in Australia.

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[1] Mr Ali Mojtahedi, Senior Solicitor, Refugee Advice and Casework Service (RACS), *Proof Committee Hansard*, 4 February 2014, p. 3.

[2] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014 p. 28.

[3] Though the tribunal retains the option to deliver decisions verbally.

[4] Ms Carina Ford, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014 p. 28.

[5] Ms Carina Ford, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014 p. 28.

3.6 In the context of the practice of the RRT and MRT, submitters argued that the recent decisions by the Full Federal Court of Australia in *Minister for Immigration and Citizenship v SZQOY*[6] and *Minister for Immigration and Citizenship v SZRNY*[7] were correctly decided and should not be overturned by the proposed amendments in Schedule 1. The Refugee Advice and Casework Service (RACS) submitted that Schedule 1 may 'fetter decision makers by preventing reconsideration of a decision, [thus creating] situations where formality takes precedence over fairness'.[8]

3.7 The ACT Refugee Action Committee supported this view and suggested that:

> [I]t is desirable for the decision maker to be open to new material, new legal decisions, or new legal circumstances which may persuade the decision maker that his or her written decision needs to be changed in a significant way…up to the point where both the party (the applicant) and the Secretary have been notified of the terms of the decision.[9]

3.8 Mr Ali Mojtahedi of RACS suggested that Justice Barker's analysis at paragraph 58 of this honour's judgement in *SZQOY* best summed up his position:

> [T]here is no compelling reason in public policy why the RRT should not be able to recall the reasons recording a decision arising from the review process under the Act before it has been communicated to a party. While finality is important in any decision-making process, there is a much greater public policy to be served if, despite having written up the reasons for a decision and instructed they be despatched to the affected party and the Secretary, the RRT has the flexibility to correct any error made so as to avoid legal error or to take steps to avoid any possible injustice. After all, the whole point of the review process is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decision-making. [10]

3.9 Mr Mojtahedi added:

> To deny a decision-maker the ability to revisit their decision before it has left the tribunal in my submission would go against the idea of the process being fair and just.[11]

3.10 However, witnesses acknowledged that the flexibility afforded to tribunal members to revisit decisions until they are communicated externally as a result of the court decisions in *SZQOY*[12] and *SZRNY*[13] is limited to a matter of days and not weeks or months:

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[6] [2012] FCAFC 131.

[7] [2013] FCAFC 104.

[8] *Submission 4,* p. 3.

[9] *Submission 7,* p. 4.

[10] [2012] FCAFC 131, para 58.

[11] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 2.

[12] [2012] FCAFC 131.

[13] [2013] FCAFC 104.

> …we are talking about a very short period of time in which they can revisit their decision. We are not talking about weeks.[14]

3.11 Whilst much evidence before the committee on Schedule 1 focused on its potential to reduce the flexibility of the decision making process in the RRT and MRT, the impact on applicants was identified as:

> [Schedule 1] reduces the tribunal's ability to consider additional information which could be detrimental to a review applicant.[15]

3.12 Witnesses to the inquiry accepted that there is a need for certainty in identifying when decisions are 'finally determined' in order to have an effective process for considering and resolving protection visa cases. However, submitters came to a view contrary to the department's as to whether a decision could be finally determined without considering whether that decision had also been notified to the applicant and the department.[16]

3.13 RACS argued that:

> …it is entirely appropriate that an application not be considered finally determined until such time that is lawfully sent to the applicant and the secretary.[17]

3.14 In response to this, the department stated that '…there is a need to make sure that the applicant is appropriately notified'.[18] However:

> …the reason for the amendments we have sought to put in place is that there is also a very definite reason to need to know when a decision has actually been made and when, therefore, it is finally determined, because a number of things flow from that.[19]

3.15 The department explained that it had sought, in the amendments proposed in Schedule 1, to balance competing public policy interests:

> I think there is an issue of weighing up the public interest in the possibility that someone may not be notified—according to the procedures set out in the act, as a result of an administrative error—against also the public interest in the need to have certainty, because some very serious consequences can flow from it.[20]

3.16 In evidence before the committee the department explained that one of the serious consequences that flow from a decision being 'finally determined' included

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[14] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 3.

[15] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 4.

[16] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 7.

[17] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 7.

[18] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 35.

[19] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 35.

[20] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 35.

that 'a person can become an unlawful noncitizen 28 days after something has been finally determined'.[21]

3.17 Nevertheless, the Law Council raised concerns about the impact of the proposed amendments on the notification requirements under the Act. The Law Council argued that '[i]t is vital that the changes ensure the decisions are notified quickly upon being recorded'. [22]

3.18 Moreover the Law Council argued that it:

> would be concerned if the amendments proposed in schedule 1 had the effect of diluting or removing the requirement to notify applicants of the outcome of decisions…If these were the consequences of the amendments, it would raise serious rule-of-law concerns and seriously undermine visa applicants' rights of review and appeal.[23]

Committee view

3.19 The committee accepts that tribunals undertaking merits review, such as the RRT and the MRT, are fulfilling a different role to the courts. In the role being fulfilled by the RRT and MRT, a degree of flexibility is required to ensure a correct and just decision.

3.20 The committee notes, however, that the flexibility afforded to tribunal members, whilst important, is not the only or even primary means of addressing new evidence or changed circumstances of the applicant or the country of origin. These issues are dealt with by other review mechanisms under the Act.[24]

3.21 The committee accepts the department's need for certainty in ascertaining when decisions are 'finally determined'. This need for certainty is heightened given the seriousness of the consequences that flow from such decisions, extending to liability of the applicant for removal from Australia. Accordingly, the committee supports the amendments in Schedule 1.

3.22 The committee is also concerned that applicants are promptly informed of the outcome of their matters by the department and the relevant tribunals as appropriate in accordance with the *Migration Act 1958.* The committee suggests that in order for the department to uphold the public interest in notifying visa applicants of the outcome of decisions, it should ensure that appropriate administrative arrangements are in place to minimise errors in notification and to ensure that errors are quickly identified and addressed.

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[21] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 38.

[22] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[23] Ms Carina Ford, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[24] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 39

3.23 The committee, whilst not making any recommendation directly on this point, queries why the RRT and MRT retreated from what the committee understands was the practice of announcing a decision at the end of the hearing or, where the decision was reserved, then at a specially convened hearing, to provide a more certain and open way of delivering the Tribunal's determination.

Recommendation 1

3.24 The committee recommends that the Department of Immigration and Border Protection put in place policies and procedures, consistent with the *Migration Act 1958*, which would support applicants to seek leave to apply out of time or apply for alternative forms of review in the rare situations where the department or a tribunal fails to correctly notify the applicant and the applicant has been directly disadvantaged as a result.