



Migration Amendment (Review Provisions) Bill 2006

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Law and Bills Digest Section

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Migration Amendment (Review Provisions) Bill 2006

Date introduced: 7 December 2006

House: The Senate

Portfolio: Immigration and Citizenship

Commencement: The day after the Act receives Royal Assent

Purpose

The Migration Amendment (Review Provisions) Bill 2006 (the Bill) amends the *Migration Act 1958* (the Migration Act) to allow the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) ‘flexibility in how they accord procedural fairness to review applicants’.¹

The Bill will:

- provide that where an applicant is at a hearing before one of the tribunals, the tribunal member will have a discretion to either (1) tell the applicant about any adverse information before it at the hearing, and invite him or her to respond, or (2) write to the applicant about the adverse information, and invite him or her to respond. At the moment the tribunals must provide adverse information in writing, and
- create a new exception for information given by the applicant to the department during the process leading to the decision that is under review, such as passport details, family composition and statutory declarations. This does not apply to oral information given by the applicant to the Department.

On 7 December 2006, the Senate referred the above Bill to the Senate Legal and Constitutional Affairs Committee for [inquiry](#) and report by 20 February 2007.

Background

[Section 424A](#) of the Migration Act requires the RRT to give an applicant particulars in writing of any information that the RRT considers would be a reason for affirming the department’s decision and to invite the applicant to comment, subject to the exceptions set out in subsection 424A(3). [Section 359A](#) sets out the same requirements for the MRT.

424A Applicant must be given certain information

(1) Subject to subsection (3), the Tribunal must:

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(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.

[Section 441A](#) deals with methods for delivering documents to all people other than the Secretary.

Subsections [353\(1\)](#) and [420\(1\)](#) of the Migration Act provide that in carrying out their functions under the Act, the MRT and the RRT must pursue the objective of providing a mechanism of review that is ‘fair, just, economical, informal and quick’.

Timeliness is an important performance indicator for the RRT. The *Migration and Ombudsman Legislation Amendment Act 2005* inserted section 414A into the Migration Act which requires the RRT to finalise reviews within 90 days (see further the [Bills Digest](#)). The RRT reports on this requirement every quarter and the report is tabled in Parliament.²

The MRT/RRT [Annual Report 2005-2006](#) reports that in the first quarter of 2005-06, 35% of RRT decisions were made within 90 days. That figure rose to 50% at the end of the second quarter, 55% at the end of the third quarter to 58% at the end of the year. For cases decided in the last quarter, 76% were decided within 90 days and the average processing time was 83 days. The average time taken to finalise all RRT cases during 2005-06 from receipt of DIAC’s documents to decision was 97 days (compared with 143 days in 2004-05).³

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For those MRT cases where there is no statutory time standard, time standards are set out in a Principal Member Direction. These are 90 calendar days from lodgement to decision for visa cancellation cases, and time standards ranging from 180 to 240 calendar days from lodgement to decision for other cases.

On 21 June 2006, the Principal Member of the Migration Review Tribunal and the Refugee Review Tribunal issued a new Direction relating to the Tribunals' Caseload and Constitution Policy for 2006-07 entitled the [Principal Member Direction 1/2006 Tribunals' Caseload and Constitution Policy](#). This policy is designed to support high quality reviews and decisions; independence and impartiality in decision-making; improving the timeliness of reviews; and giving priority to cases based on the circumstances of individual cases.

Basis of policy commitment

Definition of procedural fairness

Tribunals, such as the MRT and RRT that conduct review of decisions made by administrative decision-makers rather than making primary decisions, may be called review tribunals. Review tribunals include those bodies that undertake internal review of departmental decisions. Most review tribunals are adjudicative in nature. Review tribunals are often established in order to provide an informal alternative to judicial review, or a tier of review prior to the exercise of a statutory appeal to a court.

Often the requirements of the hearing rule of procedural fairness are expressed in the form of an obligation to afford each party to proceedings a reasonable opportunity to present his or her case. A merits review tribunal must comply with the rules of natural justice unless there is a statutory provision which permits that tribunal to depart from some or all of those rules, because those tribunals make final and binding decisions about people's legal rights and obligations.

