Submission by the Department of Immigration and Citizenship to the inquiry by the Senate Legal and Constitutional Affairs Committee into the *Migration Amendment (Review Provisions) Bill 2006*

Introduction

1. The *Migration Amendment (Review Provisions) Bill 2006* ("the Bill") amends the *Migration Act 1958* ("the Act") to allow the Migration Review Tribunal ("the MRT") and the Refugee Review Tribunal ("the RRT") (together "the Tribunals") flexibility in how they give procedural fairness to review applicants.

2. The Act contains codes of procedure setting out the manner in which the Department and Tribunals are required to provide applicants with procedural fairness. The codes in Part 5 and Part 7, which apply to the MRT and the RRT respectively, provide various procedural protections to review applicants.

3. The two major components of the codes of procedure for the Tribunals are:

   - the obligation to invite the applicant to appear before the Tribunal to give evidence and to present arguments relating to the issues arising in relation to the decision under review; and

   - the obligation, to which the Bill is directed, to put the particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review ("adverse information") to applicants for comment, subject to certain exceptions.

4. These obligations are contained in s.360 and s.359A of the Act for the MRT and s.425 and s.424A of the Act for the RRT.

5. The proposed amendments do not alter the obligation to invite the applicant to appear before the Tribunal to give evidence and to present arguments relating to the issues arising in relation to the decision under review. Consistent with judicial interpretation, the Tribunals' conduct of hearings must provide a genuine opportunity for the applicant to present his or her case.

6. In relation to the obligation to give applicants particulars of adverse information the Act provides that this must be done in the way the Tribunals consider appropriate in the circumstances. The High Court and the Federal Court have strictly interpreted the statutory provisions which relate to the way in which the Tribunal may invite comment on adverse information, particularly in *Minister for Immigration and Multicultural Affairs v Al Shamry* [2001] FCA 919, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 23 and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2. The cumulative effect of these decisions is that the Tribunals can only discharge their statutory obligations in relation to adverse information by way of a written invitation to comment.

7. Subsequent judicial comment on the cumulative effect of this interpretation has been that it is a highly technical application of the law in circumstances where no practical injustice can be found in the way the Tribunals have dealt

with a review (see for example, Justice Allsop in *SZEWL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 968). In other words, Tribunal decisions have been set aside and remitted for reconsideration for non-compliance with the statutory requirements in circumstances where there would have been no breach of the common law rules of natural justice and, objectively, no unfairness to the applicants in question.

8. The Bill amends the Act to:

I. explicitly reinforce that the Tribunals must act in a way that is fair and just. This complements subsections 353(1) and 420(1) of the Act, which provide that in carrying out their functions under the Act, the MRT and the RRT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick;

II. allow the Tribunals the discretion to choose to provide particulars of adverse information and to invite the applicant to comment on or respond during a hearing;

III. provide that if the Tribunals have not invited the applicant to comment on or respond to adverse information at a hearing, the Tribunals remain under an obligation to do so in writing;

IV. explicitly sets out that when the Tribunals' invite comment on adverse information, whether orally or in writing, the Tribunals are required to:
    a. give clear particulars of information that the Tribunals consider would be the reason, or part of the reason, for affirming the decision under review;
    b. ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision under review; and
    c. invite the applicant to comment on, or respond to, the information.

V. provide that, if the Tribunal chooses to deal with the adverse information orally at a hearing, it must also advise the applicant that he or she may seek additional time to comment on or respond to the adverse information;

VI. provide that if an applicant seeks more time to comment on or respond to adverse information provided at a hearing and the Tribunals consider that the applicant reasonably needs additional time, the Tribunals must adjourn the review and provide the applicant with that opportunity; and

VII. provide that the obligation to give an applicant adverse information and invite comment on or a response to that information does not extend to information which has already been provided by the applicant to the Department, as part of the process leading to the decision under review

(however, information that the applicant has given orally to the Department remains covered by the obligation).

9. The amendments are designed to ensure that applicants will continue to be given procedural fairness, whether this is done in person at hearing or in writing, while providing flexibility to the Tribunals in how they put adverse information to applicants.

10. The provisions are intended to ensure that an applicant will not be taken by surprise in this process and will have a reasonable period of time to comment on or respond to adverse information provided at a hearing, and that they will be treated fairly and justly. This includes a requirement for the Tribunal to adjourn the review if the Tribunal considers the applicant reasonably needs additional time.

