CHAPTER 3

KEY ISSUES

3.1 This chapter examines the main issues and concerns raised in the course of the committee's inquiry. The chapter starts by covering general concerns raised in relation to the Bill and then moves on to look at issues in relation to specific provisions in the Bill.

General issues

3.2 The majority of submissions and witnesses supported the stated intention of the Bill and its objectives of providing the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT, and together the Tribunals) with 'flexibility' while according 'procedural fairness'. However, submissions and witnesses, with the exception of the Tribunals and the Department of Immigration and Citizenship (the Department), unanimously stated that the Bill would not achieve its stated intentions and, in fact, would most likely result in further issues and problems.

3.3 Another concern raised with the committee was the extent of the discretions that the Bill confers on members of the Tribunals, in particular that these discretions would lead to inconsistency in decision-making.

Flexibility, efficiency and speed of the processes of the Tribunals

3.4 Many witnesses agreed that the Tribunals should have some form of flexibility in their administrative processes and that the aim of improving the review process was a sound one.[1] However, in relation to the Bill, the Human Rights and Equal Opportunity Commission (HREOC) stated that 'while the Bill certainly gives greater flexibility to tribunals, this should not come at the expense of the rights of applicants'.[2]

3.5 The Law Council of Australia (Law Council), in a submission to the Department on the proposed amendments in the Bill, acknowledged that:

> …(S)ome rigidity of the operation of procedural fairness obligations has arisen as a result of the statutory scheme…(I)t would be in the interests of justice and in the public interest to remove the statutory codification of procedural fairness requirements in migration decision-making altogether and to return to a system in which the common law rules of Natural Justice

1 See, for example, *Submission* 11, p.2; see also HREOC, *Committee Hansard*, 31 January 2007, p. 12.

2 *Submission 5*, p. 12; see also Refugee Advice and Casework Service, *Submission 8*, p. 5.

> can once again apply to decisions of Tribunals in the migration jurisdictions.[3]

3.6 Evidence received during the hearing indicated that the amendments contained in the Bill were not the most appropriate solution. Witnesses highlighted problems with the processes of the Tribunals, as well as concerns as to the quality of primary decisions made by the Department. Witnesses viewed these as areas which need to be considered in the context of the flexibility, efficiency and quality of the processes of the Tribunals.

3.7 A Just Australia stated 'that the inconsistency and high error rates of primary decisions at the departmental level is what is causing the high rates of appeals. If the initial processing cannot be trusted, asylum seekers are more likely to appeal'.[4] A Just Australia also commented that:

> The Government's focus on the cost of the determination system, rather than on its effectiveness has fostered poor decision-making. The focus on performance indicators, that is, a set number of cases each member is expected to finalise per year, also contributes to poor decision-making. 'Efficiency' becomes an end in itself rather than an aid to effective and fair decision-making.
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> Additionally, the RRT's funding is based on the number of cases finalised each year. This pressure will result in more and more oral directions being given, despite written direction being a better guarantor of…real procedural fairness, in order to achieve set targets and so maintain funding rates. In time, any written direction will become an anomaly.[5]

3.8 Evidence raised the prospect that rather than amend the *Migration Act 1958* (the Act) to achieve administrative efficiencies, this issue may be better addressed by increasing the resources available to Tribunals:

> Maybe the simpler way to do that is to increase the number of members of the tribunal or to increase the support staff of the tribunal to assist the tribunal members in preparing these cases, rather than saying, 'Right, let's just make it quicker and rush through these cases in this way.' I think that may be where the onus is. It is a procedural, internal issue for the tribunals to address. Obviously that would be a budgetary consideration for them, rather than trying to run a swathe through and say, 'Let's just split up these hearings and do it orally'.[6]

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3 Submission by the International Law Section of the Law Council of Australia to DIMA, Proposed Amendments to the Migration Act, 7 November 2006, p. 4; see also Mr John Gibson, Refugee Council of Australia, *Committee Hansard*, 31 January 2007, pp 18 & 20.

