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Reference: Migration Amendment (Review Provisions) Bill 2006

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 31 January 2007

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Bartlett, Crossin, Payne and Trood

Terms of reference for the inquiry:

To inquire into and report on: Migration Amendment (Review Provisions) Bill 2006

WITNESSES

Committee met at 9.04 am

CHAIR (Senator Payne)—The Senate Standing Committee on Legal and Constitutional Affairs is inquiring into the Migration Amendment (Review Provisions) Bill 2006. The bill was referred to the committee by the Senate on 7 December 2006 for report by 20 February 2007. The bill amends the Migration Act 1958 to allow the Migration Review Tribunal and Refugee Review Tribunal flexibility in how they accord procedural fairness to review applicants. The committee has received 15 submissions for this inquiry. All submissions have been authorised for publication and will be available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[9.06 am]

LENEHAN, Mr Craig Lindsay, Member, National Executive, Australian Lawyers for Human Rights

MURPHY, Mr Kerry, Member, Australian Lawyers for Human Rights

CHAIR—I welcome our first witnesses today, Mr Craig Lenehan and Mr Kerry Murphy, from Australian Lawyers for Human Rights. Australian Lawyers for Human Rights has lodged a submission with the committee which we have numbered nine. Do you need to make any amendments or alterations to that?

Mr Lenehan—We do not.

CHAIR—I invite you to make an opening statement and at the conclusion of that we will go to questions.

Mr Lenehan—I will keep this fairly short and then Mr Murphy has some points to add. I will elaborate a little bit on the capacity in which we appear. Mr Murphy is a solicitor with extensive expertise in migration law and we hope that his practical experience will be of real assistance to the committee as it considers this bill. I am, as I mentioned, a member of the national executive. I am also at the bar practising in public law and human rights law, including migration law. As I said, Mr Murphy will be identifying a number of practical problems that Australian Lawyers for Human Rights see with the bill. In the opening statement, I am simply going to focus on a couple of human rights concerns. Those concerns can be expressed fairly shortly.

In relation to the Refugee Review Tribunal, a point that we and other participants in the committee's submissions process so far have made is that this bill raises the real prospect of flawed decisions which then flow on to Australia's obligation to avoid refoulement. Refoulement is a concept that will be very familiar to the committee. In very brief terms, that situation puts Australia in potential violation of various international instruments. For example the International Covenant on Civil and Political Rights obliges Australia to take steps to prevent a real risk of torture, which is prohibited by article 7, and cruel or inhuman treatment, which is prohibited by article 10. If Australia returns a person to a country in which there is a real risk that they face that sort of treatment, that, in itself—and the Human Rights Committee is the relevant treaty body for the ICCPR—will put Australia in breach of its international obligations.

However, it is not merely the RRT area that raises human rights concerns. Those concerns can also be seen in relation to the MRT. For example, in relation to the grant or refusal of spouse visas, one can imagine that they potentially have a very significant effect on family unity. Australia has an obligation under article 17 of the ICCPR to prevent arbitrary interference with family. It also has an obligation under article 23 to protect the family as one of the fundamental units of society. By permitting flawed decision-making processes in that area, Australia is again potentially in breach of those important obligations.

More generally, as the Human Rights and Equal Opportunity Commission has observed—and I understand that they are coming to see you a little later this morning—there is the

obligation to grant a fair hearing. I do not need to add to the comments that HREOC has made apart from noting that ALHR endorses them and is similarly concerned that this bill raises the prospect of a violation of that obligation. I will now hand over to Mr Murphy who will identify some significant practical problems with the bill.

CHAIR—Thank you very much, Mr Lenehan.

Mr Murphy—There are just four points I would like to make. Firstly, I think it is important to recognise this bill is about making it easier for tribunals to refuse cases. That is a fact which has been hidden in the background: the legislation is trying to make it easier for the tribunals to refuse cases. I think we need to remember one of the points that His Honour Justice McHugh made in the SAAP case, the case that has had an influence on this legislation. At paragraph 58, His Honour said:

> The legislative object of dealing with visa applications and applications for review efficiently and quickly should not be interpreted to detract from the obligation to deal with them fairly.

I think that is a key point. The obsession with getting through the decisions quickly does not necessarily mean that the decisions are fairer. Curiously, in the second reading speech for the bill, there was a comment that the current law 'is creating serious operational difficulties for the tribunals', yet in none of the submissions that I have read from either the department or the tribunals has there been any evidence that this is the case or analysis of how this is the case. There is no analysis of why it is costing them more or why it is taking more time. Objectively it may be said, 'Well, yes, if you've got to write a letter, that may well take more time.' However, as I will indicate further on, the nature of this bill is such that it is probably going to take more time to make the decisions anyway.

The other caveat that I think is important was attached to the Administrative Review Council's letter, where the council noted:

> 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.

I think that just reinforces the point that His Honour Justice McHugh was making: the obsession with speed does not necessarily make the decisions fairer or better, legally.

Some comment has been made about whether there will be more or less litigation following this bill. As a practitioner in the area I would anticipate there is going to be more litigation. The High Court has given us guidance on how to interpret sections 424AA and 359AA and in the Full Court of the Federal Court, in SZEEU.

The proposed amendments create another whole series of tests that have to be assessed. In the course of the hearing, the tribunal member must now make an assessment: 'Does the applicant understand the importance of what I have said to the applicant? If the applicant doesn't then I have to give the applicant an opportunity to make further written submissions. Or do I the member have to go through the process of writing it out?' The member has to make this oral assessment in the course of the hearing. That in itself, I would submit, is going to lead to a whole series of further cases testing whether the member has correctly made that assessment. There seem to be a subjective and an objective requirement inserted in the bill

itself, because the 'reasonableness to the applicant' is something that some applicants are going to comprehend better than others.

Currently, the situation is fairly clear. The member is obliged to put it in writing, which, it is our submission, is a simpler process. Secondly, on this point, in the SAAP case the member offered to provide a letter to the applicant—saying why they thought there were mistakes and things that they should comment on—but never did so. And that was a point that was taken up in the judgement. So the member said, 'We're running out of time, we have to move on, sorry; I'll send you a letter to talk about this stuff,' and never did so. So, even in the factual situation of SAAP, the proposed amendments would not make any difference because the member would still have had to send the letter and would still have been in breach of jurisdictional error.

The issues of interpreters and torture and trauma cases have been addressed in other submissions, but I think it is critical to remember that, with the RRT and the MRT indicating that a significant number of cases require interpreters, that puts a higher onus on interpreters to be accurate. At a recent liaison committee meeting on 24 November 2006, the MRT and the RRT conceded there were problems with interpreters in various language groups. So how are they going to be satisfied that, yes, the interpreter has been given the full, correct information and they are satisfied that everything is okay?

A recent decision of the Federal Magistrates Court, SZGWM, [2006] FMCA 1161, highlighted a problem with the interpreter. They spoke the totally wrong dialect. It was not even clear in the hearing that it was the wrong dialect. The member interpreted the incomprehensible answers of the applicant as just not being credible when in fact it was the wrong dialect of Chinese that was the problem. That did not become clear until someone listened to the whole proceedings further down the track.

If the letter is sent out in writing, the issues become clearer than if you are in the middle of the hearing and you say: 'I think the problem with your case is A, B and C. Do you understand that?' In the context of the middle of the hearing, which can sometimes become quite heated and can be rushed, applicants can, not surprisingly, become stressed. The tribunal concedes that in its own credibility guidelines. And then the applicant is expected to answer straightaway. I know of a number of hearings where the tribunal, for example, has said, 'Previously, you said X', when in fact the applicant never said any such thing. It was only because I was at the hearing that I was able to bring this matter up and ask, 'Where did they say that?' The tribunal has then come back and said, 'Sorry, our mistake.' If I had not been there and the applicant had not been astute enough to say, 'I never said that,' then the hearing would have been skewed in relation to credibility.

That sort of example is not common, nor is it uncommon, if you take my meaning. These sorts of things can happen in hearings that are commonly orally driven. In those circumstances, it is not uncommon for mistakes to occur. I would have thought that it would be in the tribunal's interests to be clear on what the key points are if it thinks a case should be refused. If it is put in writing it gives the tribunal member more opportunity to analyse it more carefully. I think the current provisions create that scenario.

Another situation I have seen is where there is ambiguity. The tribunal may ask two or three questions in the one question and the applicant only answers one of those three questions. This is not an uncommon problem I have heard in hearings. It is probably due to trying to speed up the process, but it does tend to create problems. If the applicant only answers question No. 2 and has not addressed question No. 1, then the tribunal may say: 'We gave you the opportunity. You never said anything.' Again, I think it is creating problems for the tribunal itself.

In SAAP the tribunal indicated: 'We've run out of time here. Sorry, we have to move on. We'll send you a letter.' As I said, they never did. In a Victorian case that went to the Federal Court—unfortunately, I could not find the reference this morning; I am happy to send it to the committee later—the member clearly stated at the start: 'Sorry, we've only got an hour and a half or two hours for this hearing. We have to get a move on. We have to finish by four o'clock.' The last witness had a very short period of time in which to give critical evidence in relation to the applicant. The whole thing was pushed through very quickly. Again, that is an indication of obsession with speed rather than dealing with a matter fairly and quickly.

The department in its submission referred to the passport case, for want of a better description, SZEWL. In my experience, over 10 years, I have never had that factual situation. I think it would be a fairly rare situation, and it could have easily been dealt with by the tribunal simply sending a letter asking for the passport. The current legislation provides a mechanism for doing so.

Statistically, looking at the number of cases overturned on appeal, the annual report of the tribunal says that 15 per cent of the MRT cases are overturned and eight per cent of RRT cases are overturned. It also notes that 51 per cent of departmental decisions at the MRT are overturned, so one in every two of the department's decisions is overturned by the MRT. Yet in the department's submission, at paragraph 30, it basically asked why the tribunal members, who are in the same position as the department, should have to do more than department officers for their interviews and processes. Maybe it is because 50 per cent of the department's decisions in the MRT are being overturned. Obviously the department's processes are seriously lacking if they get it wrong 50 per cent of the time in the MRT.

