CHAPTER 5

DECISION-MAKING - PART 2

THE REFUGEE REVIEW TRIBUNAL

Introduction

5.1 This chapter considers the refugee determination process as it relates to the role and function of the Refugee Review Tribunal. The Tribunal began operating from 1 July 1993, having been established specifically as a user-friendly review body considering merits review. It was the expectation that the nature of the Tribunal – its inquisitorial rather than adversarial approach[1] – would limit the need for further review.[2] However, for a number of reasons, this has not occurred.

5.2 The major objective of the Tribunal – in common with other tribunals – is to provide a system that is 'fair, just, informal, economical and quick'.[3] These principles affect the extent to which costs and formality are reduced through there being no right to have legal representation, although individuals may have an adviser. It is claimed by many witnesses that these principles are not upheld, or that representation in a more formal sense is necessary if the applicant is to obtain a fair hearing. Such claims are also linked to the issue of appropriate and qualified advice – possibly of a legal nature – being available to prepare a case and to assist at the hearing.

The Refugee Review Tribunal

Background

5.3 An applicant who has been unsuccessful at the primary level, and who does not accept the decision, must appeal, in the first instance, to the Refugee Review Tribunal:

a) if in detention, within 7 days of notification of the primary decision, or

b) within 28 days of notification of the primary decision.

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1 See *Submission No. 62*, Refugee Review Tribunal., p.681, p. 682

2 The appeal process may have several stages. The applicant may appeal a decision of the Department of Immigration and Multicultural Affairs to the Refugee Review Tribunal (RRT) for a merits-based review of the decision. If the RRT affirms the original decision to deny the application, the applicant may seek the intervention of the Minister by use of a discretionary power under s417 of the Migration Act to remain in Australia on humanitarian grounds, or appeal the decision to the Federal Court on a point of law. The Federal Court may uphold the RRT's decision, in which case the applicant may then seek leave to appeal to the High Court. If the Federal Court does not uphold the RRT's decision, the case may be set aside and remitted to the RRT for reconsideration (*Migration Act* 1958, s481)

3 See *Submission No. 62*, Refugee Review Tribunal, p. 681

Fees

5.4 An application for review by the RRT attracts a fee of $1,000 payable within 7 days of the day that notice of the RRTs' decision is taken to have been received by the applicant. The fee is not payable if the primary decision is set aside and a new decision substituted by the RRT. If the Federal Court remits a case back to the RRT, the applicant is not required to pay a further fee.

5.5 The RRT may make a decision favourable to the applicant based on a 'review of the papers'. The RRT will review the DIMA case file and any statement by the Secretary of the Department in relation to the case, material provided with the application and any statutory declarations made by the application in relation to the matter under review, and any additional information sought by the RRT.

5.6 A detainee invited to provide additional information to the RRT, other than for the purposes of an interview, pursuant to s424B(2), has 7 days notification of the invitation to provide the information (if information is to be provided from a place in Australia) or 28 days after the date of notification (if information is to be provided from a place outside of Australia).[4] An applicant who is not in detention has 14 days to provide additional information, other than for an interview, after notification (if information is to be provided from a place in Australia) or 28 days after notification (if information is to be provided from a place outside Australia).

5.7 The RRT may extend the period within which the applicant must provide additional information or comment on information, to 28 days for information to be provided from within Australia and to 70 days for information to be provided from outside Australia, from the date of notification.

5.8 If an applicant declines to provide additional information or to comment on information provided by the RRT to the applicant pursuant to s424 of the Migration Act, the RRT may make a decision on the review without taking further action to obtain the applicant's view on the information or to obtain additional information from the applicant.

5.9 If the RRT's decision would not be a favourable one for the applicant based on a 'review of the papers', the applicant must be invited to appear before the RRT, unless the applicant consents to the RRT deciding the review without the applicant appearing.

5.10 A detainee who is invited to appear before the RRT is given 7 days notice, and an applicant, who is not a detainee, is given 14 days notice to appear before the RRT. The applicant must also be advised that, within 7 days of notification of the invitation to appear before the RRT, he or she may request in writing that the RRT

4 *Migration Regulations* 1994, Regs 4.35-4.35B

take oral evidence from a person or persons.[5] However, the RRT is not required to obtain evidence from the named person(s).

5.11 If the applicant declines an invitation to appear before the RRT pursuant to s425 of the Migration Act, the RRT may make a decision on the review without taking further action to enable the applicant to appear before it. However, the RRT may reschedule the interview date to enable the applicant to appear before it.

5.12 The RRT may request the applicant to provide additional information or comment on information at an interview. A detainee must provide the information or make comments within 14 days of notification. An applicant who is not a detainee must provide the information or make comments within 28 days of notification.

5.13 The RRT may extend the period within which the applicant must provide additional information or comment on information at an interview to 28 days of the applicant receiving notification of the extension.

5.14 The RRT may take oral evidence from an applicant in person, by telephone, closed-circuit television or any other means of communication.[6] The hearings are private.[7]

5.15 The RRT prepares a written statement of its decision on the review including the reasons for the decision, findings on any material questions of fact, and references to the evidence or other information on which the findings of fact were based.[8]

Appeal to the Federal Court

5.16 Where the RRT affirms the primary decision, the applicant may lodge an appeal, only on points of law, with the Federal Court within 28 days of notification of the RRT's decision. The Federal Court may make a decision in relation to an error in law[9] made by the RRT. The Federal Court may affirm, set aside or vary the decision made by the RRT or remit the application to the RRT for further consideration.[10] Decisions of the Federal Court can be appealed in the first instance to the full bench of the Federal Court and subsequently to the High Court.

5.17 The judicial review process is examined in detail in Chapter 6.

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5 *Migration Act 1958*, s 426

6 *Migration Act 1958*, s.429A

7 *Migration Act 1958*, s429

8 *Migration Act 1958*, s430

9 However, as is noted in Chapter 6, the Federal Court has often considered issues which are deemed not to be errors of law, in relation to refugee cases

10 *Migration Act 1958*, s481

Ministerial discretionary power to grant visa on humanitarian grounds

5.18 An applicant may also apply for the Minister to exercise his or her discretionary powers under s417 of the Migration Act to substitute a more favourable decision. The Minister has issued guidelines on the factors to be taken into account when deciding whether or not to exercise his or her discretionary power and grant an appropriate visa to the applicant on humanitarian grounds.

5.19 The ministerial discretionary power under s417 of the Migration Act is examined below at Chapter 8.

The Issues

5.20 Concerns raised with the Committee about the appeal stage of the current onshore refugee determination process, include:

- the structure and operation of the Refugee Review Tribunal including the adequacy of the inquisitorial approach of the RRT; the training and qualifications of Members; the manner in which interviews are conducted, including the use of credibility issues by RRT members to challenge applications; the manner in which country information is used by Members; the alleged bias of some RRT Members; and the use of single-member panels;
- the independence of the RRT from DIMA, with particular regard to the secondment of DIMA officers to the RRT;
- the role of the RRT with respect to the exercise of ministerial discretion;
- access to and assistance for judicial review of RRT decisions at the Federal Court; and
- concerns with the exercise of the ministerial discretion under s417 of the Migration Act.

5.21 Concerns about access to and the operation of the judicial review process and the exercise of ministerial discretionary powers are discussed in Chapters 6 and 8 of this report. The issue of legal and other assistance has been considered in Chapter 3.

The structure and nature of the Refugee Review Tribunal

Inquisitorial vs adversarial approach

5.22 The Department of Immigration and Multicultural Affairs advised that '[w]hen establishing the RRT the aim was to retain the best elements of the earlier systems, such as the non-adversarial nature of the proceedings'.[11]

5.23 The then Acting Principal Member of the RRT stated that some of the criticism of the RRT 'revolves around the fact that people have been educated into an

11 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 828

adversarial system, particularly if they have come from a legal background and the inquisitorial system is different':[12]

> In an adversarial system, as I understand it, the fact finder has a largely passive role. The collection and the presentation of the evidence is the responsibility of the parties. Hearings are usually public, unless there are exceptional circumstances. There are strict rules of evidence and procedure which apply to ensure fairness, and the hearing is very much the focus of proceedings. That is summarising greatly but they seem to me to be the key features of the adversarial process that we normally see in the courts.
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> In the inquisitorial system that parliament decided in 1993 we should operate under, the key features are that the decision maker has primary control of and responsibility for the gathering of evidence. There are no parties to the proceedings in the traditional sense. Under section 425 of the act, the RRT is required to invite an applicant to appear to give evidence and to present arguments, but there is no provision, or equivalent provision, requiring or permitting the presence of departmental representatives at the hearing. In other words, in the traditional sense, there is only one party present.[13]

5.24 The Committee was advised that some of the reasons for providing a non-adversarial approach to refugee determination cases in the RRT include the need to deal with:

- a high volume jurisdiction, with applicants most likely in the first instance to be unrepresented;
- applicants who come from a non-English speaking background;
- applicants who have suffered torture or other trauma; and
- applicants with limited financial resources.[14]

5.25 The inquisitorial approach required the Tribunal member to be more proactive and thorough, to elicit information from the applicant and others, and to obtain information on the relevant country or countries where the applicant claimed the 'refugee-producing' events had occurred.