A body which is required to comply with the rules of natural justice must give those people whose legal rights and obligations will be affected by its decisions a fair hearing (the 'fair hearing rule') and the people who comprise the decision-making body must be, and must be seen to be, impartial or unbiased (the 'bias rule').

Creyke and McMillan identify three minimum requirements of the fair hearing rule. They are:

- prior notice that a decision will be made,
- disclosure of the substance of the material on which the decision will be made, and
- an opportunity to comment upon that material and to present material in support of one's own case.⁴

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There is potential for a wide range of occurrences within the confines of these three broad requirements.

Case Law

This Bill has been introduced as a response to decisions by the High Court and the Federal Court dealing with statutory provisions which relate to Tribunals handling of ‘adverse information’. The process by which the Tribunal may invite comment on adverse information was considered in *Minister for Immigration and Multicultural Affairs v Al Shamry* [2001] FCA 919 (‘Al Shamry’), *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 23 (‘SAAP’) and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 (‘SZEEU’).

SZEEU basically resolves a possible tension between the leading 2001 case of *Al Shamry* and *SAAP*. The *SZEEU* judgment concerned five appeals from judgments of lower courts dismissing applications for judicial review of Refugee Review Tribunal decisions that the appellants were not persons to whom Australia had protection obligations. Questions had arisen about what constitutes ‘information’ and what constitutes ‘a reason or part of a reason’ for the decision. This is better understood by reference to the facts of the leading two cases.

Al Shamry

Al Shamry arrived in Australia at Sydney Airport on 14 June 1999. He was immediately detained and interviewed by an officer of the Minister and a purported record of the interview was made. The respondent filed an application for a protection visa on 23 June 1999, which was refused by a delegate of the Minister on 21 July 1999. After lodging an application for review of the delegate's decision, the respondent attended a hearing before the Tribunal on 24 August 1999. Justice Madgwick noted that, at the conclusion of the hearing, the Tribunal member had thanked the respondent for having been an ‘honest witness’. The existence and relevance of the airport interview was not raised with the respondent at or before the hearing before the Tribunal. However, what had been said by the respondent in the airport interview was ultimately used by the Tribunal, in its reasons for decision, to impugn the credibility of the respondent.

In their joint judgment, Justices Ryan and Conti identified the issue for determination in the following terms:

Counsel for the Minister accepted that a failure to observe the procedure laid down by s.424A is a reviewable error under s.476(1)(a). It was also accepted that where there is information of the kind described in s.424A(1)(a) particulars of that information must be given to the applicant for the purpose of obtaining his or her comments. **However, it was said that the information constituted by the airport interview came within the exception created by s.424A(3)(b) in respect of information given by the applicant for the purpose of the application. ‘Application’ in that**

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context, was said to mean ‘all information given by the applicant to officials in the Department (including that provided to the Tribunal) for the purpose of determining whether to grant a protection visa to the applicant...’(Emphasis added)⁵

The full Federal Court held that adverse information provided by an applicant to the Department as part of their visa application or in response to a possible visa cancellation decision was not covered by the exemption provisions in subsections 359A(4) and 424A(3).

Following *Al Shamry*, the Explanatory Memorandum notes that the tribunals complied with this decision by orally providing any such adverse information to the applicant for comment during the hearing.⁶

SAAP

The applicants in the *SAAP* case were an Iranian Sabian Mandaean mother and her daughter. In her visa application, SAAP described incidents of alleged persecution by the Muslim majority in Iran, including her children being denied admission to school, being prevented from working as a hairdresser, an attempt to abduct the eldest daughter to forcibly convert her to Islam, and her husband losing the sight of one eye from a thrown rock. At the RRT hearing, conducted via video-link, the eldest daughter was asked about these incidents, with SAAP out of the room in Woomera and her migration agent present in the hearing room in Sydney. The RRT member asked SAAP about her daughter’s responses to questions about SAAP’s husband loss of sight and the children’s attendance at school. The RRT member said he would write to SAAP about other answers given by her daughter on which he would like to receive written submissions. This did not occur.