In the department's submission, paragraph 14 talks about rights representation. There is no rights representation. Legal representatives or agents at hearings are there by leave of the tribunal. Sometimes members are quite open to giving you opportunities to make submissions, but I have had cases where I have been told, 'I'm not inviting you to make any submissions'—basically, 'Sit there and be quiet.'

CHAIR—Were you told by the tribunal member that you were not entitled to make any submissions?

Mr Murphy—Yes. I asked whether I could make a few comments and was told, 'I'm not inviting you to make any submissions,' or words to that effect. In another hearing I pointed out to the tribunal member that they were interrupting the interpreter before the interpreter had actually finished interpreting, which I thought was probably not a good idea. When I pointed this out, I was told, 'This is my tribunal; I will run it my way,' or words to that effect.

I am not saying that that is typical of the tribunal members, but the emphasis on trying to get the cases through quicker is going to encourage an attitude which the Administrative Review Council cautions is a risk. Where the members have contractual obligations to get through a high number of cases every year in order to have their contracts renewed, the emphasis is going to be more on getting through the cases quickly.

The final point I would like to make on this relates to a quote from the Monash University Castan legal centre submission. At page 14 of their submission they refer to Lord Millett, where His Lordship made the comment: '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.' I think His Lordship's point, as well as His Honour Justice McHugh's point, as said in the Administrative Review Council's point, all go against the tenor of this current legislation, which is not necessarily going to make the decisions fairer or more just, but is an attempt to make them quicker. That is one of the main concerns for the Australian Lawyers for Human Rights.

CHAIR—Mr Murphy, in your experience, what is the average length of a hearing that you would attend with a client?

Mr Murphy—At the RRT, it would probably be between two and three hours and at the MRT it would be between 1½ and two hours.

CHAIR—When we are talking about putting potentially complex, adverse information to an applicant, in your experience, how does that play out in such a hearing? Are those hearings longer? Is it something that you are used to? Is that part of the normal process?

Mr Murphy—I am used to it, because I estimate that I have appeared in maybe 250 or 300 hearings over the years. In my experience, applicants are not used to it, particularly if they come from a culture which is not traditionally adversarial in a debating type scenario—

CHAIR—In the context of our legal system, as we understand an adversarial process?

Mr Murphy—Exactly. If they are illiterate or only semi-literate, they tend to be quite overawed by the prospect of having to present their own arguments and respond to their case.

CHAIR—As terrifying as a Senate committee inquiry!

Mr Murphy—Yes, indeed. I think that that can create its own difficulties. There are very good members and there are bad members. I am not going to comment on the quality of tribunal members. Some of them are good and some of them are bad. Even the good members can find it difficult with clients who are totally terrified in the hearing process. We had one case, for example, where the client had been so traumatised that, when the fire alarm went off, he just jumped under the table and started screaming. I had another case where, at the handing down process, I was so concerned about the client that I wanted to take him home. He went home and then attempted suicide, which is quite a concern. The Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, STARTTS, have noted a number of cases of clients who have been quite traumatised after RRT hearings, not because of the member but, by having to go back through their torture and trauma experiences, because they are retraumatised in the course of the hearing. I hope I answered your question.

CHAIR—I am just trying to get a feel for your experience. As Mr Lenehan said, we should take advantage of it while you are here. I must say that the department, in their submissions,

seem pretty relaxed about the way this will play out. In fact, they do not think it will present lawyers and migration agents with any new or unique difficulties in properly representing their clients, which leads me to ask whether you or any other practitioner you know in the area was consulted as part of the process of development of the bill as to whether it would present you with any new or unique difficulties.

Mr Murphy—No, we certainly were not consulted. The first I heard of the bill was that an email was going around with an attachment of the Law Council's submission, which I saw. The next step I heard about in relation to it was when the bill was presented and the committee proceedings started. I am not sure whether there were formal meetings with the Migration Institute and so on.

CHAIR—We will pursue that with the department.

Mr Lenehan—Another point arising out of the part of the submission that I think you are looking at—that is, the department's submission, in paragraphs 12 through to 18—is that it assumes that many people before the tribunals are going to be represented.

CHAIR—I was going to ask about that.

Mr Lenehan—As we all know, there are many unrepresented people. In part, that reflects the absence of a legal aid funding scheme. So the assumptions that seem to be being made in the department's submission are not, in our view, warranted.

CHAIR—That, and I guess the fact that, in theory at least, the structure and processes of the tribunals are meant to operate such that legal representation is not necessary per se.

Mr Lenehan—Yes, which this bill may affect, I think it is fair to say.

Senator BARTLETT—Obviously you have some concerns with the bill. Do you think changes actually need to be made to the act; do you think issues have arisen that would make it desirable to change the act a bit?

Mr Murphy—There are probably a number of areas in the act that could be reformed.

Senator BARTLETT—I think there are quite a few actually, but in terms of what this is trying to address?

Mr Murphy—In terms of this particular section, there may be areas where it could be improved. For example, I take the point that if documents are submitted to the department as part of the whole protection process then in the current regime the tribunal would have to submit those documents back and say, 'Please comment on these documents.' Arguably, if the applicant does have copies of those documents then maybe in that context quite a strict regime seems to have been set up. But that is more to do with adjustments to the procedural fairness. Again, that may raise further questions in itself. One of the attractions of the current regime is that, whilst it is very strict, it is simple to understand in many ways; whereas the proposed amendments are going to create a whole series of other issues that need to be addressed in the course of the hearing and potentially raise further questions for courts to determine further down the track.

Mr Lenehan—More broadly, if there is a concern about the volume of applications before the tribunals, ALHR and other people in various committee hearings have made the point that

there is a need for improvement in primary decision making, which is a point that Mr Murphy has made. If you are talking about possible legislative amendment then we and others have pointed out a number of times that the narrow definitions of Australia's protection obligations in the act are, in our view, leading to people making what are classified as unmeritorious applications, but they are people seeking to invoke international obligations that Australia has seriously undertaken.

Senator BARTLETT—It seems to me in very broadbrush, non-lawyer terms that the intent is to reduce some of the red tape involved and give flexibility, and of course flexibility works both ways. Is there a general need to reduce some of that red tape, or do you think it is somewhat inconvenient but at least simple to understand and a necessary protection, on balance?

Mr Murphy—As an advocate, it makes it easier in representing a client to know that the tribunal has identified four issues that need to be addressed in writing and this is why the issues are important to the tribunal. That makes the advocate's job easier in terms of responding, and also to get clear instructions. It also makes it easier to assess whether a case has merit or not at a judicial review stage, because you can look back as to whether the tribunal did follow these particular steps. In that sense, it is easier on the advocate's position. I am not sure about the tribunal as I have not been in there, but I imagine they do not like the idea of having to do a lot of paperwork, such as sending out letters. But, at the same time, it is the tribunal's job to make these assessments. The importance of justice and fairness, as I have said, should not be overridden by the need for expedition and quickness in decision making.

Senator BARTLETT—The only other point you mentioned was how this could potentially open up another area of litigation as people run test cases. Broadly speaking, I suppose that can happen any time you change the act—or is that even more the case with this area surrounding procedural fairness, which, from my incomplete understanding, has been somewhat of a battleground for a while?

Mr Murphy—It has. Every time there is an amendment to the act, a new field is opened for potential judicial review. This act has been subject to considerable amendment over the years, as well as judicial interpretation. At the moment, given the decision in SAAP and full court in SZEEU, the legal position is relatively clear. My understanding, speaking with colleagues and barristers who are involved in this, is that a number of cases are settling earlier in the process because it is clear that they have not met these strict interpretive requirements.

Without that High Court and full court authority, it is going to get down to a lot more evidentiary requirements—getting transcripts, getting evidence in of what was said in a hearing; you are going to have to get evidence of experts in various language groups: was the interpreter saying the correct thing here and this sort of thing. These sorts of evidentiary issues are going to become bigger, which I think is going to increase the cost issues of the proceedings. This is hinted at in the department's own submission.

Senator CROSSIN—I spent a fair bit of time reading all of this stuff last night. I came to two conclusions, and I would like your view about them. One is this: it seemed to me that the workload of the MRT and the RRT is numerous and onerous. The other is that rather than conducting a review of how each of the tribunals operates, we are just going to simplify the

process and the applicant will become even more disadvantaged. I am wondering why there is no provision here to record any of the oral discussion or evidence that is placed before a tribunal member in a hearing.

Mr Murphy—I will take the last point first. All of the hearings are tape recorded and applicants can get copies of the recordings. However, it can take a considerable period of time to prepare an adequate transcript of a hearing. I think that is where the time comes in. In terms of the other points that you raised, there seems to be a mixing of various issues in the course of this bill. One of the issues identified is that, yes, there is a significant workload on tribunal members and that this would simplify it. But the question is: is this the appropriate way to simplify the workload of the tribunal?

Maybe the simpler way to do that is to increase the number of members of the tribunal or to increase the support staff of the tribunal to assist the tribunal members in preparing these cases, rather than saying, 'Right, let's just make it quicker and rush through these cases in this way.' I think that may be where the onus is. It is a procedural, internal issue for the tribunals to address. Obviously that would be a budgetary consideration for them, rather than trying to run a swathe through and say, 'Let's just split up these hearings and do it orally.'

Mr Lenehan—In purely practical terms, the requirement to go through the transcript of a hearing, as opposed to reading a notice which is written by the department, is going to add costs to the applicant. That picks up your point about further disadvantage and the fact that there is little, if any, legal aid available for people in this position. That is where we see the further disadvantage arising, I suppose.

Senator CROSSIN—As I understand this bill, instead of a tribunal member delivering to an applicant a view or a request in writing, I can now just have a conversation and give that to you orally. That will still be recorded. Is that correct?

Mr Murphy—That is correct.

Senator CROSSIN—Are we encouraging more oral conferences through this bill?

