Australian Government
Department of Immigration and Multicultural Affairs

Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Morris

Referral of Submission on Proposed Changes to the Migration Act

Please find enclosed a copy of the Administrative Review Council's (ARC's) submission on the proposed changes to the *Migration Act 1958* contained in the Migration Amendment (Review Provisions) Bill 2006 (the Bill). As you would be aware, the Senate has referred the Bill to your Committee. I should be grateful if you would consider the ARC's submission as part of your inquiry.

On 19 September 2006 I wrote to the ARC briefing them on the policy behind the proposed amendments and seeking their views.

On 31 October 2006 the President of the ARC provided comments in response to our request.

The Bill was introduced into the Senate on 7 December 2006 and, on that day, the Senate referred the Bill to your Committee for inquiry and report by 20 February 2007.

I again wrote to the ARC on 22 December 2006 advising them that the Bill had been referred to your Committee and suggesting that they may wish to make a submission to your Committee, or that, alternatively, I would be happy to forward a copy of their existing submission to your Committee. The ARC responded on 5 January 2007, asking that I forward to your Committee a copy of that submission.

In its submission, the ARC expressed concern about ensuring that applicants have sufficient opportunity to bring new information before the relevant Tribunal.

6 Chan Street Belconnen ACT 2617
PO Box 25 BELCONNEN ACT 2616 • Telephone (02) 6264 2244 • Facsimile (02) 6264 2479 • Website: www.immi.gov.au
Email natcomms@immi.gov.au

They also recommended that Tribunal Members should be provided with guidance on when oral comments at the time of hearing would be appropriate. We have passed their comments to the MRT and the RRT and plan to hold further discussions with those Tribunals on this point.

The Department will, of course, be providing a submission to your Committee in due course.

Yours sincerely

Chris Hodges

Chris Hodges
Assistant Secretary
Legal Co-ordination & Procurement Branch

Telephone: 6264 1427
Facsimile: 6264 4995
Email: chris.hodges@immi.gov.au

17 January 2007

ADMINISTRATIVE REVIEW COUNCIL

31 October 2006

Mr Chris Hodges
Assistant Secretary
Legal Co-ordination and Procurement Branch
Department of Immigration and Multicultural Affairs
PO Box 25
Belconnen ACT 2616

Dear Mr Hodges

Thank you for your letter dated 19 September 2006 seeking the Administrative Review Council's comments on proposed amendments to the *Migration Act 1958* (the Act) affecting the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT).

The Handing down decisions

Currently, ss. 368A and 430A of the Act require the MRT and RRT to invite the parties to be present when the decision is handed down and ss.368B(4) and 430B(4) provide that the date of the decision is the date on which the decision is handed down.

These provisions were inserted into the Act by the *Migration Legislation Amendment Bill (No.1) 1998* which came into operation on 1 June 1999. The explanatory memorandum and second reading speech provide little additional detail on the policy reasons for introducing these provisions other than that they "provide for the formal handing down of decisions and certainty of dispatch".

The proposed amendments are in response to the decision in *Inderjit Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 73 where it was held

Robert Garran Offices, National Circuit, Barton ACT 2600
Telephone: (02) 6250 5800 Facsimile: (02) 6250 5980 e-mail: arc.can@ag.gov.au
Internet: law.gov.au/arc

that the RRT erred in law in considering itself functus officio after the date of the signing of a decision and that, as a result, it ignored relevant material presented to it by the applicant prior to the formal handing down of the decision without having a valid or lawful reason for doing so.

The amendments would revoke the provisions in the Act requiring the RRT and the MRT to formally hand down review decisions and make the date of the review decision the date that it is signed by a Tribunal Member. This would bring the Act into line with the statutory provisions for the Administrative Appeals Tribunal, the Veterans' Review Board and the Social Security Appeals Tribunal which do not impose a formal handing down requirement.

Your background paper indicates that "it is not uncommon for the tribunals to receive further material from review applicants who have received an invitation to a handing down". The paper states that in many cases, applicants can use the period between the signing of a decision and its formal handing down for the repeated provision of new information and that this has been "interpreted as a convenient way for review applicants to deliberately delay the finalisation of the review application in order to prolong their stay in Australia".

The paper also says that the handing down process is administratively costly with no apparent benefit to the applicant. It notes that since the commencement of the 1998 amendments to the Act, approximately 22% of review applicants have attended the handing down of their decisions.

