



MONASH University
Law

Castan Centre for Human Rights Law

18 January 2007

Committee Secretary
Senate Legal & Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into the provisions of the *"Migration Amendment (Review Provisions) Bill 2006"*. This submission was prepared by Professor Susan Kneebone, Ms Tania Penovic and Ms Courtney Winter on behalf of the Centre.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sarah Joseph'.

Professor Sarah Joseph
Director



Castan Centre for Human Rights Law

Monash University

Melbourne

Submission to Senate Legal and Constitutional Affairs

Committee Inquiry into the provisions of the

Migration Amendment (Review Provisions) Bill 2006

*It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.*¹

1 Introduction:

The *Migration Amendment (Review Provisions) Bill 2006* (Bill) relates to the review of negative primary decisions by the Department of Immigration and Multicultural Affairs (Department) as provided in Part 5 Division 5 of the *Migration Act 1958* (the Act) before the Migration Review Tribunal (MRT), and in Part 7 Division 4 of the Act before the Refugee Review Tribunal (RRT). In reality, the issues to which the Bill is directed largely concern applications for review before the RRT which is the forum in which these issues have arisen. The focus of our submission will accordingly be upon applicants for protection visas (under s 36 of the *Migration Act*) and the review process in the RRT. We shall use Part 7 Division 4 of the Act to discuss the effect of this Bill.

- The primary object of the Bill is to clarify the nature of the discretion contained in s 424A of the Act (and its equivalent s 359A) in relation to the use of adverse information by the Tribunals. The intention of the Bill is that the discretion in s 424A be exercised in writing.² A new provision, s 424AA provides an additional discretion to the Tribunal to orally invite the applicant to comment on adverse information. Further, a new subsection 2A to s 424A makes it clear that the Tribunal is not obliged to exercise its discretion under s 424A if it has exercised its powers under s 424AA (item 23).
- The Bill also provides that the exceptions in s 424A(3) do not include ‘information that was provided orally by the applicant to the Department’ (proposed s 424A(3)(ba) – see item 25).
- The Bill contains a general statement which purports to provide that the Tribunal must act in a way that is ‘fair and just’.

¹ *Gale v Superdrug Stores plc* [1996] EWCA Civ 1300, per Lord Millett.

² The Bill proposes that the current heading of s 424A be replaced with the following: ‘Information and invitation given in writing by Tribunal’ (Note to item 19).

The overall effect of this Bill is to focus upon oral evidence and to encourage the Tribunal to require oral responses from applicants. In our view this Bill should be rejected for the following reasons:

- The Bill does not add clarity to this contentious issue area of law.
- The Bill is inconsistent with the Tribunal's own Credibility Guidelines.³
- The passage of the Bill will have the likely effect of disadvantaging an already disadvantaged group.

Our submission contains 3 parts. First, we summarise the scope and application of s 424A and the issues that have arisen in relation to its application. Secondly, we put these issues into the broader context of refugee status determination and the principle of natural justice, also known as procedural fairness. Thirdly, we assess the proposed Bill against this background.

2 The current section 424A: background and issues in relation to its application.

2.1 Background

Section 424A was added to the Act by Bill No 4 1997⁴ soon after the RRT had been established. It is important to understand where s 424A sits in the scheme of provisions in the Act. It relates to s 425 of the Act which provides that unless the Tribunal can make a decision in the applicant's favour 'on the papers', it must invite the applicant 'to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review'. That is, although the Tribunal was established as an independent merits review tribunal which would operate on a non-adversarial basis,⁵ and has been variously described as 'inquisitorial', or 'quasi- inquisitorial',

³ Australian Government, *Guidance on the Assessment of Credibility*, October 2006 available at <http://www.mrt.gov.au/publications/CredibilityGuidanceOct06.pdf>.

⁴ S Kneebone, 'The RRT and the Assessment of Credibility: an Inquisitorial Role?' (1998) 5 AJAL 98.

⁵ Media Release dated 15 July 1992 by the Minister for Immigration, Local Government and Ethnic Affairs, The Hon Gerry Hand, MP.

s 424A must be seen in the context of provisions which focus on an oral hearing, which sits better with the notion of an adversarial hearing, in contrast to pre-hearing procedures.⁶

It has been noted by the High Court⁷ that RRT proceedings are ‘not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor.’ This function is emphasised by the power in the current s 424 which gives the Tribunal the power to seek additional information. Under this provision the Tribunal may ‘get’ information or the Tribunal may invite a person to give additional information.

