# CHAPTER 3

# SECONDARY ASSESSMENT OF VISA APPLICATIONS

3.1 This chapter examines the second stage of Australia's two tiered system for processing visa applications; that is: where tribunals undertake merits review of visa and visa related decisions made by DIMIA officials. It outlines the statutory framework and review processes and canvasses the concerns raised in respect of that process to date.

### *The Migration Review Tribunal*

3.2 The Migration Review Tribunal (MRT) is a statutory body which provides a final independent merits review of visa and visa-related decisions (other than those refusing or cancelling protection visas) made by the Minister or DIMIA officers acting as the Minister's delegate. Applications seeking a review of adverse decisions in respect of protection visas are dealt with by the Refugee Review Tribunal (RRT).

#### *Jurisdiction, membership and powers*

3.3 The MRT has been in existence since 1 June 1999. The Migration Act states that the MRT is to provide a review mechanism that is fair, just, economical, informal and quick. The Act and the Migration Regulations set out its jurisdiction, powers and procedures.[1] As mentioned above, the MRT has a very broad jurisdiction in relation to non-humanitarian visa decisions made within and outside Australia. There is a large potential caseload as DIMIA deals with more than 100,000 partner and family visa applications and more than 3 million visitor visa applications in a year.[2]

3.4 The MRT comprises members appointed for fixed terms under the Migration Act. At 30 June 2005, the MRT had 67 Members. The MRT is usually constituted by

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1 See *Migration Act 1958*, Part 6.

2 The MRT is authorised to review decisions relating to a wide range of visas: bridging, visitor, student, temporary business entry, permanent business entry; skilled; partner visas; and family visas. The type of decisions involved can include decisions: to refuse to grant visas, to cancel visas, not to revoke automatic cancellation of student visas; to refuse to approve or renew approvals of business sponsors; to refuse to approve a nominated position or nomination of a business activity; in relation to status as an approved professional development sponsor; to impose a security for compliance with visa conditions and to assess a score in relation to the points test in skilled visa applications. The MRT only has jurisdiction over 'offshore' visa refusal decisions in relation to visas where there is a requirement for an Australian sponsor or close relative (who is the applicant for review). Migration Review Tribunal, *Annual Report 2004 -2005*, pp 9, 16-17.

a single Member when dealing with a case. The MRT cost $21.1 million to operate in 2004-05.[3]

3.5 The Act and Regulations empower the MRT to undertake merits review of the cases brought before it. Merits review is an administrative reconsideration of the case, to ensure that the decision taken is the 'correct or preferable' one. As the MRT explains in its annual report:

> Correct in the sense that the decision made is consistent with law and policy, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances. A merits review system should also improve the general quality and consistency of decision-making, and enhance openness and accountability.[4]

3.6 To these ends, the MRT is authorised to exercise all of the powers and discretions conferred on the primary decision-maker in addition to its own specific powers. The MRT can affirm or set aside a decision under review. If the decision is set aside, the MRT can substitute another decision, or remit the matter to DIMIA to be reconsidered subject to any directions made by the MRT. The MRT's findings are binding on DIMIA.

3.7 The Act provides that, in reviewing a decision, the MRT is not bound by technicalities, legal forms or rules of evidence, and that it must act according to substantive justice and the merits of the case.[5] However, the MRT must make its decision within the same legislative and policy framework as the primary decision-maker. In deciding a review, the MRT must apply the correct law, have due regard to policy and is bound by relevant court decisions. It cannot make a decision that is not authorised by the Act or Regulations. It is also bound by any directions issued by the Minister under section 499 of the Act.[6]

3.8 The Act and Regulations prescribe the procedure for review by the MRT. For example:

- The MRT cannot accept applications for review lodged by persons who do not have standing to apply for review. In some cases, only the visa applicant or former visa holder themselves can apply.

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3 Migration Review Tribunal, *Annual Report 2004-2005*, pp 8-9, 14, 33.

4 Migration Review Tribunal, *Annual Report 2004 -2005*, p.8.

5 *Migration Act 1958*, section 353.

6 Section 499 states that 'the Minister may give written directions to a person or body having functions or powers under this Act if the directions are about: the performance of those functions; or the exercise of those powers'. *Migration Act 1958*, section 499.

- The MRT cannot accept and consider an application lodged outside the relevant time limit prescribed under the Act. The time limits vary according to the type of visa or decision involved.[7]
- An application fee of $1400 is payable.[8] The fee may be waived or refunded if Tribunal officials are satisfied that payment has caused, or is likely to cause, severe financial hardship. The fee is also refunded if the MRT sets aside the primary decision or remits a matter to DIMIA for reconsideration.

3.9 The following paragraphs summarise the sequence of events in the MRT review process.[9]

3.10 On lodgement of a valid application, a case officer will write to the review applicant confirming its acceptance, allocating a case number and asking the applicant if they wish to provide any additional information.

3.11 The MRT will obtain the relevant case file from DIMIA. The MRT Member will examine the documents provided by DIMIA and by the applicants. If after reviewing the papers, the MRT considers a mistake has been made by the DIMIA decision-maker, it may set aside or remit the department's decisions without holding a hearing.

3.12 If the MRT is unable to make a decision favourable to the applicant on the papers, the applicant has the right to appear before the Tribunal to give evidence and argue their case. The applicant will be notified of the time and date of the hearing and asked if he or she wants any particular persons called as a witness or written information obtained. The Tribunal is not bound by an applicant's request that a witnesss be called or written information obtained.

3.13 Hearings are usually open to the public. The MRT can hold closed hearings if satisfied this would be in the public interest.

3.14 The MRT may hand down its decision at the end of a hearing or (as is more often the case) after the hearing. All MRT decisions are written and contain a statement of reasons for the decision. If the review application is upheld, the file is returned to DIMIA to impliment the decision. Further processing by DIMIA may be required, such as health and character checks or approval of assurances of support.

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7 The time limits vary from two working days for some immigration detention cases, through to seven working days for cancellation decisions and other immigration detention cases, 21 calendar days for other cases where the visa applicant is in Australia and 70 calendar days where the applicant is outside Australia. Migration Review Tribunal, *Annual Report 2004-2005*, p. 10.

8 The exception is where the application relates to a decision to refuse to grant or to cancel a bridging visa, as a result of which the applicant is in immigration detention

9 The summary is drawn from Burns, *The Immigration Kit*, pp 747-763.

3.15 According to the MRT's latest annual report:

> The MRT's procedures are designed to ensure that outcomes are reached that are consistent with the Tribunal's objective to provide a mechanism of review that is 'fair, just, economical, informal and quick'. The Act sets out procedural steps designed to ensure that an applicant can fully put his or her case to the MRT, including the opportunity to appear before the MRT.[10]

3.16 The MRT's procedures provide that:

- an applicant is entitled to have access to, or a copy of, the material before the Tribunal;
- the Tribunal must inform the applicant of information that might lead to an adverse outcome, and give the applicant an opportunity to comment upon the information;
- the Tribunal must invite the applicant to appear before the Tribunal to give oral evidence and present arguments, and to give the applicant an opportunity to ask the Tribunal to take oral evidence from other persons or to obtain other documentary evidence;
- an applicant is entitled to be represented other than during an appearance before the Tribunal;
- an applicant is entitled to be accompanied by an assistant when appearing before the Tribunal;
- an applicant can make written submissions or provide documentary evidence at any stage of the review;
- a qualified interpreter is provided if the applicant or a witness is not sufficiently proficient in English; and
- the Tribunal must produce a written record of its decision and reasons.[11]

*Representation*

3.17 Appoximately 30% of the MRT annual case load involves unrepresented applicants.[12]

3.18 The MRT's procedures provide that applicants may be assisted by representatives, who may forward written submissions and evidence to the MRT, contact the MRT on the applicant's behalf and accompany the applicant to any meeting or hearing arranged by the MRT. However, as noted above, a representative cannot present oral arguments or speak on the applicant's behalf when the applicant

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10 Migration Review Tribunal, *Annual Report 2004-2005*, p. 10.

11 See http://www.mrt.gov.au/operations.html.

12 About 30% of the 8308 cases finalised by the MRT in 2004-2005 involved applicants who were unrepresented. Migration Review Tribunal, *Annual Report 2004-2005*, p. 11. See also Migration Review Tribunal, *Annual Report 2003-2004*, p. 13.

appears before the MRT unless the Tribunal considers that exceptional circumstances exist.[13]

3.19 An applicant's representative must be a registered migration agent. The Act generally makes it an offence for a person to provide immigration assistance (as defined by the Act) unless he or she is registered as a migration agent under that Act.[14]

3.20 The Minister or DIMIA are not represented in MRT proceedings. As such, the Tribunal members take an active role in questioining applicants and witnesses and in exploring issues. DIMIA may make written submissions to the MRT, but reportedly does so infrequently.[15]

*Caseload*

3.21 The MRT finalised 8,308 cases during 2004-05. It also received 7,827 new cases in that year and had 4,685 ongoing cases as at 30 June 2005. 7061 hearings were held in 2004-05, with hearings being held in 69 per cent of all cases finalised. Interpreters were required in 55 per cent of cases where a hearing was held.[16]

13 See http://www.mrt.gov.au/operations.html.

14 See Chapter 2.

15 Migration Review Tribunal, *Annual Report 2004-2005*, p. 11.

16 Migration Review Tribunal, *Annual Report 2004-2005*, p. 15.

3.22 Table 3.1 provides a breakdown of the cases finalised by the MRT in the last five years, according to the type and category of decision and visa involved.

**Table 3.1: Cases finalised by the Migration Review Tribunal, last 5 years**

| Finalisations - type and category | 2004-05 | 2003-04 | 2002-03 | 2001-02 | 2000-01 |
|---|---|---|---|---|---|
| Visa refusal - Bridging | 799 | 739 | 807 | 733 | 476 |
| Visa refusal - Visitor | 379 | 467 | 562 | 532 | 591 |
| Visa refusal - Student | 517 | 748 | 583 | 1055 | 1219 |
| Visa refusal – Temporary Business | 413 | 794 | 1207 | 998 | 694 |
| Visa refusal – Permanent Business | 270 | 251 | 277 | 162 | 143 |
| Visa refusal – Skilled | 355 | 424 | 633 | 713 | 328 |
| Visa Refusal – Partner | 2840 | 2916 | 2333 | 1636 | 1273 |
| Visa Refusal – Family | 614 | 1129 | 1162 | 1366 | 794 |
| Cancellation – Student | 1069 | 1237 | 861 | 510 | 313 |
| Temporary Business sponsorship | 220 | 438 | 448 | 265 | 211 |
| Other | 832 | 879 | 841 | 613 | 537 |
| **TOTAL** | **8308** | **10022** | **9714** | **8583** | **6579** |

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 20, Table 3.6. Migration Review Tribunal, *Annual Report 2003-2004*, p. 23, Table 3.6; Migration Review Tribunal, *Annual Report 2002-2003*, p. 22, Table 3.7.

*Outcomes*

3.23 Table 3.2 provides a breakdown of the cases set aside by the MRT in 2004-05, according to type and category of decision and visa involved.

3.24 The MRT set aside DIMIA's primary decision in 3905 cases or 47% of all cases finalised. The set-aside rate varied between case categories. Relevant factors include the applicable criteria for the visa and the extent to which further evidence may be available. As the MRT noted in respect of partner visa refusals:

> Partner refusals were the decision most often set aside. These also constitute the largest single group of cases before the MRT. In many partner visa cases that come to the MRT, the relationship had only existed for a brief period at the time of the visa application, and at the time of the decision of the delegate. The relationship may have become more settled by the time of the MRT's decision, and the MRT is often presented with greater evidence of co-habitation, of joint financial relationships, of regular contact or visits between spouses living in different countries, and of the

support of relatives and friends. Such evidence is tested by the taking of oral evidence by the MRT, with hearings held in more than 80% of cases.[17]

3.25 The overall set-aside rates for 'offshore' cases was 62%, compared to 39% for 'onshore' cases. The MRT attributed the generally lower set-aside rate in cases involving a person already in Australia to 'a greater interest in persons on temporary visas in Australia to exercise review rights, sometimes irrespective of the merits of their case.'[18]

**Table 3.2: Set-aside rates for cases reviewed by the Migration Review Tribunal, last 5 years**

| **Set-aside rates** | **2004-05** | **2003-04** | **2002-03** | **2001-02** | **2000-01** |
|---|---|---|---|---|---|
| Visa refusal - Bridging | 22% | 27% | 30% | 35% | 22% |
| Visa refusal - Visitor | 58% | 63% | 64% | 61% | 59% |
| Visa refusal - Student | 45% | 50% | 48% | 55% | 57% |
| Visa refusal – Temporary Business | 28% | 33% | 26% | 25% | 21% |
| Visa refusal – Permanent Business | 31% | 38% | 33% | 34% | 34% |
| Visa refusal – Skilled | 63% | 59% | 58% | 53% | 43% |
| Visa Refusal – Partner | 65% | 61% | 63% | 62% | 59% |
| Visa Refusal – Family | 44% | 40% | 35% | 29% | 29% |
| Cancellation – Student | 33% | 40% | 31% | 46% | 47% |
| Temporary Business sponsorship | 22% | 27% | 21% | 25% | 22% |
| Other | 39% | 35% | 33% | 38% | 38% |
| **All cases** | **47%** | **46%** | **43%** | **44%** | **43%** |

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 22, Table 3.8. Migration Review Tribunal, *Annual Report 2003-2004*, p. 25, Table 3.8; Migration Review Tribunal, *Annual Report 2002-2003*, p. 17, Table 3.3.

