



Australian Government

Migration Review Tribunal · Refugee Review Tribunal

1 August 2014

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014

Thank you for your invitation to provide a submission addressing this Bill to amend the *Migration Act 1958*.

Our submission relates only to proposals in the Bill to enact the following powers for the Migration Review Tribunal and Refugee Review Tribunal (the Tribunals), provided for in Schedule 4 to the Bill:

1. to dismiss an application for review in circumstances where the applicant fails to appear (proposed new sections 362B(1A)(b) and 426A(1A)(b) and related provisions)
2. to give oral statements of reasons without the need for a written statement except where requested (proposed new sections 368D(2) and 430D(2))
3. Principal Member's powers to direct compliance with guidance decisions (proposed new sections 353B and 420B)
4. Principal Member's powers to issue directions setting out procedures to be followed by applicants and representatives in Tribunal proceedings (proposed amendments to sections 353A and 420A).

The Tribunals support these proposed powers, which we consider will assist us in achieving our statutory objectives of providing fair, just, economical, informal and quick merit reviews. In this regard, we note the following points:

1. Power to dismiss applications for non-appearance

- The proposal does not affect the Tribunals' obligation to invite an applicant to attend a hearing. The proposal will, however, create efficiency gains, by providing an additional mechanism for the Tribunals to use in cases that are no longer pursued by applicants. In cases where the Tribunals use the proposed power, applications will be able to be finalised more quickly and with fewer resources, as the Tribunals will not need to prepare a full decision and statement of reasons with findings and evidence in these cases.
- The proposal also has benefits for review applicants. Currently, in most cases where an applicant fails to appear, the Tribunals would proceed to finalise the review by giving a decision on the merits of the case on the available information. Subject to clear jurisdictional error, such a decision is final and cannot be re-opened, even where there is good reason for the applicant's non-appearance. Under the proposal, the power to reinstate applications in appropriate cases will enable the Tribunals to give the applicant a further opportunity for a hearing in cases of this kind.
- Other Commonwealth merits review tribunals, including the Administrative Appeals Tribunal and Social Security Appeals Tribunal, have similar powers that enable them to quickly deal with applications for review in circumstances where a party fails to appear – see section 42A of the *Administrative Appeals Tribunal Act 1975* and section 171 of the *Social Security (Administration) Act 1999*. We understand that these powers are used fairly and effectively in those contexts. The alignment of powers among Commonwealth tribunals seems even more appropriate, in light of the pending amalgamation of these three tribunals.
- The Tribunals have recently implemented a trial program for sending hearing reminder messages by SMS text message directly to certain review applicants with a mobile telephone number. If the trial is successful, the Tribunals intend to roll this program out on a wider basis. These reminders will provide an additional safeguard in ensuring applicants have an opportunity to attend their hearing, over and above the formal hearing invitation sent as required under the Migration Act.

2. Oral statements of reasons

- The proposal will create efficiency gains, by limiting the circumstances where oral reasons are required to be reduced to writing, and thereby reducing the associated costs in time and resources.
- Giving an oral statement of reasons in the context of a Tribunal hearing will also have advantages for applicants who speak languages other than English. The Tribunals

already arrange for interpreters to interpret at hearings where required, and providing an oral statement of reasons will enable the applicant to immediately hear the reasons in their own language at the time of the hearing, including the Tribunal's findings and reference to the evidence on which the decision was based. Hearings are also recorded and the recordings generally made available on request, which would include the interpreted statement of reasons. Oral statements of reasons will thereby improve access to the Tribunal's reasons for applicants in these cases.

- Applicants will still be entitled to receive a written statement of reasons if they wish, simply by requesting it within the specified timeframe.
- The AAT has a power to give oral reasons, and provision for parties to request a written statement of reasons (sections 43(2) and 43(2A) of the *Administrative Appeals Tribunal Act 1975*). As noted above, alignment of tribunal powers seems appropriate in light of the pending amalgamation.

3. Guidance decisions

- The proposal will help to ensure consistency between tribunal decisions on similar subject matter. This will contribute to public perceptions of fairness and justice in Tribunal decision-making, as like cases will be treated alike. It will increase Tribunal efficiency and certainty in dealing with common questions that arise frequently.
- Similar provisions exist in the United Kingdom's system for immigration and asylum appeals (section 107 of the UK's *Nationality, Immigration and Asylum Act 2002* empowers the President of the Asylum and Immigration Tribunal to issue directions requiring the tribunal to treat a specified decision as authoritative).
- The provision for departing from guidance decisions in cases with clearly distinguishable facts or circumstances allows for flexibility and for justice to be done in individual cases, thereby ensuring that each case is considered on its own merits. The preservation of the validity of Tribunal decisions even in cases of non-compliance with a guidance decision maintains the independence of Tribunal members.

4. Directions about procedure

- The proposal will strengthen and clarify the Principal Member's existing powers to give directions about the conduct of reviews. The power to set out procedures in Tribunal proceedings contributes to the efficient conduct of reviews, by increasing certainty and consistency in processing reviews. The AAT has similar powers (section 20 of the *Administrative Appeals Tribunal Act 1975*) and has issued a number of practice directions concerning the conduct of its reviews.

In light of the above, we support the Bill's proposal to enact these powers for the Tribunals.

Please do not hesitate to contact me if you need any more information about the matters raised in this letter or if we can be of any further assistance to the Committee.

Yours sincerely

Kay Ransome
Principal Member