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Senate Legal and Constitutional Legislation
Committee
Parliament House
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By email

Dear Senate Committee

Inquiry into the Migration Amendment (Review Provisions) Bill 2006

We appreciate the opportunity to make a short submission to the Senate's Inquiry into the provisions of the Migration Amendment (Review Provisions) Bill 2006.

Our principle concerns are detailed below.

1. The Refugee Advice and Casework Service (Australia) incorporated (RACS)

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme administered by the Department of Immigration and Multicultural Affairs (DIMA), donations from the community, an extensive volunteer network and a Management Committee. RACS' principle aims may be summarised as follows:

- to provide a free, expert legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;

- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

At a broader level, RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

2. Introductory Remarks

The provisions of this Bill demonstrate an attempt by the Government to negate the effect of the High Court's decision in *SAAP v MIMIA* [2005] HCA 24. In this decision, the High Court made it clear that the requirement in sections 359A and 424A of *Migration Act 1958* (the Act) to provide adverse information in writing was not procedural and had to be strictly complied with by the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT).

In its day to day work, RACS is predominantly concerned with the review of decisions to refuse protection visas, matters which fall under the jurisdiction of the RRT. For ease of discussion we will confine our remarks to the current operation of section 424A of the Act and clause 424AA of the Bill as they affect or may affect applicants before the RRT. Nevertheless we submit that our comments are apposite in relation to applicants whose cases are reviewed by the MRT.

Currently, s424A of the Act provides that the RRT must give applicants for review particulars of any information that the RRT considers would be the reason, or a part of the reason, for affirming the decision under review. As a consequence of the High Court's decision in *SAAP*, s424A requires that the RRT must always provide the particulars of the information and the invitation to comment in writing even if the information has already been covered at hearing.

The new s424AA(a) provides the RRT with a discretion to give the applicant orally, clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review.

The new s424AA(b) provides that if the RRT exercises its discretion to orally provide clear particulars of the information that it considers would be the reason, or part of the reason, for affirming the decision under review, then the RRT is obliged to ensure 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. The RRT is also obliged to orally invite the applicant to comment on or respond to the information and to advise the applicant that he or she may seek additional time to comment or respond. If the applicant seeks additional time to comment or respond, the RRT must adjourn the review if it considers that the applicant reasonably needs additional time to comment or respond.

In the sections which follow we identify some of the reasons why the provisions of the Bill may adversely affect applicants before the RRT.

3. Burden on Applicants

Asylum seekers are among the most vulnerable people in our society. Applicants before the RRT are already nervous and acutely aware of the significance of their responses to their lives and their future. During the hearing they must describe situations where they themselves and/or their families have suffered serious harm and/or torture and trauma. Accordingly, they are under great stress.

The amendments place an even greater burden on applicants who are already in a vulnerable situation during a hearing, *immediately* to present their case when particulars of any information that the RRT considers would be the reason, or a part of the reason, for affirming the decision under review are put to them.

4. Unrepresented Applicants

Applicants seeking review by the RRT have no right to legal representation (unless they are in detention and thereby eligible for assistance under the Immigration Advice and Application Assistance Scheme (IAAAS)). As a result, many applicants are unrepresented, although some may have friends in the hearing room for moral support.

The changes proposed by this Bill significantly impact on the procedural fairness afforded to unrepresented applicants.

The majority of unrepresented applicants may not understand the legal significance of the adverse information being communicated to them and of their response. In fact, given the following factors, namely

- the anxiety associated with the nature of the proceedings;
- the natural desire of applicants not to antagonise or offend the decision maker; and
- the pressure of the moment;

applicants are likely to attempt to respond to the Tribunal immediately, regardless of whether it is actually in their best interests to do so.

