QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 30 January 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

Inquiry into the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Asked:

Could the department respond to the concerns raised by the Law Council of Australia in its submission to the inquiry on the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (attached)

Answer:

Introduction

In its introductory paragraphs, the Law Council of Australia submits the view that harmonisation of procedures in the Administrative Appeals Tribunal (AAT) needs to occur across all divisions of the AAT to bring decisions under the *Migration Act 1958* (the Migration Act) in line with the AAT General Division.

While this view is noted, it is not intended that the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the Bill) in any way amends the procedures for review by the Migration and Refugee Division (MRD) to replicate those applicable in the General Division. It only harmonises the codes of procedure in Parts 5 and 7 of the Migration Act. The Bill complements the schedules to the *Tribunals Amalgamation Act 2015*, which commenced on 1 July 2015 and merged key Commonwealth merits review tribunals. This included the abolition of the former Migration Review Tribunal (MRT) and former Refugee Review Tribunal (RRT) and the consolidation of their functions into the MRD of the AAT.

The amendments in the Bill do not alter the decisions for which merits review is currently available under the Migration Act, or alter the rights of current or future applicants to seek review.

It is noted that there are certain policy settings and drivers that are unique to the MRD's caseload. Any amendments to align procedures between the MRD and the General Division would need to be carefully considered.

Specific issues raised by the Law Council of Australia

Section 366A – Right to representation

The Law Council of Australia recommends that subsection 366A(2) be repealed, or that subsections 366A(1) and (2) be replaced with the content of section 32 of the *Administrative Appeals Act 1975* (the AAT Act) in order to reflect the right to representation available in the General Division of the AAT. This is beyond the scope of this Bill, which is intended to harmonise the codes of procedure within Parts 5 and 7 of the Migration Act, not across the various divisions of the AAT.

Section 366A of the Migration Act currently provides for a person to assist an applicant appearing before the Tribunal in respect of a migration reviewable decision only. The Bill provides this existing position to refugee reviewable decisions, thus harmonising the procedures.

Section 357A – Tribunal 'must act in a way that is fair and just'

The Law Council of Australia states that it opposes the repeal of section 357A(3) as it enhances clarity and streamlines procedure by clearly enshrining that the Tribunal must act in a way that is fair and just.

Repealing subsection 357A(3) of the Migration Act will have no impact on the conduct of review by the Tribunal as it is simply an exhortatory provision and merely mirrors the requirements to which the Tribunal is already bound under paragraph 2A(b) of the AAT Act. Paragraph 2A(b) of the AAT Act requires the Tribunal to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick, and therefore subsection 357A(3) is considered to be redundant.

Section 362A – Access to written material

Section 362A broadly provides that an applicant is entitled to have access to any written material given or produced to the Tribunal for the purposes of the review. This section was enacted in 1995, at a time when there was no other provision in Division 5 of Part 5 of the Migration Act that required the then Immigration Review Tribunal to provide (in the sense of 'make available') to review applicants documents or information that was before the Tribunal. The Migration Act has changed significantly since 1995, including the enactment of sections 357A (the exhaustive statement of the natural justice hearing rule) and sections 359AA to 359C (which deal exhaustively with the disclosure of adverse material).

The Law Council of Australia states that "procedural fairness requires that…in advance of a hearing, an applicant be provided access to the material before the decision-maker that may be referred to in making a decision about the applicant." It is noted that the common law hearing rule not only does not require the disclosure of material that is not adverse, it also does not require the disclosure of the full text of

adverse material that is relevant, credible and significant to the decision being made; rather, only the substance of such material needs to be put to an applicant.[1]

The Tribunal is already obligated under section 359A to provide information to the applicant that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review and ensure, as far as is reasonably practical, that the applicant understands why it is relevant to the review and the consequences of it being relied on. This provides an applicant with the opportunity to consider, and comment on, information that the Tribunal will rely on in the review, and to be prepared in advance of a hearing.

There is no provision in Part 7 of the Migration Act that is equivalent to section 362A, and it is contended that Part 7 review applicants have not been hindered in their ability to prepare for and present their case due to the absence of such a provision. As such, the Law Council of Australia's suggestion that applicants will be adversely impacted following the repeal of section 362A is not supported.

Section 358A – How Tribunal is to deal with new claims or evidence – reviewable refugee decisions

The Law Council of Australia states that new section 358A, as inserted by the Bill, does not advance the goal of harmonisation and is unnecessary. The Law Council of Australia further notes that they did not support the insertion of section 423A of the Migration Act (which section 358A substantially recreates) and continue to take that view.

While the intent of the Bill is to consolidate the codes of procedure for the former MRT and RRT into a single code of procedure for review of decisions by the MRD, this does not mean that all current Part 5 and Part 7 provisions are equally applicable to applications for review of reviewable migration decisions and reviewable refugee decisions. In this context, section 358A substantially recreates current section 423A which is applicable to reviewable refugee decisions only, therefore it is unnecessary and would be contrary to the policy intent of this provision to make it also applicable to reviewable migration decisions.

