



SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

ON THE

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

Human Rights and Equal Opportunity Commission
Level 8, 133 Castlereagh St
GPO Box 5218
Sydney NSW 2001

Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') provides this submission to the Senate Legal and Constitutional Affairs Committee ('the Committee') in its inquiry into the Migration Amendment (Review Provisions) Bill 2006 ('the Bill').

Summary: the Bill should not be passed

2. The Commission submits that the Bill should not be passed.
3. The Bill creates the potential for an unfair process for determining refugee and migration cases. This process may breach the human rights of applicants in the following ways:
 - (i) By breaching an applicant's right to a fair hearing, as protected by the *International Covenant on Civil and Political Rights* ('ICCPR');¹ and/or
 - (ii) By leading to incorrect decisions which increase the likelihood of 'refoulement' of asylum seekers (returning a person to a country where they face persecution).
4. Refoulement breaches Australia's human rights obligations under *the Refugees Convention*,² the ICCPR, the *Convention on the Rights of the Child* ('CRC')³ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT').⁴
5. Children are likely to be particularly disadvantaged by the proposed amendments.
6. The Bill purports to create a mechanism of review that is fair, just, economical, informal and quick. The Commission makes clear its support for these objectives. However, the Bill does not achieve them. Instead, the changes are more likely to result in inconsistency, confusion and unfairness in the review process, increasing the risk of incorrect decisions and the refoulement of applicants.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5 (entered into force 22 April 1954).

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, [1989] ATS 21 (entered into force 26 June 1987).

Changes made by the Bill

7. Relevant to the Commission's submission, the Bill amends the *Migration Act 1958* (Cth) so that:
 - under sections 359AA and 424AA, the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT') (respectively) may orally give an applicant particulars of information for affirming an adverse decision;⁵
 - the MRT and RRT are not required to give an applicant written particulars of information for affirming an adverse decision, if the tribunal has already given the information to the applicant orally at the hearing;⁶
 - an applicant may be asked to respond at the hearing to the adverse information given orally;⁷ and
 - if the applicant requests, the MRT and RRT may grant an applicant additional time to comment on or respond to the information, where the tribunal considers it is reasonably necessary to do so.⁸

The Commissions' previous submissions on migration legislation

8. This submission focuses on the changes made by the Bill regarding procedural fairness accorded to review applicants.
9. The Commission notes its recent submissions on migration legislation reforms highlighting the importance of procedural fairness to avoiding refoulement of asylum seekers. These submissions include the following:
 - Migration Amendment (Designated Unauthorised Arrivals) Bill 2006;
 - Inquiry into the Administration and Operation of the Migration Act 1958 (Cth), 2005;
 - Migration Litigation Reform Bill 2005;
 - Migration Amendment (Judicial Review) Bill 2004; and
 - Migration Litigation Review.

They can be accessed at:

<http://www.humanrights.gov.au/legal/submissions/index.html>

⁵ Item 2 and 18, Schedule 1, the Bill.

⁶ Item 7 and 23, Schedule 1, the Bill.

⁷ Item 2 (section 359AA(b)(ii)) and Item 18 (section 424AA(b)(ii)), Schedule 1, the Bill.

⁸ Item 2 (section 359AA(b)(iv)) and Item 18 (section 424AA(b)(iv)), Schedule 1, the Bill.

The process may be unfair

10. The Commission is concerned that the changes to the procedure for providing adverse material to applicants, and for receiving their response, may operate unfairly.
11. Unfairness may result from:
 - the reliance on oral communication in the context of migration and refugee cases; and
 - the emphasis on an immediate response.
12. Accordingly, many applicants may be denied natural justice as they may not have the opportunity to fully or adequately put their case to the tribunal. There are many reasons for this, which may combine in a given case. The Commission outlines these various reasons below:

Access to Legal or Migration Advice

13. The Bill's changes may mean that applicants do not have the time or opportunity to consult a legal advisor or migration agent (particularly if the applicant is unrepresented at the hearing and is asked to respond orally to adverse information).
14. We note that a significant percentage of applicants are unrepresented in tribunal proceedings and, accordingly, would potentially be worst affected by these changes: 37% of applicants in the RRT and 33% of applicants in the MRT are unrepresented.⁹