17 Migration Review Tribunal, *Annual Report 2004-2005*, p. 21.

18 Migration Review Tribunal, *Annual Report 2004-2005*, p. 21.

*Time taken to determine review applications*

3.26 It is apparent that timeliness is an important performance indicator for the MRT.[19] The MRT's funding is based on the number of cases to be finalised in each year. According to its latest annual report, the MRT also 'operates within a legislative framework which requires a speedy resolution of matters'. Case targets are set for the MRT Members each year and each Member is expected to undertake a mix of cases (for example, from a variety of countries). Notwithstanding the importance of meeting case targets, the MRT has stressed that there is a continuing commitment to making quality decisions.[20]

3.27 The average time taken by the MRT in 2004-2005 to process a case (ie, from lodgement to finalisation) was 39 weeks or 271 days. The MRT explained that:

> … the length of a review can vary. This may depend on the type of case, the investigations or third party assessments that may be required, the overall workload of the MRT, the priority given to the case, and the extent to which the applicant request further time to make submissions or to obtain and present further evidence.[21]

3.28 The MRT must by law give priority to cases involving persons being held in immigration detention, all visa cancellation cases and cases involving visits to attend significant family events.[22] For example, the MRT's average processing time in 2004-05 for review of DIMIA decisions to refuse bridging visas was 15 days, with 70% of all reviews of bridging visa decisions involving persons held in immigration detention being finalised within the prescribed period of seven working days.[23] Priority is also given to cases which are remitted or returned from a court for the MRT to reconsider (see below).

*Judicial review of MRT decisions*

3.29 An application for judicial review was filed in 440 cases of the 8,308 cases finalised by the MRT during 2004-05 (ie, 5.3%).[24] The vast majority of such

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19 Timelines is one performance indicator used by the MRT to measure its performance in undertaking the task required of it by Government. The other performance indicators are: the number of cases finalised; the levels and outcomes of appeals against MRT decisions; and the number of complaints received by the MRT about its Members and services. Migration Review Tribunal, *Annual Report 2004-2005*, p. 14.

20 The MRT's funding agreement with the Department of Finance and Administration is based on the number of cases to be finalised in a year and an assessment of fixed and variable costs. Migration Review Tribunal, *Annual Report 2004-2005*, pp 14, 22-24.

21 Migration Review Tribunal, *Annual Report 2004-2005*, p. 11.

22 See http://www.mrt.gov.au/faqs.html.

23 Migration Review Tribunal, *Annual Report 2004-2005*, p. 23. The MRT noted in its annual report that, in most cases not finalised within the prescribed seven working days, the applicant had requested an extension of time.

24 Migration Review Tribunal, *Annual Report 2004-2005*, p. 24.

applications are withdrawn by the applicant or dismissed by the courts. Table 3.3 summarises the outcomes of applications for judicial review of MRT decisions in recent years.

**Table 3.3: Outcomes of judicial review of MRT decisions, last 5 years**

| Judicial Review outcomes | 2004-05 | 2003-04 | 2002-03 | 2001-02 | 2000-01 |
|---|---|---|---|---|---|
| Applicant withdrawal | 201 | 171 | 142 | 110 | 94 |
| Dismissed by the court | 247 | 176 | 108 | 125 | 72 |
| Remitted by consent for reconsideration | 65 | 38 | 17 | 50 | 62 |
| Remitted by court for reconsideration | 27 | 25 | 12 | 14 | 12 |
| **TOTAL** | **540** | **410** | **279** | **299** | **240** |

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 24, Table 3.10. Migration Review Tribunal, *Annual Report 2003-2004*, p. 28, Table 3.10; Migration Review Tribunal, *Annual Report 2002-2003*, p.18, Table 3.4.

### *The Refugee Review Tribunal*

99.1 The Refugee Review Tribunal (RRT) is a statutory body whose main function is to provide a final independent merits review of decisions made by DIMIA or its Minister to refuse or cancel protection visas to non-citizens in Australia.

*Jurisdiction, membership and powers*

3.30 The RRT was established in 1993 and its jurisdiction, powers and procedures are set out in the Act and Regulations.[25] As mentioned above, the RRT deals only with applications from 'onshore' asylum seekers, that is, persons who are present in Australia and who have been refused a protection visa or had such a visa cancelled.

3.31 The RRT is comprised of members appointed for fixed terms under to the Migration Act. As at 30 June 2005, the RRT had a Membership of 74, comprising the Principal Member, Deputy Principal Member, 4 Senior Members, 10 full-time

25 The Tribunal was established under Part 7 of the *Migration Act 1958*. It replaced the Refugee Status Review Committee (RSRC), which unlike the RRT, lacked a statutory basis and could only make nonbinding recommendations to the then Minister for Immigration and Ethnic Affairs. The RSRC comprised representatives from the then Department of Immigration, Local Government and Ethnic Affairs, the Attorney-General's Department, the Department of Foreign Affairs and Trade and the community. Refugee Review Tribunal Fact Sheet R8, *The Refugee Review Tribunal – An Overview*, 7 April 2005.

Members and 56 part-time Members. The RRT is usually constituted by a single Member when dealing with a particular case.[26]

3.32 According to the RRT, its Members:

> … come from a broad range of professions and are employed for the high level skills which they bring to the decision making process. Members have a wide range of tertiary qualifications and more than 50% have a legal background. Many Members come to the Tribunal with extensive experience at senior levels in the private and/or public sectors in a variety of organisations, including other Tribunals. Some Members have experience in the refugee field, refugee advocacy groups or the UNHCR. A number of Members have undertaken temporary assignments with the UNHCR … to assist in the establishment of human rights structures and to make refugee determinations in those countries.[27]

3.33 The RRT cost $21.08 million to operate in 2004-05.[28]

3.34 The RRT undertakes a full merits review. It can affirm DIMIA's primary decision, vary that decision, set the decision aside and substitute a new decision, or remit (return) the matter to DIMIA for reconsideration with directions.

3.35 In making its decision, the Tribunal is restricted to consideration of whether the 'inclusion' criteria for refugee protection as set out at Article 1A of the 1951 UN Convention Relating to the Status of Refugees (the Refugee Convention) are met.[29] It has no jurisdiction to consider whether the individual is excluded from Convention coverage and, therefore, is not owed protection on character related grounds set out in the Refugee Convention.[30]

3.36 The RRT has described its conduct of review applications as follows:

> In conducting a review of a decision to refuse to grant a protection visa, the RRT looks at the issues and evidence afresh. It considers the material relating to the protection visa application, including DIMIA's file, any further submissions from the applicant and information from other sources available to the RRT. It decides whether the applicant is a person to whom Australia has protection obligations, which includes consideration of whether he or she is a 'refugee' within the meaning of the Refugees Convention.[31]

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26 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 8, 31.

27 See Refugee Review Tribunal Fact Sheet R9, *The Members of the Refugee Review Tribunal*, available at http://www.rrt.gov.au/factsheets/R9.pdf.

28 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 43.

29 The convention was amended by the 1967 UN Protocol Relating to the Status of Refugees.

30 DIMIA, *Submission 205*, p. 27.

31 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 8.

3.37 A major objective of the Tribunal – in common with the MRT – is to provide a review system that is 'fair, just, informal, economical and quick'. As the RRT explains:

> The proceedings before the RRT are informal (non-adversarial). Applicants may attend the RRT to present oral arguments and to give oral evidence, but DIMIA is not usually represented at RRT hearings. The RRT is inquisitorial in nature and can obtain whatever information it considers necessary to conduct the review. It is not bound by technicalities, legal forms or the rules of evidence but must act according to substantial justice and the merits of the case. It cannot, however, make a decision outside what is permitted by the legislation.[32]

3.38 The Migration Act and its Regulations specify how an application for review by the RRT must be made and when and by whom. The following paragraphs summarise the current sequence of events in the RRT review process. Commentators have noted that procedures and practice are constantly evolving and changing, with legislative changes to the RRT's structure and processes and changes in its mode of operation on a policy and practice level.[33]

3.39 At present, applications must be made on the prescribed form. The completed form must lodged within a specified time which commences on the date that a person is notified or deemed to be notified of a primary decision.[34] The RRT does not have the power to extend the time limit. The time limits are:

- 7 working days for persons in immigration detention, and
- 28 calendar days for all other cases.

3.40 There is no upfront application fee. However, a charge of $1,400 is payable if the application for review is unsuccessful.

3.41 On receipt of a valid application, the RRT sends a letter of confirmation and invites the applicant to send any documents, information or any other evidence that they want the Tribunal to consider.

3.42 Once the RRT has received the application, it conducts a 'review of the papers'. The RRT will review the DIMIA case file and any statement made by DIMIA in relation to the case, material provided with the application and any statutory declarations made by the applicant in relation to the matter under review, and any additional information sought by the RRT. At this point, the RRT may make a decision favourable to the applicant based on a 'review of the papers'.

3.43 The RRT may invite the applicant or any other person to provide additional information relevant to the review. If the RRT considers that it has information before

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32 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 8.

33 Germov and Motta, *Refugee Law in Australia*, p. 75.

34 See http://www.rrt.gov.au/applyrev.htm#process.

it which would give it a reason to affirm the orginal decision (ie, adverse information), the RRT must provide the particulars of that information to the applicant and invite the applicant to comment on it. The RRT is only obliged to provide the applicant with adverse information specific to the applicant or some other person (as opposed to information concerning a class of persons).[35]

3.44 The RRT may request additional information at any stage of the review. A detainee invited to provide additional information to the RRT, other than for the purposes of an interview, has seven 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.[36] 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).

3.45 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.

3.46 All written material submitted by an applicant in a language other than English must be accompanied by a translation into English by an accredited translator. The RRT will meet the cost of translation in limited cases where the document is material to the applicant's case and no other alternative can be found within a reasonable timeframe.[37]

3.47 If an applicant declines to provide additional information or to comment on information provided by the RRT to the applicant pursuant to section 424 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.

3.48 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.

3.49 A detainee who is invited to appear before the RRT is given seven 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 seven days of

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35 Burns and Sudrishti, *The Immigration Kit*, p. 767. See pp 766 to 769 for an overview of the RRT merits review process.

36 *Migration Regulations* 1994, Regs 4.35-4.35B *pursuant to s. 424B(2),*

37 Germov and Motta, *Refugee Law in Australia*, p. 76.

notification of the invitation to appear before the RRT, he or she may request in writing that the RRT take oral evidence from a person or persons.[38] However, the RRT is not required to obtain evidence from the named person(s).

3.50 If the applicant declines an invitation to appear before the RRT pursuant to section 425 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.

3.51 The RRT will engage a qualified interpreter if satisfied that the applicant needs an interpreter for a hearing. Where possible, the RRT will use interpreters who have been accredited by the National Accreditation Authority for Translators and Interpreters (NAATI).

3.52 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.

3.53 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.

3.54 The RRT's hearings are private and confidential. In view of the nature and subject matter of asylum claims, the Tribunal is required by the Migration Act to conduct its hearings in private and to restrict the release of personal information. The Committee notes that breach of these requirements by Tribunal Members and officials is a criminal offence punishable by a term of imprisonment.[39]

3.55 The RRT's hearing are also informal.[40] Commentators have noted that the general procedure and method of conducting a hearing can vary greatly depending on the presiding Member.[41] The RRT may take oral evidence from an applicant in person, by telephone, closed-circuit television or any other means of communication.[42] Hearings are tape-recorded and the tape-recording is the official record of the proceedings. An audio-cassette tape of the proceedings will be made available to the applicant upon request.