Mr Murphy—Not quite. I perceive the intention of the bill to be to encourage procedural fairness issues to be dealt with in an oral manner rather than in a written manner. The points that we have made are indicative of the risks that that raises. Rather than necessarily making the process more efficient, it may in fact make it less efficient in the longer term, in the bigger picture. If the intention is to make it easier for tribunal members to get through their workload, there are other ways of doing that rather than cutting off avenues of procedural fairness.

Senator CROSSIN—So we are not going to get into a situation where we might be arguing about who said what to whom or what the interpretation was?

Mr Murphy—Maybe about what the interpretation was. I think that is potentially going to be an issue—particularly where the tribunals have already conceded that in some language areas there are difficulties with competent interpreting. And it is always assuming that the tape recording works and that we have a copy of the tape. In my experience, that is not a problem in 95 per cent of the cases. But there are odd cases where the tape recording does not work. In that situation—admittedly this is a minority—it is going to be difficult to establish what

actually happened in the course of the hearing. That was one of the points made in SAAP: they did not have a transcript and they did not actually know.

Senator CROSSIN—When I read this last night, an analogy came to mind: courts are heavily stretched and there is not enough time to hear cases, so from now on every jury can sit for only three hours. It seemed like we were going to not support and review what the real problems are in not getting through these cases. We were just going to pretend we were making it easier, but when you really look at the fairness for the applicant, it can be quite unfair, seeing that the emphasis is going to be on oral and these are people who are dealing in a second, third or maybe even fourth language.

Mr Murphy—Yes. Also, it is different from the courts. This is an inquisitorial process whereas the court is an adversarial process. The tribunal's role is to obtain information and assess that information, which is different from the courts, where evidence is presented and the court assesses that. Given it is an inquisitorial role, then a written format—most of the proceedings are paperwork-driven as their honours say in SAAP. This is, I think, a disadvantage to put too much emphasis on the oral.

Senator CROSSIN—With your statistics of 51 per cent of the department decisions overturned by the MRT, we have a problem at base No. 1, don't we?

Mr Murphy—I think so. The tribunal, in its own annual report, notes that there may be certain reasons why a significantly large number of cases are overturned on appeal, such as, for example, spouse cases. I understand that the set-aside rate is 68 per cent, and the note by the tribunal in its annual report, at table 4.8, says that maybe that is because better evidence is presented to the tribunal.

That may well be the case but, in my experience, it is also the case that case officers are leaping to illogical conclusions in their decision-making process, which can be corrected through proper procedural fairness methods on review. Maybe that is also part of the reason why there is such a high set-aside rate.

Senator CROSSIN—This bill essentially focuses the changes at the end point rather than looking at what is happening right at the very beginning.

Senator TROOD—Perhaps you could begin by giving me a bit of assistance on procedures, particularly in relation to representation. You have said—and I understand the rules—that there is no right of representation and yet you have mentioned your own experience of opportunities to make representations when you have been there with clients. There seems to be an inconsistency here. Could you clarify how that occurs, please.

Mr Murphy—The act provides that there is no right of representation in the tribunal. However, the tribunal's practices are such that, as a rule, tribunal members accept advisers to come along to hearings, though the tribunal's own information and documentation that it produces indicate that the role of the adviser is a very limited role and in no way akin to tribunals such as the Administrative Appeals Tribunal, where the advocate's role is quite strong. In these tribunals my role is commonly as a note taker—I write down everything that happens—and occasionally I make a comment because I think something has been misunderstood or that there is a mistake that needs to be corrected. At the end of the hearing

the tribunal may give you an opportunity to make comments if it thinks it is worth while or if members of the tribunal want you to.

In my experience, though, the current practice, given the structure of 424A and 359A, is that it may be in the applicant's interest not to say very much at all at the end, because it may be that you think there are four points that are important to the tribunal but in fact, of the four, only two are really important and the tribunal has another two points it is worried about. So, as an advocate, it is of more use to respond to the things that really are of concern to the tribunal, which they can send you in a letter, rather than what you think may be of concern to the tribunal, having sat through the hearing. The advantage of the current process is that it makes it very clear what the important issues are. There is no process in the Migration Review Tribunal and the Refugee Review Tribunal similar to, say, in the Administrative Appeals Tribunal, where you try to ascertain the issues at an early stage of the proceedings. There are telephone conferences and early conferences to say, 'What are the issues in this case? Is this a point? Is this a problem? This is a problem'—narrowing the issues in the case. That does not happen in these cases at all. Commonly you go into a hearing not knowing the attitude of the tribunal towards a particular case, because the tribunal can take a totally different interpretation of the issues from that which the department does. So if they have given you a notice beforehand and said, 'These are the four things of concern to us,' and you have responded to it, it can shorten the hearing. But that does not happen very often.

Senator TROOD—So, under the rules, there is no requirement to try to clarify the points of concern?

Mr Murphy—No, there is none.

Senator TROOD—Are you saying that it is really a matter of the individual preferences of members of the tribunals as to whether or not to allow representation and the extent to which that occurs?

Mr Murphy—No, I do not think it goes that far. The general attitude of the tribunal is that it is content for advocates to be there. Where it gets down to individual members' preferences is to how much of a role an advocate will play in the hearing.

Senator TROOD—Under the proposed changes, the member is obliged to draw the applicant's attention to the things upon which the member intends to rely—isn't that right?

Mr Murphy—That is correct.

Senator TROOD—So you would have a clarification of the issues at the end, wouldn't you?

Mr Murphy—Yes, you could. Also, in the course of—

Senator TROOD—Not just 'could' but the rules now require a member to say, 'These are the 15, two, five'—or whatever it is—'issues upon which I propose to allow or disallow your review.'

Mr Murphy—My understanding is that the amendment as proposed would give the tribunal member the option to do that orally, to do it in writing, or to do both. Assuming that they did it orally towards the end of the hearing, it may be that as an advocate you would like to tell the client that if he is going to respond to that to remember the four points he has

already made previously. In the course of the hearing you cannot really do that. You cannot say, 'Can I just have a chat to my client about this?'

Senator TROOD—Once the issue has been clarified—there are three, for example—you have the right under these new rules, as I understand them, to say, 'We want an adjournment while we consider the implications of all that.' The tribunal is obliged to give you that adjournment.

Mr Lenehan—The tribunal is obliged to consider giving you that; they are not obliged to give you the adjournment.

Mr Murphy—If they consider it is reasonable.

Mr Lenehan—Yes, if they consider that the applicant reasonably needs additional time to comment on or respond to the information. That in itself is the provision which, as Mr Murphy has said, is likely to potentially lead to some litigation. It is an additional discretion; it is something new. In our view it will end up in the courts.

Senator TROOD—Let us assume that the proceedings continue and they are concluded. The tribunal is then obliged to provide in writing, is it not, the issues upon which it relies? So, eventually, there is a statement of result, a conclusion. Is that right?

Mr Murphy—The tribunal must provide its reasons in writing.

Senator TROOD—Are they generally lengthy, are they in individual point or sentence form, or are they closer to the manner of a judgement?

Mr Murphy—In my experience the RRT decisions are longer than the MRT decisions. The MRT decisions tend to follow a shorter format, mainly because a lot of the issues in MRT are simpler to identify—do you meet this visa criteria; yes or no? Some of them are just a tick in the box. The partner visa cases, for example, are going to be longer than whether someone should get a bridging visa, maybe. So the RRT decisions tend to be longer, in my experience. Some of them might be 10, 20, 30 or 40 pages long whereas the MRT decisions tend to be three or four, maybe 10, pages.

Senator TROOD—My understanding is that this piece of legislation tries to obviate this problem: there is a requirement and a consequent delay in that once the proceedings are concluded the written statement has to be sent to the applicant after which they can then respond yet again to the proceedings before the matter is actually concluded. Therein lies a considerable procedural delay in resolving these issues. Is that your understanding? That is the procedure at the moment?

Mr Murphy—That is the procedure. The MRT is not under any legislative requirement to make decisions within a period of time, like the RRT, which has a 90-day provision in which to make the decision. So there is potentially a greater onus on the RRT because it has its 90-day requirement. But there are very strict periods of time by which you have to reply. It is not as if we are looking at months here; we are talking about 14 days or 28 days. It is not a protracted time period. If there is no response within that time then the tribunal can move to a decision. The tribunal is already empowered to make a decision if there is no response.

Senator TROOD—Like you, I am often inclined to attribute uncharitable motivations to the department.

CHAIR—I do not think you should characterise Mr Murphy that way, Senator Trood. We can characterise ourselves that way, but it is unfair to do it to the witnesses!

Senator TROOD—Perhaps I am being overgenerous in putting his view. He did say this is about refusing cases. However, it does seem to me that there is an issue here that needs attention. The consequence of the common law and the case law now is that it requires a very literal following of the act. That has created something of a monster, frankly, which this legislation appears to me to be trying to avoid by simplifying the processes, giving rights of appeal—there is still a process of appeal, of course, after the decision has been made—giving the right to reply and being cautious about the issues with regard to oral evidence, et cetera. I acknowledge the point you make about the difficulties of people whose first language is not English; that is always a problem with this issue. But there seems to be an issue here which this legislation is trying to get around.

Mr Murphy—I accept that there are procedural issues in terms of the tribunal needing to go through extra steps to complete its legislative requirements but I am not sure that this is the means to resolve that. I think there are administrative means where the tribunal could resolve that through an increased number of members—maybe decreasing the number of decisions a member has to make in a year to make it more realistic; increasing the administrative and support staff to assist members to do these sorts of things. I think there are ways within the tribunal to deal with this process rather than cutting it off in this abrupt way.

Senator TROOD—Is the implication of that observation that the arrangement proposed in the bill would be more acceptable if there were to be more staff and infrastructure to support the activities of the tribunal or are you in principle opposed to these reforms or changes?

Mr Murphy—In principle we do not think these changes are necessary because we think the current regime has set out the situation clearly, but I think that there should be an increase in the tribunal's ability to perform its duties in terms of its staff and internal mechanisms.

CHAIR—Mr Murphy, if you had to choose which of your clients should be dealt with in the context of this bill by being required to proceed in the oral environment, as it were, which of them might be given the opportunity of getting written reasons—how would you go about making that choice?