4 *Submission 3*, p. 3.

5 *Submission 3*, p. 3; see also Mr Kerry Murphy, Australian Lawyers for Human Rights (ALHR), *Committee Hansard*, 31 January 2007, pp 4 & 7.

6 ALHR, *Committee Hansard*, 31 January 2007, pp 6-7 and p. 9; see also HREOC, *Committee Hansard*, 31 January 2007, p. 15.

3.9 The Castan Centre for Human Rights Law (Castan Centre) expressed concern that any reforms introduced to address inefficiency and delay 'have shown that the obligation to accord litigants procedural fairness tends to militate against speed and efficiency'.[7]

3.10 A number of organisations also indicated that they believed that the Bill would result in increased complexity of proceedings and litigation.[8]

3.11 Mr David Manne of the Refugee and Immigration Legal Centre stated that 'we would submit that this Bill, if passed, would create the very real likelihood of increased litigation' and provided the following reasons:

> Firstly, what the bill proposes would almost certainly give rise to the increased likelihood of the tribunal lacking particularity and clarity in relation to matters put to applicants for response. Secondly, it would result in applicants being more likely to fail to appreciate or be able to respond fully to concerns. Thirdly, it would be more likely to leave the ultimate legal status of the decision, if I could say that—whether or not, for example, it was infected by jurisdictional error—far more uncertain. That is almost certainly, in our experience with assisting applicants and indeed in communicating with barristers, counsel who advise on these matters, more likely to result in people seeking judicial review in an area which is already plagued by complexity.[9]

3.12 In its submission the Department acknowledged that, at least in the short term, the amendments proposed by the Bill may result in increased costs and complexity:

> It is likely that at least initially, litigation after enactment of the Bill will be more complex, as the courts will be called on to interpret and apply the new provisions for the first time. This particular scenario is to be expected in the case of any new legislation, particularly in an area of the law which attracts as much judicial consideration as the migration law. Once the interpretation of the new provisions is settled, their application to particular fact scenarios can be expected to be relatively clear…It is possible that there will be increased costs associated with litigation as a result of the amendments contained in the Bill. Increased complexity in the conduct of litigation may result in higher costs. Although higher costs can be expected during the initial period after enactment until the interpretation of the provisions is settled, once this occurs litigation costs are likely to lessen for all parties.[10]

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7 *Submission 4*, p. 14; see also Mr John Gibson, Refugee Council of Australia, *Committee Hansard*, 31 January 2007, p. 17.

8 See, for example, A Just Australia, *Submission 3*, p. 1; Castan Centre, *Submission 4*, p. 14; Submission by the International Law Section of the Law Council of Australia to DIMA, Proposed Amendments to the Migration Act, 7 November 2006, p. 2.

9 *Committee Hansard*, 31 January 2007, p. 19.

10 *Submission 13*, p. 8.

3.13 HREOC also expressed concerns that the amendments proposed in the Bill, by creating the potential for an unfair process for determining refugee and migration cases, may breach the human rights of applicants:

> (i) By breaching an applicant's right to a fair hearing, as protected by the International Covenant on Civil and Political Rights ('ICCPR'); and/or
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> (ii) By leading to incorrect decisions which increase the likelihood of 'refoulement' of asylum seekers (returning a person to a country where they face persecution).[11]

3.14 The Department emphasised that new subsections 357A(3) and 422B(3) will require that the Tribunals act in a way that is fair and just:

> Lastly and significantly, the amendments will make explicit the requirement that the tribunals are required to meet their obligations in a way that is fair and just. This amendment is an explicit acknowledgement that review applicants must be treated fairly and justly in the conduct of reviews, including in relation to hearings and review applicants dealing with adverse information orally.[12]

Inconsistency and the Tribunals' use of discretion

3.15 The committee also received evidence expressing great concern at the breadth of discretion the Bill provides for members of the Tribunals; in particular witnesses commented that inconsistencies may arise in the application of discretion.