5.26 That this was the proposed role of the RRT was confirmed by a representative of the ALRC:

> They are more explicit in their investigative function largely because they restrict or constrain the role of parties or lawyers in the process. They probably do not have many more investigatory powers than the AAT, but

12 *Transcript of evidence*, Refugee Review Tribunal, p. 59

13 *Transcript of evidence*, Refugee Review Tribunal, p. 59

14 *Transcript of evidence*, Refugee Review Tribunal, p. 59

> the parties before them have fewer rights in terms of presenting a case in the way that proceedings are normally presented in our legal system. To that extent, the member or some ancillary related case officers are necessarily going to have to undertake additional research because you do not have the assumption that the party will be able to present their case fully and finally and nor that they will have the assistance of a lawyer.[15]

5.27 As a consequence, applicants were not required to use legally qualified advisers, an important consideration given the financial state of most applicants.

> If it was an adversarial system, they would have to engage legal assistance to argue their case for them. There would be a departmental lawyer arguing against their case so they would have to have someone in court to assist them and they would have to pay for it. If they did not have the money they would have to represent themselves and would be confronted with somebody who would have that legal expertise and who would, I would have thought, have some advantage over them.[16]

5.28 However, this witness acknowledged that he had no experience with adversarial systems, and was unable to compare the advantages and disadvantages of inquisitorial versus adversarial tribunals from personal experience.[17]

5.29 Concern about the inquisitorial approach and possible adverse decisions based on credibility were alluded to by another witness who stated that '[i]ssues of credibility, when determined by an inquisitorial RRT, need to be properly and thoroughly addressed':[18]

> The issue of inquisitorial tribunals is very new in Australia. We are a common law jurisdiction; we are not a civil law jurisdiction where inquisitorial tribunals are much more common. It is a learning process for many people.
>
> I do think that there is an inadequate teaching process for people in terms of administering an inquisitorial system with the safeguards in it that have developed over hundreds of years in the system that has otherwise been the adversarial system which has been working through our court systems.[19]

5.30 A number of other witnesses also advised that there were concerns that the RRT was not truly inquisitorial, and therefore could disadvantage applicants. Generally, there was a belief that there were insufficient funds for real investigations and insufficiently trained members. It was also considered that the Tribunal would

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15 *Transcript of evidence*, Australian Law Reform Commission, p. 506

16 *Transcript of evidence*, Refugee Review Tribunal, p 77

17 *Transcript of evidence*, Refugee Review Tribunal, p 78

18 *Transcript of evidence*, Law Council of Australia, p. 174

19 *Transcript of evidence*, Law Council of Australia, p. 180

benefit from having 'an advocate or counsel to assist'.[20] This would more truly reflect the approach of European inquisitorial processes.

5.31 It was noted too that there were other pressures placed on the Tribunal from the courts, and that these appeared to demand more while at the same time seeking to ensure that the Tribunal did not go too far.

> there are contradictory expectations of how this tribunal should operate. What model should it adopt? One has to start from the basis that whatever model is adopted is not going to be entirely satisfactory. Decision making in a complex and troubled area like refugee determination or immigration determination will never be easy, particularly in a context where on the one hand a government has a quota and says, 'We will only allow so many people in who fit these criteria,' and on the other hand the tribunal has a legal obligation to treat each case individually. There are again basic tensions in that system.[21]

5.32 A former RRT member told the Committee that:

> The inquisitorial system has some advantages. I have come across many cases in which there have been points that are quite critical to a case that neither appear in the delegate's decision nor are raised by the applicant or the applicant's representative, but they become apparent to a tribunal member sitting on the case as being very relevant. If you had a purely adversarial system then those points would never be taken into account and I do not think that would be good, because this is a matter that can affect the accuracy of one's decision. It is important, therefore, that the tribunal should be able to go away and, of its own motion, investigate things that it thinks are critical to a decision.[22]

5.33 Evidence from the Attorney-General's department also emphasised that the inquisitorial rather than adversarial approach is one that could be peculiarly suited to the fact that the tribunal is dealing with international obligations:

> …there also would need to be some care taken, if an adversarial approach were to be adopted in an area such as compliance with our refugee obligations, because it might be said that there is not really any adversarial

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20 *Transcript of evidence*, Law Council of Australia, p. 180. See also *Transcript of evidence*, Amnesty International, p. 197

21 *Transcript of evidence*, Law Council of Australia, p 255. See also *Transcript of evidence*, Mr John McMillan, p. 259: ' The judiciary has a role in setting the parameters and laying down some of the basic ground rules for decision making, but at the end of the day the decision making is the province of the executive. Everybody has to concede that injustice will occur in that process, and the most we can do within the executive is to try to develop a model, or a framework, for decision making that minimises that injustice. That means the development of a tribunal system that is part of the executive framework. To say that wherever there is a perceived injustice that justifies judicial intervention, I think undermines the separation of powers and ends up with a result that pleases nobody, a result that makes the outcome dependent upon who can afford legal remedies.'

22 *Transcript of evidence*, Dr Rory Hudson, p. 278

> relationship involved since Australia has these obligations and has an interest in complying with them rather than in seeking to combat applications for protection. So Australia really shares an interest with asylum seekers in ensuring that our obligations under the convention are met.[23]

5.34 The representative from the ALRC also advised that the RRT inquisitorial approach differed from the system used in Europe.

> The model that we have is generally termed an inquisitorial tribunal, yet tribunals are very different from many of the standing assumptions about inquisitorial proceedings in the continental system. They are different because they do not have parties with any sort of enlarged role and, in some of those tribunals, you do not have the capacity to have a lawyer. That is very different from Europe.[24]

5.35 Dr Aird expressed the following concern about the Australian refugee determination system:

> Government agencies concerned with immigration and with international relations may not be inclined to delve too deeply into human rights violations in other countries because, for them, the human rights issue arouses international tensions and makes their job harder. That is why a judicial proceeding of some kind seems to be essential in dealing equitably with asylum claims based on human rights. Only in an adversarial proceeding can the evidence on both sides be aligned so that the validity of an applicant's claim can be given at least a chance of a fair test.[25]

5.36 From the evidence presented, the Committee considered there are merits to the inquisitorial approach, if it were properly resourced and if there was a clear delineation of what was and was not incorporated from the European model.

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23 *Transcript of evidence*, Attorney-General's Department, p. 431. See, for an opposite view, the following opinion from another witness to the Committee, Dr John Aird: 'Government agencies concerned with immigration and with international relations may not be inclined to delve too deeply into human rights violations in other countries because, for them, the human rights issue arouses international tensions and makes their job harder. That is why a judicial proceeding of some kind seems to be essential in dealing equitably with asylum claims based on human rights. Only in an adversarial proceeding can the evidence on both sides be aligned so that the validity of an applicant's claim can be given at least a chance of a fair test', *Transcript of evidence*, p. 665

24 *Transcript of evidence*, Australian Law Reform Commission, p. 506

25 *Transcript of evidence*, Dr John Aird, p. 665

Recommendation

Recommendation 5.1

The committee **recommends** that a clear statement should be available on the nature and operation of the RRT and this should be freely available, including to detainees.

Recommendation 5.2

The Committee **recommends** that further training be provided for RRT members in the use of those inquisitorial methods accepted as integral to the Tribunal.

Factors influencing the quality of decision-making

5.37 Witnesses stated that perceived problems of bias, 'burnout', possibly inadequate training, and having the sole burden of responsibility for a decision, could be overcome by a strategy which provided support, on the job education, peer review, and reduced responsibility. Many organisations and individuals suggested that quality of, and confidence in, the RRT's determination process could be improved by allowing for multi-member panels.

> Section 421 of the Migration Act provides that, for the purpose of a particular review, the RRT is to be constituted by a single member. This…makes the tribunal member's task more difficult than that of a judge, and it is hardly surprising that there is dissatisfaction with decisions. A two or three person panel operating in a one stage assessment would be preferable.[26]

5.38 A considerable amount of evidence was presented, identifying several important issues. Some of these were not specifically related to the concern with single-member panels, and addressed broader questions of the methodology and constraints of the Tribunal.

Strict Time Limits prior to Hearings

5.39 Section 360 of the Migration Act requires the RRT to invite an applicant to appear before the RRT to give evidence unless the RRT can make a decision in the applicant's favour on the basis of the written application alone, or where the applicant consents to the RRT deciding the review without the applicant appearing before it. Where an applicant does not provide additional information within the specified time period or fails to appear at the interview, the RRT may make a decision on the review without taking further action to obtain the applicant's views.

5.40 The Refugee Council of Western Australia (RECOWA), in its submission to the committee, criticised the strict 28 day time limit on applying to the RRT for a review of a Protection Visa application, with no discretion to extend the time limit

26 *Submission No. 30*, McDonells Solicitors, p. 208

even in exceptional circumstances.[27] There were also anecdotal reports of asylum seekers not being advised by their lawyers of their review rights at the RRT and then failing to lodge their appeal in time.