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38 *Migration Act 1958*, section 426.

39 *Migration Act 1958*, sections 429 and 439. See DIMIA, Answer to Question on Notice, 25 October 2005, p. 34.

40 *Migration Act 1958*, section 429. The rationale for closing the RRT's proceedings to the public is the nature of protection visa claims. Refugee Review Tribunal, *Annual Report 2004-2005,* p. 9.

41 See, for example, Germov, *Refugee Law in Australia*, p. 79.

42 *Migration Act 1958*, s.429A

3.56 The RRT has the power to summon a person to appear before it to give evidence or to produce documents to it.

3.57 A person appearing before the RRT to give evidence is not entitled to be represented by any other person or to cross examine any other person giving evidence unless the Tribunal gives them leave to do so. However, an applicant is entitled to give evidence and present arguments in support of their claims.[43]

3.58 The RRT is required to prepare 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.[44] A copy is provided to the applicant and to DIMIA.

3.59 The RRT must also publish decisions considered to be of particular interest, excluding information capable of identifying the applicant or his or her dependents or relatives. Approximately 10% of RRT decisions are published.[45]

*Representation*

3.60 Approximately 31 per cent of the 3,033 cases finalised by the RRT in 2004-05 involved unrepresented applicants.[46]

3.61 The RRT's procedures provide that applicants may appoint a representative, who can forward written submissions and evidence to the RRT, contact the RRT on the applicant's behalf and accompany the applicant to any meeting or hearing arranged by the RRT. The Tribunal is not required to allow the representative to argue the case for the applicant. The applicant must appear at any hearing in person or via teleconference or videoconference facilities. The RRT may invite the applicant's representative or adviser to give make oral submissions at the conclusion of the hearing or in writing after the hearing.[47]

3.62 With very limited exceptions, an applicant's representative must be a registered migration agent.

3.63 DIMIA is not represented before the RRT, but may make written submissions to the RRT in individual cases or in relation to a particular caseload.[48]

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43 Germov, *Refugee Law in Australia*, p. 80.

44 *Migration Act 1958*, s430

45 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 9.

46 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 10. This compares to 23% of the 5810 cases finalised by the RRT in 2003-2004 and 20% of the 5077 cases finalised in 2002-2003. See Refugee Review Tribunal, *Annual Report 2003-2004*, p. 12 and Refugee Review Tribunal, *Annual Report 2002-2003*, p. 18.

47 See http://www.rrt.gov.au/applyrev.htm#process.

48 Refugee Review Tribunal, *Annual Report 2004-2005*, p 15.

*Caseload*

3.64 The RRT finalised 3,033 cases in 2004-05 and had 1,115 cases on hand as at 30 June 2005.

3.65 Applicants appointed a representative in 69 per cent of cases finalised in 2004-05. Applicants were invited to a hearing in 95 per cent of the finalised cases. Hearings were held in 73 per cent of finalised cases and interpreters were used in 89 per cent of cases involving a hearing.[49]

3.66 The RRT received 2,911 new applications for review in 2004-05. The number of applications lodged has declined over the past four years (that is, from 4,929 in 2001-02). The RRT explained:

> Over this period, the volume of lodgements has been affected not only by changes in primary lodgements and primary decision and primary grant rates (affected by circumstances overseas, departmental processing priorities and border control policies). It has also been affected by the processing of applications for further protection visas from persons who have previously been granted a temporary protection visa, and changes in the volume of court remittals. … Border control policies have largely stopped the flow of applications for protection visa applications lodged by persons who did not enter Australia lawfully. Detention cases peaked at 16% of lodgements in 2000-01, but only comprised 7% of lodgements in 2004-05. Most lodgements (93% in 2004-2005) are community cases, where the protection visa application was made after lawful arrival on another kind of visa, and the applicant holds a bridging or other visa providing lawful status during the course of the review.[50]

3.67 The RRT received 196 applications during 2004-05 from persons being held in immigration detention. It finalised 166 of these cases in that year, with 53 being undecided as at 30 June 2005.[51]

3.68 The composition of the RRT's caseload also changed during 2004-05. There was a marked rise in the number of Iraqi cases. The RRT explained that almost all of these involved TPV holders seeking a further protection visa. This rise was offset by a significant decline in applications received from other source countries such as Afghanistan, India, Malaysia and Indonesia.[52]

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49 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

50 Refugee Review Tribunal, *Annual Report 2004-2005*, pp. 16-17.

51 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

52 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 17.

3.69 Table 3.4 shows the composition of cases lodged, by source country, which shows the changing nature of the RRT's caseload.

**Table 3.4: Cases lodged with the Refugee Review Tribunal, by source country**

| Cases lodged by source country | 2004-05 | 2003-04 | 2002-03 |
|---|---|---|---|
| Afghanistan | 299 | 747 | 25 |
| Bangladesh | 137 | 105 | 154 |
| China (PRC) | 753 | 649 | 909 |
| India | 128 | 404 | 523 |
| Indonesia | 68 | 143 | 411 |
| Iraq | 540 | 6 | 18 |
| Lebanon | 50 | 48 | 111 |
| Malaysia | 88 | 142 | 163 |
| Philippines | 58 | 48 | 41 |
| Sri Lanka | 72 | 90 | 145 |
| Other | 718 | 962 | 2377 |
| **All cases** | **2911** | **3344** | **4877** |

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p.17, Table 3.4

*Outcomes*

3.70 The RRT set aside DIMIA's decision in 1,009 cases or 33 per cent of all cases finalised in 2004-05. The RRT explained:

> Typically a decision under review is set aside if a Member if satisfied that the applicant is a person to whom Australia has protection obligations under the Refugee Convention. The application for the visa is at this point usually remitted (returned) to DIMIA for further processing and final decision. The RRT's finding that an applicant is owed protection is binding on DIMIA.[53]

3.71 The set-aside rate in 2004-05 for applications lodged by persons held in immigration detention was 31 per cent – that is, 52 of the 166 detention applications

53 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

finalised by RRT were upheld. The set aside rate for detention cases in the two previous years was approximately 20 per cent.[54]

3.72 There was a significant increase in the RRT's overall set aside rate in 2004-05. As mentioned above, the RRT's set aside rate in 2004-2005 was 33 per cent. The set aside rate for previous years varied between 10 per cent and 13 per cent. This increase in the number of DIMIA decisions being overturned was explained by the RRT as follows:

> This reflected a significantly increased proportion of cases from Afghanistan and Iraq in the caseload. Most of these cases involved persons who had previously been granted a temporary protection visa and who were seeking a further protection visa. In the majority of these cases, the Tribunal found that at the time of the review the circumstances in Afghanistan and Iraq were such that a further protection visa should be granted.[55]

3.73 Table 3.5 provides a summary of the outcomes of RRT review applications.

**Table 3.5: Outcome of review applications to the Refugee Review Tribunal**

| **Outcomes of reviews** | **2004-05** | **2003-04** | **2002-03** | **2001-02** | **2000-01** |
|---|---|---|---|---|---|
| Primary decision affirmed | 1899 (22%) | 4685 (81%) | 5388 (86%) | 4647 (79%) | 4858 (81%) |
| Primary decision set aside | 1009 (33%) | 739 (13%) | 359 (13%) | 710 (12%) | 620 (10%) |
| Application withdrawn | 72 (2%) | 299 (5%) | 426 (7%) | 377 (7%) | 310 (5%) |
| Otherwise resolved # | 53 (2%) | 87 (1%) | 78 (1%) | 131 (2%) | 177 (3%) |
| **Total finalised** | **3033** | **5810** | **6251** | **5865** | **5965** |

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p. 19, Table 3.7; Refugee Review Tribunal, *Annual Report 2003-2004*, p. 22, Table 3.7; Refugee Review Tribunal, *Annual Report 2002-2003*, p. 18, Table 3.2.

# (includes applications lodged outside of the required time limit)

54 See http://www.rrt.gov.au/stats/lodgements%20and%20finalisations.pdf and the table entitled *RRT: Lodgements and finalisations since 1993.*.

55 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 19.

3.74 Table 3.6 provides the RRT set-aside rate according to source country.

**Table 3.6: RRT set-aside rates by source country**

| Set aside rates by source country | 2004-05 | 2003-04 | 2002-03 | 2001-02 | 2000-01 |
|---|---|---|---|---|---|
| Afghanistan | 89.2% | 89.8% | 32.2% | 61.6% | 61.9% |
| Bangladesh | 14.9% | 14.4% | 1.5% | 1.9% | - |
| China (PRC) | 10.4% | 4.7% | 3.4% | 6.4% | - |
| India | 1.5% | 0.4% | 0.5% | 0.7% | - |
| Indonesia | 5.4% | 3.7% | 0.9% | 2.6% | - |
| Iraq | 91.5% | 20% | 52% | - | 87.1% |
| Lebanon | 18.6% | 9.9% | 10.6% | - | - |
| Malaysia | 1.0% | 0.6% | 0.7% | 1.8% | - |
| Philippines | 1.9% | 0% | 0.2% | - | - |
| Sri Lanka | 15.5% | 5.9% | 4.2% | 15.4% | - |
| Other | 11.6% | 5.5% | 4.8% | - | - |
| **All cases** | **33.3%** | **12.7%** | **5.7%** | **12.1%** | **13.0%** |

Source: *Statistics for all countries listed in the Table were not readily available for 2001-02 and 2000-01. Refugee Review Tribunal,* Annual Report 2004-2005*, p. 20, Table 3.8; Refugee Review Tribunal,* Annual Report 2003-2004*, p. 23, Table 3.8; Refugee Review Tribunal,* Annual Report 2002-2003*, p. 19, Table 3.3; Refugee Review Tribunal,* Annual Report 2001-2002*, p. 3.*

### *Time taken to determine review applications*

3.75 Timeliness is also an important performance indicator for the RRT.[56] Like the MRT, the RRT's funding is based on the number of cases to be finalised in each year. According to its latest annual report, the RRT also 'operates within a legislative framework which requires a speedy resolution of matters'. Case targets are also set for the RRT Members each year and each Member is expected to undertake a mix of cases (for example, from a variety of countries). The RRT has stressed that,

56 Timeliness is one performance indicator used by the RRT to measure its performance in meeting the outcome required of it by Government, namely, 'the independent merits review of decisions concerning applicants for refugee status'. The RRT's other performance indicators are: the number of cases finalised; the levels and outcomes of appeals against RRT decisions; and the number of complaints received by the RRT about its Members and services. Refugee Review Tribunal, *Annual Report 2004-2005*, p. 14.

notwithstanding the importance of meeting case targets, there is a continuing commitment to making quality decisions.[57]

3.76 *The Migration and Ombudsman Legislation Amendment Act 2005* requires the RRT to finalise reviews within 90 days. The RRT has advised that measures have been developed or mooted to achieve this outcome since the proposed amendments were first announced by the Prime Minister on 17 June 2005.[58]

3.77 The average time taken by the RRT in 2004-05 to process a review application from lodgement to finalisation was 22 weeks (154 days). This is the lowest average processing time since the RRT was established in 1993. The average time taken to finalise applications from persons held in immigration detention was 11 weeks.[59]

*Judicial review – appeals to the Federal Court*

3.78 During 2004-05, 1,978 applications for judicial review of RRT decisions were made. These related to 1,932 RRT decisions. This compares to 2,824 initiating applications for judicial review filed in the previous year, relating to 2,791 RRT decisions.[60]

3.79 An application for judicial review was filed in 39.9 per cent of all cases finalised by the RRT in 2004-05. This compares to 38.1 per cent of cases finalised in the previous year.[61]

3.80 The number of RRT decisions remitted or overturned by the courts rose from 163 cases in 2003-04 to 245 cases in 2004-05.

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57 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 14, 21-22. The RRT's funding agreement with the Department of Finance and Administration is based on the number of cases to be finalised in a year and an assessment of fixed and variable costs.

58 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 2. These measures have included the transfer of Member and staff resources to the RRT caseload as well as the introduction of a new Principal Member Direction (3/2005 – Efficient Conduct of RRT reviews) which provides for a framework for processing cases within 90 days by promoting greater use of electronic communication, early lodgement of submissions setting out applicants' claims together with any available evidence, early consideration of cases by Members, and by seeking collaboration from migration agents. DIMIA, Answer to Question on Notice, 25 October 2005, p. 44.

59 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 2, 15.

60 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

61 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

3.81 Table 3.7 provides a summary of the outcomes of applications for judicial review of RRT decisions in the last five years.