3.16 HREOC commented that 'given the breadth of the discretion, it may be difficult to ensure it is applied consistently as between different tribunal members and applicants' cases. This may lead to unfairness, in that differential treatment may be accorded to applicants in similar circumstances'.[13]

3.17 Mr John Gibson of the Refugee Council of Australia highlighted two areas for potential inconsistency if the Bill were to proceed:

> Firstly…the inconsistency between members—those who will follow the oral path and those who will follow the written path. Then there will be inconsistency as to when and in what way the tribunal considers a request for time and a decision to adjourn the review to provide that.[14]

3.18 The Refugee Advice and Casework Service (Aust) (RACS) commented that the proposed changes:

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11 *Submission 5*, p. 2; see also Mr Craig Lenehan, Australian Lawyers for Human Rights, *Committee Hansard*, 31 January 2007, p. 2; Mr Graeme Innes AM, Human Rights Commissioner, HREOC, *Committee Hansard*, 31 January 2007, p. 12.

12 *Committee Hansard*, 31 January 2007, p. 29.

13 *Submission 5*, p. 7; see also Legal Aid Commission of NSW, *Submission 7*, p. 2; A Just Australia, *Submission 3*, p. 2.

14 *Committee Hansard*, 31 January 2007, pp 19-20.

> …give the RRT Member tremendous discretion in determining whether he or she thinks it reasonable to grant the applicant an adjournment of the review and allow additional time for consideration and preparation of a response…Accordingly, if the Senate proceeds to pass the Bill, we submit that clause 424AA(b) of the Bill should be amended to state that if the applicant seeks additional time to comment or respond, the RRT must adjourn the review hearing for two weeks to allow the applicant time to prepare his/her response.[15]

3.19 Mr Manne from the Refugee and Immigration Legal Centre also noted that the Tribunals are not bound by rules of evidence or precedent, and this would impact on the consistency of the exercise of discretion:

> …one of the problems in relation to inconsistency over time has been that members are not bound by the rules of evidence, nor are they bound by precedence in the sense of having to follow precedent from other cases. What you have is a jurisdiction which is riddled with problems of inconsistency on all of those matters. To come up with provisions now which are only likely to compound that problem is, in our view, unacceptable.[16]

3.20 Many organisations commented that having guidelines or an accepted procedure as well as training provided for tribunal members when exercising this discretion would benefit the review process if these amendments were passed. Ms Michaela Byers, a solicitor and migration agent, commented that '(i)f the members were required to follow certain procedural steps, all in uniform that would be fantastic. A lot of problems in dealing with the tribunal would be alleviated if the members were to follow procedural steps'.[17]

3.21 The Legal Aid Commission of NSW commented that:

> The overriding goal in this bill is to ensure that Tribunal processes are 'fair and just' (proposed ss357A(3) and 422B(3). Accordingly, the Commission submits that the Tribunals need to develop new Practice Directions, in line with any amendments…[T]he proposed bill gives Tribunal members the discretion to vary their approaches to additional information; therefore the Practice Directions need to ensure that minimum standards of natural justice are preserved.[18]

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15 *Submission 8*, p. 4; see also Legal Aid Commission of NSW, *Submission 7*, p. 3; ALHR, *Submission 9*, p. 6.

16 *Committee Hansard*, 31 January 2007, p. 20.

17 *Committee Hansard*, 31 January 2007, p. 26; see also Mr Graeme Innes AM, HREOC, *Committee Hansard*, 31 January 2007, p. 12; Castan Centre, *Submission 4*, p. 18; *Submission 6*, p. 4.

18 *Submission 7*, p. 5.