5.41 While the Committee acknowledges that these factors may cause some difficulty, and is sympathetic, it believes these limits are appropriate, given the need to limit delays as much as possible. In cases of blatant failure of registered advisers, the IAAAS program manager should bar firms who fail to advise clients of their rights. Where a firm is repeatedly found to be remiss in this regard the Law Council should be informed as well as the state authorities.

5.42 The strict enforcement of the time limits involved in providing additional information and responding to an invitation to attend an interview may lead, in exceptional circumstances, to an applicant failing to receive the invitation. The RRT does not have the discretion to extend the period within which an applicant must respond to a request for additional information, but the RRT has indicated that a member may take steps to ascertain why an applicant has not responded to an invitation to appear.

Limited time devoted to hearings

5.43 The Law Council of Australia also criticised the brevity of RRT hearings, noting that on average hearings last for between two and four hours:

> The RRT, as an inquisitorial body, is responsible for assessing, if you like, all the events of the applicant's life, all the country events and all the information that is relevant to determining that claim.
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> a case involving the potential safety of a person is dealt with… in four hours. I query how that can be done, especially when you are dealing with issues of credibility where applicants in the large part are not represented and where all the proper safeguards which the criminal law system has implemented for protection of people are not put in place in the determination system in relation to asylum seekers.[28]

Quality of information in applications

5.44 The Committee has previously noted evidence that the quality of applications on which the department makes a decision against the Refugees Convention can be poor, depending on a number of factors.[29] Evidence has also been provided suggesting that the quality of information provided to the RRT may also be lacking. The KLC identifies the requirement for the applicant to pay for the cost of translating documents as another barrier to a complete case being presented to the RRT, stating '[s]ome

27 See also *Daljeet Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1558

28 *Transcript of evidence*, Law Council of Australia, pp.173-174

29 See above, Chapter 4

applicants will be unable to afford translations and key documents from the country of origin that may support the applicant's case, will never be put before the RRT'.[30]

5.45 The Committee is aware that documents may not be available until after the DIMA hearing or may be additional material required by the RRT. However, if DIMA is making primary decisions without consideration of relevant material in translation, or without questioning the applicant, there may be serious problems with the standard of DIMA decision making, and with the quality of IAAAS service provider.

5.46 Another witness stated that questioning was often essential, as available written material may not provide all information:

> There are real risks in the tribunal being able to dispense with a hearing by making determinations on the basis of written submissions and other documentation…Further contextual information, often critically important, is not apparent on the papers and can only be gathered from questioning.
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> It should also be noted that a sole reliance on written procedures would undoubtedly disadvantage people with limited English, those with low literacy skills and those with limited formal education.[31]

5.47 The Committee notes that where a favourable decision cannot be made on the papers, there is an obligation to invite the applicant for an interview. However, it does note that in some instances it is likely there is a clear need for a skilled advocate who can assist the applicant present a case more thoroughly.

Use of interpreters

5.48 ACOSS also recommended that the right for an applicant before the RRT to have an interpreter should be enshrined in legislation or that clear directions should be given to the RRT as is the case with SSAT members, stating that this was 'critically important as the majority of applicants who appear at the RRT have limited or no English language skills.'[32] However, Practice Directions for Refugee Review Tribunal Members indicate that applicants who require an interpreter should advise the RRT of this via the 'Response to Hearing Offer' form.[33]

Dependence on the Country Information Service (CIS)

5.49 A former RRT member believed that criticism of members relying too heavily on reports from the Department of Foreign Affairs and Trade was valid in some cases, but added:

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30 *Submission No 36*, Kingsford Legal Centre, p. 308

31 *Submission No. 33*, Australian Council of Social Service, p. 222

32 *Submission No. 33*, Australian Council of Social Service, p. 222

33 *Refugee Review Tribunal 1997-98 Annual Report*, p. 34

> There are members who can be overtrusting of those reports, which have to be taken with a grain of salt. There is a wide range of information…that is available to the RRT, and some members take a wider range of information into account than others do. That is a matter of individual preference…[34]

5.50 RECOWA identified two issues that asylum seekers had to deal with in relation to substantiating their claims for refugee status:

> Firstly, the decision maker has no first-hand experience as to the conditions put forward by the applicant. In addition, the applicant's claim may not be substantiated if their country of nationality does not have a free media and if its citizens are afraid to speak freely about the conditions in the country.[35]

5.51 In relation to the source of country information, and the relative weighting placed on official sources as compared to other sources such as material from NGOs, an RRT member indicated:

> It is up to the individual member in each case to determine what weight they will give all of the evidence before them. As we might have mentioned, we have a country research area. In a fairly large number of cases, individual members will approach that section for information about a country or a particular issue in a country. The material that comes back from country research does not purport to be an analysis of that material, but they will provide a spread of information on the subject matter. That can include something from the US State Department or DFAT at one end, to NGOs and Amnesty. It is up to the individual member to then look at that information and determine what weight they will give it.[36]

5.52 He noted that in Australia, unlike some countries, there is no direction to give primacy to country information provided by a government agency and that it was up to the individual member to 'look at a broad range of material':

> …it is really up to the individual member to look at that and then accept or dismiss the evidence before them. It has to be for the member to make that decision, not the researchers. The researchers are there to provide the raw material.
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> It does not happen that way in Canada. I know the IRB actually provides some analysis. In some countries there is legislation in place which says that they have to give primacy to their equivalent of the Department of Foreign Affairs, for instance. But we do not have that, we have a system where it is the individual member's responsibility.[37]

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34 *Transcript of evidence*, Dr Rory Hudson, p. 278

35 *Submission No. 18*, The Refugee Council of Western Australia, p. 100

36 *Transcript of evidence*, Refugee Review Tribunal, p. 689

37 *Transcript of evidence*, Refugee Review Tribunal, p. 695

5.53 While members have regard to what DIMA has in its CIS holdings, they did not consult or discuss with officers from DIMA the relative merits of information held by the CIS.[38]

5.54 Concerns raised about this process included the apparent lack of organisation and evaluation of material:

> What worries me about this area is this: if you give refugee status to somebody who is not entitled to it, it is a very bad thing, but if you send back somebody who is a refugee and in danger, then that is a very serious business indeed.
>
> It seems to me that this country information system, as it has been described… is a very weak basis for decision making given the gravity of the decision… Having listened to you, to DIMA and to DFAT, it is like a great big bin into which everybody tosses all of this information… The decision maker puts the hand in, pulls out some material and that is it. It is a very uncertain process given the gravity of the decision.[39]

5.55 With respect to the requirement to provide applicants with adverse information pursuant to section 424A of the Migration Act, Mr Godfrey advised that while the requirement was only to provide information specific to the applicant, if the member has any more general adverse country information they would also put that information to the applicant, although this may not occur until the hearing.[40]

5.56 The Committee considers that its recommendation 4.6 addresses this issue.

Conduct of RRT interviews

Bias

5.57 One witness alluded to the alleged bias of some RRT members in noting a judgment of the Full Federal Court in which a judge expressed reservations about a RRT decision preferring 'not to express an opinion about whether it stemmed from bias, "as distinct from incompetence"'.[41]

5.58 This was supported by the written evidence of another witness:

> …RRT members' interviewing and interpersonal skills and attitudes vary markedly. What I have noticed over the past few years is a tendency for members to question the credibility of the applicant's claim, often apparently even trying to trick the applicant into contradicting herself… It is fascinating to listen to taped interviews, noting the interrogation-style

38 *Transcript of evidence*, Refugee Review Tribunal, p. 704

39 *Transcript of evidence*, Senator Cooney, p. 706

40 *Transcript of evidence*, Refugee Review Tribunal, p. 61

41 *Submission No. 35*, Nick Poynder, p. 250

> techniques sometimes used – apparent indifference, coldness, challenging thrusts, multiple and return questioning about particular incidents, covert remarks that are not possible to interpret, insinuation.[42]

Credibility

5.59 The types of complaints applicants have of the manner in which the RRT hearing is conducted include:

- occasions when the RRT doubts the credibility of an applicant on the basis that the RRT has considered '"implausible"' something that 'is in fact a reality in their home countries';
- when members base credibility findings on 'how particular societies or localities work' where an applicant 'knows the member did not understand "how it really is"'; and
- dissatisfaction where an applicant feels that the questioning centred on things considered irrelevant by the applicant rather than on what are considered important claims.[43]

5.60 The Refugee & Immigration Legal Centre (RILC) in noting that the RRT is the last forum at which an asylum seeker can present his or her claims for refugee status, states that therefore:

> It is imperative that the RRT operate fairly, effectively and mindful of the evidentiary, cultural, psychological and language difficulties for many asylum seekers in presenting their claims…[44]

