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The Senate Legal and Constitutional Legislation Committee  
Department of the Senate  
Parliament House  
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## RE: FECCA submission to the parliamentary inquiry into the Migration Amendment (Review Provision) Bill 2006

### SUMMARY

The Migration Amendment (Review Provision) Bill 2006 proposes that the Members of the Refugee Review Tribunal and the Migration Review Tribunal will be able to choose what they see as the most effective way of providing information to appellants. The Tribunals will no longer be bound by the previous rules requiring this information be provided in writing. In this regard, the Tribunal decision-making is still to conform to requirements of fairness and this requirement is seen as adequate safeguard by the proposers of this Bill. FECCA, however, sees the potential for increased problems of communication between the members of the Tribunal and appellants and so recommends maintaining the current safeguards of fairness and due process which are in the existing legislation, rather than enacting these proposed Amendments.

### INTRODUCTION

The Federation of Ethnic Communities Councils of Australia (FECCA) welcomes this opportunity to contribute to the Senate Review of proposed changes to the Migration Act. FECCA has consulted with members and stakeholders and is in a position to pass on a number of concerns about some aspects of the proposals contained in the Migration Amendment (Review Provisions) Bill.

### FECCA'S ROLE

FECCA is the national peak body representing Australians from diverse cultural and linguistic backgrounds. Our role is to advise, advocate, and promote issues on behalf of our constituency to government, business and the broader community. Our charter includes promoting full access and equity, advocating community harmony and the celebration of diversity, championing human rights and arguing that Multiculturalism is central to the social, economic and cultural health of Australia.

### ISSUES

#### ***Intent of the Bill.***

##### Proposed improvements to processing times for appellants

In the Second Reading of the Bill to the Senate on December on the 7th 2006, Senator Ellison discussed the rationale of the Bill for improvement in processing times for people who appear before the Migration Review and Refugee Review Tribunals.

FECCA endorses the Government's stated intention of reducing unnecessary complexity and allowing the Tribunals to operate more efficiently whilst maintaining the principles natural justice and fairness.

## ***Natural justice.***

### **Due justice**

Senator Ellison, in the Second Reading speech, reinforced the emphasis on natural justice in the existing Act and in this Bill. Some steps have been included in the proposed amendments to continue to provide for the natural justice of appellants appearing before both the Refugee Review Tribunal and the Migration Review Tribunal.

FECCA is conscious that the Migration Act 1958 operates in the context of Australia's international obligations which are embodied in the Refugee Convention of 1951 (and subsequent conventions). These long-standing obligations include providing due process for Refugees at each stage of the process. These obligations of due process are fundamental to the rule of law and the Australian society. To quote an old saying 'Justice must not only be done. Justice must be seen to be done'.

## ***Judicial concerns.***

### **Issues with the current system and potential issues with the proposed amendments related to delivery of information orally under stress in a court of law**

A number of members and stakeholders have drawn attention to significant judicial and related concerns about the operation of the sections of the Migration Act relevant to the proposed Amendments. Indeed some of these concerns lie behind the motivation for the present Bill. The principal concerns are that in the drive to improve efficiency in the workings of the Tribunals, there is a danger that procedural fairness will suffer. There is another, related danger that procedural fairness will be seen to suffer.

Grave concerns were raised with FECCA about the ability of people appearing before these Tribunals, in particular the Refugee Review Tribunal, to respond appropriately and comprehensively to the information which the Tribunal decides to present to them in an oral form. There could be occasions, particularly if a person was not represented before the Tribunal, where the best interests of the appellant were endangered. For example, there could be difficulties in assessing how well some of the information presented orally was actually understood by an applicant for whom English was not the first language. There could also be difficulties for applicants understanding of the full meaning of legal terms and legal issues. Applicants may fear to ask for an adjournment to allow time to properly understand the meaning of information presented to them due to fear of jeopardising the outcome of the Review. Applicants may also fear to ask for an adjournment due to time pressure in their living circumstances.

The Amendments before the Senate Committee put the onus on to the Tribunals to decide whether each appellant can receive information effectively orally. At the time of the hearing this information will sometimes be very emotionally charged, as it may mean the difference between an appeal being successful and the person being able to stay in Australia or the appeal being unsuccessful. In these circumstances there is a large emotional load on the appellant. Members of a Tribunal should not be expected to have sophisticated abilities to understand the response of people from other countries and different circumstances to receiving important information orally under pressure in a court of law; or to make sure the appellants really understood and could discuss fully the issues. Few people are able

to discuss in full an issue on the spur of the moment. Better outcomes occur where people have time to gather evidence on each issue relevant to the case.

FECCA further advocates that in verbal submissions the applicant should have the right to be accompanied by a competent advocate, who can assist in speaking up for them and can make sure they fully understand the process. This competent advocate could be a settlement workers, social worker or migration agent familiar with the person and their claim.

The amendments as they stand propose a system which would make it too easy for a Tribunal Member to err and in that error unwittingly fail to provide the natural justice on which the whole Migration Act is based.