**Table 3.7: Outcomes of applications for judicial review of RRT decisions**

| Judicial Review outcomes | 2004-05 | 2003-04 | 2002-03 | 2001-02 | 2000-01 |
|---|---|---|---|---|---|
| Applicant withdrawn | 675 | 519 | 288 | 194 | 341 |
| Dismissed by the court | 1288 | 1539 | 444 | 365 | 342 |
| Remitted by consent for reconsideration | 165 | 80 | 34 | 76 | 105 |
| Remitted by court for reconsideration | 80 | 83 | 31 | 53 | 47 |
| **TOTAL** | **2208** | **2221** | **797** | **686** | **835** |

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22, Table 3.10. Refugee Review Tribunal, *Annual Report 2003-2004*, p. 25, Table 3.10; Refugee Review Tribunal, *Annual Report 2002-2003*, p. 20, Table 3.4.

3.82 The judicial review process is discussed below.

### *The Administrative Appeals Tribunal*

3.83 The Administrative Appeals Tribunal (AAT) is an independent statutory body established to undertake merits review of a broad range of administrative decisions made by Commonwealth Government Ministers and officials.

*Jurisdiction*

3.84 The Administrative Appeals Tribunal has jurisdiction to review the following departmental decisions on their merits:

- refusal to grant a protection visa or to cancel a protection visa relying on Articles 1F, 32 or 33 of the Refugee Convention; [62]
- cancellation of a business visa;
- an order for the deportation of a non-citizen convicted of certain crimes;
- registration, or refusal to register, a person as a migration agent;
- deregistration, or refusal to deregister, a person as a migration agent;

62 Article 1F of the Refugees Convention concerns the commission of international (crimes such as war crimes), serious non-political crimes and acts contrary to the purposes and principles of the United Nations. Article 32 concerns the expulsion of refugees on the ground of national security or public order. Article 33(2) concerns refugees considered to be a danger to security or the community. ANAO, *Report No. 56, 2003-2004, Management of the Processing of Asylum Seekers*, pp 25-26.

- cancellation or suspension of a person's registration as a migration agent;
- refusal to grant, or to cancel, a visa on the basis that the non-citizen does not satisfy the delegate of the Minister that the person passes the character test;
- access to information (that is, decisions made under the *Freedom of Information Act 1982* (Cth)); and
- review of certain decisions made under the *Australian Citizenship Act 1948* (Cth).[63]

The Migration Act also provides for the referral of certain RRT and MRT decisions to the AAT for review. In each case, the decision may be referred by the Principal Member of the Tribunal, and must involve an important principle or an issue of general application.

*Caseload*

3.85 Applications to the AAT have generally increased over the past 10 years. There were 72 matters resolved in the AAT in 1993-94. There were 399 in 2004-05.[64]

3.86 Immigration related applications for review lodged with the AAT during 2004-05 included:

- Business Visa cancellations – 123 applications lodged;
- expedited review of section 501 visa cancellations / refusals – 98 applications lodged;
- protection visa cancellations / refusals – 5 applications lodged; and
- section 501 visa cancellations / refusals – 70 applications lodged.[65]

*Outcomes*

3.87 The following table summarises the outcomes of migration related applications in recent years.

63 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

64 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

65 Administrative Appeals Tribunal, *Annual Report 2004-2005*, p.128.

**Table 3.8: Outcomes of migration-related applications**

| Year | Applicant Withdrawal | Minister Withdrawal | Decision under Review Set Aside | Decision under Review Affirmed | Total |
|---|---|---|---|---|---|
| 2000-01 | 77 | 31 | 66 | 146 | 320 |
| 2001-02 | 98 | 80 | 78 | 95 | 351 |
| 2002-03 | 97 | 46 | 86 | 170 | 399 |
| 2003-04 | 164 | 89 | 124 | 197 | 574 |
| 2004-05 | 118 | 97 | 71 | 175 | 461 |

Source: The table is drawn from DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

## Criticism of secondary assessment procedures

3.88 The Committee received evidence critical of the review process following DIMIA's rejection of visa applications, particularly in respect of protection visa applications. Much of this criticism mirrored the criticism levelled at the primary assessment stage of visa applications (which is described in Chapter 2). Concerns raised in submissions included:

- the need to comply with strict time limits when seeking a review;
- the time taken to process applications;
- the imposition of application and transcript fees;
- restriction on legal representation at hearings;
- the quality of interpreters used;
- the attitude of tribunal members towards applicants;
- the quality of decision making; and
- scepticism about the impartiality and independence of tribunal members.

### *Concerns raised in earlier inquiries*

3.89 Similar concerns were raised with this committee in its 2000 inquiry into Australia's Refugee and Humanitarian Program.[66] That report summarised the concerns raised about the RRT at that time as including:

66 See, generally, Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Chapter 5.

> …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 the 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.[67]

3.90 The committee at that time considered that these concerns could best be addressed by improving decision-making at the primary stage, providing better advice, assistance and information to protective visa applicants as well as clarity about the RRT's methodology, and enabling the RRT to hear some cases with a larger panel of members.[68] The committee's response to concerns or perceptions about the independence of the RRT and the qualifications and training of its Members was to recommend that:

- the Principal Member of the RRT be a person with judicial experience;
- officers from DFAT, DIMIA and the Attorney-Generals Department not be appointed as RRT members;
- 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;
- further training be provided for RRT members in the use of inquistitorial methods; and
- the RRT be able to sit as a multimember panel in appropriate cases.[69]

3.91 In response to concerns that the measures used to assess the RRT's performance were inadequate, the committee recommended that DIMIA and DOFA acknowledge the RRT's changing caseload and the differing complexity of its cases and use this information 'to assess appropriate funding levels and/or systems'.[70]

3.92 The Government responded to these recommendations in 2001 by either dismissing them or stating that they were already reflected in current practice. The Government also advised that multimember panels were not permitted under the Migration Act at that time.[71]

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67 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Chapter 5, p. 146.

68 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, pp 168-9.

69 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, pp 151, 172-3, 174.

70 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, p. 174.

71 See Appendix 6.

### *Concerns raised in this inquiry*

*Arbitrary and inflexible time limits*

3.93 There are strict time limits for lodging applications for review to both the MRT and the RRT. Neither tribunal has the power to extend the time limits. In relation to the MRT the time limits vary from two working days for some immigration detention cases, through to seven working days for cancellation decisions and other immigration detention cases, 21 calendar days for other cases where the visa applicant is in Australia, and 70 calendar days for cases where the visa applicant is outside Australia.[72]

3.94 As mentioned above, the time limits for the RRT are 7 working days for persons in immigration detention, and 28 calendar days for all other cases.[73]

3.95 Submitters criticised the inflexibility of these time limits for preventing access to merits review regardless of the reasons for failing to lodge within time or the consequences for the applicant.[74] The Law Society of South Australia (LSSA), for example, pointed to the consequences of such a failure for applicants. It argued that a failure to lodge within the prescribed time:

> …flows on to affect applications made directly to the Minister. Under the *Migration Act*, the Minister only has the power to exercise her discretion to substitute a more favourable decision after the RRT or MRT has made a decision. If applicants fail to lodge an application for merits review within time, they also lose the right to appeal to the Minister. … there are many reasons an applicant may not receive notice and/or lodge an appeal within time. These include lack of access to legal advice, failure to understand the requirement to provide a current address (particularly for applicants with limited English language skills, education and/or understanding of the Australian legal system), or error on the part of the appointed agent. If DIMIA is in error, the onus is on the applicant to prove the error in order for the notification to be re-issued, which can be very difficult.
>
> Precluding such applicants from applying for an extension of time for appeal is unreasonably harsh. The MRT, RRT and federal courts should be granted the discretion to allow extensions of time in appropriate circumstances.[75]

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72 *Migration Regulations 1994*, reg. 4.10.

73 *Migration Regulations 1994*, reg. 4.31.

74 See, for example, Law Society of South Australia*, Submission 110*, p. 5, and South Brisbane Immigration & Community Legal Service, *Submission 200*, p. 9.

75 *Submission 110*, pp 5-6. Commentators have noted that, if notification was not received due to an error by DIMIA, then an applicant may be able to argue that it was not a valid notification and the time limit has not commenced. Burns and Sudritshti, *The Immigration Kit* pp 764-765.

3.96 It was argued that tribunals should have a discretion to grant an extension of time to lodge an application for review in appropriate circumstances similar to that provided to the courts via the *Migration Litigation Reform Act 2005 (Cth)*. The latter provides a discretion to grant a possible extension of a further 56 days after the 28 day period from actual notification.[76]

*DIMIA's delays in processing FOI applications*

3.97 It was put to the committee that the impact of inflexible Tribunal time limits was compounded by the time taken by DIMIA to process related Freedom of Information (FOI) applications.

3.98 The Law Institute of Victoria (LIV) suggested that extensive delays are not uncommon in FOI applications for DIMIA files:

> Such delays in processing and reviewing FOI requests is unworkable when migration law and visa applications require responses within prescribed periods (ie usually within 28 days) without access to extensions of time. Obtaining access to a client's DIMIA file is imperative for a migration agent to provide correct immigration assistance to their client. This is particularly relevant in matters involving an applicant who does not speak English and does not understand what has occurred in their case.[77]

3.99 The LSSA also raised this issue with the committee:

> The *Freedom of Information Act 1982 (Cth)* requires that DIMIA or the Minister must take all reasonable steps to enable the applicant to be notified of a decision on a request within 30 days. However, applications for access to documents held by DIMIA typically take many months to process. Current applications commonly take from 6 months to a year before a decision is made. This in turn impedes the application for and processing of visa applications. It prevents lawyers and migration agents from giving speedy advice, and in some cases, from assisting with an application at all, until the documents are made available. DIMIA should direct appropriate resources to ensuring that such unreasonable delays do not occur.[78]

3.100 A related concern was DIMIA's claimed reliance on exceptions under FOI legislation to deny access to information. As the LIV explained:

> The release of documents under FOI is usually made with exceptions, for example, on public interest grounds. For example, an offshore application such as a spouse visa may be refused due to local community information, an anonymous allegation received or negative information provided by an

76 SBICLS, *Submission 200*, p. 9. See footnote 135 below.

77 LIV, *Submission 206*, p. 24. See also Mrs Le, *Committee Hansard*, 7 October 2005, p. 22; Mr Harbord, RASSA, *Committee Hansard*, 26 September 2005, p. 19 and Ms Birss, RASSA, *Committee Hansard*, 26 September 2005, p. 19.

78 Law Society of South Australia, *Submission 110*, p. 5.

> unknown source or obtained independently by DIMIA. Similarly in visa cancellation cases, an FOI request will not always reveal all information on a DIMIA file and why a visa has been refused. Such information, unless disclosed to the applicant, can make it difficult, if not impossible, for the applicant to respond to and or correct. The principles of natural justice mean that a person who is the subject of an allegation and whose interests are affected by a decision must be accorded procedural fairness in the investigation of public interest disclosures and given the opportunity to be heard.[79]

3.101 The LIV claimed that, in cases where DIMIA invoked exceptions under the FOI legislation, the matter is practically closed as the means of challenging such decisions generally involves further lengthy delays.[80]

3.102 The committee notes that a key finding of the Palmer Inquiry into the Cornelia Rau matter was the unduly restrictive interpretation of privacy laws by DIMIA.[81]

3.103 DIMIA explained to the Committee that the number and complexity of FOI requests had increased significantly in recent years, with DIMIA now receiving more FOI requests than any other agency. It stressed that, notwithstanding the latter, it endeavours to process and finalise each FOI request within the statutory timeframes and that is implementing a range of strategies to address delays in FOI processing including structural changes, recruitment of additional staff and investigating alternative ways to meet the increasing demands.[82]

*Time taken by trubunals to process review applications*

3.104 Concerns were raised over delays being experienced at the review stage. The LIV, for example, suggested that:

> [while] resources, caseload and the individual circumstances of some cases may cause delay in a visa application decision, … DIMIA, MRT and RRT should be required to comply with strict visa decision making time periods unless certain exceptions apply.[83]

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79 LIV, *Submission 206*, p. 24.

80 If DIMIA refuses to release a file or part of a file, there is a right of internal review through the Department. If the information is not released on internal review, there is the possibility of further review by applying to the Administrative Appeals Tribunal.

81 The Inquiry found that 'DIMIA's attitude to the Commonwealth Privacy Act 1988 is unduly cautious and has operated to limit the range and effectiveness of inquiries …'. M. Palmer, *Inquiry into the Cornelia Rau Matter*, Main Finding 34, p. xiv.