5.61 Not only the applicants but also the courts have expressed disquiet at the manner in which RRT members handle or address credibility findings.[45] One witness stated that the culture of the RRT was changing such that little emphasis is being placed on psychological, cultural and language issues when assessing an applicant's credibility.[46] He advised that currently the RRT allows an applicant's advisor to put questions to the applicant and to make final submissions to the member, noting that '[w]ell prepared submissions and competent advisors in most cases assist the Member in the determination process'.[47]

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42 *Submission No. 14*, Ms Sherron Dunbar, p. 61

43 *Submission No. 31A*, Australian Law Reform Commission, pp. 289-290

44 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 324

45 *Submission No. 31A*, Australian Law Reform Commission, p. 290

46 *Submission No. 39*, Mr John Young, p. 357

47 *Submission No. 39*, Mr John Young, p. 360

5.62 The RRT advised the Committee that while the credibility of an applicant was a 'matter of fact' it was also a 'matter of commonsense'.[48] The RRT makes an assessment of the applicant's credibility by:

- examining any inconsistencies in the applicant's claims;
- determining whether new claims are raised at a hearing that were not included in the written application;
- determining whether there are any inconsistencies with known conditions in the applicant's country of origin; and
- assessing the general plausibility of the applicant's story.[49]

5.63 The RRT discounted concerns that some members may have tried to make a decision 'review proof' by using the credibility issue to reject an application, noting that the Federal Court had questioned the overuse of credibility issues in RRT decisions.[50]

5.64 Amnesty International, in evidence to the Committee, stated that the current 'credibility test' was 'too high'. It argued that applicants should be given the benefit of the doubt:

> The test should be the benefit of the doubt, but it is actually balanced on probabilities moving above that. The benefit of the doubt is below 50 per cent. It is not above 50 per cent. If somebody arrives and they cannot prove a claim, but their claims could be feasible and there is nothing to say that it is a fifty-fifty case, they should be given the benefit of the doubt, arguably. That is because of the consequences of sending someone back to a country where they might be met at an airport in the middle of the night and brought away.[51]

5.65 Other evidence suggests that decisions against an applicant in the RRT are increasingly being based on adverse findings on credibility grounds. Until the credibility issue is addressed, the RILC proposal is unlikely to see reduced costs.

5.66 Another option for dealing with credibility issues is to include credibility guidelines into the RRT's practice directions. The RILC stated:

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48 *Transcript of evidence*, Refugee Review Tribunal, p. 62

49 *Transcript of evidence*, Refugee Review Tribunal, p. 62. The RRT provided the Committee with copies of papers on Credibility, Refugee Review Tribunal, *Supplementary Information*, September 1999, Appendix A

50 *Transcript of evidence*, Refugee Review Tribunal, pp. 62-63. See also evidence from *Submission No. 35*, Nick Poynder, p. 250: 'Despite the limited grounds for review of RRT decisions, they continue to be overturned by the Federal Court at a reasonably high rate. In my view this is merely indicative of the very poor decision-making of some RRT members, who often appear to bend over backwards to find ways of rejecting claims in a way that is "review proof"

51 *Transcript of evidence*, Amnesty International, p. 49. See also a similar point made by *Submission No. 38*, Refugee & Immigration Legal Centre, p. 328

> The new RRT Practice Directions are a comprehensive document of 10 pages covering most aspects of the RRT's procedures. However, there is no reference as to the RRT's approach to issues of credibility. Credibility has become the single most important issue in applicants' claims. We consider it important that the public be provided with guidelines as to how the RRT intends to exercise this very important discretion.[52]

5.67 The RILC also suggested the option of an 'investigative officer' so that the 'inquisitor' is a different person to the decision maker, or alternatively, that in a multi-member panel, one of the members could take on that role.[53]

Conclusion

5.68 The Committee is not in a position to directly assess the quality of RRT processes, as hearings are not public. However, it notes that the inquisitorial method, when used appropriately, is intended to draw out details which go to the heart of the issues.[54] This approach may appear intimidatory,[55] but if so, this outcome may result from factors other than the method itself: either the manner of the Tribunal member or the fact that there may be limited opportunity for intervention and clarification. In cases where the applicant has no advocate or support person present, they may have difficulty coping with questions or understanding the issues.

Recommendation

Recommendation 5.3

In carrying out its task to determine whether a person is a refugee, the Committee recognises that the RRT's assessment of a claim for refugee status will, and should be, influenced by matters that go to an applicant's credibility. The Committee **recommends** that credibility continue to be a factor in the determination of refugee status.

Unfamiliarity with the inquisitorial process

5.69 It is also possible that persons more accustomed to the adversarial process may find the inquisitorial method sufficiently different to cause problems for the inexperienced:

> Our adversarial process is seen to have an advantage in that the judge, by not 'descending into the arena', is able, more objectively, to evaluate

52 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 330

53 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 332

54 See Australian Law Reform Commission Discussion Paper 62, *Review of the federal civil justice system* (1999) p. 29:' The term 'inquisitorial' refers to civil code systems in which the judge has[the] primary responsibility' ..'for defining the issues in dispute and for investigating and advancing the dispute.' See also *Transcript of evidence*, Dr Hudson, p. 277

55 *Submission No. 14*, Ms Sherron Dunbar, p. 61

> evidence. It is difficult for members who have investigated and 'found' inconsistencies in applicants' accounts of their stay, and who inevitably feel committed to their own findings, to dispassionately evaluate in, or after the hearing, whether such inconsistencies necessarily invalidate the refugee claim.[56]

5.70 Some witnesses, who supported the RRT,[57] stated that they had found Members to be generally accommodating and not averse to clarification of issues:

> …I think the tribunal is quite fair. I have been in this business now for just over 10 years and, in all the time with the RRT, the members have allowed me to interact…Although there is no cross-examination and you cannot be too inquisitorial, you can interrupt at any time and you can clarify something. At the end of it, we may spend 15 minutes to half an hour-an hour in some cases-having a good interaction with the member on the issues of the convention and the case and the credibility of the client. They are very flexible. I do not think all of the statements that have been made in the press about the problems with the Tribunal are correct.[58]

Natural justice

5.71 The removal of breach of natural justice as a grounds for appeal from the RRT to the Federal Court was criticised particularly with respect to adverse information about the applicant. Mr Clothier, Law Council of Australia, stated:

> An unrepresented applicant is presented with that information possibly not even until the decision. An unrepresented applicant may be presented with the information at the hearing but would rarely be presented with the information before the hearing. How do you approach that information? That is information which is being given to a RRT member not in open hearing. This is the traditional problem that RRTs and courts have when they are taking evidence. Because you no longer have the right to sue this RRT ifs it denies you natural justice, these natural justice issues come up and hit you in the face…

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56 *Submission No. 31A,* Australian Law Reform Commission, p. 292

57 See *Submission No. 66*, Macpherson & Kelley, p. 801: 'We regard the current procedures adopted by the RRT to be satisfactory. In our experience applicants are treated fairly and are afforded a full opportunity to present their claims for protection, are given proper access to information through FOI procedures and are provided adequate access to interpreters and advisors. Criticisms made of the RRT that it is a cross between a Star Chamber and a Kangaroo Court are completely untrue in our opinion. Members of the RRT invariably permit applicants and their advisors to comment and make submissions about the claims made by an applicant and frequently grant additional time for the submission of further material following a hearing. Members seem to us to be universally concerned with the welfare of the applicant and are conscious that often they are the last chance that an applicant will have of avoiding persecution and even death if they are returned to their country of origin. With respect to criticisms of members' demeanour, attitude and perceived bias, including the notice given to applicants of adverse material, these witnesses advised that they had never encountered situations when an adverse report was presented to applicants shortly before a hearing was to take place'. (See *Transcript of evidence*, Macpherson & Kelley Solicitors, Mr John Young, pp. 304-305)

58 *Transcript of evidence*, Mr John Young, pp. 304-305

> …This is the non-adversarial process in play…This is the evil that comes of having this so-called non-adversarial process. You do not have the ability to properly answer the conclusions of fact that are reached about you and about your situation before you enter a hearing.[59]

5.72 The RILC was critical of the restriction of the presentation of adverse information to applicants to information 'specifically pertaining to the applicant' stating:

> Cases are most commonly rejected on the basis of the RRTs' assessment of the risks facing groups of people in particular countries based on country information obtained by the RRT. For applicants to meaningfully understand the case against them they should have the opportunity to comment on any country information the RRT may wish to rely upon, which is adverse to their claims.[60]

5.73 The RRT advised that it has a duty to provide any adverse information to an applicant. It also advised that more general contradictory country information is also put to an applicant to provide them with an opportunity to comment.[61] Further, it was noted that the changes about the type of information available to applicants would ideally be viewed broadly:

> I would say that the Tribunal has not taken that to mean that that is the only information adverse to an applicant which it is required to put because there are the broader common law procedural fairness requirements. I think I am correct in saying that there is, if not a direction, an instruction from the then principal member that Tribunal members should operate in that broader sense of procedural fairness, rather than in the very narrow terms of the act.[62]

Representation before the RRT

5.74 Several witnesses also suggested that there be better representation for asylum seekers at the RRT, especially because it is 'a much more sophisticated body than the case officers employed to make decisions at first instance.'