Mr Murphy—I would be more inclined to pick the better educated clients to do it orally and the less educated clients to do it in writing.

CHAIR—How do you think the tribunal might chose? How might they exercise this discretion, because I do not think there is much guidance about the use of the discretion—

Mr Murphy—There is no guidance.

CHAIR—as far as I can tell on the reading of the bill.

Mr Murphy—There is no guidance in the bill at all, and the Administrative Review Council recommends there should be in its letter that the department annexed to its earlier correspondence. I think it will get down to the individual member—individual members will make the decision on how they have to get through it. Factors such as 'How many decisions do I have to get through by the end of the financial year?' may come into it.

Senator TROOD—Will that be met with a practice load, guidance to members or something of that order?

Mr Murphy—It could be.

Senator TROOD—Would that be a solution to the problem?

CHAIR—I wonder whether that would be a basis for a review process, whether you start putting together practice notes or the code of procedure, I think we are going to have, aren't we?

Mr Murphy—The tribunal already has documents as to guidance in terms of credibility guidelines and other issues. In my experience, they have not yet been subject to any form of judicial review because they are merely guidance, so they are not directing the tribunal how to do things.

CHAIR—No. But once there is an exercise of discretion of this nature that becomes a slightly different situation.

Senator TROOD—It is interesting that, if the code of conduct has presumably been around for quite a period of time, nobody has thought to litigate it.

Mr Murphy—This is the code of conduct for the tribunal—the section 424A and 359A is the code for the tribunal whereas the department's code is somewhat different.

CHAIR—Yes, we have dealt with that before.

Senator CROSSIN—I have flicked through the annual report of the MRT and the RRT. I notice there are 73 part-time members and 16 full-time—I think that excludes the senior and legal officers of which there are only about nine. It does not actually tell me in the part-time section whether that means the 73 people are working one day or four days a week for the tribunal. In your experience, would you know?

Mr Murphy—It varies considerably. A number of the members are on other tribunals—state or Commonwealth—so I think it depends entirely on the tribunal saying 'We need you to do this case' and appointing them accordingly. I am not privy to that sort of process.

Senator CROSSIN—So they might dedicate one day a week or even four hours a week?

Mr Murphy—More likely a day.

CHAIR—If there were a situation where a chance to respond to adverse information was only given in the oral context at the hearing, and then a decision was made after that, and down the road such a matter ended up before the courts, the only examinable information for the court would be to listen to the three hours or two hours of the tape, wouldn't it?

Mr Murphy—It would.

CHAIR—There could be a lot of interpreting.

Mr Murphy—Exactly. You would probably need someone—

CHAIR—Another interpreter to interpret the interpreting in the courts.

Mr Murphy—Yes, which is why I think at the judicial end of the processing it will be more work for the courts.

CHAIR—I think we had better talk to the interpreter services too. There being no further questions, Mr Murphy and Mr Lenehan, thank you very much for appearing. It is nice to see you in your new environment, Mr Lenehan. We will be in touch if we need any further information in relation to this inquiry.

[9.58 am]

INNES, Mr Graeme, Human Rights Commissioner, Human Rights and Equal Opportunity Commission

LESNIE, Ms Vanessa Nicole, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission

NEWTON, Ms Alexandra Jane, Lawyer, Human Rights and Equal Opportunity Commission

CHAIR—We welcome witnesses from the Human Rights and Equal Opportunity Commission. HREOC has lodged a submission with the committee, which has been numbered No. 5. Do you need to make any amendments or alterations to that submission?

Mr Innes—We have made some minor typographical amendments, and we sent the amended copy to the inquiry yesterday.

CHAIR—Thank you very much for that; it is very helpful. I now ask you to make an opening statement and we will go to questions at the end of that.

Mr Innes—Thank you for the opportunity to appear on behalf of the Human Rights and Equal Opportunity Commission to give evidence to this inquiry. As you would be aware from our submission, it is our view that this bill puts efficiency above fairness and justice and should not be passed. The changes may or may not improve the efficiency of the tribunal process; however, it is more than likely that they will result in an unfair process for determining refugee and migration claims. An unfair process breaches the right to a fair hearing. But, worst of all, it has the potential to lead to incorrect decisions and the refoulement of asylum seekers. When such decisions can mean the difference between life and death, no amount of efficiency justifies a defective process.

The bill may not lead to efficiency because it opens up new avenues of legal challenge. Giving oral reasons and responses may mean that the judicial review process drags out—for example, when disputes arise about what information was put to the applicant or how much the applicant understood. As was previously discussed, in reality that would mean returning to the transcript after having the transcript prepared but could then mean returning to the original tape recording if there were doubts about the correctness of the transcript.

Even if the bill does improve efficiency, it is likely to create an unfair process. In particular, the bill's reliance on oral communication in migration and refugee cases is unfair. This is because there is a grave danger that an applicant may not fully understand the meaning or significance of what they are being told or of what they are responding to. Even where an applicant does understand the case against them, the changes may mean that they may not have the chance to fully or adequately put their case before the tribunal. Language and cultural barriers can significantly impact on oral communication. Interpreters are used in 90 per cent of hearings in these tribunals—an unusually high percentage of interpreters in any tribunal in which I have had experience. Accordingly, misunderstandings, incorrect translations and conflicts of interest are not uncommon.

Many applicants—around one-third, I believe—are unrepresented, and under the changes such applicants might not have the chance to seek advice from a lawyer or migration agent before responding to the tribunal. Also, a large number of applicants in the RRT are victims of torture and trauma. Common symptoms they suffer from include severe anxiety and memory and concentration problems. The bill may disadvantage these people as they may be less able to understand or respond to information provided orally. Legal proceedings can be a stressful and intimidating experience for many people. This is especially so for applicants fleeing state sanctioned violence, for whom the outcome of their case may have life-and-death implications. The requirement to respond orally may act as an additional stressor and may impair an applicant's ability to best represent their case.

The bill is unfair because there is no requirement to put the full case against them to an applicant. The changes only require that information which has not been put to the department previously be conveyed to the applicant orally. Contrary to the rules of natural justice, this means that an applicant may not have the chance to comment on information which forms the basis of an adverse decision against them.

The commission is also concerned that the bill gives no guidance as to how the tribunal's discretion to grant extra time to an applicant to respond should be exercised. Given that the terms of the discretion are very broad, it may be difficult to ensure that it is applied consistently between different tribunal members and applicants' cases. This may lead to unfairness, as applicants in similar circumstances may be treated differently. Further, it is our view that an unfair process breaches the right to a fair hearing. Under article 14.1 of the International Covenant on Civil and Political Rights, all persons have a right to a fair hearing. By creating a potentially unfair process, the bill may breach this right. The content of this right is flexible, but the requirements are in proportion to the consequences of a decision. The consequences of migration and refugee matters are potentially very serious. Accordingly, it makes sense that a high standard must be met in these cases. Specifically, the commission submits that the right to a fair trial requires the tribunal to give an applicant full opportunity to challenge the information before it. Requiring an applicant to respond orally to adverse information may not be affording them this opportunity.

By creating a procedure for determining migration claims that is potentially inadequate and unfair, an unacceptable risk of refoulement is created because incorrect decisions are more likely to be made. Such refoulement will have consequences of the highest significance for the individual involved. It will also place Australia in breach of its obligations under the refugees convention as well as the ICCPR—the International Covenant on Civil and Political Rights—the Convention on the Rights of the Child and the torture convention.

The bill is likely to be particularly detrimental to children, who are usually the least equipped to represent their own interests in a hearing. There is no requirement under the bill or the Migration Act for children to be assisted or represented at a hearing. The commission are concerned that this places children in an extremely vulnerable position. We submit that it is possible that the bill will contravene Australia's obligations under the Convention on the Rights of the Child. It is therefore our recommendation that this bill should not be passed. It creates an unfair process which is likely to breach applicants' rights to a fair hearing and lead to the refoulement of asylum seekers. The bill may give tribunals greater flexibility but may

not improve their efficiency. However, even if it does, efficiency is not justified if it comes at the expense of applicants' human rights. We urge the committee to recommend that this bill not be passed.

CHAIR—Thank you. Mr Innes, Ms Lesnie or Ms Newton, do you wish to add anything at this point?

Ms Newton—I have a copy of the opening statement for the committee.

CHAIR—Thank you very much; we will take that tabled document. Thank you for your submission. As always, the submission of the Human Rights and Equal Opportunity Commission is very helpful to the committee. One of the issues you raise in paragraph 37 in particular is the question of transparency and accountability and the potential for the diminution of both of those. It seems to me that in the process of talking to the tribunals over time and talking with the department they have been at pains to say, 'We try to be transparent and accountable in our processes.' But you seem to think that these amendments have the potential to reduce that. I wonder if you would comment further on that.

Mr Innes—I am sure that both the department and the tribunals make that effort. I do not impute any lesser motive than that. The accountability is diminished by these provisions because of the lack of availability of written details about the adverse considerations that the member of the tribunal makes. I can speak as a member not of either of these tribunals but of two or three Commonwealth and two or three state tribunals for five or 10 years before I was appointed to this role. Having to put reasons in writing is an annoying but very important discipline as part of the life of a member of a tribunal. It is much easier once you have a grasp of a process to orally explain the issues that are in your mind affecting your decision. It is harder, because the work has to be tighter, to put it in writing and certainly takes more time. But it provides a clear setting out of the issues so that an applicant to the tribunal can respond to those issues.

The commission are in no way opposed to making these processes more efficient. We have, at first hand, seen the impact on immigration detainees of lengthy delays and we are aware of the impact on people in the community of lengthy delays in these tribunals. But it is the commission's view that these proposals may not make the tribunals' work more efficient and will seriously impact on their fairness. We think there are other ways to address the issue.

Senator TROOD—Thank you; it was a very helpful submission. You obviously do not like the proposals—

Mr Innes—That is correct.