In the Federal Court, Justice Mansfield found that the RRT had failed to fulfil these two aspects of section 424A, but held that this failure did not deprive SAAP of the opportunity to learn of material adverse to her claim and to comment on it; because her migration agent was present when the daughter gave evidence, the RRT asked SAAP about certain aspects of that evidence and SAAP had the opportunity to make submissions. The Full Court upheld Justice Mansfield’s decision declaring that the RRT had not erred in dismissing SAAP and SBAI’s claim for protection visas. They appealed to the High Court.

The High Court held, by a 3-2 majority, that the RRT failed to comply with section 424A of the Act, which it held set out mandatory steps to accord procedural fairness. The RRT was bound to give SAAP and SBAI written notice of the information it had obtained from the eldest daughter and to ensure as far as reasonably practical that they understood its relevance to the review. Failure to do so gave rise to jurisdictional error, rendering the RRT’s decision invalid. The Court ordered that the RRT’s decision be quashed and that the RRT review according to law the Immigration Department’s decision to refuse SAAP and SBAI protection visas.

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Justice Kirby stated with respect to s 424A:

This is, after all, simply an express provision to ensure that the Tribunal's procedures attain the highest standards of justice to the applicants before it. As this Court has pointed out in the past, such applicants are frequently in a desperate situation and, in some cases, their safety and even their lives may be at stake in the important decisions that the Tribunal makes.⁷

SZEEU

The *SZEEU* case sought to resolve the question – how strict is the requirement? What if the ‘information’ defined broadly as in the *Al Shamry* case, does not lead to unfairness? Can the decision still be quashed? The five cases in *SZEEU* were representative of these borderline fact situations.⁸ The ratio is most clearly stated per Justice Weinberg:

If *Al Shamry* stood alone and no actual unfairness could be demonstrated relief would simply be denied in the exercise of judicial discretion. *SAAP* seemingly precludes this approach from being adopted. **Henceforth any decision based on information adverse to the applicant where such information does not fall within any of the exceptions in s.424A(3) is likely to be set aside irrespective of whether there has been any actual unfairness.** (emphasis added)⁹

The Full Court of the Federal Court held that the reasoning of the Full Court in following *SAAP* and *Al Shamry* was cogent and persuasive, and the decision in the lower court in *SZEEU* was not clearly, plainly or manifestly wrong.¹⁰

Government response

When introducing the Bill, Senator Chris Ellison stated that:

The cumulative effect of the court decisions is creating serious operational difficulties for the tribunals, including delays in finalising decisions.¹¹

The Government response to these cases represented by this bill is driven by efficiency concerns, summarised by the second reading speech in the following manner:

These amendments will allow the tribunals to conduct reviews more efficiently, with less unnecessary process and paperwork. This will help the Refugee Review Tribunal to comply with its statutory 90-day time limit for finalising decisions. It will also lead, in many cases, to the faster completion of many cases, which will benefit review applicants who no doubt experience stress and uncertainty in waiting to hear of a decision.¹²

The Department of Immigration and Citizenship (DIAC) states in its submission to the Senate inquiry that the amendments may also benefit the applicant:

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Allowing the Tribunals to put adverse information to applicants during hearing may also, in many cases, be of more assistance to applicants, than putting such information in writing. The majority of applicants in both Tribunals are not proficient in the English language. Wherever required, Tribunal hearings are conducted with the assistance of an interpreter accredited in the relevant language. Putting adverse information to applicants with the assistance of an accredited interpreter is more likely to result in the applicant understanding the substance of the information and its significance to the outcome of the review.¹³

Position of significant interest groups

Senate inquiry into the administration and operation of the Migration Act 1958

The issues raised in this Bill were dealt with in some detail in the Senate References Committee on Legal and Constitutional Affairs report [Administration and operation of the Migration Act 1958](#) tabled on 2 March 2006, especially [Chapter 3 - Secondary assessment of visa applications](#).

The report deals with many of the overarching policy concerns around refugee and migration determinations, such as complexity and predicaments arising from codification of migration policy, efforts of successive governments to speed claim times up and avoid protracted court proceedings, issues with bridging visas, the perceived vagueness of 1951 Refugee Convention criteria, 'credibility' issues, the cost of judicial review, 'success' rates and many other concerns of the past decade.