> Unfortunately…it appears that few of the advisers who are appointed by DIMA even bother to attend the RRT hearings, and those who do are often ineffectual and provide very poor representation.[63]

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59 *Transcript of evidence*, Law Council of Australia, p. 331

60 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 326. See also *Submission No 36*, Kingsford Legal Centre, pp. 308-309; *Submission No. 30*, McDonells Solicitors, p.209

61 *Transcript of evidence*, Refugee Review Tribunal, p. 689

62 *Transcript of evidence*, Refugee Review Tribunal, p. 693

63 *Submission No. 35*, Nick Poynder, p. 246

5.75 Legal representation is allowed in the traditional inquisitorial model,[64] although cost factors may have prevented the adoption of this in the RRT. In addition, it has been the emphasis in tribunals to limit the need for legal representation, in part because of the powers of the tribunals themselves to undertake investigation. Some of the criticism of the RRT in respect of the lack of applicant representation may reflect the quality of individual members rather than the process itself:

> The applicant is unfamiliar with the procedure of the RRT and in many cases has no knowledge of Refugee Law. The applicant may fail to establish certain facts which are called into question simply because he does not understand the legal implications behind the questioning.[65]

5.76 For this reason, some witnesses suggested that a good migration agent was essential:

> …familiar with the law [and] also able to assist the applicant in corroborating his story by providing witnesses, independent information, expert opinion, independent document examiners etc. It is also important for the applicant to have an adviser who is familiar with the nuances behind questioning and can explain to the applicant what information is being asked of him.[66]

5.77 Others suggested that the adviser should be legally qualified. ACOSS, in noting the increasing complexity of the refugee determination law, stated:

> Many of the issues arising at tribunals are legal in nature. The right to representation is particularly important for asylum seekers given the enormity of the implications of the matter being deliberated for the applicant's life and well-being; the emotional stress experienced by applicants during hearings; and a lack of familiarity with the workings of the RRT.[67]

5.78 ACOSS submitted that other benefits for asylum seekers in having legally qualified representation at the RRT would be:

- to enable asylum seekers to concisely and accurately present their case;
- to ensure that any adverse findings about the credibility of an asylum seeker is soundly based and not related to a misunderstanding between the member and the applicant; and

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64 Australian Law Reform Commission, *Review of the Federal Justice System*, Discussion Paper No. 62 (1999), Paragraph 2.26

65 *Submission No. 39*, Mr John Young, p. 356

66 *Submission No. 39*, Mr John Young, p. 357

67 *Submission No. 33*, Australian Council of Social Service, p. 222

- to ensure accessibility to the RRT and overcome any reluctance on the part of the asylum seeker to appear alone at the interview.[68]

5.79 The Committee notes that asylum seekers may take legal and other advisers with them to the RRT interview, but that any cost is not covered through current IAAAS funding. It is not persuaded that legally qualified advisers are necessary in RRT cases. Better understanding of the process by applicants and appropriate levels of service provision by funded agents and advisers is also essential. Improving the functioning of the RRT, including use of members with appropriate qualifications and experience; better inquisitorial processes; and improved quality of applications and responses to adverse material, should also help resolve the problems identified above.

Tribunal forced into different role?

5.80 Evidence was also provided that the Tribunal was placed in a position of being the primary decision-maker, and not the review body. Amnesty International stated in its submission to the committee that criticisms of refugee status decision-making should not exclusively be directed at the RRT, noting that there were 'substantial shortfalls' in decision-making at the primary stage. Amnesty International, in noting that the RRT traditionally 'appeared to be a sufficient safety net for most refugees to be recognised in Australia' pointed to two developments which caused it concern:

- DIMA decisions have become worse and the RRT now bears the brunt of decision-making responsibilities.
- The RRT is increasingly rejecting cases on grounds of credibility or misinterpretation of facts or because Tribunal members deem that someone may indeed face torture or death on return, but not for a 'Convention reason'.[69]

5.81 As a result, the RRT is placed in the difficult position of being a review tribunal, working as a primary decision-maker:

> The problem then is that the RRT is acting less as a filter and more as a primary determinant which is not supposed to be its role at all, and then the RRT comes in for a lot of flack.[70]

5.82 The Committee believes there is some evidence to support the suggestion by Amnesty that the quality of decision-making in the department could be improved. It has made recommendations in Chapter 4 to facilitate this.

5.83 As a result of the above factors, some applicants and their advocates believe they have not had access to a reasonable hearing. The ALRC noted in its submission that '[p]ractitioners are emphatic in their comments to the Commission that most

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68 *Submission No. 33*, Australian Council of Social Service, p. 222

69 *Submission No. 50*, Amnesty International, p. 508

70 *Transcript of evidence*, Amnesty International, p. 50

clients who seek judicial review are motivated by the sense they were not fairly dealt with in the RRT',[71] with the member being perceived as the adversary as well as the decision maker':[72]

> The RRT itself is a very pared-down merits review model. The Tribunal member is the investigator, hearing advocate and decision-maker. Such an array of skills and roles is not easily combined in the one person, and cases can be particularly difficult when they turn on credibility issues.[73]

5.84 While mindful of the factors that have been identified above, the Committee notes also that the limits of the Refugees Convention and the fact that cases are not assessed by the RRT against other conventions may also contribute to a feeling of justice not having been done. The Committee's earlier recommendation about information being available on the whole process may contribute to applicants being aware of the limitations of the Convention itself and of the current interpretation of the Convention in Australia.

5.85 While it has been argued that the failure of up to 50 per cent of applicants at the RRT to appear when invited to give oral evidence is an indication that the applications are not genuine, it has also been suggested that this may be a reflection of lack of understanding on the part of applicants about what they have been asked to attend.[74] This may indicate a need for a much more clear statement of the purpose of the RRT,[75] although it is also the responsibility of IAAAS providers to ensure their clients understand the process.

Multi-member panels?

5.86 In enumerating many of the perceived problems of the RRT, a number of witnesses suggested that many of these could be overcome by the use of multi-member panels. The benefits of such panels are considered to be such as to overcome most of the factors identified above.

5.87 Section 421 of the Migration Act provides that, for the purpose of a particular review, the RRT is to be constituted by a single member. A 'single tribunal member has to be inquisitor, advocate, judge and jury'[76]:

5.88 The Refugee Council of Australia claimed that there would be substantial benefits from the introduction of multi-member panels:

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71 *Submission No. 31A*, Australian Law Reform Commission, p. 289

72 *Submission No. 31A*, Australian Law Reform Commission, p. 291

73 *Submission No. 31A*, Australian Law Reform Commission, p. 289

74 *Submission No 36*, Kingsford Legal Centre, p. 308

75 See above Recommendation 5.1

76 See, for example, *Submission No. 35*, Nick Poynder; *Submission No. 33*, Australian Council of Social Service; *Submission 24A*, Refugee Council of Australia, *Submission No. 31A*, Australian Law Reform Commission

- members get to see the style of other members…;
- new or less experienced members would be able to learn from their peers;
- members expand their repertoire of questioning techniques and interpersonal behaviour relevant to working with refugee status applicants, in particular those who are very nervous and/or highly traumatised;
- members are able to discuss a case with a colleague who is familiar with the evidence and has been present at the hearing. This way they can cross reference their deliberation process with that of a colleague who may approach things in a different manner and/or view things from a different perspective;
- members whose interpersonal style is detrimental to the inquisitorial process or who have become burnt out due to the nature of the work can readily be identified and counselled;
- multi-member panels lessen the possibility of actual or perceived bias;
- in cases of considerable complexity where the collective wisdom of the members would strengthen the decision, the constitution of multi-member panels would be of particular benefit; and
- applicants benefit from having such subjective matters as assessment of credibility taken out of the hands of one person.[77]

5.89 A similar series of benefits was also listed by the Administrative Review Council.[78] The RILC also argued that multi-member panels would overcome some of concerns with credibility issues, stating that a multi-member panel:

> ...would significantly reduce the scope for unfair credibility findings. The consultation by all three members would provide an important brake on any caprice in reaching findings of fact. The benefit of the doubt would be accorded to the applicant if there was disagreement between the members about the veracity of the claims.[79]

The purpose of the RRT should not be distorted

5.90 The Committee believes that the increase in the number of persons on a panel is not necessarily a solution to a number of identified problems that appeared to result from the inquisitorial process *per se*, and from factors outside the control of the

77 *Submission No. 24A*, Refugee Council of Australia, pp. 268-270. See also *Submission No. 33*, Australian Council of Social Service, p. 223

78 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (AGPS 1995), p. 53

79 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 330

Tribunal, specifically the quality of decisions made by the department, and the limited number of interviews of applicants at the primary decision-making stage. The latter problem can only be resolved by improving the departmental process. The former, in many instances, is more to be resolved by ensuring that what is appropriate to the inquisitorial process is maintained and adhered to.