3.22 Mr Steve Karas, Principal Member of the MRT and the RRT provided further information on how the Tribunals would ensure that tribunal members exercise their discretion consistently:

> There will be a briefing session and a training session for members to acquaint them with the amendments. At the same time…we intend to issue a principal member direction, which has the force of law that guides the members on how to deal with certain situations.[19]

Discretion to give adverse information orally

3.23 Proposed sections 359AA and 424AA give the Tribunals the discretion to provide the applicant with information orally. The provisions also allow for the applicant to be invited to respond to the information orally, rather than in writing.

3.24 The key concern raised in relation to these provisions was that they would adversely impact on the procedural fairness accorded to applicants in the review process. The concerns raised in relation to procedural fairness were interlinked, but can broadly be divided into three issues, namely:

- the importance of written communications in according applicants procedural fairness in the review process;
- the impact of these provisions on the role of advisers and legal representatives of review applicants; and
- how the use of interpreters would affect the implementation of provisions in the Bill.

The importance of written communication in according procedural fairness

3.25 A number of submissions highlighted the importance of written communication in according procedural fairness to RRTand MRT applicants.

3.26 The Castan Centre cited Justice Kirby in the *SAAP* case[20] to demonstrate the value that applicants place on written communication:

> A written communication will ordinarily be taken more seriously than oral exchanges. People of differing intellectual capacity, operating in an institution of a different culture, communicating through an unfamiliar language, in circumstances of emotional and psychological disadvantage will often need the provision of important information in writing. Even if they cannot read the English language…the presentation of a tangible communication of a potentially important, even decisive, circumstance from the Tribunal permits them to receive advice and give instructions.[21]

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19 *Committee Hansard*, 31 January 2007, p. 31.

20 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 at 175 (18 May 2005).

21 *Submission 4*, p. 18.

3.27 HREOC outlined its concerns in relation to procedural fairness not being accorded to applicants who are required to respond orally to adverse information:

> Even if the bill does improve efficiency, it is likely to create an unfair process. In particular, the bill's reliance on oral communication in migration and refugee cases is unfair. This is because there is a grave danger that an applicant may not fully understand the meaning or significance of what they are being told or of what they are responding to. Even where an applicant does understand the case against them, the changes may mean that they may not have the chance to fully or adequately put their case before the tribunal. Language and cultural barriers can significantly impact on oral communication. Interpreters are used in 90 per cent of hearings in these tribunals—an unusually high percentage of interpreters in any tribunal in which I have had experience. Accordingly, misunderstandings, incorrect translations and conflicts of interest are not uncommon.[22]

3.28 In particular, HREOC highlighted the adverse impact that the provisions may have on child applicants who are required to respond orally to adverse information.[23]

3.29 The Legal Aid Commission of NSW also expressed doubts as to whether applicants would be afforded procedural fairness under these provisions:

> The Commission opposes this bill as it removes an important protection for applicants. Following the decision in *SAAP v MIMIA* [2005] HCA 23, ss359A and 424A letters have created a new stage in the [Tribunals'] decision making process, by which applicants are notified in writing of information and which can be used to refuse the review application. An oral process of providing the information at the hearing and requesting an immediate response will not allow many applicants the opportunity to comment on the [Tribunals'] concerns. Natural justice requires that applicants are afforded a meaningful opportunity to respond to adverse information.[24]

3.30 The Department submitted that applicants would not be accorded a lower standard of procedural fairness through receiving information orally rather than in writing:

> By putting adverse information to applicants orally, applicants will not receive a lower standard of procedural fairness. The standard is the same as that required where the Tribunals put adverse information to the applicant in writing, and in many cases may be enhanced by the benefits of being given the information, and the explanation of its relevance in the presence of the Tribunal and with the assistance of an interpreter in the applicant's language…The Tribunals must continue to act fairly and justly in conducting the hearing, including testing any evidence provided by the

22 *Committee Hansard*, 31 January 2007, p. 11; see also *Submission 5*, p. 8.

23 *Submission 5*, p. 11; see also *Committee Hansard*, 31 January 2007, pp 12 & 15.