Relevant to this bill, the report deals with timeliness indicators,¹⁴ the particular concerns of approximately 30 per cent of RRT and MRT cases which involve an unrepresented applicant,¹⁵ and the issue of adverse information. Regarding the existing section 424A, the report states at pages 97-98:

3.34 The International Commission of Jurists (ICJ), for example, raised particular concerns in respect of the use of adverse information, including information from unidentified sources. It advised the Committee that:

One gets a distinct sense, in the RRT in particular, that the entire proceeding really takes the form of cross-examination of the asylum seeker. ... There are no real rules of admissibility of evidence. If the tribunal regards it as relevant to its inquiry, it is admissible. Certainly it is open to the tribunal to determine what weight to give to certain evidence, but often an applicant who has given their evidence under oath in person before the tribunal is confronted with information from unidentified sources which would seem to contradict an aspect of the person's evidence. Yet the witness who provides either information or an opinion is often not identified. Their expertise or their qualifications to express an opinion are not disclosed.

3.35 ICJ representatives also argued that applicants may be unable to rebut or examine adverse information in any meaningful way:

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If there is information before the tribunal that the tribunal regards as a reason or part of a reason to affirm the department's refusal then they are required [by section 424A of the Migration Act] to issue a letter under that section to the applicant disclosing the information, explaining why it is relevant and inviting them to respond. But what happens ... is that you are not given the actual documents. You are not given the exchange of correspondence that may have given rise to this information. You are not given full texts of documents. As a lawyer in a court, if someone seizes upon a paragraph of a document to defeat my case, I would ordinarily look at the document as a whole to ascertain the proper context and see if there was anything else in the remainder of the document which may rebut or perhaps qualify to some extent the interpretation that has been given to the extract. That in my view is proper natural justice – the proper right to reply to adverse information. But the tribunal is ... not obliged to give you that document or that evidence. It can just paraphrase it in a letter or provide it to you under section 424A, saying, 'We have information that suggests X', where that conclusion may not even be what is in the piece of information. So you do not have an opportunity to examine the reasoning process that led to the statement that that information means that conclusion.

3.36 The import of the above is that such information can be used to reject an applicant's claim on the basis of a lack of credibility:

It is often used as a basis on which to conclude, as a finding of fact, that its weight outweighs the sworn testimony of the person and that their credibility is doubtful. Therefore their whole claims fails and that is it. Credibility is a finding of fact in relation to which there is no access to judicial review, so that is particularly problematic.

As a result, Recommendation 24 of the Senate report states:

3.115 The committee recommends that applicants have a right to be provided with copies of documents the contents of which Tribunal members propose to rely upon to affirm the decision that is under review.¹⁶

MRT/RRT

In their [submission](#) to the current Senate inquiry, the MRT and RRT were in favour of the Bill:

The Tribunals consider that the proposed amendments will benefit applicants for review and enhance the ability of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) to meet their statutory obligations to provide reviews that are fair, just, economical, informal and quick.

The Tribunals' experience with the operation of the current provisions is that having to repeat to an applicant in writing what has been dealt with comprehensively at a hearing is often inappropriate and unnecessary in determining a review in a fair, just,

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economical, informal and quick manner. In many cases, this information is uncontested information...¹⁷

Legal groups/refugee advocates

The position of most of the groups who made submissions to the Senate inquiry, including the Human Rights and Equal Opportunity Commission (HREOC), the Law Council, Australian Lawyers for Human Rights, Amnesty International, Legal Aid NSW and the Refugee Advice and Casework Service (RACS) is that the Bill should not pass.

