RILC Refugee & Immigration Legal Centre Inc

31 January 2006

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No. of pages (incl. this one): 8

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

Re: Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Amendment (Review Provisions) Bill 2006 ("the Bill")

We refer to the above matter.

In this regard, we thank the Committee for the opportunity to make submissions concerning the Bill. We attach herewith our written submission, and apologise for the delay.

We confirm that we will appear as a witness before the Committee by teleconference today at 10.30am.

If you have any queries or require any further additional information, please contact David Manne of this office on **(03) 9483 1144.**

Yours sincerely,

David Manne
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RILC **Refugee & Immigration Legal Centre Inc**

Submission of the Refugee & Immigration Legal Centre Inc. to the Senate Legal and Constitutional Affairs Committee Inquiry on the Migration Amendment (Review Provisions) Bill 2006 ("the Bill")

A. Introduction – the Refugee & Immigration Legal Inc.

1. The Refugee and Immigration Legal Centre (RILC) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants in the community and in detention.

2. RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme (IAAAS) and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over ten years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited Port Hedland, Curtin, Perth, Baxter, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

3. In the 2005-2006 financial year, RILC gave assistance to 3,126 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involved advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals ("the Tribunals"). Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

B. Outline of submissions

4. RILC welcomes the opportunity to make a submission to this Inquiry. We note that the provisions of the Bill are essentially directed at eliminating the requirement of the Tribunals to provide an applicant with written particulars of information which form a part or the whole of the reason for affirming a

Departmental refusal. The provisions thus seek to further restrict the requirements of procedural fairness to be afforded applicants[1] before the Tribunals.

5. By way of introductory comment, we note that RILC[2] has previously expressed strong opposition to this Committee concerning a wide range of provisions in proposed and enacted legislation which have related to restrictions on the ability of applicants in migration and refugee matters to access procedural fairness. These include the following submissions, which can be accessed at http://www.rilc.org.au/repsubs.htm:

- Submission covering letter to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 22 May 2006, and Speech by David Manne for Castan Centre for Human Rights Law: "*Boatloads of Extinguishment?* Forum on the proposed offshore processing of "Boat People"" (5 May 2006)

- Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Litigation Reform Bill 2005

- Submission to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Judicial Review) Bill 2004, and Submission to the Migration Litigation Review

- Submission to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Procedural Fairness) Bill 2002 & Migration Legislation Amendment Bill (No.1) 2002

We refer to and rely on our previous submissions in this regard.

6. In this context, we remain acutely concerned that any residual, basic safeguards which are afforded by the common law or legislation be preserved for the purposes of ensuring procedural fairness and natural justice is afforded in decision-making by the Tribunals. In strongly opposing the introduction of the Bill, we intend to focus primarily on the impact of such provisions on individual applicants, and the jurisdiction more generally. I

7. In summary, we submit that:

- The provisions of the Bill create the very real likelihood that the Tribunal's processes will fail to afford adequate procedural fairness to all review applicants, and, in turn, that the process may be infected unfairness.
- The provisions of the Bill diminish crucial safeguards which operate to provide some protection to applicants before the Tribunals. These safeguards provide the applicant with written indications of matters which

[1] We note 'applicant' in this context includes Australian permanent resident or citizen sponsors, nominators, visa applicants, and cancellation review applicants.
[2] And its predecessor organisations, RACS and VIARC.

concern the Tribunal and are sufficiently serious to potentially result in a refusal of the application, and generally provide the applicant with a clear, meaningful and adequate opportunity to respond to such matters.

- The provisions of the Bill are likely to operate with particular harshness and unfairness on many of those who are already disadvantaged by factors such as cultural, linguistic and/or educational background, and experiences of past torture or trauma. Given their vulnerabilities, such applicants, who already face substantial difficulties and obstacles under current Tribunal processes would be even further disadvantaged with the real risk of there being denials of procedural fairness. The Bill would entrench and exacerbate, rather than address, an existing structural imbalance in the process for applicants.
- The Bill's erosion of procedural fairness safeguards increases the likelihood of errors in decision-making on material matters by the Tribunals. This is of particular concern given the nature of most matters before the Tribunals, is such that errors can result in refoulement to persecution or long-term dislocation from family in Australia.
- The provisions of the Bill are substantially inconsistent with the stated objective of the Tribunals under the *Migration Act* 1958 ("the Act"), which is to create a review mechanism which is "fair, just, economical, informal and quick", in that they have the real potential to operate unfairly, arbitrarily, unevenly and confusingly to the detriment of applicants.
- The Bill purports to strike an acceptable balance between providing applicants with procedural fairness, while providing flexibility to the Tribunals. In our submission, the provisions of the Bill are incapable of achieving such a balance as they remove existing safeguards and permits the dictates of 'flexibility' to prevail over procedural fairness at the largely unfettered discretion of the Tribunal.