5.91 For this reason, the Committee has recommended above that there be greater clarity about the process and what it can and cannot offer, including the limitations placed upon the Tribunal.[80] It has also made a recommendation about training in the inquisitorial process and considered other issues of training for Tribunal members.[81]

5.92 With respect to other matters, such as bias, credibility, and a feeling of not having been listened to, the Committee considers that certain of these may result in part at least from the expectations of the applicants and the level of service provided. At this point, the Tribunal is limited by the Refugees Convention and by fairly specific understandings of what the various grounds embrace. It is unlikely that a multi-member panel will be able to change this and increase satisfaction. Where an application is unsatisfactory, it may be that there is no genuine ground under the Refugees Convention and nothing the member asks can elicit this. There is little value in attributing such problems to the RRT.

5.93 Similarly, it is likely that many persons will continue to feel aggrieved regardless of the number of persons on the panel and regardless of the length and detail of questioning. It is not the role of any tribunal or court to provide a solution which will leave everyone satisfied.

5.94 This is not to say that there are no likely benefits arising from a larger panel. Complaints which refer to the behaviour of a member, if justified, do not need to be resolved by increasing the panel, but by the imposition and maintenance of standards of behaviour. Where complaints are consistent – and there should be evidence of this in the tape of the hearing – then the Principal Member should take appropriate action.

5.95 Procedures should not be a matter of individual choice, but fall within the province of standard practice. Papers produced on standards – such as the documents provided by the Tribunal on credibility – should be guidelines which the Principal Member must ensure are read and understood. Nonetheless, any member deemed to be biased or aggressive may be inclined to behave less obviously in the presence of colleagues, and any member with poor quality information may be shown up by another member more familiar with an area.

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80 See above, Recommendation 5.1

81 See above, Recommendation 5.2 and also Paragraph 5.97 and Paragraphs 5.139-5.151, and Recommendation 5.8

Complex issues

5.96 Another area in which there may be benefit from multi-member tribunals are in the more complex cases:

> The experience of the Refugee Review Tribunal is eloquent that there are difficult issues which cannot be resolved by a single member sitting alone. If the Tribunal structure continues along the framework of a single member sitting alone, then the Federal Court will by default become the second level of appeal.[82]

5.97 However, it is not clear how many of the cases heard by the RRT could be considered complex, and if there are large numbers of 'basic' cases which could continue to be heard by one fairly experienced member, perhaps with newer members sitting in. Because of the other factors identified – perhaps poor work by the primary decision maker; incomplete applications; cases which have limited chance of success under the grounds of the Convention itself –it is difficult to determine if there are many matters which may require two or three members. The situation may be resolved by better training , including on the inquisitorial process:

> I think the RRT cases in the Federal Court indicate that a lot of members have difficulties with the hearing process. Where you have that demonstrated you can put those members in with another more experienced member and they can be essentially learning on the job.[83]

5.98 A further benefit identified with multi-member panels was the capacity to obtain more quickly an idea of what was appropriate practice. The ALRC for example suggested that individuals might tend to be more easily sidetracked by irrelevant matters, and unable to assess them appropriately. Tribunals with more than one member allows discussion of an issue at hand, and can be a good approach.[84]

Comparison with other tribunals

5.99 The Committee notes that much information has been provided on the merits of other multi-member tribunals. Although there has been comparison with the SSAT and other bodies,[85] it is important not to forget that the persons most directly involved are likely to be in somewhat different situations**.** Regardless of the complexity of many SSAT cases, the 'facts' of the matter are generally more readily available, and

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82 *Transcript of evidence*, Mr John McMillan, p. 254

83 *Transcript of evidence*, Australian Law Reform Commission, p. 514

84 *Transcript of evidence*, Australian Law Reform Commission, p. 514

85 The National Convenor of the Social Security Appeals Tribunal (SSAT), noted that there had been a recommendation to provide for a maximum rather than a minimum of three members in special circumstances for the SSAT. The type of cases that could be heard as single member panels would comprise 'simple, straightforward ones' including cases involving 'a simple issue at law, no discretion, the fact is simple, date of commencement issues, jurisdiction appeals'. A trial by the SSAT revealed that the majority of cases heard would continue to be heard by more than one member, with a substantial number by two-member panels. *Transcript of evidence*, Social Security Appeals Tribunal, pp. 459-460

the individuals concerned are likely to have been living in Australia or supported by someone who is more familiar with the system.

5.100 The RRT applicant is subject to pressures which may make it difficult to see that there is an impersonal system, under which he does not qualify. In such circumstances, the benefits of a two or more member panel may be more for the tribunal members than the applicant, in that the members may feel they have sought to clarify the situation and are convinced they cannot do any more. In addition, benefits may also arise in the area of credibility if multi-member panels are less prone to 'country fatigue'.[86]

Costs

5.101 The Refugee Council of Australia identified the additional costs of multi-member panels in terms of sitting fees, provision of papers and travelling costs as the main disadvantages to the multi-member approach.[87]

5.102 The Council considered that:

> …the advantages of multi-member panels justify the additional cost in many cases. Savings from the use of single members to deal with cases that would benefit from a multi-member panel are a false economy
>
> …limitations such as the mandatory single-member operation in the RRT should be abandoned.[88]

5.103 The ARC also argued that the potential additional costs associated with constituting multi-member panels could be limited as a result of:

- improved applicant satisfaction;
- increased member skills and confidence;
- increased efficiency; and
- reduction in number of judicial appeals.[89]

5.104 The ALRC stated:

> Single member panels may not be cost effective if the effect of such attenuated processes is that applicants feel aggrieved at the process and seek further, costly judicial review. This human factor has to be calculated in the

86 *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 329-330

87 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (AGPS 1995), p. 53

88 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (AGPS 1995), p. 54

89 *Submission No. 31A*, Australian Law Reform Commission, p. 292

> efficiencies extracted from litigation and review systems. Adjustments could be made to the merits review process which might obviate the need for exceptional legislation challenging the assumptions of our legal system in which judicial review has a beneficial supervising role to play.[90]

5.105 The ALRC indicated that multi-member panels need not be a more expensive option, because 'you can set it up so that a member becomes the decisive member in those hearings, that they undertake to write the decision, so that you can have two hearings'.[91] In this way three members could sit on three panels during the day, with the decision writing responsibilities being shared between them – the first panel could be headed by one member who writes the decision, and then that member is a panel member in the next hearing without the write up responsibility.

Attitude of the RRT to multi-member panels

5.106 In its 1994-95 annual report, the RRT expressed the view that multi-member panels would enhance the quality and consistency of decision-making.[92] When questioned by the Committee about whether multi-member panels of the RRT would be more desirable than single-member panels, the then Acting Principal Member noted the resource implications of such a change to the existing legislative requirements, and further stated:

> I do not think I have a view on whether it would be more effective or not. I think that probably is for others to say. I have indicated earlier that I think the present system can work and can work quite well.[93]

5.107 The Committee notes that comments by the Registrar of the RRT of the value of having 'another eye to look at the decision'.[94]

Conclusions

5.108 The Committee does not consider that the problems identified above can be easily solved by changing the format of the tribunal. However, it does consider that, in conjunction with improved decision-making at the primary stage, improved provision of information to applicants, better application advice and assistance, and greater clarity about the methodology of the tribunal, there may be benefits from being able to hear some RRT cases with larger panels.

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90 *Submission No. 31A*, Australian Law Reform Commission, p. 297. See also *Submission 24A*, Refugee Council of Australia, p. 270

91 *Transcript of evidence*, Australian Law Reform Commission, p. 514

92 Refugee Review Tribunal, *Annual Report 1994-95*, p. 7

93 *Transcript of evidence*, Refugee Review Tribunal, p. 89

94 *Transcript of evidence*, Refugee Review Tribunal, p. 395

Recommendation

Recommendation 5.4

The Committee **recommends** that the Refugee Review Tribunal be able to sit as a single member body and as a panel of two and up to three members as appropriately determined by a Senior, or the Principal, Member. Members would be drawn from people with appropriate backgrounds for considering refugee and humanitarian applications.

5.109 Increased flexibility of the RRT arising from this would, in the Committee's view, address the issues of:

- the need to have proper and consistent application of law so as to address the causes for appeals to the Federal Court on points of law;
- the risk of bias in decisions with balance provided by other panel members;
- the risk that all relevant country information is not taken into account; and
- the need to properly undertake the inquisitorial nature of refugee and humanitarian application reviews.

5.110 The panel approach would also help ensure the continual dissemination of information and reasons behind decisions within the RRT itself. The Committee would expect the panel structure to contribute to a continuous improvement in the quality of decision-making by the RRT.

5.111 The Committee's recommendations that the RRT add a panel structure and that applicants have greater information and assistance in preparing applications, coupled with the provision of adverse information from the primary decision maker and the RRT, are also designed to address the issue of credibility.

Independence of the RRT

5.112 Another issue which is expected to be addressed through the establishment of multi-member panels is that of compliance or lack of independence.