The reasons given by these organisations include the following:

- The Bill will not achieve its aim of creating a mechanism of review that is fair, just, economical, informal and quick. Instead, the changes are more likely to result in inconsistency, confusion and unfairness in the review process, increasing the risk of incorrect decisions and the refoulement of applicants.¹⁸
- The Bill creates the potential for an unfair process for determining refugee and migration cases which may breach the human rights of applicants by not providing a fair hearing;¹⁹ and/or by leading to incorrect decisions which increase the likelihood of ‘refoulement’ of asylum seekers (returning a person to a country where they face persecution).²⁰
- The opinion of the superior courts in regard to what constitutes procedural fairness is correct and should be followed.²¹ Justice Madgwick recently raised concerns about natural justice in immigration decisions in the press.²² In relationship to the courts in the area of migration review, ALHR cites Justice John Basten of the NSW Supreme Court, a leading migration law expert, who has noted with regard to SAAP:

In order to understand how the High Court dealt with the matter, it is necessary to take a step back and examine the statutory history. The key to this history, as is now well known, lies in a succession of attempts by various governments to tie down the elements of procedural fairness which it was considered should properly govern the exercise of powers under the Migration Act, so that decisions would not be invalidated by overly generous and unpredictable judicial assessment of what procedural fairness required in a particular situation. One way in which that was sought to be done was by setting out the procedures in the Act and preventing any judicial review in the Federal Court for breach of non-statutory obligations of fairness: see old s.476 (now repealed) inserted by the Migration Reform Act 1992 (Cth). Another step taken was of course the inclusion in 2001 of the privative clause, which was undoubtedly intended to be the stick which would kill the snake, though interestingly amendments which sought to codify exhaustively statutory procedural fairness followed the introduction of the privative clause. The judgment of the Court in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, effectively precluded the privative clause from fulfilling its intended function. However, *Plaintiff S157* did not deal with the new provision stating that the statutory procedures set out exhaustively the content of the obligation of procedural fairness: see s.422B.²³

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- Asylum claimants as well as many applicants for migration should be understood to be amongst those most in need of procedural safeguards. This is due not only to their vulnerability in a different social, cultural and legal context, but also to the consequences of an incorrect decision. The Castan Centre argues that the thrust of this Bill is inconsistent with the RRT's own Credibility Guidelines which recognise the specific vulnerabilities of asylum seekers, including problems with oral evidence.²⁴
- The amendments will particularly disadvantage unrepresented applicants and children:

The majority of unrepresented applicants may not understand the legal significance of the adverse information being communicated to them and of their response. In fact, given the following factors, namely

 - the anxiety associated with the nature of the proceedings;
 - the natural desire of applicants not to antagonise or offend the decision maker; and
 - the pressure of the moment;

applicants are likely to attempt to respond to the Tribunal immediately, regardless of whether it is actually in their best interests to do so.²⁵
- The safeguards in the amendments rely too much on the exercise of Tribunal Member's discretion, especially adjournments.²⁶

Financial implications

There are no new direct costs associated with the Bill. The Financial Impact Statement states that amendments are 'likely to result in potential savings for the Tribunals as unnecessary processes will be avoided'.²⁷ However several submissions to the Senate inquiry argue that amending the legislation will result in more legal challenges, not less.²⁸

The Department of Immigration and Citizenship states at paragraph 35 of its submission:

It is possible that there will be increased costs associated with litigation as a result of the amendments contained in the Bill. Increased complexity in the conduct of litigation may result in higher costs. Although higher costs can be expected during the initial period after enactment until the interpretation of the provisions is settled, once this occurs litigation costs are likely to lessen for all parties.²⁹

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Main provisions

Schedule 1—amendments to the Migration Act 1958

Review Processes of the Migration Review Tribunal and the Refugee Review Tribunal

Item 1 inserts **new subsection 357A(3)** at the end of section 357A which provides that in applying Division 5 of Part 5 of the Act, the MRT must act in a way that is fair and just. Division 5 relates to the MRT's conduct of its reviews. This overarching requirement complements subsection 353(1) of the Act, which provides that in carrying out its functions under the Act, the MRT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Existing section 360 provides that, unless the MRT considers that it will find in the applicant's favour or the applicant consents to not appear before the MRT, the MRT must invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. Section 366 provides that the MRT may allow the applicant to appear or to give oral evidence before it by telephone, closed-circuit television or any other means of communication. The MRT is required to appoint an interpreter if the applicant is not sufficiently proficient in English.

As noted in the background section above, as a consequence of the High Court decision in *SAAP*, section 359A currently requires that the MRT must always provide the particulars of the information and the invitation to comment to the applicant in writing even if the information has already been covered orally at hearing.