Senator TROOD—and encourage us to propose that they not be passed. Is there any way they could be retrieved? Are there things that one could do? In relation to, for example, the matter of the wide nature of the discretion which you mentioned, would there be some virtue in trying to make that more specific—trying to set up some criteria, some conditions or something of that kind—or would you think that, generally speaking, not a discretion that should be given in the first place?

Mr Innes—We would, but we recognise the fact that such proposals can always be improved in a number of ways and setting out some criteria for the discretion would certainly

be an improvement to these proposals. I do not think that in our submission we have given consideration to what those criteria might be. In fact, it might be difficult to do that, but I think reducing the breadth of the discretion would certainly achieve more consistency across tribunal members and cases. There are almost 100 members of RRT. I think it was referred to earlier this morning. I am not sure of the membership of the Migration Review Tribunal. Consistency across memberships and tribunals is something which all tribunals strive towards and they are more or less successful. I am trying to recall if we said anything further on other ways to improve the—

Senator TROOD—You do not specifically mention any more in your submission about that point.

Mr Innes—We did do some—

Ms Newton—Yes, we have considered other ways. Obviously, the commission's position is that we are not in support of this bill but, in looking at other ways that efficiency may be improved, we have considered the possibility of circumstances of applicants, for example, where they are from an uneducated background where they may not have access to assistance to respond to the commission's reasons in writing—in which case, the current regime may impose a burden. So one other alternative that we have considered is the potential to give applicants an alternative as to whether they would prefer the adverse information to be provided by the tribunal orally or in writing. Our position is that in either circumstance the applicant really does need to have adequate time to go away and consider that information in order to formulate it and come back with a considered response to the tribunal.

Senator TROOD—That would be one other option, but do you not consider that the proposed arrangement in this bill where a member of the tribunal could give time for adequate consideration gives enough protection for that need?

Mr Innes—No, and there is no information before us as to how that decision might be made. I would not like to speculate on what factors might be in the tribunal member's mind when they made that decision because there is nothing in the bill that sets that out.

Senator TROOD—There seems to be a great deal of inconsistency in the extent to which representation takes place. That is a critical issue, it would seem to me. Can you provide us with any clarity or information about your own knowledge of the matter of representation?

Mr Innes—Our understanding is that representation before the tribunals has declined over the past few years. I would have thought that the main reason for that was less availability of legal aid. My colleague has the figures, but I think about 33 per cent of applicants in these tribunals are not represented. As Mr Murphy said, representation is not by right but by leave of the tribunal. In general in such tribunals representation is allowed, but the fact that it is not there by right means that the capacity of the representative to participate can differ and can be limited by members of the tribunal.

Senator TROOD—That seems to be what Mr Murphy was saying: that there are different practices in different circumstances—it is inconsistent and not reliable et cetera.

Ms Newton—From the RRT's annual report, building on what the commissioner has said on decreasing representation in the tribunals, currently 37 per cent of applicants in the RRT

are unrepresented and 33 per cent in the MRT are unrepresented. That figure has increased, as the commissioner has said, over the past five years. Back in 2002-2003, it was 20 per cent, building to 23 per cent in 2003-2004 and 31 per cent in 2004-2005. There definitely does seem to be a trend towards decreasing representation of applicants.

Mr Innes—I think it is important to put those figures in the context of these tribunals. These are unusual tribunals. These are tribunals where people are appearing who are not residents of Australia and who may well not be accustomed to Australian cultural and legal practices. These tribunals are not like the Social Security Appeals Tribunal or the Consumer, Trader and Tenancy Tribunal, both of which I have worked at, where, whilst people may not be experts, they have some general appreciation of the way our tribunal system works. The other factor is that 90 per cent of people in these tribunals require interpreters. These are very unusual tribunals, and it is very important to put any issue regarding these tribunals in that context.

Senator TROOD—I think that is a very important point. Would it facilitate the practices that are proposed in this bill if there were a requirement that there be representation, or at least if the prohibition against representation were removed so that it is more generally to be encouraged?

Mr Innes—There is no prohibition against representation; there is no right to representation. I am not trying to nitpick, but that is an important distinction, I think.

Senator TROOD—Would it facilitate the practices, then, if there were to be a right to representation?

Mr Innes—A right to representation is one thing but availability, if it relates to cost, is another. I am guessing because we just do not know, but I am not sure that a right to representation would change the figures if legal aid is not available to people. It is all very well for a person seeking refugee status in Australia to have a right to be represented in a tribunal, but if they do not have the money and there is not an organisation funded to provide that then it is not going to happen whether or not there is a right.

Senator TROOD—I can see that point. I cannot see the department being very enthusiastic, either, about removing or changing their rules in relation to that.

Ms Newton—On that point: if representation were to be increased that would obviously improve the processes of the tribunals, but in addition the point needs to be made that they are ultimately inquisitorial and not adversarial proceedings, which, as the previous witnesses outlined, means that the role of a legal or migration representative in these proceedings is, out of necessity, often quite limited. That has to be borne in mind when considering the nature of the proceedings and how applicants can most—

Senator TROOD—It is an inherently difficult set of circumstances to deal with, isn't it?

Ms Newton—Yes, certainly.

Mr Innes—It is. These are very difficult decisions to make. If I can interpose a personal comment: I have been a member of I think six different tribunals over the last decade. I chose not to apply for either of these tribunals because of the degree of difficulty of the decisions that are made by these tribunals and the impact that those decisions have on people's lives. I

just did not feel that I could regularly—day in, day out—make those sorts of decisions. This is a particularly difficult pair of tribunals to work on.

Senator CROSSIN—I want to ask some questions about the opportunity to review. The applicants having access to a tape of proceedings and having the opportunity to review what has been said before they are required to respond to any adverse information is, I assume, if they get access to a record of proceedings either in a taped form or by transcript. Is that correct?

Mr Innes—I think access is normally provided via tape these days. Is that correct?

Ms Newton—Yes. I understand that at present applicants are able to request the tape recording of proceedings. Whether they choose to request it or not is up to them.

Senator CROSSIN—But, if they want a transcript, they have to pay for it; is that correct?

Mr Innes—That is correct.

Senator CROSSIN—When we talk about removing this opportunity, what opportunity is that? Is it the right to request the tape?

Mr Innes—No, I do not think that is what is being proposed. At the moment the tribunal is required to provide its adverse findings in writing. These amendments mean that the tribunal member will have the choice of whether they provide their adverse findings in writing or orally.

Senator CROSSIN—So, if they decide to provide it orally, it will be on a tape.

Mr Innes—If they provide it orally it will be in front of the applicant at the time of the hearing and the tape of those oral findings will be available. If they decide to provide it in writing, as I understand it, nothing will have changed from what occurs today.

Senator CROSSIN—So, what if I am an applicant and I get adverse information and a tribunal member says to me, 'I'm only going to give it to you orally.' I hear that, I listen to it, but if I want a week or 10 days to think about what that means for me, I will only have a tape. Is that right?

Mr Innes—That is right, if you want to review what was said, which is something that I would think you would want to do—this is a pretty important decision affecting your life. Some of us are probably pretty good at taking notes and writing things down, but this is a circumstance which is affecting the rest of your life and where that life will take place, and is potentially sending you back to a situation that you regard as pretty scary, pretty horrific—because people do not seek asylum lightly, in the main. So there is a fair bit of pressure on you and the expectation, if the reasons are provided orally, is that you will either take notes or that you will get a copy of the tape at some point, to be able to listen to it again.

Senator CROSSIN—I suppose for me that is the kind of crux of where I am having trouble coming to grips with the whole fairness of this. I think we would all probably have been in a situation where you can have the same conversation with a number of people many times and nobody ever relays every part of that accurately, whereas something in writing is consistent. So it is the inconsistency of the oral discussion or findings that I find impacts on the credibility of the department's claim that this is somehow fair.

Mr Innes—I could not put it much more clearly than that. But there is another layer that you need to add, which is that in nine out of 10 of the cases you are hearing in your second language, you are hearing it through an interpreter, so you are not hearing it in your first language. So not only do you have all of those problems with taking that information in, which you or I might have, but it is not in your first language. Add that to the list and you start to really appreciate the seriousness of this problem.

Senator CROSSIN—I want to go to the issue of the children being disadvantaged. Is it the case that sometimes there are children who would go before a tribunal by themselves?

Mr Innes—Yes.

Senator CROSSIN—What range of ages are we talking about here?

Mr Innes—I do not have figures on children seeking asylum, but there is no restriction on the ages of children seeking asylum. Mary Crock prepared a report which was launched last year on children seeking asylum alone. There may be some useful data in that. But there has been a range of children who have come to Australia who for various reasons have been separated from their parents or whose parents are no longer alive.

Senator CROSSIN—So if we were trying to influence the government's view about this legislation at all then one of the options may well be that for children, or even senior people—I was going to say pensioners, but that is probably not an adequate term—

Mr Innes—They are not pensioners—not in Australia.

Senator CROSSIN—I guess I am thinking of people who might be quite old trying to seek asylum here. One of the things the committee might try to do is say that in that instance everything must be in writing and no oral evidence is relied on.

Mr Innes—It is the commission's view that children—people under 18—are the most vulnerable of this very vulnerable group. Whilst, again, we are not at all supportive of this proposal, if this proposal were to go forward but provide that for anyone under 18 the adverse findings always be provided in writing, the commission would certainly support that.

Ms Lesnie—Perhaps we could add to that that children be represented. If this bill were to pass and there were special provisions to do with children, I think there would be three factors that you would add: (1) that reasons always be in writing; (2) that children be represented; and (3) that there be extra time to respond to those reasons in writing.

Senator CROSSIN—You would have heard me ask some questions of the previous witness here about the fact that we seem to be tweaking and making changes at the end point to make the system more efficient. I cannot see anything in the bill before me that suggests that this is going to provide better outcomes for applicants. It is just going to make it easier for members of the tribunal to cope with the workload or the whole system to try to get through some key performance indicators quicker. I am wondering if, in your experience, there are some comments you might want to make about the efficiencies of the tribunals. How many people are part time? Perhaps there should be more full-time staff or more staff. Should they have a legislative requirement like the RRT to try to complete a case in so many days? What can we do about the beginning of this process so that it is fair or efficient right the way through?

