A Just Australia

Australians for Just Refugee Programs

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Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Committee,

Australians for Just Refugee Programs Inc. brings together over 13,000 individual supporters, 120 non-government organisations and over 70 prominent Australian patrons under the banner of *A Just Australia* (AJA). AJA's role is to campaign for the just and compassionate treatment of refugees and asylum seekers. We believe that Australia's policies toward refugees and asylum seekers should at all times reflect respect, decency and traditional Australian generosity to those in need, while advancing Australia's international standing and national interests.

We aim to achieve just and compassionate treatment of refugees, consistent with internationally adopted human rights standards, to which Australia says it is committed.

Please find enclosed our submission, *Procedural Fairness – a question of interpretation*, to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Review Provisions) Bill 2006.

We thank you for the opportunity to provide a submission.

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A Just Australia

Procedural Fairness – a question of interpretation

Submission by *A Just Australia* to the
Senate Legal and Constitutional Committee
Inquiry into the Migration Amendment (Review Provisions) Bill 2006

Recommendation

A Just Australia recommends that the Migration Amendment (Review Provisions) Bill 2006 not be passed.

Executive Summary

These proposed amendments to the Migration Act seek to remove two key rights of applicants to the Migration Review Tribunal and the Refugee Review Tribunal - rights that are necessary for applicants to be able to provide full and accurate information in support of their application for a visa.

These proposed amendments reflect a cavalier approach to the lives of those who come before the Refugee Review Tribunal (RRT), a body that ultimately makes life or death decisions. To treat such serious issues as a matter of 'efficiency' in this way is disturbing.

The RRT needs fundamental reform to bring its procedures and methods in line with similar Tribunals, and more importantly to reflect the traditional Australian values of respect, a fair-go and generosity to those in need.

These amendments do not reform the RRT, but instead further entrench procedural unfairness – a failing long criticized from within the Senate and the Judiciary. Indeed, these changes will likely result in increased appeals as they allow for greater discretion by decision-makers and thus more margin for error.

Previous committee inquiries

This amendment seeks to make two changes with regards RRT and MRT practices. Firstly that evidence adverse to a case may be presented orally and without written documentation by the Tribunal to the applicant, and secondly that there is no requirement at all for the Tribunal to provide evidence that was deemed to have been previously provided by the Department of Immigration, whether or not that information is still viewed by the tribunal as having an adverse effect on the applicants case and will be used in the decision-making process.

In regards the first issue, this committee has already found that the merits review processes for visa-related decisions:

> "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."[1]

1 Legal and Constitutional References Committee: *Inquiry into the Administration and operation of the Migration Act 1958* para 3.192

With regards the second amendment, this committee has found that

> "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." [2]

In particular these amendments will have a marked adverse effect on applicants of non-english speaking background who rely heavily on interpreters during the application process, particularly hearings. Removing the requirement for written communication means these applicants will be required to make complex and legal decisions on the spot, based upon the information provided by interpreters who are often required to give unqualified explanations of the gravity or possible outcomes of these decisions.

Given the above, this committee should recommend that this Amendment not be passed.

Background Concerns

Refugee appeals process politicized

The issue of the merits and judicial appeals processes for refugee visa-related decisions has been one of great contention in the past decade. Many amendments have been made to 'streamline' this process in light of Government claims that asylum seekers have been making vexatious appeals in order to prolong a stay in Australia that they did not deserve under the law.

While it is true that the number of RRT decisions appealed to the courts have increased over the past decade, this increase cannot be assumed to be due to applicants 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 prioritize efficiency over fairness, have 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. This lack of confidence by applicants results in more appeals.

The inconsistency of decisions made at the RRT leads to unfair decisions.

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."[3] The conduct of hearings is entirely discretionary, resulting in judges hearing appeals repeatedly commenting on the poor quality of review at the RRT. Justices Einfeld and North of the Federal Court made a pithy summation in *Selliah v MIMA*:

> [H]earings before the Tribunal are virtually unique in Australian legal 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 questioned about it ... These methods contravene every basic safeguard established by our inherented system of law for 400 years.[4]

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2 *Inquiry into the Administration and operation of the Migration Act 1958* para 3.201
3 Catherine Dauvergne and Jenni Millbank, Federal Law Review 31 (2003): 299.
4 *Selliah v MIMA* [1999] FCA 615, [3]-[4].

Creating even wider options for the discretion of Tribunal members, will result in more court appeals to determine whether procedural fairness has been applied. If there is a clear requirement for procedural fairness to be better demonstrated through providing thorough, written communications, this should *reduce* the number of appeals.

RRT decisions open to political pressure

Furthermore, as the RRT has the same Minister as DIMA (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. Allowing increased discretion for members creates more incentive to place pressure for preferred decisions.

RRT decisions and funding open to efficiency pressure

The government's focus on the cost of the determination system, rather than on its effectiveness has fostered poor decision-making. The focus on performance indicators, that is, a set number of cases each member is expected to finalise per year, also contributes to poor decision-making.. "Efficiency" becomes an end in itself rather than an aid to effective and fair decision-making.

Additionally, the RRT's funding is based on the number of cases finalised each year. This pressure will result in more and more oral directions being given, despite written direction being a better guarantor of for real procedural fairness , in order to achieve set targets and so maintain funding rates. In time, any written direction will become an anomaly.