82 DIMIA, Answer to Question on Notice, 5 December 2005, pp 24-25. From 2002 to 2004, the number of FOI requests increased by 46% to 15,446. DIMIA received over 11,600 requests in 2004-05. DIMIA, Answer to Question on Notice, 11 October 2005, p. 4

83 LIV, *Submission 206*, p. 25.

*Tribunal application and transcript fees*

3.105 As noted above, a person whose protection visa application has been refused is advised that they can seek a review of the decision by the RRT. At the same time they are advised that an application fee of $1400 is payable if their application is unsuccessful.

3.106 It was put to the committee that:

> …'the use of application fees and charges is used by DIMIA and other related agencies to deter asylum seekers making a review application. Such fees limit an asylum seeker's access to justice and right to seek review of a decision by DIMIA to refuse their Protection visa application.[84]

3.107 The LIV considered payment of these fees, or the prospect of having to pay these fees if unsuccessful, placed an unnecessary burden upon asylum seekers and their supporters. It referred the Committee to the failure by DIMIA and the RRT to make clear to recent East Timorese asylum seekers, who had filed RRT applications and who were later granted humanitarian visas by the Minister exercising her discretion, that they were entitled to seek a refund of the review application fee. The payment of the fee, it was claimed, had not only caused many families financial hardship but also forced a number to borrow money to pay the fee.[85] The LIV recommended that the review application fee should be either reduced or abolished.

3.108 Similar concerns were raised in respect of transcription fees. For example, the Refugee Advocacy Service of South Australia noted that, when advising asylum seekers on potential appeals of RRT decisions, the fees charged for Tribunal transcripts forced the Service to rely on tapes of the Tribunal hearings and the services of volunteers to transcribe those tapes. However, it noted that, in non-immigration matters, transcript fees are usually waived in relation to legal aid matters. They submitted that 'transcript fees should be waived and copies of transcripts of RRT hearings provided free of charge to those making applications or lodging appeals.'[86]

*Restrictions on legal representation*

3.109 As with the primary assessment of protection visa applications, criticism was levelled at the restrictions on legal representation at hearings, particularly RRT hearings.

3.110 As explained above, there is no automatic right to representation and no right to call witnesses or to cross-examine witnesses at tribunal hearings. Effective legal representation at a hearing depends on the discretion of the tribunal. A migration agent or lawyer can only speak or make submissions on an applicant's behalf if and when

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84 LIV, *Submission 206*, p. 18.

85 LIV, *Submission 206*, pp 18-19.

86 RASSA, *Submission 51*, p. 5.

the tribunal member considers it appropriate to do so. It was put to the committee that such a lack of legal support increases the vulnerability of persons who often speak little English, may have mental problems as a result of being held in detention and have no understanding of the legal system in Australia.[87]

3.111 As the International Commission of Jurists (ICJ) noted

> Refugee law in Australia has become an extraordinarily complicated area of specialised legal skill, as the Courts have construed the migration legislation and international law through many appeals of tribunal and departmental decisions. The complexity of refugee law, which many lawyers find difficult to grasp, let alone asylum seekers, renders even more unsatisfactory the provisions of the Migration Act that prohibit legal representation in the review tribunals.[88]

3.112 The difficulties faced by unrepresented applicants were a particular concern. As noted above, approximately 30 per cent of RRT and MRT cases involve an unrepresented applicant. The LSSA advised the committee that it has:

> … concerns about evidence that is put before the RRT as well in that often the applicant is not represented and they will be presented with certain evidence by the tribunal member which, it is put to them, is contrary to their claim, and asked to respond to it pretty much on the spot. Often you have a scenario where it is one piece of evidence versus another. We say that it is actually quite unfair for that unrepresented applicant to have to try to deal with information when they may be completely unaware of where it has come from. How is an unrepresented, untrained applicant who probably does not even speak English very well supposed to put their case forward in a way that they are actually able to test the information that is being put against them? That is probably one of the really serious problems that comes with having people unrepresented before the RRT.[89]

3.113 As noted above, this committee in its June 2004 Report on *Legal aid and access to justice,* recommended the Commonwealth legal aid guidelines be amended to provide for assistance in migration matters, both at the preliminary and review stages, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.[90] It is apparent that neither recommendation has been implemented.

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87 RASSA, *Submission 51*, p. 4.

88 ICJ, *Submission 115*, pp 4-5.

89 *Committee Hansard*, 26 September 2005, p. 12.

90 *Legal aid and access to justice* Senate Legal and Constitutional References Committee Report, June 2004, p. xxix

*Quality and appropriateness of interpreters*

3.114 Both the MRT and the RRT will arrange for an interpreter to assist an applicant at a hearing, if required. However, as previously noted, criticism has been levelled at the quality of interpreters used as well as the appropriateness of certain interpreters, because of their cultural and ethnic background. Similar claims and concerns to those were raised in respect of the use of interpreters during the primary assessment of applications were levelled at the use of interpreters by the Tribunals. The RASSA, for example, referred to the following in relation to the RRT:

> … [p]roblems with interpreters which are often apparent once tapes of the hearing are listened to and the transcript reviewed. These occur where interpreters do not have adequate fluency in the English language or in pronunciation. At times there may be ethnic conflicts between the interpreter and the applicant.[91]

*Conduct and attitudes of Tribunal Members*

3.115 It was claimed that a lack of procedural protections for applicants coupled with a confrontational attitude by some members, particularly on issues of credibility, had undermined tribunal decision-making.

3.116 The discretionary nature of RRT hearings was highlighted by submitters such as A Just Australia:

> Evidentiary practices and procedures at the RRT have been observed to be 'operating at such a routinely low standard that they contribute to decisions that are manifestly unfair and potentially wrong in law.' The conduct of hearings is entirely discretionary, meaning:
>
> - there *may* be pre-hearing contact between the Member and the applicant, but there usually is not;
> - the applicant *may* be able to bring a friend along for emotional support (an issue that is particularly relevant for traumatised people with a negative experience of the authorities in their country of origin);
> - the Member *may* lead the applicant through their story chronologically or may instead focus only on one or two issues arising from their DIMIA file; and
> - the Member *may* (selectively) use whichever country information they believe is relevant in assessing whether or not an applicant's story is credible – information which the applicant does not have access to, and which is of varying quality.[92]

91 RASSA, *Submission 51*, p. 4.

92 AJA, *Submission 184*, pp 7-8.

3.117 As noted above, there is also no automatic right to representation before the Tribunals and no right to call witnesses or to cross-examine witnesses at hearings, with legal representation at a hearing depending on the discretion of the Tribunal.

3.118 The committee's attention was drawn to the following judicial summary of the nature of the review provided by the RRT.

> [H]earings before the Tribunal are virtually unique in Australian procedures and in the common law system generally. … The Tribunal is both judge and interrogator, is at liberty to conduct the interview in any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the opportunity of reading and understanding the material before being questioning about it … These methods contravene every basic safeguard established by our inherited system of law for 400 years.[93]

3.119 It was argued that the lack of procedural safeguards was being compounded by the attitude and approach taken by some Tribunal Members. The RASSA, for example, cited the following conduct as evidence of poor decision making by the RRT:

- Very leading, directed or selective questioning by the RRT member which appears not designed to elicit the applicant's story but rather to find a reason for rejecting their claim.
- RRT members not addressing their mind to the key question as to whether this person is a refugee but spending an inordinate amount of time in trying 'to catch them out'.
- Applicants being placed under stressful questioning and required to respond on the spot without any opportunity to consider issues raised and provide further submissions.
- Applicants not being given a proper opportunity to simply tell their story.
- The RRT member often places great emphasis on so-called 'inconsistencies' in submissions. Sometimes assumptions as to credibility are made on the basis of inconsistencies without taking into account the fact that applicants may be under stress and may be being questioned about issues that took place several years ago where they may not have a good memory recall.
- RRT members often making assumptions or putting words in the mouth of an applicant, making erroneous conclusions and not necessarily asking for clarification of conclusions.
- RRT members 'brushing off' issues raised by the applicant, or saying they will come back to those issues and then not doing so.

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93 Justices Einfeld and North in *Sellian v MIMA*[1999] FCA 615, [3]-[4], cited in A Just Australia *Submission 184*, p. 8

- RRT members raising spurious reasons as to why an applicant should leave Australia and return to their former country. Examples include questions such as – if the applicant had bribed their way out of their home country, then why couldn't they bribe people to live there safely, or asking why they simply couldn't keep a low profile in their own country. Each of these questions of course implies that the RRT member accepts that the person cannot live freely and safely in their own country, and yet often the applicant is still rejected.
- Obvious failures of the RRT to acknowledge the genuine refugee claims of certain groups of people, eg. Sabain Mandaeans, Arab Iranians and Christian converts, who more recently have been recognised as persecuted groups.[94]

3.120 Similar comments were expressed by other submitters and witnesses.[95] The International Commission of Jurists (ICJ), for example, raised particular concerns in respect of the use of adverse information, including information from unidentified sources. It advised the Committee that:

> One gets a distinct sense, in the RRT in particular, that the entire proceeding really takes the form of cross-examination of the asylum seeker. … There are no real rules of admissibility of evidence. If the tribunal regards it as relevant to its inquiry, it is admissible. Certainly it is open to the tribunal to determine what weight to give to certain evidence, but often an applicant who has given their evidence under oath in person before the tribunal is confronted with information from unidentified sources which would seem to contradict an aspect of the person's evidence. Yet the witness who provides either information or an opinion is often not identified. Their expertise or their qualifications to express an opinion are not disclosed.[96]

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

> If there is information before the tribunal that the tribunal regards as a reason or part of a reason to affirm the department's refusal then they are required [by section 424A of the Migration Act] to issue a letter under that section to the applicant disclosing the information, explaining why it is relevant and inviting them to respond. But what happens … is that you are not given the actual documents. You are not given the exchange of correspondence that may have given rise to this information. You are not given full texts of documents. As a lawyer in a court, if someone seizes upon a paragraph of a document to defeat my case, I would ordinarily look at the document as a whole to ascertain the proper context and see if there

94 RASSA, *Submission 51*, pp 4-5.

95 See, for example, ASRC, *Submission 214*, pp 16-19, and Mr Guy Coffey, *Submission 81*, p. 4.

96 Mr McNally *Committee Hansard* , 28 September 2005, p. 40.

> was anything else in the remainder of the document which may rebut or perhaps qualify to some extent the interpretation that has been given to the extract. That in my view is proper natural justice – the proper right to reply to adverse information. But the tribunal is … not obliged to give you that document or that evidence. It can just paraphrase it in a letter or provide it to you under section 424A, saying, 'We have information that suggests X', where that conclusion may not even be what is in the piece of information. So you do not have an opportunity to examine the reasoning process that led to the statement that that information means that conclusion.[97]

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

> It is often used as a basis on which to conclude, as a finding of fact, that its weight outweighs the sworn testimony of the person and that their credibility is doubtful. Therefore their whole claims fails and that is it. Credibility is a finding of fact in relation to which there is no access to judicial review, so that is particularly problematic.[98]

*Approach to assessment of credibility*

3.123 The issue of the RRT's assessment of an applicant's credibility continued to be a vexed one for many submitters and witnesses. As explained in Chapter 2, assessment of credibility is intrinsic to the determination of refugee status.