Section 424A should be read with s 424 which currently states:

- (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision ...
- (2) the Tribunal may invite a person to give additional information.

Section 424 is often considered together with s 427(1)(d), the so-called ‘inquisitorial’ power. Issues that have arisen in relation to s 424 (considered with s 427(1)(d)) include:

- What is ‘information’, and what kind of information does it apply to (the word ‘get’)
- How must the Tribunal have ‘regard to’ the information?

One issue however seems to be ignored by the courts, namely, in what circumstances must the Tribunal ‘invite’ a person within the meaning of s 424(2).⁸ An argument that has arisen in relation to s 424 and s 427(1)(d), is whether there is any duty to exercise or to consider the exercise of these powers. On that point it has been said consistently that there is no duty to exercise or even to consider the exercise of these powers. They are described as discretionary or empowering provisions that do not impose any duty to make

⁶ S Kneebone, above note 4.

⁷ *SZEBL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 (15 December 2006) per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at [47].

⁸ Eg *Dissanayake v Minister for Immigration & Multicultural Affairs* [2002] FCA 976 (Sundberg J).

enquiries.⁹ This is consistent with the view that the RRT is inquisitorial only to a ‘limited degree’.¹⁰

As the above discussion illustrates, the RRT has considerable flexibility and discretion in relation to its procedures, and such exercises of discretion are difficult to challenge. However its overall duty is to act fairly, whether measured in accordance with common law principles or s 420 of the Act (see below).

2.2 Application of s 424A

Section 424A in its current form provides:

424A. Applicant must be given certain information

(1) Subject to subsection (3), the Tribunal must:

(a) give the applicant, in the way the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) by one of the methods prescribed in section 441A; or

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

(a) that is not specifically about the applicant and is just about a class of persons of which the applicant is a member; or

(b) that the applicant gave for the purposes of the application; or

(c) that is non-disclosable information.

⁹ *Hernandez v Minister for Immigration & Multicultural Affairs* [2001] FCA 725 (Beaumont J).

¹⁰ *Dabarera v MIMA* (2002) 190 ALR 243; [2001] FCA 1390 (Gray J).

This provision has generated much litigation.¹¹ At the outset it is to be noted that the wording in proposed s 424AA(a) only differs from s 424A(1) insofar as it is made clear that the obligation to give information is to be discharged orally.

Issues that have arisen in relation to s 424A(1) include:

i) *The scope and meaning of ‘particulars of any information’.*

In relation to this phrase, the courts have generally been guided by the common law obligation to provide natural justice in relation to adverse evidence (see below). Specifically, it has been held that ‘information’ does not include opinions formed by the RRT on credibility issues (see below).

ii) *The scope and meaning of the words ‘that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review’.*

It seems that the word ‘would’ means ‘could’,¹² which is consistent with the common law obligation to provide natural justice in relation to adverse evidence (see below). The interpretation of the second part of this phrase is contested but can be read to conform with the obligation to give written reasons for decisions (s 430 of the *Migration Act*).¹³

iii) *Manner of compliance with the obligation.*

This issue has proved to be controversial. Whereas s 424A(1) suggests some flexibility in the words ‘in the way the Tribunal considers appropriate in the circumstances’, s 424A(2) by contrast refers to the methods specified in s 414A which require writing.

¹¹ C Beaton-Wells, ‘Disclosure of adverse information to applicants under the Migration Act 1958’ (2004) 11 AJ Admin L 61.

¹² Beaton-Wells above note 11, 65.

¹³ Beaton-Wells above note 11, 65-66.

It would appear that the Bill has been introduced as a response to the High Court's decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁴ (*SAAP*). In that case the Minister argued that as the applicant had been invited to a hearing under s 425 of the Act, s 424A no longer had any role to play. By a majority of 3:2 the High Court rejected that argument. In *SAAP*, the High Court considered that the word 'must' in s 424A(1) imposed a mandatory obligation on the RRT to provide the adverse information in writing 'in all circumstances', whether at a pre-hearing interview or when the applicant appears before the Tribunal.¹⁵ The court held that as a consequence of the mandatory language of the provision, a breach of s 424A constituted jurisdictional error and rendered the RRT's decision invalid.¹⁶

We submit, contrary to the views of the Solicitor-General for the Commonwealth,¹⁷ that this decision does not entrench an inflexible interpretation of s 424A. The decision in *SAAP* must be seen in the context of the RRT's powers, as discussed above, and the facts of the case.