24 *Submission 7*, p. 4; see also *Committee Hansard*, 31 January 2007, p. 18.

> applicant in response to adverse information put to them during the hearing. Moreover, the Department anticipates that the courts will continue to closely scrutinise Tribunal decisions which come before them to ensure that the Tribunals have complied with the statutory requirements.[25]

The role of advisers and legal representatives

3.31 The committee was told that the proposed amendments would 'further limit the role of the advisor in review applications'.[26]

3.32 Mr Kerry Murphy of Australian Lawyers for Human Rights (ALHR) explained his current role as an adviser to applicants:

> The Act provides that there is no right of representation in the tribunal. However, the tribunal's practices are such that, as a rule, tribunal members accept advisers to come along to hearings, though the tribunal's own information and documentation that it produces indicate that the role of the adviser is a very limited role and in no way akin to tribunals such as the Administrative Appeals Tribunal, where the advocate's role is quite strong. In these tribunals my role is commonly as a note taker—I write down everything that happens—and occasionally I make a comment because I think something has been misunderstood or that there is a mistake that needs to be corrected. At the end of the hearing the tribunal may give you an opportunity to make comments if it thinks it is worth while or if members of the tribunal want you to.[27]

3.33 Mr Murphy went on to outline how the current procedure of putting adverse information in writing assisted applicants:

> In my experience, though, the current practice, given the structure of 424A and 359A, is that it may be in the applicant's interest not to say very much at all at the end, because it may be that you think there are four points that are important to the tribunal but in fact, of the four, only two are really important and the tribunal has another two points it is worried about. So, as an advocate, it is of more use to respond to the things that really are of concern to the tribunal, which they can send you in a letter, rather than what you think may be of concern to the tribunal, having sat through the hearing. The advantage of the current process is that it makes it very clear what the important issues are.[28]

3.34 Ms Michaela Byers told the committee that, in her view, one of the concerns with the Bill is that it is silent on advisers being able to intervene in proceedings

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25 *Submission 13*, p. 5.

26 Ms Michaela Byers, *Submission 2*, p. 3; see also HREOC, *Submission 5*, p. 4; RACS, *Submission 8*, p. 5.

27 *Committee Hansard*, 31 January 2007, p. 8.

28 *Committee Hansard*, 31 January 2007, p. 8.

where they feel that their client has misunderstood the information presented by the Tribunals:

> I do not find that there is any room for that at all in the bill. It is silent on the adviser or on seeking advice before making that decision. This is very frustrating as I have seen since the tribunal was established in 1993 that, each time the rights of the adviser to seek advice seems to be further taken away. I see this is going to cause even more restrictions on that.[29]

3.35 The Department responded to these concerns saying that:

> The Department is not of the view that lawyers and migration agents will be presented with any new or unique difficulties in properly representing their clients as a result of the Bill…Applicants (and their lawyers and migration agents) will continue to be able to make submissions to the Tribunals at any time, and the Tribunals are required to consider any submissions that are received up until the time the decision is handed down.[30]

3.36 The Tribunals commented that advisers and representatives would be able to express a view during the hearing. However, the tribunal member would not necessarily be obliged to accept a request from the adviser. Mr John Lynch, Registrar of the Tribunals stated that:

> Most advisers today, without this sort of provision, would express a view. If they thought the hearing was running badly for the client or if the client was not well or was not prepared, they would say it. Under this new arrangement, if this passes, they would be perfectly entitled to say: 'We don't want this to happen this particular way. We'd prefer it if you put these particular aspects in writing. They are too complicated for my client,' or, 'We're not prepared today to deal with them…'[31]

The use of interpreters

3.37 The *Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005-06* (Annual Report) stated that 66% of MRT hearings and 90% of RRT hearings required the services of an interpreter, with more than 60 languages and dialects used.[32]

3.38 Many witnesses expressed concern about the operation of the provisions in the Bill where interpreters are required.

3.39 The Refugee Advice and Casework Service (Aust) Inc (RACS) stated that '[t]he new provisions place a huge burden on interpreters accurately to convey the

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29 *Committee Hansard*, 31 January 2007, p. 23.