3.124 The ICJ argued that the RRT and MRT have developed a fixation on the question of credibility of visa applicants, and many cases are now rejected on the basis of adverse findings of fact in this regard. It stressed that these findings are usually made after vigorous cross-examination of applicants:

> Standard cross-examination techniques are employed by Members at the hearings in relation to visa applicants, and much like in court proceedings, witnesses can become confused or upset when faced with co-ordinated, strategised and direct challenges to various aspects of their case, including their credibility. Usually, this all takes place in a language other than their own, and through the use of interpreters of mixed competence.[99]

3.125 The outcome – according to the ICJ – was that:

> In many cases, adverse credibility findings are made as a result of relatively minor inconsistencies in an applicant's evidence. It is hardly surprising that in many cases (if not most of them), there will be some inconsistencies or lack of precision in some of the evidence before the tribunals. This is particularly so in refugee matters where many applicants have limited

97 Mr McNally *Committee Hansard* , 28 September 2005, p. 44.

98 Mr McNally, *Committee Hansard* , 28 September 2005, p. 40.

99 ICJ, *Submission 115*, p. 3.

> education and for whom presenting a complicated refugee case would be a formidable task, even if it were in their own language.[100]

3.126 It was argued that the lack of an effective right to representation before the Tribunals only compounded the problem:

> Due to the very nature of the RRT and the MRT, and the lack of the right to representation, the hearings before the RRT and MRT often take the form of cross-examination by the Member of the witnesses (including the visa applicant), and very little more. There is no right for the visa applicant to have a lawyer or other representative undertake re-examination, and if the Tribunal identifies other witnesses and sources of information, there is no entitlement to test that adverse evidence through the applicant's cross-examination of those other witnesses. Their hearsay statements, often only in writing, are admitted without any real challenge or testing, and they are often preferred to the applicant's own evidence.[101]

3.127 The Asylum Seekers Resource Centre (ASRC) echoed the ICJ's concerns. It advised the Committee that:

> … it is our view that RRT members regularly question applicants in an inappropriate manner and often draw unfair and unjustified conclusions on matters of credibility.[102]

3.128 The ASRC pointed to the significant number of submissions to the 2000 inquiry and to the many suggestions made to the RRT over the years concerning the RRT's inappropriate approaches to credibility. It argued that, despite the latter, the RRT's approach to credibility remained just as problematic:

> With the exception of the mantra of 'ongoing training for RRT members' we are not aware of any substantive attempts to deal with the issue.[103]

3.129 A particular concern was the RRT's approach to and treatment of applicants who had suffered torture or trauma:

> Assessment of psychological reports from torture/trauma counselling services in relation to an applicant's history of past persecution presents apparent difficulties for the RRT. Little weight is generally given to such reports by RRT members. However members are often limited in their expertise and their ability to fairly and accurately make findings on the credibility of persons who are victims of torture/trauma.[104]

3.130 The ASRC made the following suggestions for change:

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100 ICJ, *Submission 115*, p. 3

101 ICJ, *Submission 115*, p. 3.

102 See ASRC, *Submission 214*, pp 16-18.

103 ASRC, *Submission 214*, pp 16-18.

104 ASRC, *Submission 214* , pp. 16-18

- The RRT incorporate into its Practice Direction Specific guidelines on its approach to credibility (as is the case in Canada).
- The use of use multi-member panels.
- Further training for RRT members on making decisions in a way which minimises the need to rely on credibility.
- The RRT give greater weight to expert medical reports such as those from doctors, psychologists, psychiatrists or specialist torture/trauma counsellors detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.
- A summit be held specifically on the issue of credibility in the refugee determination process, with the aim of identifying recommendations for change.[105]

*Performance management*

3.131 Concerns were raised that the measures used to assess the performance of the Tribunals compromised their independence and decision-making.

3.132 It was put to the Committee, for example, that a government focus on the cost of the determination system rather than its effectiveness had fostered poor decision-making by the RRT. A Just Australia argued that:

> … the focus on performance indicators, a set number of cases members are expected to finalise per year, as a away of measuring the performance of Tribunal members also contributes to this [poor decision-making]. 'Efficiency' becomes an end in itself rather than an aid to effective and fair decision-making. The RRT's credibility would be greatly enhanced, and its decisions greatly improved, if it had … a greater focus on the quality, rather than the quantity, of decisions made by members.[106]

3.133 Performance measurement was also an issue that arose in this committee's inquiry in 2000, with witnesses in that inquiry also arguing that the RRT Members' decision quotas affected the quality of decision-making. Such concerns prompted the committee to recommend that the workload of RRT Members be re-assessed.[107]

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105 Recommended summit participants include DIMIA case officers, Tribunal members, practitioners in the area, Federal Court judges, academics, medical experts, psychologists, counsellors from torture/trauma counselling services, asylum seekers and refugees, and international experts in refugee law. ASRC, *Submission 214*, pp 16-18.

106 A Just Australia*, Submission 184*, p. 9.

107 Senate Legal and Constitutional References Committee*, Sanctuary under Review*, p. 174.

3.134 The Committee understands that annual case targets in 2004-05 for full time RRT Members were 115 or 120 cases or at least 2.2 cases per week. Members averaged 94 per cent of their case targets in that year.[108]

3.135 Commentators have suggested that the Tribunal Member's task is a challenging one and can result in pressure to cut corners:

> Review of protection visa applications involves reading the DIMIA file and documents provided by the applicant for the review as well as research into the applicant's home country and particular issues raised by their claims, The Member will have to decide whether they need to obtain further information or extend an invitation to comment on adverse information, Once that process is complete, the Member must decide whether a favourable decision can be made 'on the papers'. In most cases, it cannot and a hearing invitation must be extended. The Member must prepare questions for the hearing, conduct the hearing – almost invariably through an interpreter – and then write up their decision. The Tribunal is assisted by country and legal research sections, both of which have a considerable database of information at their disposal. Tribunal Members are required to type up their own decisions and the ability to use a word processor is one of the selection criteria for appointment. The Member's task is a formidable one and it is not surprising that the SLCLC [the Senate Legal and Constitutional Legislation Committee] recommended that the workload of RRT Members be reassessed. It is also not surprising that the pressure of this workload may cause Members to cut corners or fail to cover all the issues in the reasons for their decisions.[109]

3.136 As noted above, both the MRT and RRT also rely on the level and outcomes of appeals against their decisions as measure of their performance. A Just Australia pointed to an 'exponential' increase in the number of court appeals lodged against RRT decisions in recent years as evidence of poor Tribunal decision making:

> Despite repeated attempts by the Federal Government to prevent appeals to the courts from the RRT, the number of applications for judicial review of RRT decisions has risen consistently since the Tribunal commenced operations, climbing from 52 in the 1993-1994 financial year to 914 in 2000-2001, and 2824 in 2003-2004. This climb does not simply reflect an increase in asylum seekers. Rather applications for judicial review as a *percentage* of Tribunal decisions have risen. Applications were lodged for judicial review of 3% of RRT decisions in 1993-1994 … [whereas] in 2003-2004, applications for judicial review were made in respect of 35% of all RRT decisions.[110]

3.137 A Just Australia maintained that this increase:

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108 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

109 Germov & Motta, *Refugee Law in Australia*, p. 812.

110 A Just Australia, *Submission 184*, p. 7. Applications for judicial review were lodged in respect of 39.9% of RRT cases finalised in 2004-2005 (see table 3.5 above).

> … cannot simply be explained away by asserting that those appealing decisions are acting in bad faith. The increase in appeals has corresponded with multiple attempts by the government to prevent any such appeals by progressively tightening the provisions of the *Migration Act*. Repeated amendment of the Act, combined with intense government pressure on Tribunal members to privilege efficiency over fairness has created a situation where the legislation is so complex, and the Tribunal system under so much strain, that users of the system widely believe it to be incapable of making consistent decisions.[111]

*Independence*

3.1 Several submissions expressed doubts about the independence of the Tribunals, with some calling for their abolition.[112]

3.138 The joint submission from the Human Rights Council of Australia and A Just Australia, suggested that the Minister:

> ….exerts an unhealthy influence over what was meant to be an independent review mechanism. This influence rests partly in the combination of her powers of appointment to the RRT, the short tenure of these appointments, and the fact that single-member panels mean it is possible for the Minister to more easily identify or pressure individuals whose decisions go consistently against the department. … In addition, the failure of key selection criteria for members to include legal or human rights expertise raises doubts about the emphasis these issues are given in the making of life and death decisions for asylum seekers.[113]

3.139 These concerns were shared by the ICJ:

> A number of tribunal Members are employed on maximum term contracts, but are eligible for re-appointment at the Minister's discretion. It is not satisfactory in terms of the independence of the review tribunals that the Minister who determines appointment and re-appointment of tribunal Members, is also the Minister responsible for administering DIMIA, whose decisions are under review by the tribunal. It is a classic example of a structure whereby the purportedly independent tribunals could be subjected to powerful political pressure from the Minister whose departmental delegates are being called into question in the review cases. It is reasonable to fear that review tribunal Members may feel indirect, if not direct, pressure to provide decisions that please the Minister, and which could not be seen to be contrary to government policy. … Further, concerns about the

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111 AJA, *Submission 184*, pp 7-8.

112 Refugee Advocacy Service of South Australia Inc., *Submission 51*, p. 4; Ms M E Flenley, *Submission 91*, p. 2; Human Rights Council of Australia and Australians for Just Refugee Programs Inc., *Submission 185*, p. 5. See also comments of Mr McNally of the ICJ at *Committee Hansard* , 28 September 2005, p. 40.

113 Joint submission by the Human Rights Council of Australia and A Just Australia, *Submission 185*, p. 5.

> independence of the review tribunals are reinforced when one notes that many tribunal Members are ex-DIMIA officers, promoted by the Minister through the ranks of the public service. Further, if a visa applicant takes the tribunal and the Minster to court over a tribunal decision, the tribunals engage the same lawyer as the Minister to represent both parties in the proceedings.[114]

3.140 This concern was echoed by A Just Australia, which argued:

> …as the RRT has the same Minister as DIMIA (whose decisions it reviews), it is extraordinarily vulnerable to political pressures in decision-making. This is particularly so given the political prominence of asylum issues, and the extremely vocal championing of the Department's decisions by both Philip Ruddock and Amanda Vanstone.[115]

3.141 Mr Julian Burnside QC was also critical of the RRT. He advised the committee that:

> …there is a real problem with the nature, structure and operation of the RRT,…They are not independent of government – although notionally they are, in reality they are not because they are on short-term contracts and they are given a very clear message about what outcomes the government wants. … A more workable system might be one where, first of all, the members of the RRT are given some sort of independence. They should not be on short-term contracts; they should be given the sort of independence that is commensurate with the importance of the decisions they are making.[116]

3.142 RASSA noted that there have been reports suggesting that 'Tribunal members those members whose decisions please the Government have a greater chance of being reappointed'.[117]

*An over reliance on ministerial discretion*

3.143 It was put to the Committee that the lack of confidence in decision making at the primary and secondary assessment stage had led to an over reliance on the use ministerial discretions. A Just Australia noted that:

> … the frequency with which the Minister is required to intervene to overturn decisions of the RRT is also of concern. The Department's figures reveal that of the 2049 visas granted as part of the onshore humanitarian program, 1259 (over 60%) were the result of decisions by the Minister (DIMIA 2005). … Obviously, 60% of total onshore humanitarian program

114 ICJ, Submission 115, p. 2.

115 AJA, *Submission 184*, p. 8.

116 *Committee Hansard* , 27 September 2005, pp 47 and 52.

117 RASSA, *Submission 51*, p. 4.

> extends well beyond anomalous cases and might suggest that at the stage of the RRT, … genuine asylum claims are not being recognised.[118]

3.144 The UJA and ASPHM also suggested that a lack of confidence in decision-making by DIMIA and the RRT:

> … has resulted in ministerial discretion being over-emphasised by asylum seekers and their supporters in the determination process. Though substitution of a more favourable decision by the Minister does not imply a wrong decision by the RRT, nor that the person granted a visa is considered to be a Convention refugee, many protection claimants and their supporters equate ministerial intervention under section 417 with a grant of refugee status to the person, and with an implied failing of the RRT to make the right decision. Increasingly, public perception is that the power is used to grant visas to refugees where Australia's onshore protection program has failed them.[119]

3.145 As Chapter 4 explains, the current system of ministerial discretions is not without criticism.

*Alternative approaches*

3.146 Witnesses and submitters offered a range of alternatives which, in their view, would improve the independence and integrity of Tribunal decision making processes.

3.147 RASSA, for example, argued that the RRT Members:

> … should be lawyers. They should have tenure or in the alternative be restricted to one fixed term of appointment with no right of renewal. In other words, there should be no perception that Tribunal members are relying on the Government's favour for continuing employment.[120]

3.148 Some have argued for longer terms of appointment, transparent selection processes and the imposition of a presumption of reappointment unless the relevant selection panel can provide cogent reasons for non-appointment.[121]

3.149 Others, such as the ICJ, called for the abolition or substantial modification of the Tribunals. The ICJ advised the Committee that its position was:

> … that the MRT and the RRT should either be abolished (with the case load and jurisdiction being transferred to the AAT) or they should be modified such that their structure and procedures, and access to judicial review, are the same as is presently applicable to cases in the AAT. Members of the

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118 AJA, *Submission 184*, p. 9.

119 UJA and Hotham Mission, *Submission 190*, p. 9. See also the Law Society of South Australia, *Submission 110*, p 112.