Oral examination of adverse information

Item 2 inserts the operative provision for the changes to the MRT procedures, **new section 359AA**. It provides a new discretion for the MRT to orally give particulars of information and invite the applicant to comment on or respond at the time that the applicant is appearing before the MRT in response to an invitation issued under section 360.

Where a review applicant is appearing before the MRT pursuant to an invitation issued under section 360, **new paragraph 359AA(a)** provides the MRT with a discretion to give to the review applicant orally, clear particulars of the information that the MRT considers would be the reason, or part of the reason, for affirming the decision under review (*adverse information*).

Safeguards

There are several safeguards for the new practice of dealing with adverse information orally at a hearing.

New paragraph 359AA(b) provides that:

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- if the MRT exercises its discretion to orally provide adverse information, then the MRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision.
- The MRT is also obliged to orally invite the applicant to comment on or respond to the adverse information and to advise the applicant that he or she may seek additional time to comment or respond. If the applicant seeks additional time to comment or respond, the MRT must adjourn the review, if it considers that the applicant reasonably needs additional time to comment or respond.
- In inviting the applicant to comment on, or respond to information while the applicant is appearing before it, the MRT must clearly set out the particulars of information and why it is relevant. The applicant can seek clarification and make additional comments.

The Explanatory Memorandum states:

It will enable the MRT to give clear particulars of information orally at a hearing without also being required, as is presently the case, to give the same particulars in writing to the applicant after the hearing.

The amendment will facilitate the more efficient conduct of reviews by improving their quality, timeliness and will reduce the cost of reviews.

The amendments will also ensure that applicants are not taken by surprise and are given time, if necessary, to provide their comments or response.³⁰

Items 4 to 16 amend existing sections 359A to 359C to make the language consistent with new section 359AA.

Item 7 inserts **new subsection 359A(3)**. It provides that the MRT is not obliged, under section 359A, to give particulars of the information to an applicant, nor invite the applicant to comment on or respond to the information if, at the time the applicant appeared before it, the MRT exercised its discretion under new section 359AA (inserted by item 2) to orally give clear particulars of the information and orally invited the applicant to comment on or respond to the information.

If the MRT has exercised its discretion under new section 359AA to provide clear particulars of the information to the applicant orally, it may still choose to provide the particulars, or part of the particulars, and the invitation to comment on or respond to the information, to the applicant in writing, under section 359A.

New exception to provide information

Item 9 inserts **new paragraph 359A(4)(ba)** into subsection 359A(4).

Subsection 359A(4) provides that certain classes of information are excepted from the requirement in subsection 359A(1).

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New paragraph 359A(4)(ba) provides for a new class of information that is excepted from the requirements of subsection 359A(1). The MRT will not be required to give to the applicant information that the applicant has given during the process that led to the decision that is under review, unless it was information provided orally by the applicant to the Department.

This includes, for example, written information provided to the Department by the applicant as part of their visa application (where it is the decision to refuse that application which is under review by the MRT), or in response to a notice of intended visa cancellation (where the subsequent visa cancellation is under review).

For example, an applicant might have provided a copy of their passport to the Department in support of a visa application but not to the MRT in support of their review application. Because the MRT receives the applicant's file from the Department, the MRT will have the copy of the passport. If there is information in that passport that would be a part of the reason for the MRT to affirm the decision under review, the MRT is not required to inform the applicant of the particulars of the information in the passport, because the applicant had already provided that passport.

The exception provided by new paragraph 359A(4)(ba) does not extend to information that the applicant has provided orally to the Department. This would include information provided by the applicant as part of interviews with the Department for the purposes of applying for a visa or in response to a possible visa cancellation decision or information provided to the Department as part of some other process (for example, an interview with a Departmental officer at an airport about the applicant's entry into Australia). Such information is typically not recorded verbatim.³¹

Review Processes of the Refugee Review Tribunal

Items 17 to 32 are mirror amendments that relate to the RRT. For example, **Item 17** inserts new subsection 422B(3) at the end of section 422, which provides that in applying Division 4 of Part 7 of the Act, the RRT must act in a way that is fair and just.

Item 18 inserts **new section 424AA** relating to the RRT which is equivalent to **item 2** inserting new section **359AA** in relation to the MRT as set out above.