As McHugh, Kirby and Hayne JJ emphasised in their judgments in *SAAP*, s 424A is a statutory attempt to define the common law requirement of procedural fairness. The majority stressed that the Tribunal decision was likely to have been made in breach of those principles. In other words, the High Court decision could alternatively have been made relying upon those principles. In any event, the decision in *SAAP* which rejects the Commonwealth's argument for a limited role for s 424A, is consistent with the Tribunal's own view that its decision-making process must be seen as a 'continuum'. Further as McHugh J suggested, the majority's interpretation was consistent with the words discussed in ii) above, that is, the obligation relates to the making of the decision. By

¹⁴ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA24 (18 May 2005).

¹⁵ *SAAP*, above note 14 per McHugh J at [71], also Kirby J at [154], Hayne J at [183].

¹⁶ *SAAP*, above note 14, per McHugh J at [77], Kirby J at [173], Hayne J at [208].

¹⁷ Talk by David Bennett QC to the Victorian branch of the Australian Institute of Administrative Law (AIAL), 'Is natural justice becoming more rigid than traditional justice', October 2006, to be published by the AIAL in the National Lecture Series.

inference, this obligation can arise at any stage in the decision-making process. As McHugh J said in *SAAP*, in relation to s 424A:

[T]he object of the section must be to provide procedural fairness to the applicant by alerting the applicant to the material that the Tribunal considers to be adverse to the applicant's case and affording the applicant the opportunity to comment upon it.¹⁸

iv) *Section 424A(2) distinguishes persons in immigration detention.*

We note that the Bill makes no separate provision for persons held in detention.

v) *The exceptions created by ss (3.)*

It is to be noted that the proposed s 424AA does not contain an exceptions clause. The Bill however proposes to qualify the scope of s 424A(3)(b) in relation to 'information that the applicant gave for the purpose of the application'. This exemption was considered by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Al Shamry*¹⁹ (*Al Shamry*). Ryan, Merkel and Conti JJ confined the exemption to information provided to the RRT for the purpose of review by the Tribunal.²⁰ Such a construction was consistent with a purposive approach to statutory interpretation in light of s424A's enactment of a 'basic principle of the common law rules of natural justice that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of power proposes to take into account in deciding upon its exercise.'²¹

The Full Federal Court (Moore, Weinberg and Allsop JJ) was called upon to determine whether the *Al Shamry* judgment was wrong in *SZEEU v Minister for Immigration and*

¹⁸ *SAAP*, above note 14 per McHugh J at [50].

¹⁹ (2001) FCR 27.

²⁰ *Al Shamry*, above note 19, Ryan and Conti JJ at [18-19], Merkel J at [35-37].

²¹ *Al Shamry*, above note 19, per Merkel J at [39], Ryan and Conti JJ concurring at [20].

Multicultural and Indigenous Affairs.²² Their Honours considered themselves to be bound to follow *Al Shamry* unless the earlier judgment was plainly wrong, manifestly wrong or clearly erroneous.²³ Moore J described the decision as ‘cogent and persuasive’²⁴ and Weinberg J confirmed that the expression ‘part of the reason’ should be read benevolently, in a manner informed by the rules of natural justice.²⁵

The consequence of the judgments of the Full Federal Court is that all information provided prior to the review process is subject to s 424A. The Bill seeks to alter the current position, with s 424A(3) excluding certain categories of information from the disclosure requirement in s 424A(1). The words ‘for review’ are inserted after the word ‘application’ by s 424A(3)(b) to distinguish information given by the applicant during the first stages of the process of refugee status determination (at the Departmental level). The Bill proposes to add a new s 424A(3)(ba) which makes it clear that the exemption does not include ‘information that was provided orally by the applicant to the Department’. This (as is explained below) has implications for the merits review function of the RRT and the application of the new Credibility Guidelines.²⁶

The RRT’s powers set out in s 415 of the Act are those of de novo review, with the technical consequence that the tribunal may have regard to any relevant information, including information connected with an applicant’s visa application. The material provided to the Tribunal under s 418(3) will be comprised of Department documentation concerning an applicant’s visa application and information the applicant has provided to the Department. It may be considered that an applicant does not need to be informed about adverse material which they have themselves provided. We would strongly disagree with any such view. The circumstances in which the information is given mean that it is likely that applicants will be unaware of decisive information and consequently unable to provide a response. The dangers are elaborated by Merkel J in *Al Shamry*:

²² [2006] FCAFC 2 (24 February 2006).