Language and Cultural Barriers

15. Language and cultural barriers can have a significant impact on oral communication. This factor is particularly relevant in migration matters given that the majority of applicants come from non-English speaking backgrounds.
16. In 2005/6 an interpreter was used in 90% of RRT hearings.¹⁰
17. In those cases where an interpreter is not used but the person speaks English as a second language, language and cultural barriers may play a significant role in creating unfairness, as the amendments require an applicant to understand and respond to information given orally.
18. In those cases where an interpreter is used, over-reliance on oral communication may still present a range of challenges.¹¹ These include

⁹ Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005 – 06, above n 9.

¹⁰ Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005 – 06, (i): <http://www.mrt.gov.au/publications/ar0506/MRTRRTAR0506.pdf>. at 10 January 2007.

¹¹ Paul Cambridge and Lucy Williams, 'Approaches to Advocacy for Refugees and Asylum Seekers: A Development Case Study for a Local Support and Advice Service' (2004) Vol 17 (1) *Journal of Refugee Studies* 97.

concerns an applicant may have about disclosing confidential or sensitive information about events in their country to a person from the same (or an opposing) ethnic or religious community group. In addition, conflicts of interest, miscommunication or incorrect translation may impact on communication between an interpreter and an applicant.

Torture and Trauma

19. Similarly, experiences of torture and trauma can detrimentally impact on an individual's ability to communicate orally. A history of torture and trauma is prevalent among asylum seekers and other migration review applicants.¹² While people who have experienced torture and trauma may experience a range of different symptoms, inability to concentrate, memory problems, severe anxiety and impairment in social functioning are commonly reported.¹³ Accordingly, an applicant who has experienced torture and trauma may be less able to understand particulars of information provided to them orally, or to respond to or comment on such information given orally at the hearing.
20. While the Bill provides that a tribunal may grant such an applicant additional time to respond, this provision is also a matter of significant concern to the Commission. First, an applicant with the symptoms described may not have the presence of mind to understand the potential legal implications for their case of requesting additional time to respond. Second, as applicants are sometimes reluctant to disclose the details of their torture or trauma,¹⁴ these factors may not be considered by a tribunal in determining whether to grant an applicant additional time to respond.

Stress and Intimidation in Legal Proceedings

21. Legal proceedings can be a stressful and intimidating experience for many people. This is more likely to be the case for applicants in migration cases because the Australian legal system may be completely different to that in their country of origin.
22. In addition, for most applicants the outcome of tribunal proceedings is a matter of vital importance. Indeed, for some, a tribunal's decision may have life and death implications. Placed under such extraordinary pressures, an applicant's ability to best represent their case may be impaired.

¹² Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) states that, 'Many refugees have reported being exposed to single, multiple or continuous events associated with war or organised violence, such as active combat, harassment, persecution, imprisonment and torture': <http://www.startts.org/> at 9 January 2007.

¹³ STARTTS website: www.swsahs.nsw.gov.au/areaser/startts/services/counc-ther.asp at 10 January 2007.

¹⁴ Neal Holtan, Kathleen Antolak, David R. Johnson, Lisa Ide, James Jaranson, and Karen Ta, 'Unrecognised Torture Affects the Health of Refugees' (2002) 85 *Minnesota Medicine*: <http://www.mmaonline.net/Publications/MNMed2002/May/Holtan.html> at 10 January 2007. This article notes that torture survivors may fear that disclosure puts them at new risk of harm. They may also mistrust interpreters or those in positions of authority, or may perceive that no one will believe them.

23. The Bill's requirement that an applicant respond at the hearing to adverse information given orally may act as an additional stressor. This could further undermine an applicant's ability to give an adequate account of their case.

Less Time to Respond

24. An applicant who is asked to respond at the hearing to adverse information given orally will have less time to respond than if the information were provided to them in written form.
25. The Commission is concerned that, if additional time is granted to some applicants and not to others, inequities may result in terms of applicants' abilities to best represent their cases.