11. Prior to the introduction of the Bill into Parliament the Department sought comments from various external stakeholders, including the Law Council of Australia, the Administrative Review Council and the Migration Institute of Australia. Those stakeholders provided comments. However, due to the Government's priorities, not all of those comments could be fully taken into account in preparing the Bill. The Department has subsequently contacted the stakeholders to advise them that the Bill has been referred to this Committee and offered to refer their comments to the Committee if they wished.

Comments on the Committee's Specific Terms of Reference

Hindering the ability of lawyers and migration agents to properly represent clients

12. The purpose of the amendments is to continue to provide applicants with procedural fairness, while allowing the Tribunals flexibility in the manner in which this is done. The amendments seek to modify the requirement that the Tribunals may only formally invite comment on adverse material in writing.

13. In conducting hearings the Tribunals are required to provide applicants with a genuine opportunity to give evidence and to present arguments regarding the issues arising in relation to the decision under review. A failure to provide such an opportunity would result in jurisdictional error.

14. In practice, the Department understands that the future conduct of hearings after the amendments will not vary greatly from how they have been conducted in the past. The Department is not of the view that lawyers and migration agents will be presented with any new or unique difficulties in properly representing their clients as a result of the Bill. The Department understands that Tribunal hearings will continue to provide a forum for applicants to make their case, for Tribunal members to understand the applicant's case, for Tribunal members to question and test the applicant's case, and for the Tribunal to put to the applicant the critical issues concerning

their case, where it is fair and appropriate to do so, while providing the applicant with the opportunity to respond to these critical issues. In all cases where an interpreter is required, an interpreter is present to assist with communication. Applicants (and their lawyers and migration agents) can request adjournments and make submissions following the hearing.

15. Applicants (and their lawyers and migration agents) will continue to be able to make submissions to the Tribunals at any time, and the Tribunals are required to consider any submissions that are received up until the time the decision is handed down.

16. A hearing is an appropriate opportunity to put adverse information to applicants. Prior to the enactment of s.359A and s.424A[1], the common law controlled the Tribunals' natural justice obligations. In many cases a hearing was the mechanism by which the Tribunals put to applicants the critical issues concerning their case and sought comment upon those issues. In those cases where a denial of procedural fairness was found, it almost always arose because the adverse information was not fully put to the applicant, rather than because the mechanism was flawed.

17. Lawyers and migration agents will continue to be able to effectively represent their clients if the Tribunals have the ability to put adverse information to applicants at hearing. Lawyers and migration agents will continue to be able to accompany and advise their clients at hearings, and Members may permit the making of oral submissions in appropriate circumstances. Lawyers and migration agents will also continue to be able to make written submissions before and after hearings. There is a substantial body of case law which recognises that the Tribunals are bound to consider any material put forward by the applicant, or on their behalf, prior to the Tribunal handing down its decision (see for example, *Applicant V346 of 2000 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1179).

18. After considering all of these points, it is not clear how these processes will reduce the effectiveness of lawyers and migration agents to properly represent their clients.

Review applicants will not be entitled to natural justice

Putting adverse information to applicants orally

19. Considerable care has been taken in the drafting of the Bill so that the amendments ensure that applicants continue to be given procedural fairness, while providing the Tribunals with flexibility in the manner in which they put adverse information to applicants for comment.

20. The amendments require that in putting adverse information to applicants orally:

[1] Sections 359A and 424A were inserted into the *Migration Act 1958* as part of a suite of amendments introduced by the *Migration Legislation Amendment Act (No. 1) 1998* which received royal assent on 11 December 1998 and commenced on 1 June 1999.

- the Tribunals must give clear particulars of the information;
- ensure as far as is reasonably practicable that the applicant understands why the information is relevant and the consequences of it being relied on; and
- invite the applicant to comment on or respond to the information.

21. These obligations are the same as the obligations that the Tribunals currently have when putting adverse information to applicants in writing. The additional requirement in the Bill is to advise the applicant of the consequences of the information being relied on in affirming the decision under review. By putting adverse information to applicants orally, applicants will not receive a lower standard of procedural fairness. The standard is the same as that required where the Tribunals put adverse information to the applicant in writing, and in many cases may be enhanced by the benefits of being given the information, and the explanation of its relevance in the presence of the Tribunal and with the assistance of an interpreter in the applicant's language.