C. Obstacles to affording procedural fairness

8. In our submission, it is crucial to appreciate that the majority of applicants who go before the Tribunals are people who are already disadvantaged within the review process by a range of factors which include:

- cultural, linguistic and educational background;
- experiences of past torture or trauma;
- victims of domestic violence;
- impecuniosity;
- medical conditions;
- confinement in immigration detention; and
- unfamiliarity with the Australian legal system.

Further, the majority of cases concern issues which are particularly grave, namely, protection from persecution and family reunion. We submit that while legal proceedings in any Australian jurisdiction should provide adequate procedural

safeguards to applicants, in migration and refugee matters, the likelihood that erosion of these rights will result in unfairness and serious harm to an applicant is particularly acute.

9. In our experience, review applicants routinely face a number of serious difficulties and obstacles in relation to their participation in such legal proceedings. For example:

- Applicants often find the basic requirements of the process incomprehensible. The distinction between an adversarial and inquisitorial process is often not understood. The lack of understanding regularly involves matters as fundamental as what are the key questions to be determined by the Tribunal, what evidence is required, and how that evidence is to be assessed.
- Applicants commonly find Tribunal processes, and in particular, hearings, to be extraordinarily stressful, frightening, confronting, traumatic and not conducive to inviting a free and full articulation of their claims. This can substantially diminish the ability of an applicant to put their case, comprehend any material concerns of the Tribunal, and to respond adequately to those concerns instantaneously at the hearing.
- Such problems as those mentioned above are often compounded by factors beyond an applicant's control such as the demeanour and approach of the Tribunal. Many people who we have assisted have reported to us that they found the Tribunal's manner to be aggressive, overbearing, impatient, dismissive and confusing. For many, this has had the undesirable effect of depriving them of their ability to fully and properly communicate their case. We also note here the notoriously complex and inaccessible nature of the migration legislation, policies and procedures generally.

10. The problems outlined above are exacerbated where applicants are from a non-English speaking background and, as in the vast majority of cases, require the use of an interpreter. In our experience, this an inherent additional obstacle to the applicant being able to communicate effectively to the Tribunal at a hearing. Where interpretation of evidence is required, there is an inevitable diminution in the precision of communication. This lack of precision is increased where the Tribunal holds hearings by video link or telephone. (We note with concern the increasing tendency of the Tribunals to use these mechanisms where, for example, matters are constituted to Members interstate.) We further note that there are significant variations in the quality of the interpreting and in the capacities of applicants and Tribunals to use interpreters effectively. In our experience, serious communication errors can and do occur on a regular basis and often result in substantial unfairness to applicants due to applicants' evidence and responses being miscommunicated to the Tribunal, and/or the Tribunal's questions, including in relation to material credibility concerns, being misinterpreted. Similar issues commonly arise as a result of the Tribunal's lack of understanding of an applicant's cultural and/or educational background.

11. In the circumstances outlined above, to permit the Tribunals to communicate material concerns orally at the hearing only, and to refuse to allow an applicant to respond other than at the hearing is to run the real risk of the applicant being denied procedural fairness. While the current requirement that material concerns be put to an applicant in writing with an opportunity for a written response to be provided does not guarantee that an applicant will be able to fully comprehend and respond to such concerns, it provides a far fairer, more realistic and genuine chance for the applicant to know the case they have to answer. In part, this is due to this process eliminating some of the key barriers to proper communication of the matters in issue and the process for their determination.

12. In our experience, a significant proportion of applicants before the Tribunals have experienced torture or trauma (including victims of domestic violence), which may diminish, in some cases substantially, their ability to effectively comprehend and communicate matters such as adverse information at a Tribunal hearing.[3] We are concerned that the Bill's provision for oral communication only of adverse information may operate particularly unfairly on survivors of torture or trauma, given that such people are often impaired in relation to some of the very attributes which are essential to adequately dealing with adverse information orally and instantaneously – namely, concentration, comprehension, and recollection of matters put to them. Often, other forms of disadvantage, such as cultural and/or linguistic barriers simultaneously compound such difficulties. Thus, the Bill's provisions, in allowing material adverse information to be dealt with rally at Tribunal hearings only, creates a greater likelihood that such applicants will be deprived of a meaningful opportunity to respond to matters which could result in a refusal of their case.

13. In this context, we further submit that in our experience, providing persons who are torture/trauma survivors an opportunity to respond to written adverse matters pre or post Tribunal hearing often greatly enhances the possibility of the applicant be able to understand and prepare a coherent and pertinent response to such concerns, in turn, substantially assisting the Tribunals in their ability to arrive at the meet the legislative objectives of the jurisdiction and to arrive at the correct and preferable decision. Further, having regard to past conduct of the Tribunals and the experiences of applicants who are torture/trauma survivors, we remain most concerned about an applicant's ability and preparedness, particularly if unrepresented, to seek further time from the Tribunal to respond to adverse matters, and the Tribunals properly identifying with consistency those applicants for whom it is necessary to afford further time for response due in part or whole to such impairment.