## ***Structure, Support and Resources for the Tribunals***

Further support and resources to the Tribunals would decrease processing times

FECCA stakeholders emphasised that these Tribunals are doing some important and positive work. The Migration Review Tribunal was singled out for particular praise.

FECCA supports the full resourcing of both the Review Tribunals so that the efficiency and speed of work of the Tribunals can be further enhanced without any possibility of jeopardising the rights and processes of those appearing before the Tribunals.

Steps have already been taken recently to further improve the efficiency of the work of the Tribunals. This includes the successful prioritising of matters before the Migration Review Tribunal. There may be a need for additional resourcing, including additional staff, for the Tribunals.

There is also an argument for a review of the process of appointing members to the Tribunals. The focus here, again in the interests of natural justice, would be to enhance the transparency of the appointments and the proper accountability of the Tribunal members.

The work of the Tribunals is critical to the proper operation of Australia's Migration and Refugee programs and it is noted that there certainly can be instances where appeals before the Tribunal's are based on misinformation or non-genuine grounds. Tribunal Members are to be thanked for undertaking this challenging and demanding work.

## ***Strengthening the Integrity of Review Processes***

Review courts and procedural mistakes

There is a risk in the implementation of these proposals that justice will not be being seen to be done for those people who are regarded as vulnerable people. People applying for Refugee status are in a vulnerable position and the intention of the law is to ensure that all processes are fair. This intention is certainly spelt out in Senator Ellison's Second Reading Speech and in the existing Act. Positive intentions however are not always seen to lead directly to positive outcomes.

Concerns about the operation of the Refugee Review Tribunal are not new. Its own data demonstrate that decisions made at each step of the Refugee application process have been overturned at the next level of appeal. This is true of decisions made by Officers within the Department of Immigration and Multicultural Affairs as well as decisions made in the Refugee Review Tribunal itself. For example, the Refugee Review Tribunal report on its case load for 2005-6 revealed that 30% of cases considered by the RRT resulted in overturning the decisions made by Departmental Officers not to offer protection to asylum seekers.

Review bodies are designed to take a careful overview with a broader perspective. Similarly, when Courts have examined decisions of the Refugee Review Tribunal itself, many of those decisions have not satisfied the full requirements of the law.

The RRT reports that from 2002-2005, 473 refugees had their claims rejected both at

Departmental level and by the RRT but were subsequently recognised as refugees by the courts.

The Australian legal system is seen to be procedurally fair by provision for appeals and superior courts. These processes can be time consuming and costly. However, it is in such a superior court that Federal Court Judge, Justice Madgwick, articulated considerable unease about an appellant not appearing to have had a fair go before the Refugee Review Tribunal. This concern that procedural mistakes are being made at the level of the Refugee Review Tribunal has also been experienced and expressed by FECCA members.

Given the difficulty with procedural mistakes which are already occurring, further empowering the Refugee Review Tribunal with a decision-making over the fairness or otherwise of a process in which it itself has an interest would be counter to transparency and natural justice for appellants.

This new legislation proposes that the Members of the Migration Review Tribunal and the Refugee Review Tribunal will be able to choose what they see as the most effective way of providing information to appellants. The Tribunal will no longer be bound by the previous rules requiring this information be provided in writing. In this regard, the Tribunal decision-making is still to conform to requirements of fairness and this requirement is seen as adequate safeguard by the proposers of this Bill. FECCA, however, sees the potential for increased problems of communication between the members of the Tribunal and appellants and so recommends maintaining the current safeguards of fairness and due process which are in the existing legislation, rather than enacting these proposed Amendments.

#### **Safeguards related to adjournments**

Another safeguard included in the Bill also needs reassessment. After receiving information orally, an appellant may request an adjournment. Under this proposed amendment, the Tribunal itself can decide to grant that adjournment or not. The appellant may not understand the information properly, and communication issues are likely. Such confusion could well be the basis for an appeal later. The desired outcome of streamlining operations would have backfired. Clarity and transparency at each stage of the process is the fastest way to process each application and any appeals.

#### ***Other concerns raised during consultation:***

A number of other concerns were raised with FECCA during the Consultation process.

- Questions were asked about what protections would be in place for appellants who represent themselves or make comments or answer questions without having a representative present?
- Will translation and interpretation services be provided?
- How much notice will be given to appellants to appear before the Tribunal?

FECCA does not have the resources or mandate to be able to answer some of these concerns raised with us.

## **CONCLUSION**

Senator Ellison stated that the intention of removing the requirement of provision of written information is motivated by a desire to improve the efficiency and speed of processing applications.

Further improving the working of the Tribunals is a laudable aim, for justice delayed is, to an extent, justice denied.

However, according to Federal Court Judge Justice Madgwick, some of the operations of the Refugee Review Tribunal itself have caused considerable unease. FECCA has serious concerns about empowering the Tribunals with the ability to determine how to provide appellants with important information outside of the established the existing guidelines, and to the widening of the Tribunals' discretion in the conduct of the appeal process.

We would be happy to discuss any of the issues raised in this submission. Please do not hesitate to contact me on (02)6282 5755, should you wish to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Kulasingham', with a horizontal line underneath and a small flourish at the end.

Mark Kulasingham

FECCA Director

19 January, 2007