²³ *SZEEU v MIMIA*, above note 22, Moore J at [8], Weinberg J at [147-148], Allsop J at [190].

²⁴ *SZEEU v MIMIA*, above note 22 at [9]. Note that this case involved 4 separate applications, the facts of which illustrate the problems and issues that such applicants face, as discussed in this Submission.

²⁵ *SZEEU v MIMIA*, above note 22 at [163].

²⁶ Credibility Guidelines above note 3.

An applicant for a protection visa will have provided information relevant to the outcome of the application prior to applying for a review of the delegate's decision. Such information may, in some cases, have been provided prior to the application for a visa. The prescribed application form requires that the basis for the application be stated. Further, the information given may be supplemented by information provided subsequently to the Department or to a delegate of the Minister. An applicant may have no record of the information provided but, more importantly, may not be aware of its significance to the review ultimately to be conducted by the RRT. It is therefore understandable that the legislature would require that, in fairness, any adverse information provided prior to review, *the significance* of which the applicant may be unaware, be disclosed to the applicant to enable him or her to respond to it. That approach is particularly important in the context of the inquisitorial and non-adversarial nature of proceedings before the RRT.²⁷

As this statement recognises, there is a fine balance between disclosing the weight that the Tribunal member gives to competing considerations in reaching a decision, and the obligation to seek comments on relevant adverse evidence. Section 424A read as whole encourages the latter.

The words in ss (3)(a) about 'a class of persons of which the applicant is a member' have proved to be controversial as has the meaning of 'non-disclosable information' in ss (3)(c). However the Bill does not attempt to clarify them.

vi) *The Bill attempts to clarify the meaning of s 424A(1)(b) by adding the following phrase: 'and the consequences of it being relied on in affirming the decision that is under review'.*

²⁷ *Al Shamry*, above note 19 at [40]. Note the strong critique of the Department's decision making processes: Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958* (March 2006), Chapter 2 'Processing of Protection Visa Applications'.

This provision mirrors s 424AA(b)(i). The purpose of this is presumably to satisfy the rules of natural justice by an explanation of the relevant adverse consequences (see below).

vii) *Summary.*

As has been noted above, the High Court has said that RRT proceedings are ‘not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor.’²⁸ We believe that the introduction of the Bill would undermine the flexibility which the Act gives to the Tribunal in the exchange of information between the applicant and Tribunal. It will have the effect of further distancing the RRT from the non-adversarial model pursuant to which it was envisaged to function.

Our overall concern with proposed s 424AA is that it adds to the raft of discretions which the RRT already possesses in relation to ‘information’, but focuses upon the oral hearing inconsistently with the non-adversarial role.

Further, the purpose of the Bill appears to be to side-step the interpretation issues which s 424A has raised (as discussed above). At the same time, it repeats part of the wording of s 424A which has generated so much litigation. In our view it is likely to lead to more, not less litigation.

²⁸

SZEBL above note 7 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at [47].

3 Refugee status determination and the natural justice principle

There are two features about this Bill which indicate the need to scrutinise its terms and effect. First, the Bill is largely directed at asylum seekers – persons applying for protection as refugees under Australian law. It is well known that the duty to ascertain and evaluate all the relevant facts in determining refugee status is shared between the applicant and the examiner.²⁹ Our concern is that this Bill gives the Tribunal the power to mandate oral responses from persons who are by definition vulnerable, and who have no right to legal representation or to legal aid. Most applicants are non English speaking persons who require the assistance of interpreters. It also is notorious that decisions about refugee status largely turn upon issues of credibility. This Bill will encourage the RRT to focus upon statements made at the initial (Departmental) stage and upon oral responses. As the recently released Credibility Guidelines³⁰ recognise, there are many reasons why discrepancies arise at different stages of refugee status determination.