Applicants' Reluctance to Request More Time

26. While the tribunal must advise an applicant that they may seek additional time to respond to the adverse information given orally at the hearing,¹⁵ the amendments place the onus on the applicant to make this request.
27. The Commission is concerned that, in the context of refugee cases, some applicants may be reluctant to request more time to respond from the tribunal for fear that this may be held against them and, potentially, jeopardise the outcome of their case.
28. Given that the majority of refugee and humanitarian applicants are fleeing situations of state-sanctioned persecution, corruption and abuse, some applicants may feel disempowered and vulnerable in the legal process. Those that do not know or understand their rights and guarantees under the Australian legal system, may perceive that requesting more time may have an adverse impact on their case.

Access to Recording of Proceedings

29. Currently, merits review applicants may request a copy of the taped recording of proceedings following the hearing of their matter in the MRT or RRT.
30. In practice, this enables an applicant to review the recording of proceedings before they are required to respond to any adverse information put to them by the tribunal. At present, the tribunal is required to provide this information to the applicant in writing after the hearing.
31. Under the Bill's changes, an applicant required to respond orally at the hearing to adverse information, will not have the opportunity to review the recording before doing so.
32. This change may lead to unfairness in some cases. Giving an applicant access to the hearing recording before their case is determined provides the applicant

¹⁵ Item 2 (section 359AA(b)(iii)) and Item 18 (section 424AA(b)(iii)), Schedule 1, the Bill.

with the chance to clarify inconsistencies and respond to misunderstandings that may have arisen at the hearing. Given the frequent use of interpreters in tribunal proceedings (as mentioned above), errors in communication and discrepancies are inevitable. This is particularly the case where there are variations in a language, as between different countries or tribes, as spoken by the applicant and their interpreter.

33. Since an applicant's credibility is a vital factor in all tribunal proceedings, such miscommunications could prove pivotal in determining the outcome of their case.

No Structure for Exercising the Discretion

34. The Commission is also concerned that the Bill gives no guidance as to how the tribunal's discretion to grant additional time to an applicant to respond should be exercised.
35. The terms of the discretion are very broad. The Bill states that the tribunal has power to adjourn the review, 'if the tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information'.¹⁶
36. The Commission submits that, given the breadth of the discretion, it may be difficult to ensure it is applied consistently as between different tribunal members and applicants' cases. This may lead to unfairness in that differential treatment may be accorded to applicants in similar circumstances.

Diminished Transparency and Accountability

37. The Commission is also concerned that providing oral rather than written particulars will reduce the transparency and accountability of the review process for applicants and their advisers.
38. While written particulars provide an applicant with a conclusive and clear record of the information for affirming an adverse decision, oral particulars may not always achieve this objective. For example, where an applicant's adviser is not present at the hearing, it may not be clear to the adviser, based on the applicant's report only, what the tribunal considered the adverse information to be.
39. Similarly, if an applicant were to lodge an application for judicial review of the RRT's decision, to which particulars of the adverse information given orally by the tribunal was relevant, difficulties may result. While it may be possible for an applicant to subsequently obtain this information from the recording of proceedings, difficulties may arise if such recordings are incomplete or indecipherable.

¹⁶ Item 2 (section 359AA(b)(iv)) and Item 18 (section 424AA(b)(iv)), Schedule 1, the Bill.

An unfair process breaches the right to a fair hearing

40. Under article 14(1) of the ICCPR, all persons have a right to a fair hearing in the determination of a ‘suit at law’.¹⁷ The Commission submits that, by creating a potentially unfair process, the Bill may lead to breaches of the right to a fair hearing.
41. Given that the consequences of a decision in many migration matters are potentially very serious (including refoulement in refugee applications), the requirements for a fair hearing should be correspondingly high.¹⁸ The Commission is concerned that the changes may not allow this high standard to be met in all cases.
42. It has been recognised that there are a number of components to the right to a fair hearing under the ICCPR.¹⁹ In particular, Manfred Nowak has stated that ‘the most important criterion of a fair trial is the *principle of “equality of arms”*’ between parties (emphasis in original).²⁰
43. In *Jansen-Gielen v The Netherlands*, the United Nations Human Rights Committee held that the principle of equality of arms required the courts to adjourn proceedings in order to provide equal opportunities to both parties to challenge the documentary evidence.²¹ Similarly, *AARELA and NAKKALAJARVI v Finland* confirmed that it is a fundamental duty of the courts to ensure full opportunity to each party to challenge the submissions of the other.²² The court held that this includes ensuring that the parties have the *ability* to contest all the arguments and evidence adduced by the other party (emphasis added).
44. In the context of non-adversarial proceedings, such as those before the MRT and RRT, a fair trial would, in the Commission’s submission, require the Tribunal to allow an applicant the chance to fully challenge the information before it. In some circumstances, requiring an applicant to respond orally to the particulars of information for affirming an adverse decision, may not be affording them a full opportunity to challenge the information. For example,