22. Further, when putting adverse information to applicants orally, the Tribunals will be required to advise applicants that they may seek additional time to comment or respond. Where an applicant seeks additional time and the relevant Tribunal is of the view that the applicant reasonably needs additional time, the Tribunal must adjourn its hearing.

23. The Tribunals must continue to act fairly and justly in conducting the hearing, including testing any evidence provided by the applicant in response to adverse information put to them during the hearing. Moreover, the Department anticipates that the courts will continue to closely scrutinise Tribunal decisions which come before them to ensure that the Tribunals have complied with the statutory requirements.

24. Allowing the Tribunals to put adverse information to applicants during hearing may also, in many cases, be of more assistance to applicants, than putting such information in writing. The majority of applicants in both Tribunals are not proficient in the English language. Wherever required, Tribunal hearings are conducted with the assistance of an interpreter accredited in the relevant language. Putting adverse information to applicants with the assistance of an accredited interpreter is more likely to result in the applicant understanding the substance of the information and its significance to the outcome of the review. Correspondence from the Tribunals, including invitations issued in compliance with s.359A and s.424A, are in English and an applicant may rely on a person other than an accredited translator to assist them in understanding the letter. Under the amendments, applicants will be able to directly discuss issues with the Tribunals with the services of an interpreter provided by the Tribunals. From this perspective, the Bill may result in a more effective practical standard of procedural fairness for applicants.

New exception to the procedural fairness requirement for information already provided by the applicant to the Department

25. The Bill creates a new exception to the Tribunals' obligation to put to applicants information that would be the reason or part of the reason for affirming the decision under review. The exception is contained in new s.359A(4)(ba) and s.424A(3)(ba). These provide that the MRT and RRT, respectively, are not bound to give to the applicant information that the applicant themselves already gave during the process that led to the decision that is under review, unless it was information provided orally by the applicant to the Department.

26. Two examples below show how the amendments might operate in practice. The first example illustrates a circumstance in which the Tribunals will not be required to put information to an applicant because it had already been provided to the Department. The second example illustrates a circumstance where the Tribunal will be required to put information to an applicant for comment.

27. In the first example the applicant attaches a copy of their passport to their Protection Visa (PV) application, but does not independently provide a copy of that passport to the RRT during the course of their application for review of the delegate's decision to refuse the PV application. In this circumstance the RRT, if it were to refer to matters such as that the applicant had held a passport of a particular country and had travelled on particular dates in its reasons to affirm a decision under review, would currently need to invite the applicant in writing to comment upon such information. These may be matters that are not in dispute and would in other contexts be matters that could be quickly confirmed at hearing. Including such information increases the length and detail of what must be provided in writing to applicants, and increases the risk that the applicant may not focus on or understand the critical issues in the review. The amendments would mean that if the applicant had provided a copy of their passport to the Department in connection with the process leading to the decision that is under review by the RRT, the Tribunal would not be required to invite the applicant to comment on the information contained within the passport.

28. In the second example the applicant previously attached a copy of their passport to an application for a Student Visa, but not to their subsequent PV application which is the subject of the review before the RRT. In this circumstance the RRT cannot rely on the information contained in the applicant's passport in coming to a decision, without first putting that information to the applicant orally at hearing or in writing. This is because the information, even though provided to the Department by the applicant, was not given during the process that led to the decision that is under review by the RRT. This recognises that in these circumstances the applicant cannot be expected to be aware that information he or she has given in an unrelated context, such as a previous visa application, may be used by the tribunal in the review of a present visa application

29. It is anomalous for the Tribunals to have to put to an applicant information, such as that mentioned in the first example (above), which the applicant previously gave to the Department in connection with the process leading to the decision under review by the RRT (a PV application in the above example). The Tribunals review decisions made by officers of the Department (as delegates of the Minister for Immigration and Citizenship). In undertaking their review function the Tribunals may exercise all of the powers and discretions conferred by the Act on the original decision-maker. That is, the Tribunals stand in the shoes of the original decision-maker.