In our view, the thrust of this Bill is inconsistent with the RRT’s own Credibility Guidelines which recognise the specific vulnerabilities of asylum seekers, including problems with oral evidence. Paragraph 4.1 of the guidelines considers the various facts and circumstances that may affect an applicant’s ability to provide oral evidence or present his/her claim and stresses the importance of giving consideration ‘to the circumstances of each case to ensure that as far as possible the hearing is conducted in a way that facilitates the taking of evidence and the opportunity for the Applicant to present his or her case.’ Paragraph 4.3 cautions members to be ‘mindful that a person may be anxious or nervous due to the environment of a hearing and the significance of the outcome’ in light of factors such as educational, social and cultural background, prior experiences of trauma, health status and the possibility of ‘mistrust in speaking freely to people in positions of authority.’ In emphasising the use of oral evidence, the Bill will have the likely result of overlooking the considerable hurdles faced by this vulnerable group in negotiating, managing and comprehending the process of Tribunal review. It

²⁹ UNHCR Handbook, para 196. The Handbook was accepted by the High Court as a guide for refugee status determination procedures in *Chan Yee Kin* (1989) 169 CLR 379.

³⁰ Credibility Guidelines above note 3.

will increase the difficulties experienced by applicants which the Credibility Guidelines seek to address.

Secondly, the Bill is proposing a statutory modification of the principles of natural justice, which require a fair hearing. A cardinal principle of this concept is that a person has the right to know the case against them, and to be given a genuine opportunity to respond to adverse information. It is well known that the duty to accord natural justice must be tailored to the specific needs of individuals. For example, the courts will apply different standards to articulate and educated persons³¹ but at the same time will allow decision makers flexibility in choosing fair procedures. However, administrative expediency cannot override the need to grant a fair hearing and a genuine opportunity to respond to adverse information.

On a number of occasions the High Court has stated that statutory codes and provisions do not replace natural justice, or specifically, that the High Court's jurisdiction to grant remedies for breach of the rules of natural justice cannot be ousted.³² Yet it has become commonplace in Australia for legislators to introduce statutory codes and provisions into the Act which have led to ongoing litigation. In *SZEEU*, Weinberg J said in reference to the appeals in that case:

They seem to me to illustrate, and not for the first time, the problems that can arise when the legislature embarks upon the course of establishing a highly prescriptive code of procedures for dealing with visa applications instead of simply allowing for such matters to be dealt with in accordance with the well-developed principles of the common law.³³

The proposed subsection 422B(3) provides that in applying Division 4 of Part 7 of the Act, the RRT must act in a way that is 'fair and just'. The subsection purports to complement s 420(1) which requires the RRT to pursue the objective of providing a

³¹ *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486.

³² *Re Refugee Review Tribunal: Ex parte Aala* (2000) 204 CLR 82, *Re Minister for Immigration: Ex parte Miah* (2001) 206 CLR 57.

³³ *SZEEU v MIMIA*, above note 22 at [174].

review mechanism that is fair, just, economical, informal and quick. These five objectives do not necessarily operate in mutual harmony.³⁴

Concerns about inefficiency and delay lie at the heart of decision making in a legal setting. In relation to the civil justice system, regular and wide ranging attempts have been made to address these concerns.³⁵ But reforms introduced to address such concerns have shown that the obligation to accord litigants procedural fairness tends to militate against speed and efficiency. In the context of attempts to improve the system in England and Wales, Lord Millett made the statement quoted at the beginning of this submission: ‘[i]t is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.’³⁶ Similarly, the High Court of Australia has found that principles of case management (such as the speedy hearing of disputes) can not be permitted to supplant the attainment of justice in civil proceedings.³⁷ In the context of RRT proceedings, the outcome of administrative review is likely to exert a profound influence on the lives of applicants. If a decision is wrongly upheld, the consequences for an applicant may be persecution or death. In the circumstances, the process of administrative review should maintain its current rigor rather relaxing its processes in order to achieve greater efficiency.

Our prediction is that the Bill is unlikely to achieve the objectives sought. We believe that it will lead to more litigation, greater complexity of proceedings and thus to greater overall expense and delay. Despite attempts to codify the natural justice obligations of the RRT, the courts have and will continue to assert their jurisdiction to correct breaches of procedural fairness. Furthermore, while judges can analyse written information relatively easily in order to determine whether material provided constitutes ‘the reason, or part of the reason, for affirming the decision under review’, the analysis of information provided orally is altogether more complex. Proceedings alleging a breach of s 424AA are likely to engage the courts and parties in

³⁴ See *Minister for Immigration v Eshetu* (1999) 197 CLR 611.