¹⁷ Article 14, above n 2. We note that while some commentators have stated that article 14(1) only applies to criminal charges, there are academics supporting its application to other procedures: see Michael Alexander, ‘Refugee Status Determination Conducted by UNHCR’, *International Journal of Refugee Law*, (1999) Vol 11 (2), 251.

¹⁸ Under Australian domestic law, the content of the ‘hearing rule’ forming part of the requirements of natural justice is flexible depending on the circumstances of the case: *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475; *Kioa v West* (1985) 159 CLR 550, 585; see further Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 482. One relevant factor is that where the potential consequences of a decision are grave, the affected person is allowed a more extensive opportunity to be heard.

¹⁹ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd revised ed, 2004), 409. The authors note a number of requirements for a fair hearing. These include, equality before the courts, including equal access to courts; fair and public hearings and competence, impartiality and independence of the judiciary.

²⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd revised ed, 2005), 321.

²¹ No. 846/1999, 8.2.

²² No.779/1997, 7.4.

where an applicant does not have the ability (for one of the reasons set out above) to adequately represent their case orally, the tribunal's requirement that they do so may breach their right to a fair hearing under article 14(1).

An unfair process may lead to incorrect decisions and 'refoulement'

45. An unfair process may lead to incorrect decisions as a tribunal will not have a case fully and adequately put before it.
46. Incorrect decisions in cases involving refugee status determination create an unacceptable risk of 'refoulement'.
47. The prohibition on 'refoulement' is recognised as one of the most fundamental principles in international human rights law. It arises out of Australia's obligations under the Refugees Convention as well as the ICCPR, the CRC and the CAT.
48. Article 33 of the Refugees Convention states that no State 'shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'²³
49. Similarly, the United Nations Human Rights Committee has consistently held that the prohibition on refoulement flows from the ICCPR. It has found that a State will contravene its obligations under the ICCPR if it removes a person to another country in circumstances in which there is a real risk that their rights under the ICCPR will be violated.²⁴
50. This responsibility arises, in part, from the primary obligation of each State party, under article 2 of the ICCPR, 'to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.²⁵ Delivering a person by compulsion into the hands of a third party who might inflict harm prohibited by the ICCPR, contravenes the obligation owed to all those within the territory of a State party.
51. The Commission also notes General Comment 20 to the ICCPR which confirms that States parties 'must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.²⁶

²³ Article 33, above n 1.

²⁴ See: *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996; *C v Australia* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993.

²⁵ Article 2, above n 2.

²⁶ At paragraph 9.

52. The same approach applies, by analogy, to the rights of children. Article 4 of the CRC obliges Australia to undertake all appropriate legislative, administrative and other measures to implement the rights recognised in that Convention.²⁷ That international obligations extend to indirect contraventions of a convention is also a principle that has also been accepted in domestic law.²⁸ For example, a State party breaches its international obligations if it sends an asylum seeker to a host third country which then refoules the person to their country of origin.
53. Article 3 of CAT also imposes an obligation of non-refoulement.²⁹ It provides:
1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
54. By creating a procedure for determining migration claims that is potentially inadequate and unfair, an unacceptable risk of refoulement is created because incorrect decisions are more likely to be made. Such refoulement will have consequences of the highest significance for the individual involved. It will also place Australia in breach of its obligations under the Refugees Convention as well as ICCPR, the CRC and CAT.