Mr Innes—There are a number of things that we can do. The worst problem faced by asylum seekers is that many of them are in immigration detention. So the first thing that we could do is make immigration detention non-mandatory. That would be the first and most positive step that the government could take to remove the current pressure on the general welfare and mental health of asylum seekers.

We have not, by any means, done an in-depth study of these tribunals, but the RRT has a mandatory 90-day requirement for provision of its findings. I think the last report showed that the average was 97 days. So it is not meeting its mandatory requirement. That suggests to me that there is a resourcing problem in the tribunal. I would think that this process could be made more efficient not by passing this bill but by providing some more resources to the process.

As we have said in our submission, we are not persuaded that this bill will make the process more efficient. We think it will create more potential for argument at the further end of the process, because there will be more applications for review due to the lack of written findings.

Senator BARTLETT—I think you outlined most of the issues pretty well, but the one thing that I want to explore is whether you think any changes are needed around the area that this bill seeks to address. I am not talking about the whole act.

Mr Innes—I am not sure that there is much more that I can add to what we have already said. As I say, I would start with the mandatory nature of detention and work on from there. I think I have outlined the sorts of changes that the commission would view as ways of making the process more efficient.

The commission is very supportive of the government's intent to make the process more efficient because we see the impact that it has on the people involved. The commission's recent report on immigration detention reinforces the damage to people's general welfare and mental health from the length and indeterminate nature of detention. This is true, to a lesser degree, of people in the community. Just putting aside the benefit to government of a more efficient process—and all of us are supportive of that—from the point of view of the welfare of asylum seekers we are very supportive of making the process more efficient but we do not think this bill will do that and in the process it will make the process unfair.

Senator BARTLETT—I think you have covered the areas well enough for me. Thank you.

CHAIR—Thank you very much for attending today. Thank you for the commission's submission to the committee. We will be in contact if we need any further information in relation to this bill.

[10.34 am]

GIBSON, Mr John Aubrey, President, Refugee Council of Australia

MANNE, Mr David Thomas, Coordinator and Principal Solicitor, Refugee and Immigration Legal Centre Inc.

Evidence was taken via teleconference—

CHAIR—Welcome. Thank you both for appearing before us today via teleconference. The Refugee and Immigration Legal Centre has today provided a submission to the committee, which will be submission No. 16. Mr Manne, I am assuming that you do not need to make any amendments or alterations to that.

Mr Manne—Not at this point. I apologise for the delay in providing the submission.

CHAIR—That is okay. I also welcome by teleconference Mr John Gibson from the Refugee Council of Australia. The Refugee Council of Australia has lodged a submission with the committee which we have numbered 10. Do you need to make any amendments or alterations to that submission?

Mr Gibson—I do not.

CHAIR—I would like you both to make brief opening statements and then we will go to questions from members of the committee.

Mr Gibson—I would like to say a number of things to begin. I will make them as brief as I can. I am very grateful for the opportunity and, of course, we acknowledge the role that your committee plays, particularly in scrutinising this sort of legislation. I do not know whether the committee has had the opportunity to read the observations of Justice Weinberg in the authority and the full court judgement of SZEEU. In that there are some very important observations about the workings of the current system, to which the amendments are directed. I do not know whether I have time to read into *Hansard* some of what was said.

CHAIR—It depends on the length of the judgement.

Mr Gibson—One of the most important things that His Honour said, and which has been adopted in a recent decision of NBKT, is that one of the significant problems and reasons for the difficulty with the legislation in 424A and 359A is that the legislator has chosen to use the term 'information'. I will quote: 'when searching for a global expression designed to trigger the obligations imposed under 424A'. He also makes the point that the problems have arisen directly from an attempt to prescriptively codify and prescribe exhaustively the requirements of natural justice without having given adequate attention to the need to maintain some flexibility. I do not mean flexibility in process but flexibility in applying the rules of natural justice. They are, I would submit with respect, very important contextual observations in which this amendment should be seen.

There are three or four major points that we would like to make. First, in relation to the ability of the tribunal to, as it were, comply with its obligations orally, the Law Council, with which we agree, make the point that the proposed scheme would lack the precision that the present system has. The Castan Centre observed that framing questions with the rigour,

discipline and reflection in the course of the decision-making process, which the written process requires, is—in our respectful submission—indispensable.

You will note that two of the amendments involve a further explanation orally to explain the consequences of why something is part of the reason for a decision, but more pertinently it adds an additional layer of discretion, which may well be something that is judicially reviewable, which is the discretionary decision the tribunal will make as to whether to grant additional time for response and to adjourn the review. The words 'to adjourn the review' are also a novel concept. We say that that particular element again provides a highly unnecessary and potentially impractical working. All the other parties consistently have made note of the understanding and the difficulties of unrepresented, vulnerable people in understanding the process as it now is and that the proposed scheme will simply compound that.

I would like to add, in relation to judicial review consequences, that if it is intended that this will reduce the recourse to litigation—and it is conceded that obviously a lot of highly technical cases have come before the courts—the judicial review consequences of the proposed scheme, if adopted, will essentially compound the problem. It will require a massive amount of time in pouring over transcripts to see whether in fact information has been properly described and conveyed. The Castan Centre make the point about the complexity of the analysis that will be involved in looking at orally provided information. There is no substitute, in our submission, for rational, considered responses in writing to information that is provided in writing. That is the first aspect.

Secondly, in relation to the question of removing the distinction between information provided at first instance to the department and to the tribunal, the point I would make is that the jurisprudence has clearly developed an important aspect of natural justice which requires the tribunal under the current scheme to bring to the attention of applicants where there are inconsistencies—something said before that is not said later or something that is added to. That is properly a part of natural justice. Those sorts of inferences are ones on which cases inevitably turn. The elimination of that distinction will, in my view, interfere with what is a proper aspect of the rules of natural justice. It is quite clear that people may have no record of, or be unaware of, the significance of documents or even not be aware of what they said two or three years ago. For that reason, too, we would say that distinction should not be abolished.

In conclusion, perhaps one of the most pertinent points that is consistently made in a number of the submissions is that the proposed amendments will produce a confused and uncertain scheme, with inconsistent practices between members of tribunals. I would respectfully suggest that nothing will be surer, individual tribunal members will adopt their own processes and practices and, essentially, that will lead to uncertainty and inconsistent application of the proposed scheme. My respectful recommendation is that the best outcome would be, as the judges to whom I refer effectively suggest, a return to the rules of natural justice and, failing that, to leave the scheme as it is. Many of the points have been worked out progressively by the courts and, currently, at least, as far as we know, we know what we are working with, despite some of the problems and the technicalities.

CHAIR—Mr Manne, do you have a brief opening statement?

Mr Manne—We thank the committee for the opportunity to give evidence in this inquiry and to, once again, make submissions to this committee in relation to matters that concern procedural fairness being afforded to applicants in the migration and refugee jurisdictions. By way of brief background, the Refugee and Immigration Legal Centre is a specialist legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia and has through predecessor organisations been doing so for over 18 years. In the last financial year we gave assistance to 3,126 people. Our clients are the very people who are the subject of this inquiry—that is, people who are, largely, from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and, in many respects, are often acutely disadvantaged in other ways. Much of our work also involves advice or full legal representations or review applicants at both the migration and refugee tribunals.

In essence, in our submissions we note 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 part or the whole of the reasons for assuming the departmental refusal. The provisions of the bill thus seek to further restrict the requirements of procedural fairness to be afforded applicants appearing before the tribunals.

Our submissions, in essence, are that the provisions of the bill in that context create the very real likelihood that the processes of tribunals will fail to adequately afford procedural fairness to all review applicants and, in turn, the processes may well be infected by unfairness. That is because the provisions of the bill clearly diminish crucial safeguards which operate to provide some protection to applicants before tribunals. The safeguards provide the applicant with written indications of matters of concern to tribunals which are sufficiently serious to potentially result in the refusal of the application and, generally, although not always, we would provide the applicant with a clear, meaningful and adequate opportunity to respond to such matters.

We would also add to that that the context is crucial in relation to this bill, the context being that the bill is likely to operate with particular harshness and unfairness on many of those who confront the tribunals, given that in our experience—and it is certainly also borne out by statistics of the tribunals—many of those who confront the tribunals are already acutely disadvantaged by factors beyond their control, which include matters such as cultural, linguistic or educational background or experiences of past torture and trauma.

In our submission, there should never be an erosion of adequate procedural fairness safeguards in any legal jurisdiction in Australia. But in this area it is of particularly acute concern where erosions do occur given that the matters at stake not only involve applicants who may well start from a point of disadvantage in terms of being able to properly respond to concerns but in addition involve things that matter most in general in people's lives—that is, protection from human rights abuse or family reunion with Australian relatives.

Ultimately, our overall submission is that the bill, in purporting to strike an acceptable balance between providing applicants with procedural fairness and providing flexibility to tribunals, fails to do so given that the bill is ultimately incapable of achieving such a balance as it removes existing safeguards—most importantly, the requirement of written particulars to an applicant for response—and ultimately permits the dictates of flexibility to prevail over

procedural fairness. Also, it is largely at the unfettered discretion of the tribunal. In our submission, that is an unacceptable erosion of the right to procedural fairness which could well place people's lives at grave risk and, indeed, deny people family reunion with Australian relatives.

Senator CROSSIN—I thank you both for your efforts in putting your views together for us. I wonder if we might have a look at the end result of the application of this legislation. It has been put to us this morning that in fact this will increase the amount of litigation or court action due to either the uncertainty of information that people have been given or, I suppose, the further potential for that information to be misinterpreted. Do you have a view about that?

