

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 26 April 2024

Question date: 29 April 2024

Paul Scarr asked the following question:

1. Please refer to the answers to questions on notice provided by ACRC and RACS. How does the Department respond to the concerns raised?

The response to the question is as follows:

Question 1

Clause 359A(4)(d) of the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024 (CT1 Bill)

New paragraph 359A(4)(d) of the Migration Act provides that under the adverse information process set out in section 359A, the Tribunal is not required to give to the applicant information that was included or referred to in the written statement of the decision that is under review. Section 359A does not prevent the Tribunal from bringing any information to the applicant's attention, if they consider it necessary or appropriate to do so. Rather, section 359A provides the minimum procedural steps the Tribunal must take before affirming a decision on review to ensure that the applicant has an opportunity to respond to information that may form the basis of the Tribunal's decision.

As the key document pertaining to the decision on review, it is reasonable for the Tribunal to proceed on the basis that the applicant will be aware of the contents of the written statement of decision and it is not necessary to require the information to be separately brought to their attention. Applicants retain the opportunity to respond to any of that information during the review process and particularly at the hearing.

Clause 362A(1) of CT1 Bill

A response in respect of clause 362A(1) is provided in response to question 10 of Senator Scarr's Questions on Notice for the Attorney-General's Department following the department's appearance before the Legal and Constitutional Affairs Committee on 26 April 2024. The provision has been amended via Government amendments to clarify that documents must be provided where a request is made.

Clause 66 of the ART Bill

Please refer to question 4 of Senator Scarr's Questions on Notice for the Attorney-General's Department following the department's appearance before the Legal and Constitutional

Affairs Committee on 26 April 2024 in respect of clause 66.

Clause 68 of the ART Bill

The ART Bill does not change the arrangements as to when the Tribunal may or must appoint an interpreter in migration and protection matters (currently set out in sections 366C and 427 of the Migration Act). Under existing arrangements, where the applicant requests an interpreter, the Tribunal has discretion to deny that request where the Tribunal considers the person is sufficiently proficient in English (subsection 366C(2)). The Tribunal is also empowered to appoint an interpreter where no request is made (subsections 366C(3) and 427(7)).

While in practice, it would be expected that the Tribunal would consider the wishes of the applicant, in a situation where a review cannot proceed because a party is not able to understand the proceedings without an interpreter, it is imperative that the Tribunal can make appropriate orders to support the efficient conduct of proceedings and adhere to its obligations under clause 55 to ensure the party can present their case.

Question 2

More clarity to be provided around an applicant's rights to judicial review on Tribunal and Panel decisions where the application for a review by the Panel is made following a Tribunal decision (per Division 3 of Part 5 of the ART Bill). Specifically, if a decision made by the Panel is taken to replace the first decision made by the Tribunal and/or that first decision made ceases to be a valid decision in instances when the Panel is constituted to provide a further decision. From that, whether a decision from the Panel extinguishes any rights to judicial review on a first Tribunal decision.

Item 284 of Schedule 2 of the CT1 Bill provides that an application cannot be made to refer a Tribunal decision to the Guidance and Appeals Panel (GAP) for decisions under the Migration Act (other than Part 3 Decisions). This means the Tribunal will only ever make one decision in relation to a reviewable migration or protection matter – that is, either the Tribunal will decide the matter as an ordinary matter, or the matter may be referred to the GAP on the basis that it contains an issue of significance, and the GAP will decide the matter.

The exclusion of decisions under the Migration Act (except for Part 3 decisions) from being able to be referred to the guidance and appeals panel for review supports the efficient and timely resolution of matters, preserves the finality of Tribunal decisions (ensuring clear visa status for applicants), and prevents applications being made to the guidance and appeals panel to prolong an applicant's stay in Australia.

Once the ART has made a decision in a reviewable migration or protection matter (whether it is an ordinary Tribunal decision, or a GAP decision), applicants may seek judicial review in the federal courts. A decision from the Guidance and Appeals Panel will not affect any existing rights to judicial review for migration and protection visa applicants. Appeals will continue to be available to the Federal Circuit and Family Court of Australia in accordance with Part 8 of the Migration Act.

For completeness, the Department notes that the effect of a GAP decision on an earlier Tribunal decision (in jurisdictions where this can occur) is set out in clause 127 of the ART Bill and the effect of an application for referral to the GAP on the timeframe for appealing to the Federal Court is set out in clause 174.

That free legal representation or assistance is provided to applicants.

When considering whether to refer a matter to the GAP, the President must have regard to the circumstances of the parties in making a decision to escalate or elevate a matter (subclause 122(3) ART Bill). A relevant factor for the President to consider may be whether a party has the kind of representation that would enable them to engage with that process, or whether the Tribunal is aware of pro bono representatives or legal assistance providers who may be interested in representing a party in such a matter. In practice, legal assistance providers or pro bono representatives may also identify to the Tribunal that a matter may be suitable for referral to the GAP, informed by their knowledge of unresolved legal or factual issues affecting a larger cohort of matters.

In addition, Government amendments progressed on Migration Act amendments in Consequential and Transitional Bill No. 1 (as passed by the House of Representatives on 21 March 2024) provide that an applicant for review of a reviewable migration or protection decision may apply to the Attorney-General for legal or financial assistance if the proceeding is referred to the guidance and appeals panel.

The Panel's review of a decision moves expeditiously, within defined timeframes, and avoids any unnecessary delay for the applicant.

The Government does not anticipate that guidance and appeal panel proceedings will be any slower than ordinary tribunal proceedings.

There are clear provisions built in recognising that determination in these jurisdictions are facts specific (that is, protecting against overreliance on guidance decisions and appropriate attention to individual claims), and subject to rapid change based on international conditions (that is, subject to regular and defined review including validity periods).

Tribunal members are required to have regard to Tribunal guidance decisions, but guidance decisions are not binding. Members must determine each matter before them according to the individual merits of those cases, and, where appropriate, differentiate the specific circumstances of each matter from any relevant guidance decisions.

The functions, operation and efficiency of the Panel are subject to regular statutory review.

The Government introduced clause 294A into the ART Bill as part of the parliamentary amendment process. This clause creates a statutory requirement for the Minister to cause a review to be conducted into the operation of the ART Bill and any consequential and transitional matters. The review would commence approximately five years into the operation of the new Tribunal. Such a review would provide a point-in-time assessment of the Tribunal's operation, its practices and procedures, and any opportunities to improve these matters. The review will therefore cover the functions, operations and efficiency of the GAP.

Clause 242 of the ART Bill provides that the President's annual report must include an assessment of the operations of the GAP, and numbers and particulars of results of GAP proceedings in each year, ensuring that there is ongoing monitoring. Clause 264 of the ART Bill prescribes the Administrative Review Council must produce an annual report. The report must include a description of any systemic issues related to the making of reviewable decisions that the President has informed the Council of during that year.