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[3] See for example, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" 15 (2003) *International Journal of Refugee Law* 377. It is available electronically at http://ijrl.oxfordjournals.org/ ; A submission to the Senate Legal and Constitutional Committee's "Inquiry into the administration and operation of the Migration Act 1958"by Guy Coffey, Clinical Psychologist.

14. Further, having regard to the matters above, we are particularly concerned the provisions of the Bill would impact even more unfairly on the approximately one third of review applicants who are unrepresented. We note that in our experience, many of those who are unrepresented have been unable to access legal assistance due to factors such as impecuniosity. Unrepresented applicants commonly start from a position of disadvantage in which they are far less likely to understand not only the general requirements of the process, but also, the relevance of adverse information put to them at a hearing for comment and effective methods of response. If the Tribunal chooses to confine communication of adverse information and opportunity for comment to the hearing, as is allowed for under the Bill, unrepresented applicants will be deprived of any opportunity to seek legal advice about such matters. In our experience, it is often crucial for applicants to obtain legal assistance in relation to the nature of process and the preparation of evidence in providing such responses. Put simply, many people we have advised have struggled to understand such matters, and have benefited profoundly from receiving from the Tribunals' particulars of adverse information in writing, and legal assistance to address such concerns.

15. The preceding comments also apply to a significant number of applicants who are legally represented. We note, in particular, that the Bill would still effectively force many applicants to comment instantaneously at hearing to concerns without the ability to obtain legal advice, or adequate time for reflection and consideration of more clearly articulated concerns provided by the Tribunal in writing.

16. In this context, we are also concerned that under the Bill, the onus is on the applicant to request additional time to respond, but that it is entirely at the discretion of the Tribunals as to whether that additional time would be provided. In our experience, many applicants feel so overwhelmed and disempowered by the hearing process that they would be reluctant to request more time to respond for fear that this would prejudice their prospects of success. In other cases, many applicants will be likely to either fail to appreciate the importance of requesting further time to respond, including the nature of evidence which would be capable of addressing the Tribunal's concerns.

17. We further submit that the nature of matters before the Tribunals is often not conducive to only communicating adverse information orally at hearing, as contemplated by the Bill. The assessment and determination of migration and refugee matters before the Tribunals is often a difficult task involving the consideration of a complex combination of legal and evidentiary factors, routinely complicated by one or more of the additional barriers set out in paragraph 8 above. Often, for example, credibility concerns are multi-layered, and involve a complex consideration of the relative importance of relationship to other aspects of evidence. Thus, it is not always easy to identify what is issue in a material sense at the hearing. In our experience, the routine lack of clarity of a Tribunal in the communicating its concerns to applicants orally at hearing often serious diminishes an applicant's ability to know how and what to respond to. In this regard, it is common for applicants and/or legal advisers to not understand the nature and scope of the Tribunal's concerns. Such problems have been partially

overcome by the current requirement for the Tribunals to articulate such matters in writing pre and/or post hearing.

18. Further, by requiring persons to respond to information provided orally only, even if additional time is granted, the applicant will often be forced to rely largely on memory as to the nature of the concerns. This approach does not adequately account for people whose capacity to remember is negatively impacted on by factors such as psychological and other medical conditions; stress; age; and lack of education.

19. We note that the Bill proposes to confer very broad discretions on Tribunals in relation to the manner and time for response to adverse information. We have considered whether the deficiencies outlined above could be overcome by the provision of a mechanism to guide the exercise of this discretion. However, we submit that such amendments would not adequately cure these defects given that they do not address the fundamental problem created the Tribunals being empowered to avoid the provision of adverse information in writing and preventing applicants from being able to make considered, comprehensive written responses.

20. Finally, we refer to our previous submissions to other Inquiries of this Committee mentioned in paragraph 5, and reiterate our concern that the erosion of basic procedural fairness safeguards in the consideration of, for example, refugee matters, can clearly result in serious errors in the Tribunal's decision-making. Put simply, serious mistakes in this area have can not run the real risk of Australia violating its international human rights treaty obligations, including our non-refoulement obligations, but of placing the rights and the lives of people at grave risk of serious, life-threatening harm.

D. Conclusion

21. The Bill fails in its objective of striking an acceptable balance between providing applicants with procedural fairness, while providing flexibility to the Tribunals. In our submission, the provisions of the Bill are incapable of achieving such a balance as they remove existing safeguards, most important of which is the requirement of the Tribunals to provide an applicant with written concerns and an opportunity to respond to these concerns, and permits the dictates of 'flexibility' to prevail over procedural fairness at the largely unfettered discretion of the Tribunal. This unacceptable in any legal jurisdiction, but is of particularly acute concern when the matters at stake involve protection of people from human rights abuse or family reunion with Australian relatives, as many cases at the Tribunals do.

22. In our submission, the Bill should not pass.

Refugee & Immigration Legal Centre Inc.
January 2007