³⁵ See for example Australian Law Reform Commission, *Managing Justice-A Review of the Federal Civil Justice System*, Report No 89, 1999 at www.lawreform.vic.gov.au.

³⁶ *Gale v Superdrug Stores plc* [1996], above note 1.

³⁷ *Queensland v JL Holdings* (1997) 189 CLR 146, at [154] per Dawson, Gaudron and McHugh JJ.

poring over RRT transcripts and considering arguments about whether information delivered orally was or was not clearly enunciated and explained as required by the Act.

While the decisions with which the Bill is concerned have a profound impact on applicants' lives, the Tribunal procedure operates in a manner which often disadvantages applicants. The RRT tends to put applicants to positive proof of their claims, representing a departure from the UNHCR Handbook. Issues of credibility permeate the process notwithstanding the provision of evidence by applicants on oath or affirmation. Applicants generally have no means of independent corroboration and may be required, through the process of oral hearing, to relive experiences of trauma and persecution.³⁸ Their resulting demeanour and style of presentation may be seen by the Tribunal to undermine credibility. As a consequence of problems faced by applicants in establishing credibility, the Tribunals' Credibility Guidelines³⁹ draw specific attention to the need for members to be mindful of prior traumatic experiences which may cause anxiety within the hearing environment.⁴⁰ The guidelines recognise that contradictions, inconsistencies and omissions may result from an applicant's inability to remember dates, locations, distances, events and experiences with precision. Such inability may be attributable to factors such as the effluxion of time or unrealistic expectations held by the RRT in relation to precision and detail of recollections.⁴¹ In relation to experiences of trauma, the guidelines state as follows:

Traumatic experiences including torture may impact upon a number of aspects of an Applicant's case including the timeliness of an application, compliance with immigration laws, or the inconsistency of statements since arrival in Australia. They may also impact adversely on an Applicant's capacity in providing testimony of such events.⁴²

³⁸ See generally Credibility Guidelines, above note 3, where specific attention is drawn to the need to be mindful of prior traumatic experiences which may result in anxiety within the hearing environment [4.3].

³⁹ Credibility Guidelines, above note 3.

⁴⁰ Credibility Guidelines, above note 3 [4.3].

⁴¹ Credibility Guidelines, above note 3 [5.6],[5.8].

⁴² Credibility Guidelines, above note 3 [5.3].

While there is no joinder of issues between parties and there is generally no contradictor, the Tribunal's reliance on official 'country of origin' information of a general nature has often been preferred to the applicant's testimony in order to conclude that the applicant is not, or on account of changed country circumstances is no longer, entitled to protection.⁴³ Applicants may be unable to contradict such information, even in circumstances where it is incorrect or is too broad to address the applicant's specific circumstances. The proposed legislation would further undermine the position of applicants for review.⁴⁴ We accordingly recommend that the Bill be rejected.

4 Proposed s424AA – problems and prospects

Section 424AA of the Bill applies where 'an applicant is appearing before the Tribunal because of an invitation under section 425'. It thus clarifies that the Bill applies to oral hearings (contrast the discussion of *SAAP* above). For reasons outlined below, the vulnerability of applicants for review and the difficulties inherent in oral presentation would indicate that a shift away from s 424A is inappropriate.

Paragraph (a) of s 424AA provides that the RRT may orally give the applicant clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review. Paragraph (b) provides an obligation that the Tribunal must ensure that the applicant understands why the information is relevant and must orally invite the applicant to comment or respond. The applicant must be advised that he/she may seek additional time to comment on or respond to the information. It is unclear whether the applicant's response may be provided in writing or must be oral. If additional time is sought, the RRT must adjourn the review if it considers that the applicant needs additional time to provide their comment or response. **In our view, this procedure is likely to lead to further delays in the hearing process.**

⁴³ See generally S Kneebone, above note 4.

⁴⁴ In this context note that the number of applications for judicial review of RRT decisions has fallen substantially. See <http://www.rrt.gov.au/statistics/Judicial/Review.pdf>. Accessed 12 January 2006.