Children are likely to be particularly disadvantaged by the Bill

55. The Bill is likely to be particularly detrimental to the most vulnerable, such as children, who are usually the least equipped to represent their own interests in a hearing.
56. The Bill makes no special provision for children, including unaccompanied children, to be assisted or represented at a hearing where they may be required to respond to adverse information given orally.
57. More generally, under the *Migration Act 1958* (Cth) there is no legal obligation requiring the MRT or RRT to conduct a hearing for a child applicant in the presence of an adviser or support person. The RRT has, however, acknowledged that it may be advisable to do so.³⁰

²⁷ Article 4, above n 3.

²⁸ *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514 cited with approval in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543, 558-559 (von Doussa J).

²⁹ The article was found to have been breached by Australia in *Elmi v Australia*, Communication No 120/1998, UN Doc CAT/C/22/D/120/1998.

³⁰ Refugee Review Tribunal, *Guidelines on Children Giving Evidence*, 3 accessed at: <http://www.rrt.gov.au/publications/RRT%20Guidelines%20on%20Children%20Giving%20Evidence.pdf>

58. Where the tribunal considers that a child is unable to provide reliable oral evidence, the tribunal may take evidence from persons closely associated with the child.³¹ However, we note that, unlike some jurisdictions, the *Migration Act* makes no provision for the appointment of a next friend or guardian to represent the child.
59. By requiring a child to respond to adverse information given orally at the hearing, the Commission is concerned that the child may not:
- have the opportunity to seek outside advice before doing so;
 - have sufficient time to understand the information communicated to them at the hearing or to fully comprehend the response required by the tribunal; or
 - understand the importance of their response and its possible implications for the outcome of their case.
60. These concerns are additional to the Commission's concerns relating to the fairness of the Bill's procedure (as outlined in paragraphs 12 to 45 above).
61. The Commission submits that it is possible that the Bill will contravene a child's rights under the following articles of the CRC:
- Article 3: best interests of the child to be a primary consideration;³²
 - Article 4: states parties are required to undertake all appropriate legislative, administrative and other measures to implement the rights in CRC;³³
 - Article 22: special assistance for refugee children;³⁴ and
 - Article 40: right to a fair hearing.³⁵
62. In its September 2006 General Discussion Day, the Human Rights Committee ('the Committee') discussed the content of a child's right to be heard under article 40 of the CRC. The Committee stated as follows:

In order to ensure that the views of the children in conflict with the law are duly taken into account, the following must be provided as a minimum in order to ensure their participation in accordance with articles 12 and 40 of the Convention;

- (a) adequate legal or other appropriate assistance;
- (b) free access to an interpreter if the child cannot speak or understand the language used;
- (c) respect for his or her privacy during all stages of the proceedings;
- (d) recognition that the child has a right to participate freely and cannot be compelled to give testimony.³⁶

³¹ Ibid.

³² Article 3, above n 3.

³³ Article 4, above n 3.

³⁴ Article 22, above n 3.

³⁵ Article 40, above n 3.

³⁶ *Human Rights Committee, General Discussion Day on the Right of the Child to be Heard*, 43rd session, 11 -29 September 2006, 7.

63. In particular, the Commission is concerned that the changes may result in children being required to participate in tribunal proceedings without adequate legal or other appropriate assistance (as required in paragraph (a) above). Accordingly, there is a strong possibility that the operation of the Bill may lead to a breach of Australia's international obligations under article 40.

Conclusions and recommendation

64. The Commission submits that the Bill creates an unfair process which is likely to breach applicants' right to a fair hearing and may lead to the refoulement of asylum seekers. It should not be passed.
65. The Explanatory Memorandum to the Bill states that,
- [T]hese amendments are designed to ensure that applicants are still provided with procedural fairness while providing flexibility to the Tribunals in how they meet their obligations.³⁷
66. While the Bill certainly gives greater flexibility to tribunals, this should not come at the expense of the rights of applicants.

Human Rights and Equal Opportunity Commission
19 January 2007

³⁷ Explanatory Memorandum, Migration Amendment (Review Provisions) Bill 2006, p4.