30. Section 352 of the Act for the MRT and s.418 of the Act for the RRT require the Secretary of the Department to give to the Registrar of the Tribunals each document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the decision under review. In practice this entails the Department providing a copy of the relevant file(s) to the Tribunals. The purpose of these provisions is to ensure that the Tribunals have before them the material which was before the primary decision-maker, including all of the material put forward by the applicant. The Tribunals are bound to consider this material in deciding the review. It is an anomalous situation for the Tribunals to have to put to an applicant information that the applicant had already provided in support of their claims for the decision under review, and which the Tribunal is bound to consider (having received that information from the Secretary of the Department who is required to give it to the Tribunal). Moreover, it is not an obligation for primary decision-maker, in whose shoes the Tribunals stand on review, to put to an applicant adverse information that applicant provided to the primary decision-maker.

31. The proposed limitation on the Tribunals' obligation to put to applicants information which they previously provided and which is the reason or part of the reason for the decision, will not extend to anything provided orally by the applicant to the Department during the process which led to the review. For example, if the primary decision-maker conducts an interview with the applicant in connection with a visa application, anything said during that interview by the applicant will not fall within the exception (assuming that it was not submitted independently by the applicant to the Tribunal). The Tribunal will have to put that information to the applicant, either orally at hearing or in writing, seeking the applicant's response or comment, before it can rely on the information to make a decision.

32. The rationale for not extending the exception to information provided <u>orally</u> by an applicant is the recognition that applicants are less likely to be able to remember things they might have said, for example, during the course of an interview possibly several months earlier. In addition, there may be no agreed or verbatim record of such information. For example, the applicant may be unaware of the contents of an officer's notes of a telephone conversation or an interview.

Increased rather than reduced litigation complexity

33. It is likely that at least initially, litigation after enactment of the Bill will be more complex, as the courts will be called on to interpret and apply the new provisions for the first time. This particular scenario is to be expected in the case of any new legislation, particularly in an area of the law which attracts as much judicial consideration as the migration law. Once the interpretation of the new provisions is settled, their application to particular fact scenarios can be expected to be relatively clear. It is not certain that the procedures which the Bill seeks to put in place will be any more or less complex than the rules of natural justice. The content of those rules depends on the facts of the particular case in question and the statutory context in which they arise, as the High Court has pointed out on numerous occasions (see for example Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504).

34. Because the Tribunals' proposed obligations, in cases where they put adverse information to applicants orally, closely mirror those currently in effect for the written alternative, the courts will not be interpreting and applying the new provisions in isolation. There is already a substantial body of jurisprudence dealing with matters such as what information is the reason or part of the reason for the decision (see for example, *SZEEU*), the necessity for particulars and extent of the requirement to explain the relevance of the material. In this regard, while some initial examination and interpretation of the provisions can be expected, the courts will not be called on to develop a completely discrete body of jurisprudence.

35. It is possible that there will be increased costs associated with litigation as a result of the amendments contained in the Bill. Increased complexity in the conduct of litigation may result in higher costs. Although higher costs can be expected during the initial period after enactment until the interpretation of the provisions is settled, once this occurs litigation costs are likely to lessen for all parties.

36. The Department understands that following the enactment of amendments the Tribunals will in many cases invite the applicant orally to comment on adverse information, as well as continue to issue written invitations to comment. As a result, the Department expects that in many litigation cases the tapes of the Tribunal hearing will need to be transcribed and put into evidence before the court so that the court has a basis upon which to determine whether or not there has been compliance with the statutory provisions. This is likely to be more costly than the current situation, where transcripts of Tribunal hearings are not routinely required in the conduct of litigation.

37. Transcripts of Tribunal hearings are required in some cases under the current legislative scheme and were also required prior to the enactment of s.357A and s.422B of the Act, when the common law rules of natural justice were not excluded by the codes of procedure contained in the Act. The Department does not expect the litigation costs incurred in obtaining transcripts of Tribunal hearings to be significantly higher than current costs.

38. Litigation costs should not be considered in isolation from the whole of government costs incurred in the Tribunals having to conduct their reviews in a time consuming and inefficient manner in circumstances where no practical injustice can be found in the way the Tribunals dealt with a particular review. The current requirement to put adverse information to applicants in writing seeking their comments or response in order to comply with the statutory provisions is often less efficient than dealing with the material orally at a hearing, and may also duplicate effort where the adverse information has been dealt with orally. The courts in having determined that strict compliance with the statutory provisions is required have also noted that dealing with adverse information orally has not resulted in any practical injustice. It is possible that the Bill will result in a lesser overall cost to government by allowing the Tribunals to give applicants practical and efficient natural justice, and reducing the number of remittals to the Tribunals based on technical applications of the law, rather than any unfairness to applicants.