30 *Submission 13*, pp 3-4.

31 *Committee Hansard*, 31 January 2007, p. 43.

32 Commonwealth of Australia, *Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005-06*, p. 29.

nature of the adverse information and the significance of any oral response the applicant is being invited to make to the information'.[33]

3.40 The Castan Centre commented on the additional complexities when oral evidence is given remotely:

> The oral communication of reasons through an interpreter may obfuscate the process and lead to misunderstandings between Tribunal and applicant. The problem of misunderstanding is likely to be exacerbated where the review is conducted through video link up or telephone conferencing, and particularly where the RRT member and/or interpreter is separated geographically from the applicant.[34]

3.41 Ms Byers commented that 'the review applicant and witnesses usually do not speak English and must respond to the Member's questions through an interpreter. The competency of the interpreter is paramount in such circumstances'.[35]

3.42 Ms Byers described some difficulties she had experienced with interpreters when appearing before the Tribunals:

> I have a number of interpreters whom I have made complaints about to the tribunal who are banned from being the interpreter for my clients.
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> …They just did not know how to interpret the words of the review applicant. Some of them are very particular and very special but they are not rare, I would say, with the language that I was looking at particularly where there is a problem, which is Mandarin.
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> …I have also had a problem where the review applicant was asked questions about Christianity and they could not be interpreted by the interpreter because the interpreter was not a Christian and just did not understand the terminology. So there are similar problems there on the basis of religion. It could be for the other convention grounds as well, but those are the most dire problems that I have had in the tribunal.[36]

3.43 The committee notes Ms Byers' evidence that the interpreters she has lodged complaints against and who have been removed from her particular cases, are still working within the Tribunals' review system. Ms Byers stated that:

> I regularly see the ones that I have asked not to be allocated to my clients in the tribunals and the courts. Normally you have to put in a written complaint to the tribunal and they will investigate that complaint by asking the member who was at that hearing for their opinion. If the member agrees

33 *Submission 8*, p. 4.

34 *Submission 4*, p. 17.

35 *Submission 2*, p. 1.

36 *Committee Hansard*, 31 January 2007, pp 22 & 23.

> with me, they will then put on the system that that interpreter not be allocated to any of my clients in the future.[37]

3.44 The Tribunals responded to Ms Byers' comments as follows:

> In such cases, the Tribunals may accommodate the representative's request and not allocate the interpreter in question to any case involving that particular representative but may not necessarily exclude the interpreter from other work in the Tribunals. The Tribunals have generally had regard to such requests in booking interpreters for particular representatives, even though the Tribunals may, in some cases, otherwise consider that the interpreter continues to meet the high standards expected of interpreters.[38]

3.45 In its submission, the Department also highlighted the benefit that applicants would have in interpreters being present when adverse information was put to the applicant:

> Wherever required, Tribunal hearings are conducted with the assistance of an interpreter accredited in the relevant language. Putting adverse information to applicants with the assistance of an accredited interpreter is more likely to result in the applicant understanding the substance of the information and its significance to the outcome of the review. Correspondence from the Tribunals, including invitations issued in compliance with s.359A and s.424A, are in English and an applicant may rely on a person other than an accredited translator to assist them in understanding the letter. Under the amendments, applicants will be able to directly discuss issues with the Tribunals with the services of an interpreter provided by the Tribunals. From this perspective, the Bill may result in a more effective practical standard of procedural fairness for applicants.[39]

Other concerns

3.46 The committee heard evidence on other ways in which the provision of information orally may adversely impact on review applicants. Ms Byers commented that:

> …the review system already places a great burden on review applicants to present their own cases. The proposed sections 359AA and 424AA [place] a further burden on review applicants to make a legal decision on the spot during a hearing whether to comment or to ask for an adjournment…most review applicants seek a quick decision and will attempt to comment regardless of whether it is in their best interests to do so.[40]

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37 *Committee Hansard*, 31 January 2007, p. 23.