> …let us say there are 10 members whom I might say are bad or biased or something like that—if you had three-member tribunals, you would be terribly unlucky to get three really bad ones…It also spreads the skills and gives different perspectives and a balance of different views, but in terms of people's concern about the quality of RRT members, you would almost be guaranteed to get a mix of both 'good' and 'bad' members on a tribunal.[95]

95 *Transcript of evidence*, Nick Poynder, p. 103

5.113 The same witness indicated that the perceived lack of independence of the RRT contributed to the decision of many asylum seekers to appeal to the Federal Court, stating:

> In my view the number of appeals from the RRT to the courts will continue to rise for as long as applicants and their advisers continue to lose faith in the RRT as an "independent" decision-making body. In my experience most practitioners perceive that, with the increasing politicisation of the refugee determination process, there is a greater pressure on the RRT to reject cases, and this has been borne out by the ever-decreasing number of cases approved by the RRT.[96]

5.114 The Committee notes that set aside rates for the RRT have decreased since it was established in 1993, with a rate for 1993-94 of 14 per cent, for 1994-95, 17 per cent, for 1995-96, 18 per cent, for 1996-97, 12 per cent and for 1997-98, 10 per cent.[97]

5.115 Direct criticism has been made of the current minister, previous ministers and the department who implement those decisions. The Committee Chair noted:

> I am dealing with the global criticisms rather than the specific criticisms. Part of the defence of these criticisms is that there is an independent RRT which assesses and reviews those decisions. But when you find that some of the decision makers in that independent body are employees on leave from the department, it does bring into question the perception of independence which we have addressed.[98]

5.116 While noting that it is difficult to counter perceptions of lack of independence, the RRT stated:

> In terms of the objectivity of the tribunal, I would say that you have to look at the tribunal as a whole in terms of the fairly large membership of the tribunal and the background of the people there. We come from a broad cross-section of professions. The objectivity can only be determined by looking at what the tribunal is doing and whether the tribunal is seen to be acting in an independent way, despite the fact that one or two people have links to DIMA, which they may or may not ever be in a position to take up again.[99]

5.117 The Refugee Council of Australia, prior to the establishment of the RRT, had expressed concern that the former review body, the Refugee Status Review

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96 *Submission No. 35*, Mr Nick Poynder, p. 250

97 Refugee Review Tribunal, *Annual Reports 1993-94 to 1997-98*

98 *Transcript of evidence*, Senator McKiernan, p. 703

99 *Transcript of evidence*, Refugee Review Tribunal, p. 703

Committee had not been sufficiently independent from the Department of Immigration to avoid the perception of bias.[100]

5.118 The Committee notes that, under s499 of the Migration Act, the Minister may give directions to the RRT where the directions are about:

a) the performance of those functions; or

b) the exercise of those powers.

5.119 Mr Poynder noted that the RRT was still 'structurally' a part of the Executive and was therefore 'in practical terms subject to influence from the government of the day.' He stated:

> The RRT is funded by the executive, members are appointed by the Executive with significant input from the Minister, and the appointments are for a limited period… so that threats of non-reappointment is always a possibility for Tribunal members.[101]

5.120 The Refugee Advice and Casework Service (RACS), in its submission to the committee, expressed concern about the ability of the RRT to operate independently and the 'extent to which an independent merits review tribunal can and should be directed by government policy'. It drew attention to statements made by the Minister for Immigration and Multicultural Affairs:

> There is no doubt that tribunals are meant to be independent decision-making bodies. It is undeniably the role of all members to be impartial and free from bias. It is equally true that it is not the role of tribunals to determine migration policy. That is a matter for the government of the day. It is essential that each and every member of the tribunal is aware of and acts on government policy as expressed in the migration legislation, has full regard to ministerial policy directions, and gives due weight to supporting policy guidelines.[102]

5.121 These comments were made at the launch of the Migration Review Tribunal. It is not clear to the Committee that these comments could be specifically applied to the Refugee Review Tribunal, although the comments do have general application to the functioning of any Tribunal.

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100 *Submission No. 24A*, Refugee Council of Australia, p. 263

101 *Submission No. 35*, Mr Nick Poynder, p. 249

102 Speech by Minister for Immigration, Launch of the Migration Review Tribunal, 4 June 1999 quoted in *Submission No. 46*, Refugee Advice and Casework Service, p. 415

Recommendation

Recommendation 5.5

The committee **recommends** the Principal Member of the RRT should be a person with judicial experience.

Role of the RRT with respect to policy issues

5.122 Amnesty International when referring to the interpretation of the 1951 Convention definition of 'refugee', noted that some grounds that were not recognised in Australia were recognised overseas, and that others could be interpreted in a wider or narrower way.

5.123 In the Committee's view, the RRT's function is to meet or assess applications against Australia's obligations under the 1951 Convention. In carrying out this function, the RRT's deliberations must be separate from Australia's broader migration policy. The Committee considers that the RRT would be over-stepping its duties and powers to apply interpretations of what constitutes refugee status in such a way that people who do not strictly fall within the Convention definition are admitted to Australia as refugees.

5.124 Were the RRT to operate outside its charter in this way, it would be straying into the field of general migration policy and must expect a policy-type response from the responsible minister. Nonetheless, the committee notes that there has been some broadening of the meaning of various terms in the Refugee Convention and that this is likely to continue.[103]

5.125 The Committee expects that those involved in decision-making under the proposals in this report will not seek to extend their remit beyond the minimum requirements that Australia has under international agreements and conventions nor beyond the additional limits applied by virtue of government policy. Should this occur, the minister ought to be able to effectively re-impose the government's policy by direction, or in the worst case, re-examine the policy.

Appointment of members

5.126 The RILC has also expressed concern at the manner in which members are appointed to the RRT and the detrimental effect this has on the perception of independence of the RRT. Members are appointed by the Governor-General on the recommendation of the Minister who also fixes the terms of appointment for members. The RILC states:

103 See above, Chapter 1

> It is fundamentally inconsistent with basic rules of independent administrative merits review for Departments whose decisions are to be reviewed to appoint their 'reviewers'.[104]

5.127 A number of factors contribute to the perception of a lack of independence on the part of the RRT, including the proportion of former DIMA officers appointed as members of the RRT.[105] The RRT advised that out of the present 52 members, three are former DIMA officers. This compares with six out of the 52 coming from the Attorney-General's Department. Twenty-nine of the current members are lawyers.[106] The RILC stated, for example, that one of the members of the Melbourne Tribunal is a former Victorian State Director of the department.[107] The former Acting Principal Member had previously been employed in the department:

> The appointment of new Members to the RRT who come from DIMA backgrounds also changes the atmosphere of the RRT. These officers have been trained to function in a certain manner; they are interrogative and begin from a position of disbelief.[108]

5.128 In the Committee's view departmental officers working as Tribunal members are subject to actual or perceived pressure to take account of the department's and the minister's wishes at any given time. This will limit their capacity either to make an impartial decision, or to be seen to make an impartial decision.

Recommendation

Recommendation 5.6

The committee **recommends** that officers from DIMA, Attorney-General's or DFAT should not be RRT members. Officers seeking such placements should move to the unattached list.

Performance measurement

5.129 The RRT advised that its Resource Agreement with the Department of Immigration and Multicultural Affairs and the Department of Finance and Administration is dependent on the RRT meeting a target number of decisions per year at a specified cost per decision.[109]

5.130 This point was cited as an example of why the review by the RRT is inadequate. A witness to the Committee stated:

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104 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 326

105 *Transcript of evidence*, Senator Payne, p. 72

106 *Transcript of evidence*, Refugee Review Tribunal, pp. 72-73

107 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 326

108 *Submission No. 39*, Mr John Young, p. 356

109 Refugee Review Tribunal, *Supplementary information* (September 1999), p. 6

> …it has been made clear to members that the chief factor governing their appointments is their productivity (how many decisions each member makes per year). In these circumstances RRT members cannot afford to take the time to do proper research into their cases, to grant adjournments where necessary, to study the law in depth, to keep up to date with developments in the countries from which applicants come, or to write lengthy decisions which properly address the claims and arguments being advanced on behalf of applicants. All these factors are having a serious impact on the quality of RRT decisions. [110]

5.131 The witness argued that one of the consequences of poor decision making by the RRT is the high number of decisions being overturned by the Federal Court, requiring remittal to the RRT for reconsideration, which 'detracts from the RRT's ability to finalise a case quickly'.[111]

5.132 ACOSS, in its submission to the Committee, expressed concern at the measures that may be adopted to assess the performance of RRT members and to ensure that they are accountable. In particular, they stated that any performance assessment should not 'operate at the expense of independence or good decision-making'. ACOSS added:

> ACOSS is concerned that any performance appraisal that focuses too heavily on productivity targets or which includes consideration of the set aside or confirm rate would compromise the willingness of Members to conduct cases in an appropriately questioning manner and to seek out relevant and pertinent information.[112]

Recommendation

Recommendation 5.7

The Committee **recommends** that DIMA and the Department of Finance and Administration acknowledge the changing workload of the Refugee Review Tribunal, and the differing complexity of its cases. This information should be used to assess appropriate funding levels and/or systems.