Mr Gibson—I agree wholeheartedly. There seems to be no question. I was a member of the tribunal for four years. I do recognise the difficulty in communication and certainly in precision in interpreting, even assuming that you have a grade IV interpreter and a whole range of very positive conditions. The need to interpret and convey with precision particulars which themselves have to be framed with some rigour will lead, unquestionably, in my view, to an uncertain outcome. If challenges are to be made in the courts, it will require, probably invariably, people looking at transcripts and the ability to frame arguments about the lack of correspondence between the information that was supplied and the part of the decision to which reference is made. On both of those issues, I could not agree more. I have read, as part of what I do, probably in the region of 400 to 500 of these 424A judgements and I agree wholeheartedly with the argument that it is a product of a highly technical regime. I just do not think it will be improved. It will be essentially compounded by the proposed changes.

Mr Manne—We would submit that this bill, if passed, would create the very real likelihood of increased litigation and also, in that context, far more work for the courts at the very point at which government policy and indeed the implementation of it has been directed at the very opposite—that is, a reduction in workloads for the court and indeed a streamlining of that process; I think that is the phrase that has often been used. It would run completely counter to government policy and indeed implementation of practices. Why? In our view, it is principally for the following reasons. Firstly, what the bill proposes would almost certainly give rise to the increased likelihood of the tribunal lacking particularity and clarity in relation to matters put to applicants for response. Secondly, it would result in applicants being more likely to fail to appreciate or be able to respond fully to concerns. Thirdly, it would be more likely to leave the ultimate legal status of the decision, if I could say that—whether or not, for example, it was infected by jurisdictional error—far more uncertain. That is almost certainly, in our experience with assisting applicants and indeed in communicating with barristers, counsel who advise on these matters, more likely to result in people seeking judicial review in an area which is already plagued by complexity.

What, in essence, all of this would amount to is not refining and clarifying issues so that there was some form of certainty and clarity as to why someone was refused and whether or not they were able to provide responses in relation to potential reasons for that refusal. Rather, it would create more confusion as to the very way in which a decision was made and whether or not it was ultimately infected by jurisdictional error. Put another way, the current system, whereby written particulars are required, has, in our submission, a far greater capacity—as we have seen—to provide greater clarity to applicants who are refused in relation to whether or

not they have prospects of success at the courts. And indeed, if they do appeal it has also, in our experience, provided counsel, on both sides I should say, and the courts with far greater clarity as to the issues at stake so that the interests of justice are served better.

Senator CROSSIN—Thank you. I have one other question. I think you raised earlier the possibility—in fact, the greater probability—of inconsistency with this bill being applied by different members of the tribunal. The witnesses we have heard from have touched on this but not to any degree. I wonder if you have some further points or arguments you want to make about that. I am assuming your comments go to the discretion now that members will have as to whether it is oral or written and the lack of any strict or clear guidelines as to how that might be applied consistently across members.

Mr Gibson—Those two points are particularly important. Firstly, there was the point that you just made about the inconsistency between members—those who will follow the oral path and those who will follow the written path. Then there will be inconsistency as to when and in what way the tribunal considers a request for time and a decision to adjourn the review to provide that. There is, as I said, not only a potential for inconsistency and inconsistent application but more pertinently it may well raise as a ground of jurisdictional error, a failure, notwithstanding it is couched as the tribunal considers the applicant reasonably needs additional time. You can get into all sorts of arguments about that. So that raises the point I made previously about another layer, as it were, of process which, in our view, seems to run directly counter to the prescription or the requirements of fair, just, economical and quick.

This again leads to the fundamental point which we want to make which has been taken up elsewhere in submissions—that is, that the way to solve the problem and the technicality would be essentially to return to the tried and true principles of natural justice which not only are couched in terms of fairness and not just causal relevance but essentially are so well known and effectively require the tribunal to bring to the attention of an applicant something which is critical to the ultimate decision on which the decision is likely to turn. If this were to happen, the number of judicial review applications on procedural fairness grounds would be significantly reduced. I do not think there is any question about that. I think Justice Weinberg's comments and observations at SZEEU are directly in point.

Mr Manne—Our organisation assists applicants on a very regular basis at the tribunal. It appears before the tribunal and indeed assists in all aspects of tribunal processes. One of the themes that we have experienced in this work over the years is inconsistency. It is a jurisdiction which is plagued by inconsistency of approach on just about all substantive matters. Just to give you some graphic examples, we have had like cases—that is, cases involving applicants from the same country with a similar profile in all material respects in relation to claims of having a well-founded persecution—that have received different decisions from tribunal members, one being an approval and one being a refusal; in other words, completely different outcomes on similar facts can and are reached at times.

Another very important inconsistency that we have experienced over the years is the attitude of members towards applicants on matters such as the effects of torture and trauma, the effects of diminished ability to communicate evidence given the cultural background or completely different approaches taken by members on how to use an interpreter and the

competency of interpretation. These are the types of matters that ultimately bear heavily on questions of procedural fairness and ultimately on the outcome.

I would also note for the record that one of the problems in relation to inconsistency over time has been that members are not bound by the rules of evidence, nor are they bound by precedence in the sense of having to follow precedent from other cases. What you have is a jurisdiction which is riddled with problems of inconsistency on all of those matters. To come up with provisions now which are only likely to compound that problem is, in our view, unacceptable.

Senator BARTLETT—The RILC submission lists a few submissions you have given to this committee previously and to other reviews specifically on the area of procedural fairness, and we know you read numerous voluminous court judgements on these sorts of areas.

It seems that you have been bashing away at this particular area of procedural fairness and things around the privative clause for a very long time, through a number of different pieces of legislation, and each time there are a few court cases that pan out a particular direction and have another go at amending the legislation and you guys give us submissions saying, 'This is going to lead to a whole lot more court cases.' Is there actually a problem there that needs to be addressed? The department's submission states that some judges are saying:

… it is a highly technical application of the law in circumstances where no practical injustice can be found—

but decisions still need to be remitted. It quotes Justice Allsop in particular, in the SZEWL case in the Federal Court last year. Is that actually a problem?

Mr Gibson—Yes. As I said at the beginning, Senator Bartlett, I do not think there is any question that the system as it is—and certainly, in our view, as it will be compounded—is redolent with technical distinction. Justice Weinberg made the point that 'distinctions of the type, which are highly refined and which require the tribunal to engage in extraordinarily sophisticated reasoning, do not seem to me to serve any worthwhile purpose'. I do not think anybody could put it any better. But, as His Honour points out, and as other judges have agreed, it comes back to the fact that the fulcrum of the scheme is the term 'information', and 'information', as their honours say, just is not a term that can apply across the board. The short answer to the conundrum, the problem, is essentially to do away with the section 424A scheme and, as I said, return to the tried and true and well-established principles of natural justice.

I think all senators will remember that from 1994 onwards there was no ground of procedural fairness or natural justice because part 8 of the old Migration Act prevented that being raised as a ground for challenging tribunal decisions. There was a slight window of opportunity after the judgement in Miah back in 2001. And then, as you would all remember, with the privative clause coming into effect in October 2001, there were virtually no grounds that were justiciable until 4 February 2003 when the decision in the Plaintiff S157 case was handed down. It is since that time that all the section 424A litigation has developed. Lawyers being lawyers, obviously fine points have been taken, and judges quite appropriately—because they think that natural justice is an important principle to adhere to—have quite consistently developed, in some cases, different approaches to the same issue. But the real

problem stems from its highly technical nature, and the rigidity essentially stems from the framework and the content. And the proposals, in our considered view, simply will not make it better; they will make it worse.

Mr Manne—It is our submission that comments expressing concerns that the current system is too technical or lacks flexibility—that seems to be one of the common justifications for this bill—are a bit of a red herring. The first question that must be asked is: will the requirements of procedural fairness be met or not and what is the best and most workable approach under the current system? It is clearly always a question of balance and a question of degree. But, going back to the basic point here, all the debate about the system at the moment revolves around whether or not applicants in this jurisdiction ought to be afforded clear, written expression of the principal concerns which could form the basis, wholly or partially, of a refusal, and an opportunity to respond to those. It is a bit of a red herring to call that technical.

Just going back to first principles here, procedural fairness is not about the outcome; it is about ensuring that the proper steps are taken to reach the decision. It seems to us, as we say in our submission, that allegations of inflexibility or technicality are really quarrelling with what are essentially basic, simple and acceptable steps—in fact, required steps—for ensuring that this fundamental procedural fairness is met. That is our submission on that matter.

Senator BARTLETT—I guess the legislation is a way of trying to alleviate concerns. As you would know, the legislation before us specifically states that, in applying these divisions:

... the Tribunal must act in a way that is fair and just.

I guess that refers to when they use their discretion about doing things orally or when or not to have an adjournment. Is that the area where we are just going to get another flurry of court cases about whether or not it has been fair or just on each single exercise of those discretions?

Mr Gibson—It is quite conceivable. As you know, the various amendments include the attempt—at 422B—to make the division the exhaustive repository of the rules of natural justice, which is yet to be tested in the High Court. The question of what is intended and what actually results, of course, can be two different things. But, when you start talking about acting in a fair and just way, then it may well be that a court would say, 'Well, that really does invoke matters of natural justice and a fair hearing.' If on poring over the transcript or listening to the tape it does not seem that the tribunal was effectively doing that, even when it ostensibly considered an adjournment, then I would agree wholeheartedly that that could be a platform for a challenge. It is for that reason, and for all the others, that we say that the problems will be compounded.

CHAIR—Thank you, and thank you for your submissions on the legislation.

[11.08 am]

BYERS, Ms Michaela, Private capacity

CHAIR—Welcome. You have lodged a submission with the committee, which we have numbered 2. Do you need to make any amendments or alterations to that submission?

Ms Byers—No, I do not.

CHAIR—Would you like to make a brief opening statement for the committee and then we will go to questions.

Ms Byers—I notice all the esteemed organisations that have appeared before me. I am here as a private individual. I am a solicitor and migration agent. I have been a solicitor since 1991 and a registered migration agent since 1993. I appear in the tribunals on about a fortnightly basis. This month I have appeared before the tribunals eight times with clients. The tribunals ask for a hearing with a review applicant when they have formed a negative view on the papers before them. So the basis for bringing the review applicant before the tribunal is that there has already been a negative finding on the papers. Advisers like me are not allowed to speak, so it is an inquisitorial hearing in which the applicant has to present their own evidence and there are a lot of difficulties with that. Some people from different cultural backgrounds would like to please the member and agree with them on whatever they can as they think that will somehow enhance the decision. That does happen in their own countries, but it does not work here and they do not understand that. I try to make my clients understand. Most of my clients are Chinese and I speak Chinese, but that still does not seem to enhance their understanding of the hearing itself, the role of the member and what can come from how they present their own case.