Although applicants who are not proficient in English are provided with interpreters, the process of communication through an intermediary is one which by its very nature accommodates a margin of error. The proposed s 424AA is likely to increase the margin of error in a jurisdiction in which negative primary decisions are frequently upheld due to credibility of presentation and plausibility of narrative. The oral communication of reasons through an interpreter may obfuscate the process and lead to misunderstandings between Tribunal and applicant. The problem of misunderstanding is likely to be exacerbated where the review is conducted through video link up or telephone conferencing, and particularly where the RRT member and/or interpreter is separated geographically from the applicant. Reviews concerning applicants held in immigration detention are frequently subject to such arrangements,⁴⁵ the effects of which are compounded by the impact of detention on an applicant's mental health and concomitant ability to present his or her claim. The difficulties of assessing oral evidence through an interpreter and conducting a hearing in circumstances where the applicant is in immigration detention are recognised in the RRT and MRT's Credibility Guidelines.⁴⁶

The affirmation of negative primary decisions has significant consequences for applicants. It is thus imperative that applicants be given clear details of information which constitutes the reason for the Tribunal affirming the Department's decision. The expression of this information in writing accords procedural fairness to applicants by giving them the opportunity to give evidence or to make submissions about determinative material.⁴⁷ It provides a safeguard which minimises the risk that an applicant may fail to address critical information on account of a misunderstanding of the Tribunal member's views. Like oral information, written information requires translation. It may be argued that the provision of written information does not enhance procedural fairness because, like oral information, it may be lost in translation. Non-English speakers seeking refugee protection in Australia are vulnerable to the limitations inherent in the translation process.

⁴⁵ See for example *SAAP*, above note 14 where the first appellant was detained in Woomera Hospital while the migration adviser, RRT member and interpreter were located in Sydney.

⁴⁶ Credibility Guidelines, above note 3 at Part 4, especially Part 4.2-4.4.

⁴⁷ *SZEBL v Minister for Immigration and Multicultural and Indigenous Affairs*, above note 7.

But while these risks can never be eliminated, they can be minimised by the provision of clear, written information.

The process of articulating reasons in writing also promotes rigor in Tribunal procedure and exerts an appropriate level of discipline on adjudicators making decisions as to whether an applicant is a refugee within the meaning of Art 1A(2) of the Refugees Convention⁴⁸ (as amended by the Refugees Protocol⁴⁹) and accordingly entitled to Australia's protection. We believe that concerns about the speed of administrative review may be better addressed by further training of Tribunal members. In elaborating upon the importance of written communication of critical facts in a legal setting, Justice Kirby said the following:

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 ... the presentation of a tangible communication of a potentially important, even decisive, circumstance from the Tribunal permits them to receive advice and give instructions.⁵⁰

Finally, this Bill does not add clarity to this complex and contested area. It is vague with respect to the nature and possible sources of the information it concerns. In its emphasis on the oral hearing, it is likely to render the review process more confusing and subject to misunderstandings. Section 424AA is likely to increase the margin of error and compromise the integrity of the decision-making process in an area of great human importance.

⁴⁸ The Convention relating to the Status of Refugees, Geneva 28 July 1951, [1954] *Australian Treaty Series* No 5.

⁴⁹ The Protocol relating to the Status of Refugees, New York 31 January 1967, [1973] *Australian Treaty Series* No 37.

⁵⁰ SAAP above note 14 at [175].

5 Conclusion

The proposed legislation will compromise procedural fairness to a disadvantaged group. It represents a departure from the non-adversarial model envisaged for the RRT and MRT and is inconsistent with the Tribunals' own Credibility Guidelines.⁵¹ We believe that more, rather than less, litigation is likely to ensue as a consequence of the Bill, with greater complexity of proceedings. We agree with the following statement of Justice Kirby with respect to s 424A:

This is, after all, simply an express provision to ensure that the Tribunal's procedures attain the highest standards of justice to the applicants before it. As this Court has pointed out in the past, such applicants are frequently in a desperate situation and, in some cases, their safety and even their lives may be at stake in the important decisions that the Tribunal makes.⁵²

As outlined above, RRT procedure operates in a manner which often disadvantages applicants. The Bill may be intended to represent a modest amendment to the Act but, in our view, the effect of the Bill is unlikely to be modest. Its proposed procedure is likely to result in greater error and misunderstanding and apply an inferior standard of justice.

Prepared by Professor Susan Kneebone and Tania Penovic on behalf of the Castan Centre for Human Rights Law with research assistance from Courtney Winter.

⁵¹ Credibility Guidelines, above note 3.

⁵² SAAP above note 14 above at [169].