While we appreciate the administrative efficiencies that the proposed amendments could achieve, they will also effectively reduce the amount of time currently available to applicants to present all relevant material to the Tribunals. As new information is apparently often presented to the Tribunals after the signing of decisions, we would urge that, in bringing the amendments forward, a careful assessment is made to ensure that those who may genuinely wish to bring new information before the Tribunals have sufficient opportunity to do so prior to that point. We would not be supportive of any amendments that sought to give primacy to administrative efficiency over the ability of applicants to have all relevant material considered.

Provision would also need to be made in the amendments for the method of notification required if personal service via the handing down is deleted from the Act as well as a comprehensive information program to ensure that potential applicants are aware of and understand the practical implications of the proposed changes.

Procedural fairness obligations

Currently ss. 358A and 424A require the MRT and RRT to give the applicant certain information that would be the reason, or part of the reason, for affirming the decision under review. The provisions also require that the Tribunals ensure the applicant understands the relevance of the material and is invited to comment on it.

These provisions were inserted into the Act by the *Migration Legislation Bill (No.1) 1998*. The explanatory memorandum and second reading speech provide some detail on the policy reasons for introducing these provisions; as

> The Bill also introduces certain safeguards for applicants by introducing a code of procedure for both the MRT and the RRT which is similar to that already applying to decisions made by the Department. This code includes such matters as ...a requirement that applicants be given access, and time to comment, on adverse material relevant to them.

The statutory provisions have been interpreted in a number of cases, most notably *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 23, *Minister for Immigration and Multicultural Affairs v Al Shamry* [2001] FCA 919 and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2. From your background paper it may be deduced that the cumulative effect of the decisions has been to impose on the Tribunals sometimes incongruous and unnecessary requirements in order to comply with their statutory procedural fairness obligations. The paper says that the decisions have impacted adversely on the capacity of the Tribunals to be economical, informal and quick, as well as fair and just.

The proposed amendments would allow the Tribunals to provide applicants with adverse information relevant to the reason for affirming the decision under review orally or, as presently required as a result of the court decisions, in writing. The amendments would also provide that the Tribunals would not be required to put to applicants for comment information that has already been given by the applicant in writing for the purposes of the process leading to the decision under review.

The background paper states that the proposed changes do not depart from the underlying intention of giving applicants access to and the opportunity to comment on adverse material. We agree that they would give the Tribunals greater flexibility in meeting their procedural fairness obligations under the Act and remove current apparently unnecessary limitations in that regard. We consider that this would be desirable.

However, while there are circumstances, such as those referred to in the paper, where the provision of information orally will be of more assistance to applicants, there will continue to be some circumstances where this will not be the case. The Council would be concerned if, on the basis of considerations of cost, speed and informality, an informal preference were to develop in the Tribunals for oral comments at the time of hearing. The Council considers that there should be guidance provided to Tribunal Members in this respect.

We would like to thank you for the opportunity to comment on the proposed amendments. In view of his position as Secretary of your Department, Mr Andrew Metcalfe was not asked to contribute to the Council's consideration.

Additional matter

There is one additional matter of importance to the proper functioning of the Administrative Appeals Tribunal that we would like to bring to your attention.

The matter relates to the amendment last year to Part 8 of the Act which gave the Federal Court jurisdiction in relation to migration decisions made by the AAT on review under s 500 of the Act. The Tribunal also reviews decisions concerning the cancellation of business visas under s 136 of the Act. Under Part 8 as currently drafted, the Federal Magistrates Court (FMC) has jurisdiction in relation to those decisions, including decisions made by a Judge or Deputy President of the Tribunal. The general policy expressed in s 44AA of the *Administrative Appeals Tribunal Act 1975* is that the FMC should not review decisions made by a Judge or Deputy President. It would appear that this policy is also appropriate in relation to the review of migration decisions.

We consider that it is important that this matter be rectified and would be grateful if you could consider the possibility of it being dealt with in the legislation relating to the amendments on which you have sought our views.

Recommendations

In summary, our main recommendations in relation to the proposed amendments are:

1. that in removing the formal handing down requirements under the Act, care is taken to ensure that applicants have sufficient opportunity to present new information to the Tribunals prior to the signing of the decision.
2. in relation to the proposed procedural fairness amendments, that guidance be given to Tribunal Members on the different circumstances in which they should provide applicants with written or oral notice of adverse information.

We would be happy to speak with you further on any of the foregoing and would be pleased to contribute further to consideration of the proposed

amendments as they are progressed.

Yours sincerely

Jillian Segal

Jillian Segal AM
President