Item inserts **new paragraph 424A(3)(ba)** in relation to the RRT which is equivalent to the **item 9** insertion of **new paragraph 359A(4)(ba)** for the MRT as set out above.

Application

Item 33 deals with the application of the amendments in Schedule 1. **New paragraph 33(a)** provides that the amendments made by this Act apply to an application for review of an MRT-reviewable decision made under section 347 of the Act which is made after item 33 commences (the day after the Act receives the Royal Assent).

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New paragraph 33(b) provides that the amendments made by this Act apply to an application for review of an RRT-reviewable decision made under section 412 of the Act which is made after item 33 commences (the day after the Act receives the Royal Assent).

Concluding comments

The Bill does address Justice Weinberg's concern that there was an inflexible requirement in the legislative framework even where there was no manifest unfairness in a particular case.

The High Court has stated categorically what it considered to be the requirements for procedural fairness in RRT decisions in the *SAAP* case. Given the fact that the Bill makes the amendments contingent on an overarching fairness requirement in several places, it seems inevitable that the High Court would construe these requirements strictly. The Bill may not therefore provide legal certainty in the short term and will initially be subject to challenge, as DIAC has foreshadowed. The attitude of the courts in the long term will depend on the specific facts of each case, any particular vulnerabilities of the claimant and whether there have been any elements of unfairness within the overall framework of the legislation.

The effect of the Bill may also be different in situations where the tribunals are dealing with large numbers of new claims, as opposed to the current relatively quiet period.

Endnotes

1. Senator Chris Ellison, 'Second reading speech', *Senate Debates*, 9 December 2006, p. 1.
2. The most recent third report was tabled on 12 September 2006.
3. MRT/RRT Annual Report 2005-6, p. 32.
4. Creyke and J McMillan, *Control of Government Action: text, cases and commentary*, LexisNexis Butterworths, Sydney, 2005. See further M Aronson, D Dyer and M Grove, *Judicial Review of Administrative Action*, 3rd ed, Lawbook Co, Sydney, 2004; and Neil Rees, 'Procedure and evidence in 'court substitute' tribunals', *Australian Bar Review*, October 2006, v.28(1): 41-87.
5. *Minister for Immigration and Multicultural Affairs v Al Shamry* [2001] FCA 919 at [17].
6. Explanatory memorandum, p. 2.
7. *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 23 at [169].
8. For a summary of the five fact situations, see the *RRT Bulletin*, August 2006, p. 13.

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9. *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 at 122.
10. *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 at [9] *per Moore J*, [154] *per Weinberg J*, [184], [199] *per Allsop J*.
11. Senator Chris Ellison, *op. cit.*
12. *ibid.*
13. DIAC, submission 13.
14. Senate References Committee on Legal and Constitutional Affairs report [*Administration and operation of the Migration Act 1958*](#), 2 March 2006, p.
15. Senate Report, *op. cit.*, pp. 93–94
16. Senate Report, *op. cit.*, p. 117.
17. RRT and MRT Submission 12. p. 1.
18. HREOC Submission 5, p. 2.
19. As protected by Article 14(1) of the *International Covenant on Civil and Political Rights* ('ICCPR');
20. As protected by the Refugees Convention, the ICCPR, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
21. Amnesty International submission 14.
22. Tim Dick, 'Immigration laws worry judge', Sydney Morning Herald, 7 December 2006. His comments were in relation to the case of *SZHMM v RRT* [2006] FMCA 932 (16 June 2006) *per Scarlett FM*, on appeal to Madgwick J *SZHMM v Minister for Immigration & Multicultural Affairs* [2006] FCA 1541 (13 November 2006) in the Federal Court.
23. ALHR submission 9, pp. 6–7.
24. Castan Centre for Human Rights, submission 4, p. 12.
25. RACS, submission 8, p. 3.
26. RACS submission 8, p. 4.
27. Explanatory Memorandum, p.3.
28. For example, Castan Centre submission 4, p. 14.
29. DIAC, submission 13, p. 8.
30. Explanatory memorandum, p. 5.
31. Explanatory memorandum, pp. 8–9.

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