SUBMISSION ON BEHALF OF

THE LEGAL AID COMMISSION OF NEW SOUTH WALES

TO THE

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

ON THE

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

The Legal Aid Commission of New South Wales (the Commission) is established under the *Legal Aid Commission Act* 1979 (NSW) and is an independent statutory body. The Commission receives funding from the Australian and New South Wales Governments to provide legal services to socially and economically disadvantaged people. Legal services include representing clients in federal and state courts and tribunals and providing advice to clients on legal problems. Further, the Commission also works in partnership with private lawyers in representing legally aided people. The Commission is currently funding a Cooperative Legal Service Delivery Program to encourage better coordination and cooperation between government, private and community legal and quasi-legal service providers in country NSW, in planning and delivering legal services so as to enhance the efficient and effective use of scarce legal resources and improve access to justice.

Areas where the Commission provides advice and assistance include tenancy, consumer credit, social security, veterans' benefits and migration matters.

The Commission appreciates the opportunity to make a submission on this important reference.

The Commission has for many years provided advice and representation in migration matters. Currently the Commission grants aid, subject to means,

merit and legal aid guidelines, provides advice and representation to review applicants at the Migration Review Tribunal and the Refugee Review Tribunal (the Tribunals) under the Immigration Advice and Application Assistance Scheme.

There are six solicitors in the Government Law Unit of the Civil Litigation Branch who are registered migration agents and who regularly assist with review applications. This includes responding to correspondence from the Tribunals and attending Tribunal hearings. Therefore, the Commission is well-placed to comment on the potential impact of this bill on review applicants, especially those disadvantaged persons who are represented by the Legal Aid Commission.

The Commission's comments and concerns on the proposed legislation are as follows:

1. The proposed legislation has the potential to establish a confused and uncertain scheme for elucidating responses to additional, or adverse, information. The proposed ss359AA and 424AA permit Tribunal members to undertake the process orally and without prior notice, to the applicant. Yet, the current ss359A, 359B, 379A, 424A (2), 424B (2) and 441A remain, and provide that the Tribunals may send the additional information in writing and require a response in writing. It is noted that inevitably this 'additional information' may include adverse information which may cause the Tribunals to refuse the review application.

   Accordingly, if this bill is passed, the manner, time and method of advising the applicant of the additional information (and the manner, time and method for the applicant's response), will be at the discretion of Tribunal members. In addition the proposed s359AA suggests that the additional information may be given orally to the applicant at the hearing, but that the applicant may be given time to respond in writing.

   If Tribunal members are given the broad discretion to give additional information as 'the Tribunal considers is appropriate in the circumstances' (s424B(1)), each member may approach the task differently, thereby creating a perception of random Tribunal processes. It will be difficult to advise applicants about anticipated stages in the determination process. Certainly some vulnerable applicants will be disadvantaged because of lack of procedural clarity.

2. The impact of the bill should be considered in relation to the background of the client group. Many Tribunal applicants are unrepresented and from non-English speaking backgrounds. Few will have experience of Australian legal proceedings. Many are traumatised and unable to articulate responses well in the stressful environment of a hearing. Yet, review applications concern key personal and emotional issues, such as being found to be a refugee, or reuniting with family members.

It is a great benefit to stressed applicants to have the relevant information provided in writing, and to be given time to articulate a response. Reliance on oral provision of additional information will likely 'ambush' many applicants who are limited by lack of representation, language, education, or mental ability.

The proposed scheme should be compared with the established process of similar appeals tribunals, such as the Administrative Appeals Tribunal (AAT). The AAT has pre-hearing conferences during which key issues are clarified and both parties can detail their contentions in writing.

3. Commission staff is concerned that some applicants will be unaware of the Tribunals intention to discuss additional information at the hearing. They may be surprised by the information and the request to respond at the hearing. Many unrepresented and/or traumatized applicants will be unable to respond quickly and coherently. Such confusion may unfairly lead to questions about an applicant's credibility.

4. The proposed ss359AA(b)(i) and 424AA(b)(i) require that the applicant is aware of the relevance of the additional information and the consequences of his/her response to that information. This creates a significant question for individual Tribunal members who will need to be satisfied about the applicant's comprehension of the additional information, and its impact on the application.

   Reliance on oral proceedings will require that the Tribunal member will ask the applicant to affirm his/her understanding that the response to additional information may be crucial to determining the application. In the experience of the Commission this question is likely to confuse and intimidate many unrepresented applicants.

   For the hearing process to be both just and efficient, the applicant should be advised in writing, prior to hearing, that additional information will be put forward at the hearing, and that an inappropriate response may result in refusal by the Tribunal.

   The Commission is concerned that the Tribunals may misinterpret an applicant's comprehension, ability to understand the interpreter or ability to read documents which includes adverse information.

5. The Commission submits that the proposed changes will not be effective to obtain clear coherent and thoughtful responses from the applicants. For example during the course of a hearing a Member is likely to be required to put the same question to an applicant in various different ways and repeat the same question a number of times because, an applicant is stressed and having difficulty understanding the questions. Also, quite often there are problems with understanding

the interpreter, which will cause an applicant to misunderstand the Tribunals' concerns.

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

If the bill is to be recommended by the Senate Legal and Constitutional Committee, the Commission submits that the rights of vulnerable applicants may be partly protected by implementation of the following:

A. Pre-hearing procedure is established by which issues in dispute are identified, and this must include any adverse information, sent in writing to the applicant.

B. A notice should be sent out in conjunction with the Invitation to Hearing letter, advising of the Tribunals intention to request a response to additional information. This notice could be in the form of a general information sheet, and not refer to a specific applicant or visa criteria, however it should stress that the Tribunal member is expecting an oral response at the hearing. Applicants should also be advised that there is option to ask for time to respond in writing.

C. The Commission submits that traumatized applicants, or applicants with physical or mental disabilities, cannot be expected to respond orally to previously unseen information. If there is relevant evidence (such as medical reports) before the Tribunals on an applicant's inability to manage the hearing process, the Tribunal must provide a written outline of additional information to be raised at hearing, and the applicant be given the option of responding in post-hearing submissions.

D. If the Tribunals intend to rely on the oral process as proposed in ss359AA and 424AA, sufficient time must be allocated for the hearing. Currently, the discussion of additional information can be rushed and confused during hearings because the interpreter, and perhaps the hearing room, has been booked for a limited time. A hurried atmosphere does not allow applicants to respond thoughtfully to additional information.

E. Consideration should be given to incorporating statutory time-limits for responding to the Tribunals request for a response to additional information. Due process requires that applicants are given a

reasonable time to respond, and obtain translations if necessary. Currently, Migration Regulations 4.17 to 4.18B and 4.35 to 4.35C stipulate the periods which various classes of applicants have to respond to requests from the Tribunals. The bill does not refer to 'prescribed periods' for the applicant's response. Accordingly, it would be possible for Tribunals to impose unrealistically short response times. The Commission submits that that any amending legislation needs to mirror the current statutory scheme which ensures that applicants are given a reasonable period to respond.

The overriding goal in this bill is to ensure that Tribunal processes are 'fair and just' (proposed ss357A(3) and 422B(3). Accordingly, the Commission submits that the Tribunals need to develop new Practice Directions, in line with any amendments. As indicated above, the proposed bill gives Tribunal members the discretion to vary their approaches to additional information; therefore the Practice Directions need to ensure that minimum standards of natural justice are preserved.

Thank you for the opportunity to provide this submission. If you have any questions please do not hesitate to contact Elizabeth Biok on (02) 9219 5895 or via e-mail elizabeth.biok@legalaid.nsw.gov.au.