The RRT's funding should instead be based upon the number of cases *correctly* finalised each year, taking into account reviews of decision-maker practice and judicial review outcomes.

No evidence of misuse of appeals system

The time taken to process asylum claims is excessive and has been well documented elsewhere. One response from the Government has been to claim that delays are the result of asylum seekers misusing the system of appeals. As a result, the Government has acted to systematically reduce asylum seekers' access to appeal processes, so that decisions by an Officer of the Commonwealth on asylum seeking matters no longer have the same judicial scrutiny as decisions on other matters. Thus, asylum seekers in Australia no longer have adequate legal protection to ensure their rights.

Furthermore, the Government's claim of the misuse of appeal systems is difficult to substantiate. Having commissioned a report into alleged misuse – The Penfold Report – the Government then refused to release the reports findings. Thus, there is no publicly available evidence about the misuse of the appeals system by asylum seekers. *A Just Australia* believes that the inconsistency and high error rates of primary decisions at the departmental level is what is causing the high rates of appeals. If the initial processing cannot be trusted, asylum seekers are more likely to appeal.

Concerns regarding amendments

1. Redefines procedural fairness

In his second reading speech, Senator Ellison stated that the purpose of the amendments was "to allow the Migration Review Tribunal and Refugee Review Tribunal flexibility in how they give procedural fairness to review applicants."[5] In fact, this amendment gives greater flexibility to define what *is* procedural fairness. These amendments would result in the RRT and MRT not being required to provide equitable procedural fairness as required in other similar Tribunals.

2. Oral directions already shown to be flawed

After reviewing evidence of RRT hearing transcripts presented to the High Court during *SAAP*, Justice Gummow found that quite clearly the Tribunal Member gave incorrect oral directions to the applicant, directly resulting in the applicant not addressing adverse evidence. [6]

This amendment seeks to allow for greater discretion in a system already proven to be flawed.

3. Reductions in representation at RRT

Approximately 31 per cent of the 3,033 cases finalised by the RRT in 2004-05 involved unrepresented applicants. 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.[7]

It has been submitted to previous inquiries that the 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.[8]

As more and more applicants are unrepresented during hearings it becomes more and more important that they are able to seek adequate advice on how to respond to potentially adverse evidence. Only written communication can ensure this.

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.[9] Not only was this recommendation not acted upon, this amendment will compound the difficulties of unrepresented applicants already found by this committee.

5 MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006 Second Reading.
6 SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 (18 May 2005) para 105.
7 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 10, *Annual Report 2003-2004*, p. 12 and *Annual Report 2002-2003*, p. 18.
8 *Inquiry into the Administration and operation of the Migration Act 1958* RASSA, *Submission 51*, p. 4.
9 Legal and Constitutional References Committee Report, *Legal aid and access to justice Senate* June 2004, p. xxix

4. Relies too heavily on interpreters for legal advice

Evidence has been presented to this committee in past inquiries on the inadequacies of interpreter services in Australia. This amendment will place greater pressure on interpreters to provide translated oral legal summaries for applicants during hearings. This task is likely to be beyond their skills.

5. Written communication required for procedural fairness.

Written communication has been found to be a basic requirement to ensure that procedural fairness has been met. To remove such a requirement does not give 'greater flexibility', rather it gives greater unfairness to procedures.

Justice Kirby wrote:

> It may be difficult for some to appreciate the importance of written communications of critical facts in a legal setting. But the Parliament understood the need for it and so provided in s 424A of the Act. A written communication will ordinarily be taken more seriously than oral exchanges. People of differing intellectual capacity, operating in an institution of a different culture, communicating through an unfamiliar language, in circumstances of emotional and psychological disadvantage will often need the provision of important information in writing. Even if they cannot read the English language - or like the appellants, any language - the presentation of a tangible communication of a potentially important, even decisive, circumstance from the Tribunal permits them to receive advice and give instructions.
>
> It is precisely for such a case that the provision of written communication was contemplated by the Parliament. It is not a needless formality or an inflexible imposition. It is a prudent procedure enacted to take into consideration the exact circumstances of a case such as the present. [10]

6. Timing of hearings

There is no provision in the Migration Act as to *when* the Tribunal must take evidence from a person named by the applicant. Justice Hayne[11] found, “In which case, without written documentation outlining any adverse evidence, the applicant would be unable to 'present arguments relating to the issues arising in relation to the decision under review.' [12]

As such, the current Amendment allows for significant problems towards delivering procedural fairness, even under the new interpretation.

10 Justice Kirby, SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 (18 May 2005) para 175-176.

11 Justice Hayne, SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 (18 May 2005) para 196.

12 Migration Act 1958, s 425(1).

7. Reduced evidence provided to applicants

The second part of the Amendment leaves to the Tribunal's discretion whether to provide evidence to the applicant where that evidence was deemed to be previously provided as a part of the application process with the Department of Immigration. In effect this means that the applicant may be wholly uninformed, orally or in writing, of evidence from previous applications currently under consideration by the Tribunal member that may be adverse to his or her case.

This committee has already recommended

> "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."[13]

In light of this previous recommendation, this Amendment should not be passed.

13 *Inquiry into the Administration and operation of the Migration Act 1958* para 3.201