Submission to the

Senate Legal and Constitutional Affairs Committee

regarding the

Migration Amendment (Review Provisions) Bill 2006

Submitted by

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Amnesty International's work on refugees

Amnesty International is a world wide movement of more than 1.8 million people across 150 countries working to promote the observance of all human rights.

Protecting the rights of refugees is an essential component of Amnesty International's global work. We aim to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights, the United Nations (UN) Convention on the Status of Refugees and other internationally recognised standards. Amnesty International works to prevent human rights violations that cause refugees to flee their homes. At the same time we oppose the forcible return of any individual to a country where he or she faces serious human rights violations.

For a detailed overview of Amnesty International's refugee policy, please refer to our report *Refugees – Human Rights Have No Borders*.[1]

Introduction

Amnesty International Australia welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the proposed Migration Amendment (Review Provisions) Bill 2006. In keeping with the mission of Amnesty International, this submission will focus on changes affecting the Refugee Review Tribunal (RRT) rather than those affecting Migration Review Tribunal (MRT) processes. There are circumstances where clients of concern to Amnesty International Australia do utilise the MRT, for example those applicants in detention who have been refused Bridging E visas and are therefore denied release into the community. However most of these clients are asylum seekers and may at some point utilise the RRT, further adding to the RRT focus of this submission.

Amnesty International Australia recognises that some of the proposed amendments are aimed at ensuring a more efficient system of processing applicants and meeting time limits. However, there is concern that in some cases the efficiencies will decrease the applicant's ability to understand and present information necessary to support their application.

NB: the referencing system below relates to the Explanatory Memorandum

[1] http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/ACT340031997ENGLISH/$File/ACT3400397.pdf

Section 1

1. b)
Relating to 'information already provided' by the applicant to DIMA.

Amnesty International Australia is concerned that this amendment will remove the opportunity for applicants to be able to clarify information presented or orally provided during a hearing. It is often the case that stress, poor representation, inconsistent interpreting or simply a desire to be compliant can result in a lack of clarity in the evidence presented. There would often be areas that the asylum seeker would want to clarify.

Section 1(b) refers to 'information already provided'. The potential definitive nature of this statement is of concern. There are certainly many circumstances where an applicant would wish to add to, clarify or further discuss 'information already provided'. It is also possible that information provided to the Department of Immigration and Multicultural Affairs (DIMA) may in fact be adverse and used to make a decision against the applicant. Without this being put to the applicant there is no knowledge that he / she should provide additional information, invite a specific witness to the hearing or clarify the information submitted. Decisions can be made based on evidence or lack of, and an individual or family's long-term safety are directly effected by a decision of the RRT. Whilst understanding that many DIMA files are extremely large and contain a great deal of information, Amnesty International Australia maintains that all adverse information be presented to the applicant for comment.

1. e)
Relating to 'reasonable' amount of additional time granted to an applicant when needed.

Amnesty International Australia welcomes the flexibility afforded to applicants considered to 'reasonably need additional time' to comment on information. We trust that this flexibility will apply when applicant's are required to obtain documentation from overseas, call upon specific witnesses and the like. Amnesty International Australia has welcomed the 90 day rule which is an obvious recognition by the RRT and DIMA that the previous situation of indefinite wait periods was ineffective and caused great hardship to applicants. This amendment would need to be managed to ensure that by permitting additional response time, the applicant's case was not then pushed to the bottom of a pile and not re-assessed for a considerable period.

The following example of a recent case in which Amnesty International Australia was involved, highlights how vital it is that applicants have the opportunity to clarify information, provide other versions of information in some cases and the need for some information to be re-checked:

> After asylum seeker Mr W had his case affirmed by the Tribunal, the Federal Court referred the matter back to the Tribunal for another review. In the first Tribunal matter, Mr W's credibility was completely questioned, documents he presented were not believed to be genuine and the entire basis of his claim was viewed as fraudulent. The Tribunal member relied on information provided by the Department of Foreign Affairs and Trade (DFAT) who had been asked to verify a piece of information Mr W had

submitted, showing that he was 'wanted for arrest' in his country of origin. The information returned by DFAT was that Mr W's account and documentation was fraudulent and this acted to sully the rest of his case and evidence. For his second Tribunal matter, Mr W enlisted the assistance of Amnesty International Australia, a migration agent and a friend in his country of origin. After much research and some very complex endeavours by Mr W's friend overseas, documents defending Mr W were submitted to the reconstituted Tribunal. It was then found by this Tribunal that the information provided by DFAT was in-fact incorrect and their investigations had not been completely thorough. Mr W was eventually found to be a refugee and all of his claims accepted by the Tribunal.

Although this case did not involve a decision by the Minister it does substantiate our claim that time restrictions, in a number of circumstances, are inappropriate and would be extremely adverse in some cases. There is no way Mr W could have obtained all of the necessary information from his home country within a 28 day time frame. Should he have been required to do so under new s 417 changes (if he were applying for Ministerial discretion) Mr W would by now have been returned to his home country, he would be either imprisoned and tortured or killed. With a short time frame and the Minister likely to utilise information from sources such as DFAT, this case illustrates the potential for Australia to engage in *refoulement* under the proposed changes.

Section 2

2.1

Refers to Migration Act Subsections 359A(4) and 424A(3) and the exceptions for when the RRT does not need to provide adverse information to the applicant.

Amnesty International Australia's concerns with this section were somewhat addressed when discussing section 1(b). It is acknowledged that this section draws upon existing sections of the Migration Act. However Amnesty International Australia wishes to reiterate that all adverse information should be put to the applicant for comment regardless of whether they submitted the application or not. This suggestion is supported by the Federal Court decision in *MIMIA v Al Shamry FCA 919* and the ensuing Full Federal Court decision of *SZEEU v MIMIA* (2006) FCAFC 2 (as noted in the Explanatory Memorandum of the Bill). Amnesty International Australia welcomes the High Court finding in *SAAP v MIMIA* [2005] HCA 23 that the RRT should provide adverse information for comment in writing and not simply present this orally at a hearing. The environment of a hearing can be stressful, extremely foreign, a representative / lawyer / agent may not attend and the applicant may be completely unaware of how to respond to information they had not previously recognised as being adverse. Amnesty International Australia acknowledges concerns such as time delays and going over materials more than once. However, again we reiterate the longevity and impact of the RRT's decisions upon the lives of families and individuals.

Section 6

6.3
Refers to provision of oral information at a hearing as opposed to written information at a later date.

"If the Tribunals do not orally, at the hearing, give applicants clear particulars of the relevant adverse information…".
Again, Amnesty International Australia agrees with the High Court decision in *SAAP v MIMIA* and maintains that providing this information in writing should be standard Tribunal practice. 'Clear' is open to misinterpretation. It is common for applicants to feel compelled to show the Member they understand all that is going on and they may respond in the affirmative yet not actually have a thorough understanding of the question put to them. Putting adverse information in writing will reduce misinterpretation and will provide a fairer opportunity for the applicant.

Conclusion

Amnesty International Australia welcomes amendments that increase Tribunal efficiencies. However we urge that the considerations noted in this submission be adopted in order to ensure that these efficiencies do not detract from an applicant's access to a fair and just process of independent appeal.