Unless applicants have a legal right to seek an adjournment *of the hearing*, the passing of the Bill in its present form may result in an increase in unfair outcomes for applicants who have genuine claims. In fact, even if applicants have such a legal right, there is a grave

danger they may choose to forgo their right to an adjournment for all the reasons presented above. This in turn could place Australia at greater risk of breaching its *non-refoulement* obligations under the *Refugees Convention*.

5. Additional Impact When Interpreters Utilised

When an applicant has been invited to attend an RRT hearing, it is often their first and last opportunity orally to present their case. In the vast majority of cases the applicants do not speak English and rely on an interpreter in order to understand the Member's questions and comments and to respond accordingly.

The new provisions place a huge burden on interpreters accurately to convey the nature of the adverse information and the significance of any oral response the applicant is being invited to make to the information.

Currently, when adverse information is presented in writing, an applicant has time to have the section 424A letter translated or interpreted outside the context of the Tribunal hearing. The applicant has time to check documents in his/her possession, seek supporting evidence and, if he or she chooses to do so, to make a thorough and carefully considered response.

A weakness of the present system, however, is that the response to a 424A letter must be in writing, which may considerably disadvantage unrepresented non-English speaking applicants together with applicants who do not write English fluently. Such applicants may struggle considerably to write a thorough and carefully considered response in English in the timeframe allowed. The proposed amendments may in part attempt to address this concern. We submit, however, that natural justice will not be achieved unless applicants have a legal right to an adjournment of the review hearing (if one is requested). Even then, we have grave concerns, for the reasons given in the previous section, because many applicants will be too afraid to make the request.

6. Excessive Discretion Given to the RRT Member

The proposed changes, however, give the RRT Member tremendous discretion in determining whether he or she thinks it reasonable to grant the applicant an adjournment of the review and allow additional time for consideration and preparation of a response.

This is particularly serious when one considers that a wrong decision may have drastic consequences for the applicant's well being and safety if they are returned to situations where they will face persecution.

Accordingly, if the Senate proceeds to pass the Bill, we submit that clause 424AA(b) of the Bill should be amended to state that if the applicant seeks additional time to comment or respond, the RRT *must* adjourn the review hearing for two weeks to allow the applicant time to prepare his/her response.

7. Role of Representatives

The role of representatives in the review process is already limited. The inquisitorial nature of the review process ensures that representatives only have limited involvement in the Tribunal proceedings. We note that the introduction of these amendments will mean that representatives have even less opportunity to advise their clients on the best course of action for their case. Unrepresented applicants will not have the opportunity to seek legal advice at all (unless the Bill is amended as we have proposed).

8. Recommendation

The Refugee Advice and Casework Service submits that the Bill should not be passed.

RACS submits that the Bill creates an unfair process which is likely to breach an applicant's right to a fair hearing and may lead to the *refoulement* of a refugee.

The Explanatory Memorandum to the Bill states,

[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.¹

While the Bill gives greater flexibility to the Tribunals, we concur with the Human Rights and Equal Opportunity Commission that this should not come at the expense of the rights of applicants.

If the Senate decides to proceed and pass the Bill, at the very least we submit that clause 424AA (b) (iv) of the Bill should be amended as set out below:

424AA Information and invitation given orally by Tribunal while applicant appearing

If an applicant is appearing before the Tribunal because of an invitation under section 425:

- (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
- (b) if the Tribunal does so—the Tribunal must:
 - (i) 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 that is under review; and
 - (ii) orally invite the applicant to comment on or respond to the information; and
 - (iii) advise the applicant that he or she may seek additional

¹ Explanatory Memorandum, Migration Amendment (Review Provisions) Bill 2006, p4.

time to comment on or respond to the information; and
*(iv) if the applicant seeks additional time to comment on or
respond to the information—adjourn the review hearing for two weeks.*

9. Concluding Remarks

A submission such as this cannot possibly canvas all the issues which may be of interest to the Committee. Accordingly, please do not hesitate to contact Mark Green on (02) 9211 4001 if you require any further information or assistance with any aspect of this submission.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

Mark Green
Coordinator