Location of the RRT

5.133 The Committee notes suggestions that the perception of an independent RRT could be strengthened by transferring the RRT to the Attorney-General's portfolio.[113] A number of these were made by legal organisations, including National Legal Aid, and by the Law Council:

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110 *Submission No. 16*, Dr Rory Hudson, p. 77

111 *Submission No. 16*, Dr Rory Hudson, p. 77

112 *Submission No. 33*, Australian Council of Social Service, pp. 222-223

113 *Transcript of evidence*, Refugee Review Tribunal, p. 73. See also above, Chapter 4, Paragraphs 4.80-4.86

> The Law Council urges the Committee to recommend that onshore refugee determination be removed from the Department [of] Immigration and Multicultural Affairs (DIMA). As it is a matter involving Australia's legal obligations, it is the Law Council's view that determination mechanisms should be established within the portfolio of the Federal Attorney-General.
>
> The Law Council urges the Committee to examine carefully the extent to which the RRT's decision-making is monitored by DIMA and the consequences that flow from any monitoring process for individual members. [114]

5.134 Mr Godfrey, Acting Principal Member, RRT, advised the committee that he did not believe that the performance of the RRT would be enhanced by moving it to the Attorney-General's portfolio. He further stated that the need for lawyers was less imperative given the inquisitorial nature of the RRT.[115]

5.135 In response to questions about the possible transfer of the RRT to the Attorney-General's portfolio, Mr Moss, Deputy Secretary, Attorney-General's Department, stated:

> In general it is and has been the case… that responsibility for particular subject matter RRTs generally lies in the portfolio which is responsible for the subject matter…
>
> In relation to suggestions that the RRT might be under the Attorney General's portfolio, that would be contrary to the approach that has been followed by successive governments, including the current one. I perhaps should add that I think we could handle the matter efficiently, notwithstanding comments made in the committee to the contrary.[116]

5.136 The Refugee Council has argued that an agency charged with the review of another agency's decisions must be, and be seen to be, independent from the other agency. It stated:

> Freedom from government influence is, in our submission, particularly crucial in the area of refugee determination, given the inherently political nature of refugee cases. Refugee law compels an assessment and evaluation of the human rights record of foreign governments, and the treatment of foreign governments of their own citizens. Primary level decision making is thus often viewed by the community as susceptible to influence by other considerations, such as diplomatic and trade relations or fear of immigration consequences, irrespective of whether this translates into reality.[117]

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114 *Submission No. 73*, Law Council of Australia, pp.1083-1084, 1085

115 *Transcript of evidence*, Refugee Review Tribunal, pp. 73-74

116 *Transcript of evidence*, Attorney-General's Department, p. 430

117 *Submission No. 24A*, Refugee Council of Australia, p. 267

5.137 The Committee notes, however, that the RRT is subject to direction from the Minister. While it is independent of the department, it is neither appropriate nor possible for it to be isolated from the general trends of government policy.

5.138 The Committee agrees that the RRT should be seen to be above reproach and its members not subject to conflict of interest charges. However, it believes that the recommendation above concerning membership[118] more appropriately addresses that issue. The Committee notes the proposed amalgamation of tribunals into the Administrative Review Tribunal (ART). Should that not eventuate, or the RRT remain outside the ART, it may be appropriate to reconsider the portfolio location of the Tribunal.

Qualifications and training of RRT members

5.139 Concern has been expressed at the lack of legal qualifications of RRT members and the effect it may have on the quality of decisions particularly in the light of the number of cases being appealed to and won in the Federal Court.

5.140 Amnesty International commented:

> It might help in what the test is in the burden of proof. It might help in distilling arguments, but I do not necessarily say that it would have to be lawyers. I think that lawyers bring with them a certain level of training and skill.
>
> I think the idea of it being a lawyer perhaps would enhance the quality of decision-makers, but it is not a prerequisite. We have some minimum procedural principles in which we say that decision-makers should be independent specialists. They should be experts in international refugee law and human rights law.
>
> …we are looking at a standard of decision maker who not only is independent and specialised but also has the feel, if you want, for international refugee law and international human rights law which, of course, may satisfy some of the questions about whether the refugee convention is being interpreted in the correct way in Australia.[119]

5.141 The Committee notes that the total number of cases being appealed to the Federal Court is not in itself indicative of poor decision-making by the RRT. However, the set aside rate by the Federal Court may be an indication of poor application of the law by RRT members. Given this, the Committee is persuaded that the inclusion of legally qualified members on some panels should contribute to improved decisions made by the RRT.

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118 See above, Recommendation 5.6

119 *Transcript of evidence*, Amnesty International, p. 50

5.142 In addition to the Members, the Refugee Review Tribunal includes a Legal Research Section comprising legal researchers who provide a range of services to Tribunal Members, including:

- the preparation of legal research bulletins and *Decisions Bulletins*;
- advice on 'procedural and substantive' matters relating to particular applications;
- advice to registry staff on procedural matters; and
- reading and advising on draft decisions referred to them by Tribunal Members.[120]

5.143 The RRT advised that the service of reading and advising on draft decisions was an optional one, but indicated that new members were advised to put the first 40 decisions through the legal section. Ms Toohey, Registrar, Refugee Review Tribunal stated:

> In the time when I was a member, I put almost all of my decisions through the legal research team because I always found it useful to have advice and to ensure the lawfulness of the decision. It has always been made very clear to members that the decision as to whether they take any advice given on their decision is theirs. It has also been made clear, both to members and to staff, that it is not the role of the legal researcher to comment on the merits or the outcome of a particular decision.[121]

5.144 The RRT advised that for the previous financial year, for example, some 50 per cent of decisions passed through the legal research section.[122]

5.145 The RRT indicated that the types of comments received from the legal section included identifying spelling errors, identifying case law missed or incorrectly cited, to more substantive comments about 'the reasoning process and the information cited to justify the decision'. Few were returned without comment.[123]

5.146 The then Acting Principal Member of the RRT, in evidence to the Committee, stressed that 'once a case is constituted to a member no one can direct what that decision should be':

> The RRT does have practice directions and it does have section 420 directions, copies of which have been provided to the committee. The RRT also has a code of conduct and a performance appraisal system. Nothing in any of those documents allows any other party, including the principal member, to infringe on the requirement that it is the individual member in

120 *Transcript of evidence*, Refugee Review Tribunal, p. 392

121 *Transcript of evidence*, Refugee Review Tribunal, p. 393

122 *Transcript of evidence*, Refugee Review Tribunal, p. 394

123 *Transcript of evidence*, Refugee Review Tribunal, p. 394

> each case who must be satisfied that the applicant is someone to whom Australia owes protection obligations under the convention.[124]

5.147 It has also been suggested that some applicants are willing to pursue any line of appeal even if not legally represented. The ALRC has stated that:

> Such cases… could be avoided if the members were more skilled at dealing with the hearing process, formulating and asking questions, framing and formulating findings, dealing circumspectly, without recourse to speculation to make findings on credit, and if they ensured that applicants felt they had been full(y) heard and fairly dealt with.[125]

5.148 ALRC also reflected that there 'are distinctions between the skills of examination and cross-examination on the one hand, and effective decision making and decision writing on the other'.[126]

5.149 There is evidence to suggest that too much is being expected of RRT members within the present structure.

5.150 The ALRC suggests several options for obtaining/developing the broad range of skills expected of RRT members, including:

- better and on-going training for RRT members;
- the introduction of a case officer (or advocate) to undertake a fact finding role and present evidence to the RRT, thereby removing the need for a member to present adverse evidence to an applicant but still enabling the member to ask questions based on the evidence presented.[127] If this were to be adopted, a balance between informality and the presentation of evidence would need to be achieved;[128]
- allow for multi-member panels – the benefits include the perception that there is a 'fairer atmosphere'; and
- education and training.

5.151 The Committee accepts the ALRC's observations with regard to education and training and to the RRT being able to form panels. The Committee does not accept the introduction of an advocate role because of the risks this would create of moving to an adversarial system.

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124 *Transcript of evidence*, Refugee Review Tribunal, p. 678

125 *Submission No. 31A*, Australian Law Reform Commission, 290

126 *Submission No. 31A*, Australian Law Reform Commission, 291

127 *Submission No. 31A*, Australian Law Reform Commission, 291

128 *Submission No. 31A*, Australian Law Reform Commission, 292

Recommendation

Recommendation 5.8

The Committee **recommends** that members of the RRT be drawn from a broad cross-section of the Australian community, including the legal profession, with experience in refugee and humanitarian issues.

The RRT and the ministerial discretionary power

5.152 Where the RRT has found that an applicant is not a refugee but nevertheless has strong humanitarian claims, the RRT's current practice is to make a recommendation with respect to the Minister's discretionary powers under s417 of the Act, by drawing the application to the attention of the department. In evidence to the Committee, the then Acting Principal Member of the RRT advised that no formal practice direction had been issued to members but that the Tribunal had ensured 'that all of the members have been aware of the process'.[129]

5.153 The Ministerial discretion is considered in detail in Chapter 8.

129 *Transcript of evidence*, Refugee Review Tribunal, p. 94