120 RASSA, *Submission 51*, p. 5.

121 Germov, *Refugee Law in Australia*, p. 810.

> tribunals should only be appointed by the Attorney-General, and there should be no temporary appointments following which there is any eligibility for re-appointment as a Member.[122]

3.150 The ICJ maintained that the tribunals' current structure and procedures meant that one cannot have confidence in their ability to impartially, independently and effectively determine the facts of a case:

> Only through a right to representation, the right to question witnesses against them, and through judicial officers who are not potentially subjected to Ministerial political pressure, can any confidence in the outcome of these tribunals be had. Given the gravity of the decisions being made by these tribunals, which very often have life-changing implications for the applicant (and in refugee cases, potentially life-threatening implication) the present structure and procedures are inadequate and inappropriate.[123]

3.151 Others recommended the use of multi-member RRT panels as a way of improving the decision making of the RRT and reducing the perception of government influence.[124] According to the NSW Legal Aid Commission, reasons for considering use of multi-member tribunals included:

> … the sheer complexity of refugee law, the difficult experiences that applicants invariably bring before the tribunal and the inevitable sense of pressure that the members feel in terms of deciding, in many cases, somebody's future – their life. We feel that multimember tribunals, two-member or three-member tribunals, sometimes may spread that pressure around and allow for a fairer and more comprehensive assessment of a person's claim.[125]

3.152 The Committee notes that the earlier finding that a panel approach to RRT hearings 'would … help ensure the continual dissemination of information and reasons behind decisions within the RRT itself' and that it 'would expect the panel structure to contribute to a continuous improvement in the quality of decision-making by the RRT.'[126] As mentioned above, the latter prompted the Committee's recommendation in 2000 that 'the RRT 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.'[127]

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122 Mr McNally, *Committee Hansard*, 28 September 2005, p. 40.

123 ICJ, *Submission 115*, p. 4.

124 Human Rights Council of Australia and Australians for Just Refugee Programs Inc., *Submission 185*, p. 5; Asylum Seekers Resource Centre, *Submission 214*, pp 16-19. See also comments of Mr Burnside QC in *Committee Hansard* , 27 September 2005, p. 53.

125 Mr Gerogiannis, *Committee Hansard* , 28 September 2005, p. 69.

126 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, p. 169.

127 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Recommendation 5.4, pp 139-141.

### *The RRT's response*

3.153 The Committee put the above concerns to the RRT and DIMIA.

3.154 Their advice was that a broad range of quality control mechanisms exists to ensure that merits review decision making quality in the portfolio remains at a high level. These include:

- Tribunal Members being recruited for high level of skills and experience through a competitive and extensive nation-wide recruitment process;[128]
- Priority being given to the training and professional development of Tribunal Members, with a formal training program involving induction and follow up training of Members as well as leadership, guidance and advice by mentors, legal advisers and Senior Members.
- Reliance on specialist legal and country research staff and ready access to a very wide range of legal and relevant country information.
- Procedural requirements to ensure fairness and justice.
- The existence of a Member Code of Conduct and a requirement to act according to the Australian Public Service (APS) Values and APS Code of Conduct.
- Active performance management of Members.
- The availability of a formal complaints mechanism (although only a small number of complaints are received).
- Appropriate professional development and training are also conducted at the National Members Conference.[129]

3.155 In response to concerns over consistency in decision making, the RRT stressed that each cases before the Tribunal is decided on its merits and involves consideration of the individual circumstances presented by each applicant. It was argued that the variation in individuals' circumstances mean that it is seldom possible to compare individual cases.[130]

3.156 In response to concerns over a lack of legal representation at hearings, the RRT noted that, while the conduct of the hearing is at the discretion of the Tribunal Member, the hearing must be a genuine opportunity to present evidence and arguments. In practice, representatives are invited to provide submissions and comments after the applicant has given their evidence, but when and how they do so

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128 In response to concerns over Member's lack of legal qualifications, the RRT noted that analysis of Court remittals to the RRT did not suggest that legal error occur noticeably more or less on the part of Members with legal qualifications than those without such qualifications.

129 See generally DIMIA, Answer to Question on Notice, 25 October 2005, pp 36-50.

130 DIMIA, Answer to Question on Notice, 25 October 2005, p. 41.

remains at the discretion of the Member. The RRT also noted that procedural fairness may require that an applicant before the tribunal be represented in hearings.[131]

3.157 The RRT also advised it's contract for the provision of interpretative services stipulates that the interpreters provided by the Contractor must be generally accredited to NAATI Interpreter Level or above, where such accreditation is provided in the language. Where accreditation is not available, or where the Contractor is unable to provide an interpreter at the NAATI level or above, the Contractor must seek approval from the Tribunals. Interpreters are also required to comply with the standards and requirements set out in the RRT's Interpreter Handbook and the code of ethics devised by the Australian Institute for Interpreters and Translators. They are also generally required to advise the Tribunal of any possible conflicts of interest.[132]

3.158 The RRT did advise that on occasion difficulties were experienced in obtaining appropriately qualified interpreters in high demand language (such as Vietnamese) and also obtaining accredited interpreters in emerging languages (such as African languages).[133]

3.159 In response to concerns over the time being taken to decide cases, the RRT noted that the Tribunal now had the lowest average processing times since the RRT was established in 1993.[134]

3.160 The Committee also observes that recent amendments to the Migration Act noted above will require the RRT to finalise reviews within 90 days. However, as explained, failure to comply with this deadline will not render an RRT decision invalid. As also explained above, a range of measures have been or are being developed to achieve this deadline, including transfer of MRT members to the RRT to assist with the RRT caseload.

## Further avenues for review

3.161 There are two potential further avenues for review following a decision of a review tribunal.

- A written request to the Minister to exercise his or her personal discretion to grant a visa
- An appeal to the courts for a review of the Tribunal decision.

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131 See *Appellant WABZ* v *MIMA* (2004) 204 ALR 687

132 DIMIA, Answer to Question on Notice, 25 October 2005, p 43.

133 DIMIA, Answer to Question on Notice, 25 October 2005, p 44.

134 The percentage of cases over 9 months old since lodgement has been dramatically reduced from 35% of cases at the end of 2002-03 to 1% of cases at the end of 2004-05. The percentage of cases over 12 months old has been reduced from 16% in 2002-03 to less than 1% in 2004-05 DIMIA, Answer to Question on Notice, 25 October 2005, p 44.

***Ministerial discretionary power to substitute a more favourable decision***

3.162 An applicant may apply to the Minister to exercise his or her discretionary powers under sections 351 and 417 of the Migration Act to substitute a more favourable decision. These powers are discussed in Chapter 4.

***Judicial review of visa related decisions***

3.163 As mentioned above, a person who wishes to challenge a decision of the MRT, the RRT or the AAT can seek to have that decision reviewed by the Federal Magistrates Court, the Federal Court or the High Court.

*Jurisdiction*

3.164 The jurisdiction of the Federal Magistrates Court and the Federal Court to review decisions is largely conferred by, and subject to the Migration Act.[135] If a person is unsuccessful in the Federal Court, they may appeal in the first instance to the full bench of the Federal Court, and then to the High Court under section 73 of the Constitution. Primary decisions (ie, decisions by DIMIA officials) for which there is a right to merits review by the MRT, the RRT, or the AAT, are not reviewable. Only decisions of the MRT, the RRT and the AAT are reviewable by the Federal Court or the Federal Magistrates Court.[136]

3.165 An applicant may also appeal *directly* to the High Court (ie, without going through the Federal Court or Federal Magistrates Court) for interlocutory relief from a decision of a primary decision maker or a Tribunal under the original powers of the High Court, contained in section 75(v) of the Constitution.[137]

3.166 The courts cannot review the merits of the case. An appeal may on be lodged on the basis that *an error of law* has been committed in the making of the decision. Part 8 of the Migration Act applies a 'privative clause' that applies to most decisions made under the Migration Act, including decisions of the RRT, MRT and AAT, to narrow the scope for judicial review of those decisions. In February 2003, the High Court upheld the constitutional validity of the privative clause but found that it did not

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135 The Federal Magistrates Court has concurrent jurisdiction with the Federal Court. The choice of forum is left to the person making the application. The key difference between the two courts is that the Federal Magistrates Court is intended to be a relatively informal forum dealing with more routine migration matters more quickly. See DIMIA, *Judicial Review*, 11 March 2004, at http://www.immi.gov.au/legislation/judicial_review.htm.

136 *Sanctuary under Review*, pp 181-202; Germov, *Refugee Law in Australia*, p. 573; DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005; DIMIA , *Judicial Review*, 11 March 2004.

137 Migration Act, Parts 8, 8A and 8B. See also *Sanctuary under Review*, pp 181-202; Germov, *Refugee Law in Australia*, p. 573; DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005; DIMIA , *Judicial Review*, 11 March 2004.

apply to decisions tainted by 'jurisdictional error'. Jurisdictional error covers most legal errors.[138]

3.167 DIMIA has stated that, in practice, this means that the Federal Court, the Federal Magistrates Court or the High Court cannot overturn the visa-related decision unless:

- the decision-maker was not acting in good faith in making the decision; or
- the decision is not reasonably capable of reference to the decision-making power given to the decision-maker; or
- the decision does not relate to the subject matter of the legislation; or
- the decision exceeded the limits set out in the Constitution.[139]

3.168 The Migration Act also prevents class, representative or otherwise grouped court actions in migration proceedings.[140]

3.169 If a court finds a jurisdictional error in a decision under review, it cannot substitute its own decision. The courts must return the decision to the decision maker to be reconsidered, subject to any directions issued by the court. The High Court has the power to quash decisions under review and to issue a writ of *mandamus*, compelling the Minister to consider the decisions and remit the matter back to a differently constituted Tribunal.[141]

*Time limits*

3.170 Applications must be made to the Federal Court Registry within 28 days of the person concerned being deemed to have been notified of the decision. The same time limit applies to applications to the Federal Magistrates Court. Applications made directly to the High Court under section 75 of the Commonwealth Constitution must currently be made within 35 days of actual notification of the decision.[142]

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138 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

139 DIMIA , *Judicial Review*, 11 March 2004.

140 There are some exceptions to this prohibition, including consolidation of proceedings by a court in certain circumstances. See DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

141 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

142 Provisions of the *Migration Litigation Reform Act 2005* (Cth) will, on commencement, impose uniform time limits on applications for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court. These are found in the proposed new sections 477, 477A and 486A of the Act respectively. The time limits will be 28 days from actual (as opposed to deemed) notification of a decision. The courts will have a discretion to extend this time limit by 56 days to a maximum of 84 days provided the application is made within the 84 days and the court is satisfied that it is in the interests of the administration of justice to extend the 28 day period.

*Caseload*

3.171 2,714 applications for judicial review of migration decisions were filed in 2004-05. Of these 73 percent were reviewing RRT decisions, 17 percent challenged MRT decisions, with the remaining 10 per cent for review of other decisions.

3.172 Applications to the Federal Magistrates Court and the Federal Court at first instance for judicial review of portfolio decisions have increased over the past ten years. In 1993-94 there were 381 applications to the Federal Magistrates Court and the Federal Court, compared with 3,748 in 2003-04.[143]

*Outcomes*

3.173 As DIMIA explains, a case is resolved when: either the applicant or the Minister withdraws before hearing, or the court remits the decision to the decision-maker for reconsideration (that is, the applicant wins), or the court dismisses the application (that is, the Minister wins). In 2004-05, the Federal Magistrates Court and the Federal Court at first instance dismissed 2,099 applications after hearing and another 896 before hearing when applicants discontinued, and upheld 112 applications after hearing and remitted the decisions for reconsideration. The Minister also withdrew from 264 matters prior to hearing.

3.174 Table 3.9 below sets out the outcomes of matters before the Federal Court in the first instance.

143 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

**Table 3.9: Outcome of matters before the Federal Court.**

| Year | Applicant Withdrawal | Minister Withdrawal | Applicant Win | Minister Win | Total |
|---|---|---|---|---|---|
| 2000-01 | 396 | 205 | 71 | 611 | **1283** |
| 2001-02 | 410 | 131 | 75 | 811 | **1427** |
| 2002-03 | 526 | 53 | 48 | 879 | **1506** |
| 2003-04 | 890 | 136 | 102 | 2451 | **3579** |
| 2004-05 | 896 | 264 | 112 | 2099 | **3371** |

Source: DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005

### *Concerns raised in previous inquiries*

3.175 The significant growth in the number of applications for judicial review and the costs and the time taken to determine these appeals have been the concern of government over a number of years.[144] These concerns have prompted successive governments to seek to amend the Migration Act to restrict judicial review of visa related decision making.[145] These measures have in turned prompted a number of parliamentary inquiries which have canvassed the arguments for and against restricting access to judicial review.