Sections 361(1) and 361(2) – Request for Tribunal to call witness and obtain written material

The Law Council is of the view that the amendments to section 361 place an additional burden on applicants to provide written notice of the oral and written evidence the applicant wants the Tribunal to obtain prior to the day on which the applicant is scheduled to appear.

Current sections 361 and 426 require written notice to be given to the Tribunal within 7 days after being notified of the invitation to appear. In practice, this generally requires the applicant to provide written notice prior to the day of the hearing. This is because the *Migration Regulations 1994* prescribe the minimum period of notice for

[1] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225CLR 88 at [29].

an invitation to appear before the Tribunal, which is 7 days if the applicant is in detention, or 14 days otherwise,[2] unless the applicant agrees to a shorter timeframe.

Amended section 361 makes it clear that the applicant is required to give their notice to the Tribunal prior to the start of the day of the hearing so the Tribunal can administer its review efficiently.

Further, applicants seeking review of a reviewable refugee decision will have on the face of the Migration Act the same entitlement available to an applicant of a reviewable migration decision to request that the Tribunal obtain written evidence or material.

Section 366C – Interpreters

The Law Council is concerned that the removal of the express power under current section 366C to request an interpreter may result in unnecessary and avoidable adjournments if the need for an interpreter does not arise until the date of the hearing.

While new section 366C is different to the current section 366C, new section 366C replicates for all reviewable decisions what has been working successfully under current subsection 427(7) in relation to reviewable refugee decisions. The intention of new section 366C is to continue to enable the Tribunal to provide for an interpreter for a person giving evidence who is not proficient in English. Any concerns regarding unnecessary or avoidable adjournments would appear to be unfounded as an identical provision has been operating successfully in section 427(7).

The Tribunal's consideration and decision to appoint an interpreter under new section 366C must be exercised in accordance with the Tribunal's existing responsibility under section 2A of the AAT Act to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Section 359A(1)(c) – Removal of 'responds to'

The amendments in Part 1 of Schedule 2 to the Bill clarify that applicants are expected to substantively engage with information put to them by the Tribunal. This does not, as the Law Council suggests, assume that applicants will already be aware of the issues. Under section 359A, when inviting an applicant to comment on information, the Tribunal is required to give the applicant clear particulars of any information that the Tribunal considers would be the reason, or part of the reason for affirming the decision under review, and ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review and the consequences of it being relied on in affirming the decision that is under review.

The amendments in Part 1 of Schedule 2 are consistent with the intention of current subsection 359C(2), which is that if an applicant does not substantively engage with an invitation to comment, that the Tribunal may make a decision on the review without taking any further action to obtain the applicant's views on the information.

[2] Except for certain bridging visa decisions, which are excluded from s 361.

Section 476(2) – Review of a decision of the Tribunal to dismiss an application

The Law Council has raised concerns that dismissal of a matter due to an applicant's failure to appear at a hearing will not be reviewable if the applicant fails to apply for reinstatement of the matter within the specified period. This is not an accurate interpretation of new paragraph 476(2)(e).

If an applicant fails to appear before the Tribunal, current paragraph 362B(1A)(b) allows the Tribunal to dismiss the application. The applicant may apply for reinstatement of the application within 14 days after receiving the notice of the decision to dismiss. If the applicant fails to apply for reinstatement (or applies for reinstatement, and the Tribunal does not consider it appropriate to reinstate the application), the Tribunal must confirm the decision to dismiss the application. The effect of this is that the decision under review is taken to be affirmed.

The purpose of new paragraph 476(2)(e) is to ensure that the original decision to dismiss the application is not reviewable by the Federal Circuit Court. It does not change the jurisdiction of the Federal Circuit Court in relation to the latter decision of the Tribunal to confirm the dismissal. In reviewing the latter decision to confirm the dismissal, the Federal Circuit Court can consider whether there were any errors with the original dismissal decision. This is the case whether or not the applicant applies for reinstatement before the Tribunal confirms the dismissal.

Section 350A – Multiple applications for review of refugee reviewable decisions

The Law Council notes that there is no explanation in the EM as to why the insertion of new section 350A is necessary. New section 350A is consequential to the repeal of Part 7 and to the insertion of the new defined term *reviewable refugee decision*. Aside from use of the new term *reviewable refugee decision*, new section 350A mirrors current section 416, which is in Part 7. Because new section 350A is not a 'new' provision but merely mirrors a current provision in order to achieve the harmonisation objective, it is unnecessary for the EM to discuss the merits of the provision itself.

Paragraph 171 of the Explanatory Memorandum (as referred to by the Law Council) explains the operation of the application provision for new section 350A.

In relation to the Law Council's concerns regarding matters remitted by a Court, it is noted that such matters will not be considered a 'further application' for the purpose of new section 350A.