38 *Submission 12A*, p. 2.

39 *Submission 13*, p. 5; see also *Committee Hansard*, 31 January 2007, p. 33.

40 *Submission 2*, p. 2; see also A Just Australia, *Submission 3*, p. 1; RACS, *Submission 8*, p. 3; Refugee and Immigration Legal Centre, *Submission 16*, p. 4.

3.47 Of particular concern in this respect were the implications for unrepresented applicants. Ms Alexandra Newton of HREOC highlighted the increased proportion of unrepresented litigants appearing before the Tribunals:

> From the RRT's annual report…currently 37 per cent of applicants in the RRT are unrepresented and 33 per cent in the MRT are unrepresented. That figure has increased…over the past five years. Back in 2002-2003, it was 20 per cent, building to 23 per cent in 2003-2004 and 31 per cent in 2004-2005. There definitely does seem to be a trend towards decreasing representation of applicants.[41]

3.48 A Just Australia argued that, as the number of unrepresented applicants increased, it was important that they be able to seek adequate advice on how to respond to potentially adverse information.[42]

3.49 HREOC raised concerns that 'in the context of refugee cases, some applicants may be reluctant to request more time to respond from the tribunal for fear that this may be held against them and, potentially, jeopardise the outcome of their case'.[43] Amnesty International Australia (Amnesty) also stated that it is common for applicants to feel 'compelled' to demonstrate to a Tribunal member their understanding of what is going on, often responding in the affirmative, although not understanding the question being put to them.[44]

3.50 HREOC also raised the situation of access to tapes of hearings proceedings and stated:

> Currently, merits review applicants may request a copy of the taped recording of proceedings following the hearing of their matter in the MRT or RRT…Under the Bill's changes, an applicant required to respond orally at the hearing to adverse information, will not have the opportunity to review the recording before doing so. This change may lead to unfairness in some cases.[45]

Changes to adverse information provided to applicants

3.51 The second set of amendments in proposed paragraphs 359A(4)(ba) and 424A(3)(ba) mean that the Tribunals will not have to provide the applicant with a written copy of information that the applicant previously provided to the Department as a part of the application process. This exception does not extend to information

41 *Committee Hansard*, 31 January 2007, p. 13.

42 *Submission 3*, p. 4; see also RACS, *Submission 8*, p. 3.

43 *Submission 5*, p. 6; see also FECCA, *Submission 11*, p. 2.

44 *Submission 14*, p. 4.

45 *Submission 5*, p. 6.

given orally by the applicant to the Department, such as information provided during an interview with a Departmental officer for a visa application.[46]

3.52 The committee received evidence suggesting that the amendments proposed by these provisions would fundamentally change the merits review process undertaken by the Tribunals and would deny applicants procedural fairness.

3.53 For example, ALHR submitted that:

> …section 359A(4)(ba) represents a regrettable attempt to narrow the scope of the merits review process. Although claiming to loosen what is stated to be a strict interpretation of section 359A, the Bill fundamentally alters the role of the MRT to the detriment of applicants and the review process more broadly.[47]

3.54 The Human Rights Commissioner, Mr Graeme Innes AM, stated that:

> The bill is unfair because there is no requirement to put the full case against them to an applicant. The changes only require that information which has not been put to the department previously be conveyed to the applicant orally. Contrary to the rules of natural justice, this means that an applicant may not have the chance to comment on information which forms the basis of an adverse decision against them.[48]

3.55 The Department submitted that it is anomalous for the Tribunals to have to put to an applicant information which the applicant has already given the Department in connection with the process leading to the decision under review:

> [Under the Act, the Secretary for the Department is required] to give to the Registrar of the Tribunals each document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the decision under review. In practice this entails the Department providing a copy of the relevant file(s) to the Tribunals...The Tribunals are bound to consider this material in deciding the review. It is an anomalous situation for the Tribunals to have to put to an applicant information that the applicant had already provided in support of their claims for the decision under review, and which the Tribunal is bound to consider (having received that information from the Secretary of the Department who is required to give it to the Tribunal). Moreover, it is not an obligation for[the] primary decision-maker, in whose shoes the Tribunals

46 See Senator the Hon. Chris Ellison, Minister for Justice and Customs, *Senate Hansard*, 7 December 2006, p. 22.

47 *Submission 9*, pp 7-8.

48 *Committee Hansard*, 31 January 2007, p. 11; see also Submission by the International Law Section of the Law Council of Australia to DIMA, Proposed Amendments to the Migration Act, 7 November 2006, p. 3.

stand on review, to put to an applicant adverse information that applicant provided to the primary decision-maker.[49]

Committee view

3.56 The committee is supportive of the stated intent of the Bill to provide the Tribunals with some flexibility in their administrative processes while according procedural fairness to applicants. However, the evidence provided to the committee during the inquiry was equivocal as to whether the amendments contained in the Bill would achieve this aim.

Proposed sections 359AA and 424AA

3.57 The committee has concerns about the amendments in the Bill which insert sections 359AA and 424AA and provide tribunal members with discretion to give the applicant adverse information orally and invite the applicant to comment verbally during the hearing.

3.58 The committee accepts evidence from the Department that in some circumstances it may be advantageous for the applicant to receive adverse information orally during the hearing and to be able to respond or comment on this information verbally during the hearing. However, the committee is concerned that the current drafting of proposed sections 359AA and 424AA enable tribunal members to exercise a range of discretions. The applicant will be unaware of how or why the discretion may be exercised, or not, in any particular case. In particular, the committee is concerned by evidence, including from the Department, that proposed sections 359AA and 424AA are likely to be the subject of further litigation. It is almost certain that the provisions will invite litigation challenging whether the Tribunals:

- considered that the applicant understood the information;
- reasonably formed the view that the applicant did not require more time to respond to the information; and
- met the overarching requirement to apply the provisions in a fair and just manner.

This litigation will likely involve reference to records of the proceedings and disputes between the parties regarding the accuracy of the translation.

3.59 In addition, the committee is mindful that the circumstances of the applicants before the Tribunals potentially place the applicants in a vulnerable position: for example, applicants are generally communicating using an interpreter; they may have experienced torture or persecution by authorities; and may seek, above all, a quick resolution of their status. The risk of unfairness and further disadvantage to applicants in these circumstances is simply unacceptable.

49 *Submission 13*, p. 7.

3.60 During the public hearing, HREOC stated that 'one alternative that we have considered is the potential to give applicants an alternative as to whether they would prefer the adverse information to be provided by the tribunal orally or in writing'.[50]

3.61 Accordingly, the committee recommends that adverse information should only be provided verbally where the applicant elects this course. This approach would introduce flexibility into how the Tribunals accord procedural fairness without introducing a range of discretions that tribunal members must exercise and associated uncertainty around the exercise of those discretions.

Proposed paragraphs 359A(4)(ba) and 424A(3)(ba)

3.62 The committee accepts that the requirement for the Tribunals to provide applicants with information they have previously provided in support of their application is overly prescriptive and was an unintended consequence of the drafting of sections 359A and 424A. Accordingly, the committee recommends that the Senate pass the amendments to introduce proposed paragraphs 359A(4)(ba) and 424A(3)(ba).

Recommendation 1

3.63 The committee recommends that proposed sections 359AA and 424AA be amended so that adverse material may only be provided orally at the election of the applicant.

Recommendation 2

3.64 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair

50 *Committee Hansard*, 31 January 2007, p. 13.