3.176 In 1999-2000, this Committee inquired into whether, among other things, there was sufficient oversight by the judiciary of Australia's onshore refugee determination process to ensure that Australia's international obligations were met. That Committee concluded :

> The weight of evidence and submissions presented to the Inquiry argued in favour of the need to maintain a judicial review system for refugee determination that has the power to pass judgement on refugee matters under the rule of law, while respecting and maintaining the ideal of the separation of powers. Some submissions also argued that judicial oversight promotes the development of jurisprudence in the migration area and encourages consistency in decision-making. Australia's international legal obligations to provide access to courts and tribunals and judicial oversight of the refugee determination, must also be met. However, according to DIMA, judicial oversight involving litigation in the courts is a

144 For the year ending 30 June 1996, the litigation expenditure for DIMIA was less than $6.5 million. By 2004-2005, the cost had risen to in excess of $42 million. DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

145 See, for example, Bills Digest No. 118 2003-2004, Migration Amendment (Judicial Review) Bill 2004 (Cth), Parliamentary Library, 6 May 2004.

> resource-intensive review process. All parties in the review process of refugee determination are concerned about the costs of either operating or engaging in the system of review presently in place.[146]

3.177 The committee at that time refrained from recommending major reforms of the judicial review of refugee determination process. Instead the Committee recommended that a feasibility study be undertaken on the benefits of modifying the current on-shore refugee determination process. The study would assess, among other matters, the feasibility of moving to a wholly judicial determination process, including the costs of any such process. An objective would be to assess if such a process could be more open and transparent than the current multi-tiered system, which the majority of the committee considered had been highly criticised.[147]

3.178 The Government did not accept this recommendation. It argued that it had mechanisms in place to monitor the performance and effectiveness of the onshore refugee determination process and, moreover, efforts are continually made to maintain its integrity and improve its efficiency.[148]

***Concerns raised during this inquiry***

3.179 The issue of the Act's restrictions on judicial review of the refugee determination process arose during this inquiry principally in the context of perceived shortcomings and inadequacies of the MRT and RRT as review bodies.

3.180 In light of the concerns over the Tribunals' capacity to decide matters appropriately, much was made of the fact that the courts, in undertaking judicial review of Tribunal decisions were generally bound by the Tribunals' finding of fact in the case. The ICJ, for example, expressed alarm over the fact that:

> …[t]here is no right of appeal to a court if the review tribunal clearly makes errors of fact. The tribunals are the final arbiters of fact; there is no access to merits review of a decision of the MRT or RRT. … Except for the limited ground of 'jurisdictional error of law', decisions of the MRT and RRT are immune from judicial review or oversight under ordinary administrative law principles.[149]

3.181 Similar concerns was raised by Mr Julian Burnside QC:

> One of the problems is that there is some pretty bad decision making in the RRT. People then try to go to court, but the court's hands are tied largely because they cannot review the merits of the case; they can only look at

146 *Sanctuary under Review*, p. 200.

147 Other committee recommendations were for comparative databases and studies on how other countries had incorporated into their domestic law international legal obligations requiring access to courts and tribunals, and judicial oversight of the refugee determination process.

148 See Appendix 6.

149 ICJ, *Submission 115*, pp 3 - 4.

> whether there has been a jurisdictional error. That is a pretty difficult concept and there have been some quite horrifying decisions that have nevertheless survived judicial review.

3.182 Church organisations and representatives also expressed alarm over government moves to restrict judicial scrutiny. In a joint submission, for example, Uniting Justice Australia and Asylum Seekers Project Hotham Mission pointed to widespread community dissatisfaction with Australia's system for assessing refugee claims, with a widely held view that the system is unjust:

> The minimalist interpretation of the definition of a refugee under the Refugee Convention and Protocol combined with the failure of the RRT to act as an independent and reliable body that both does, and is perceived to, conduct fair and proper merits review of departmental decisions, has resulted in widespread community dissatisfaction with the system for assessing refugee claims. The system is not widely perceived to be just. This perceived lack of justice is exacerbated by the emphasis, in the broader program, on deterring people from accessing the onshore protection system. In this policy environment, reform of application processing and review rarely considers human rights and our obligations to asylum seekers, but rather focuses on the resources that asylum seekers use in having their protection claim assessed. These failings, combined with efforts to limit judicial scrutiny, have resulted in a widespread view that an appeal to the RRT does little to guarantee the applicant a fair, thorough, and independent examination of the claim.[150]

3.183 Witnesses and submitters called for reform. It was argued that widening the scope for judicial review and oversight would improve the quality of decision-making in the review tribunals:

> Only through full judicial oversight of review tribunal decisions can one have real confidence in the outcomes of the tribunals. … the only way to achieve this is to reinstate merits review in the federal courts. Otherwise, potential miscarriages of justice that flow from the structure and procedures in the tribunals will inevitably continue to occur.
>
> As a less satisfactory alternative to full merits review in the courts, policy makers should at least permits judicial review on the basis of ordinary error of law and in particular, under accepted principles of administrative law, and under the *Administrative Decisions (Judicial Review) Act 1977*. This is the situation in the AAT.[151]

3.184 Mr Burnside QC also recommended reform:

> I think also that a system would be workable if it allowed for an appeal to the courts—not a judicial review, but an appeal – so that you get a merits review in court, but subject to a filter at the front end. The last thing any of

150 UJA and ASPHM, *Submission 190*, p. 9.

151 ICJ, *Submission 115*, p. 4.

> us wants, especially those of us in the profession, is to see the courts flooded with merits reviews.
>
> If you had a front-end filter, something like the special leave requirements in the High Court, a judge would have a look at the application, see whether he or she thought that something had gone wrong in the tribunal and, if so, then you would have a merits appeal in court. If he or she did not think something had gone wrong, then all you would have would be the residual judicial review so that, if something had gone wrong in jurisdictional terms, that would still be open to correction. Having that sort of pressure release valve of merits review in the court would save some very serious problems. I think it would give refugee appellants a sense that they have had some sort of justice, because frankly a lot of them come away from the RRT thinking that they have not had justice, and you would have to agree with them in a lot of cases.[152]

## Committee view

3.185 The committee notes and acknowledges the concern of many witnesses and submitters with respect to judicial review of tribunal decisions. It is frustrating that the substantive issues put to this committee's inquiry are little changed from those put to various other inquiries over a number of years, and have not been addressed.

3.186 Managing an appeals process is always complex and there will always be those who exploit any available appeals process as a way to draw out the length of proceedings and so extend their stay in the country. However, the committee cannot help but conclude that DIMIA administers the review system with two underlying – but unarticulated – assumptions that all appeals are essentially vexatious, and that anyone who does not get the result they want will appeal. This cynicism risks blinding DIMIA to real instances of injustice.

3.187 In spite of departmental assurances that 'procedures are in place' to ensure impartiality, due process and fairness, it is striking that virtually everyone else, without exception, disagrees. In many cases, as this chapter has shown, these critics are both experienced in the law generally, and in the operation of DIMIA's tribunals. As such, their criticisms are well informed and cannot be lightly dismissed.

3.188 The fact remains that DIMIA's tribunals are considered to be partisan, to not adequately apply natural justice procedures, and therefore not able to consistently deliver just outcomes.

3.189 Several matters stand out. The first of these is impartiality.

3.190 The credibility of a tribunal depends largely on public confidence in the competence and impartiality of its members. However, evidence to this inquiry and other inquiries is that there is a widely held perception that the RRT's integrity and

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152 *Committee Hansard* , 27 September 2005, pp 47 and 52.

independence is seriously compromised by its current arrangements. As the ARC stated in a 1996 report, it is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity and that they perform their duties free from undue government or other influence. It is crucial that there is no perception (let alone reality) that tribunals are in any way influenced either in reaching decisions in particular cases or more generally.[153] To this end, the committee reiterates the recommendation made in 2000 that the Migration Act be amended to allow for multi-member panels.

3.191 For the tribunals to have credibility, the appointment process of members must also be amended. The Minister should have no place in appointing quasi-judicial officials who will be making assessments of her department's decision making. Appointments should be made by a transparent, merit based process and made by either an independent panel or at the least, the Attorney General or Minister for Justice. Adjustments should also be made to the rules of tenure to remove any perception that members are subject to undue ministerial or departmental influence.

3.192 A second matter relates to procedure. Again, the committee notes the department's easy assurance that procedural rules are in place. However, they are apparently not the right ones. As this chapter shows, current provisions allow basic flaws in natural justice, relating to capacity to respond to adverse evidence, to be properly represented, and to call and challenge witnesses. Leaving these matters solely to the arbitrary discretion of Members is not adequate.

3.193 Third, as explained in Chapter 2, the committee endorses the Government's move to introduce a 90 day time period or target by which the RRT should finalise reviews involving protective visa applications. However, the committee is concerned that, in responding to this expectation, there is a need to ensure that both the MRT and RRT (which share an increasingly common Membership) are adequately resourced and funded for the task at hand. The committee notes proposals for MRT members to transfer across to the RRT to assist with the RRT caseload in peak times. There is a need to ensure that this does not adversely affect the MRT's ability to progress its caseload. It is noted that the average time taken by the MRT in 2004-05 to process a case (ie, from lodgement to finalisation) was 39 weeks.

3.194 The committee notes that the ANAO is undertaking a performance audit of the RRT and the MRT as part of the ANAO audit work program issued in July 2004. The audit commenced in April 2005 and is focussed on productivity issues, quality of service and trends in review outcomes and the relationship between DIMIA, the RRT and the MRT.[154] The specific objective of the audit is to assess whether the MRT and the RRT:

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153 The Administrative Review Council: *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Canberra 1995, p. 70.

154 Refugee Review Tribunal, *Annual Report 2004-2005*, p 26.

- have established appropriate arrangements for the governance, business planning and performance management of tribunal operations;
- have achieved intended operational efficiencies from the introduction of common facilities, services and resourcing;
- provide appropriate training and development and information support services to promote quality decision-making;
- make case decisions within applicable tribunal time and productivity standards;
- provide applicants with services and conduct tribunal reviews in accordance with statutory requirements and tribunal service standards; and
- appropriately communicate and consult with DIMIA and other Tribunal stakeholders.

3.195 The audit report is expected to be tabled in the Autumn 2006 Parliamentary Sittings.[155]

3.196 The committee acknowledges that many failed asylum seekers are unlikely to have the finances to meet the application fee that is imposed following an unsuccessful review application and therefore must either borrow the money, which in most cases would be impossible, or rely on community support. However, as the fee is only imposed following an unsuccessful review application, the committee does not consider that the fee acts as a disincentive to people wishing to seek a review. As to the level of the fee, the committee makes no comment. In relation to the provision of transcripts of RRT immigration hearings to unsuccessful applicants, the committee considers that these should be provided on the same basis as applies to non-immigration matters.

3.197 The committee shares the concern of many witnesses and submitters over the potential costs and injustice incurred as a result of the inflexible time limits for lodgement of applications for review in the MRT and the RRT. All fact finding tribunals and courts, whilst working to time limits, should have the discretion to vary time limits in particular cases before them in the interests of justice.

**Recommendation 20**

**3.198 The committee recommends that DIMIA and the Department of Finance and Administration review the RRT and MRT current funding levels and systems in light of the current and expected workloads of both Tribunals.**

155 *ANAO, 'Work Program", 2005-2006,* Canberra, July 2005, pp. 73-78.

**Recommendation 21**

**3.199 The committee recommends that the Migration Act be amended to provide that the MRT and RRT can, in appropriate circumstances, grant an extension of time in which to lodge applications for review.**

**Recommendation 22**

**3.1 The committee recommends that the *Migration Act 1958* be amended to provide an entitlement to legal representation at Tribunal hearings for applicants and an entitlement to call and examine witnesses at hearings.**

**Recommendation 23**

**3.200 The committee recommends that the Commonwealth legal aid guidelines be amended to provide for assistance in migration matters, both at the preliminary and review stages, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.**

**Recommendation 24**

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

**Recommendation 25**

**3.202 The committee recommends that RRT incorporate into its Practice Directions specific guidelines on its approach to credibility.**

**Recommendation 26**

**3.203 The committee recommends that the MRT and the RRT be included in the training and development initiatives and strategies being developed by DIMIA as part of the response to the Palmer report.**

**Recommendation 27**

**3.204 The committee recommends that the RRT incorporate into its Practice Directions specific guidelines on the weight to be given to expert medical reports, especially those detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.**

**Recommendation 28**

**3.205 The committee recommends that the RRT be able to sit as a single member body and as a panel of 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.**