My main concern, in my submission, is when it comes to the point where the review applicant is asked whether they want to comment on the information that the tribunal finds may be the reason or part of the reason for an adverse decision or whether they want to adjourn. I do not believe most review applicants would understand that. Most review applicants want a quick decision and they want to please the member, and I believe they would not, in most cases, ask for an adjournment to seek independent advice and assistance in answering the concerns of the tribunal.

The role of the interpreter is also crucial. I have a number of interpreters whom I have made complaints about to the tribunal who are banned from being the interpreter for my clients. So the standard of the interpreter is crucial in interpreting the importance of the issues that the tribunal member is trying to get through to the review applicant. In a period of 13 years I think I have only ever had two clients who did not need an interpreter, so we would have to assume there is always going to be an interpreter there to give that meaning, that understanding, of how crucial that one part of a two- or three-hour hearing is for the rights of the review applicant.

I can see that that would be a highly litigated point—transcripts, the ability of the interpreter, whether the review applicant understood the importance of what was being put to them and the importance of the decision that they needed to make. I believe that is a legal decision that does require independent advice and assistance. I do not think this proposed amendment will in any way simplify, cure or make it any more flexible for the tribunal, and it

could lead to a new round of litigation in case law that requires the High Court to make a decision on section 424AA and its equivalent for the Migration Review Tribunal. Each time the High Court has made a decision—such as SAAP—I see that the government has attempted to patchwork, circumvent that and supplement more legislation, which I think just makes the situation more complicated and overregulated.

CHAIR—Thank you very much, Ms Byers. You are right about your last observation. You should be on this end of that process.

Ms Byers—Yes, I have some views on that.

CHAIR—I think your perspective in your submission is very useful to the committee because it is pretty practical. Basically, this is what you deal with.

Ms Byers—Yes.

CHAIR—I am interested in the observations that you particularly make about interpreters. You say that you have banned interpreters from your clients—and I understand that; that is a unilateral action that you take—but what happens after you make a complaint about an interpreter? In fact, I would be interested for you to tell us the basis of the complaints that you make and what happens after that. Do those interpreters continue in the system, to the best of your knowledge?

Ms Byers—Yes, they do. I regularly see the ones that I have asked not to be allocated to my clients in the tribunals and the courts. Normally you have to put in a written complaint to the tribunal and they will investigate that complaint by asking the member who was at that hearing for their opinion. If the member agrees with me, they will then put on the system that that interpreter not be allocated to any of my clients in the future.

CHAIR—What about someone else's clients—

Ms Byers—Yes, I know. I have pointed out to them that I have seen those interpreters at the Federal Court in the tribunal still interpreting.

CHAIR—or potentially someone without any advising at all ending up with that interpreter assisting them in a hearing.

Ms Byers—That is right. Most review applicants, I find, are unrepresented, especially in the Refugee Review Tribunal.

CHAIR—We need to clarify the figures on that, but I am sure that it is at least 30 per cent, as far as I can ascertain from the discussions today. What is the basis of the complaints that you make? I do not expect you to go into specifics about individuals, but if you could go to the general basis of the complaints that you might make about an interpreter when you have had a bad experience on behalf of a client.

Ms Byers—They just did not know how to interpret the words of the review applicant. Some of them are very particular and very special but they are not rare, I would say, with the language that I was looking at particularly where there is a problem, which is Mandarin. They would be dealing on a daily basis with those claims in the Federal Court and the Tribunal, and they should understand that terminology even if they do not believe that religion.

CHAIR—I see the point you are making.

Senator TROOD—Are interpreters assigned by the tribunal to a case? Is that the story? It is not a question of you requesting to have a specifically nominated interpreter; an applicant requests an interpreter? Is that right?

Ms Byers—We are asked in the request for hearing information to provide the language and dialect. It is then up to the tribunal to allocate the interpreter.

CHAIR—We have some submissions which talk about the challenges of dealing with oral instructions, information and invitations, as they are cast in this legislation, and therefore interpreters. One of the observations in a couple of submissions is about the potential for conflicts of interest. I assume a potential conflict of interest is where, hypothetically, for example, a migration agent or a lawyer may be representing an individual who seeks asylum in Australia based on their adherence to Falun Gong and, if they are provided with an interpreter who does not support or proactively opposed the practise of Falun Gong, that would have the potential to create a conflict of interest.

Ms Byers—I have also had a problem where the review applicant was asked questions about Christianity and they could not be interpreted by the interpreter because the interpreter was not a Christian and just did not understand the terminology. So there are similar problems there on the basis of religion. It could be for the other convention grounds as well, but those are the most dire problems that I have had in the tribunal.

CHAIR—As I understand, the role of an agent or adviser is essentially a note-taking role during the hearing process because you do not have an appearance, as such; you are just there as an adviser.

Ms Byers—That is correct.

CHAIR—If these amendments are passed, the tribunal member may choose to ask your client, or the person for whom you are the representative, questions or provide the information or the invitation orally—that, is he exercises the discretion that will be provided in the bill. How do you understand the bill? Do you understand that the bill provides you, as an adviser, with an opportunity to intervene or participate in the proceedings if you think that your client is getting it wrong, does not understand or is having a problem with an interpreter?

Ms Byers—I do not find that there is any room for that at all in the bill. It is silent on the adviser or on seeking advice before making that decision. This is very frustrating as I have seen since the tribunal was established in 1993 that, each time the rights of the adviser to seek advice seems to be further taken away. I see this is going to cause even more restrictions on that. Some members like the advisers to contribute or they like to get explanations from the advisers as to why submissions were written in certain ways or why information was left out. Other members choose to totally ignore the advisor and, if the advisor even makes a little noise, they raise their arm to tell the advisor to be silent. I have had that treatment as well. They say, 'If you want to say anything, you can put it in submissions after the hearing.'

Going to this proposal, that tact would not be of much use at all if my client goes ahead and says they want to answer it. Sometimes, I even butt in; I go straight ahead anyway. I believe there would be a point at which my client may even argue with me that they want to answer it because they have been waiting so long and they want to have a quick decision—especially in the MRT, where spouse applicants can wait up to 18 months to have a hearing. They have

been waiting so long and they want to push the issue. They want to get their visa, get their family here or whatever. I can see that, in some situations, that would bring the review applicant into conflict with the adviser.

CHAIR—I want to get a better understanding from you, if I can, of the observations you make about the proposed sections 359A(4)(ba) and 424A(3)(ba). I have been re-reading the department's submission on this point and trying to understand it as well. I cannot wade through the observations on this point—and I am sure that is just me and not anyone else. As I understand it, it is about information provided in the original interview with the department. Is that correct?

Ms Byers—Yes, I believe that is so.

CHAIR—Do applicants receive a copy or a CD-ROM of the record of interview? For starters, is it taped?

Ms Byers—It is taped but no recording is ever provided to the applicant.

CHAIR—So an applicant is unable to obtain a copy of the record of interview of their meeting with DIC?

Ms Byers—That is correct. There is no recording provided after the interview and you cannot access it through a freedom-of-information application.

CHAIR—As I understand it, material exchanged at interview is excepted from the procedural fairness aspects of this bill.

Ms Byers—That is correct.

CHAIR—What amount of time can potentially elapse between the interview and when an applicant is before the tribunal?

Ms Byers—As I said, in spouse visa applications before the Migration Review Tribunal, it can be 12 to 18 months. In the case of asylum seekers, the tribunal hearing is usually quite quick because there is a requirement that it happen within a 90-day period, but some of my applicants have been to the tribunal four times. We have been to court and back, then refused, and to court and back. I have one client who was interviewed in 2002, and we are about to have a fourth hearing before the RRT.

CHAIR—So unless they have taken contemporaneous notes for themselves at the time of the interview, or they had an adviser with them who did that, then they do not have that information and it is excepted from the procedural fairness provisions by this bill?

Ms Byers—That is correct. Also, many spouse visa applicants are interviewed overseas. In those cases, the adviser is usually not present—they are in Australia with the sponsor—so there would be no notes at all in those situations.

CHAIR—Do you understand the bill as giving you or any other adviser the opportunity to make a representation to the tribunal if you think that, in the exercise of their discretion to invite the applicant to deal with these matters orally, they have made an error? Do you have any opportunity to make a case in relation to that?

Ms Byers—Again, it is at the discretion of the member, and I do not think there is anything in this bill that covers that point. Whether they will allow you two weeks to put submissions together about what happened at the hearing—

CHAIR—But if you are at the hearing and you think that is a fundamental problem—because your client is having problems with the interpreter or is stressed or upset or whatever the circumstances might be—you do not see the bill giving you an opportunity to say to the tribunal member, 'I really think we need to do this in written form'?

Ms Byers—No, I do not think the bill gives us that opportunity at all.

CHAIR—Do you see the bill as giving your clients an opportunity to seek a review of a decision to deal with matters orally?

Ms Byers—No, I do not see that it does that.

Senator CROSSIN—I want to go to an issue you have raised in your submission. You have probably been the first person today to allude to this, although it has probably been in the back of our minds. There are two things. One is the willingness of the applicant to please. I know exactly what you mean. People tend to either nod or agree. It is not so much that they say what they think people want to hear but in their politeness, in their courteous way they might keep nodding.

Ms Byers—It is very hard to say no.

Senator CROSSIN—Also, there is the willingness to try to fast-track this somehow—the pressure that might be on people to not take the time to think about what has been said to them but to respond straightaway, even though it is not in their best interests. Do you have experience with applicants now who want to jump in and say something and defend themselves before they have thought through what the implications of that might be?

Ms Byers—I am always receiving instructions to fast-track everything, and if I have an opportunity to give further submissions they always ask why I would want to do that. They do not understand how important it is that certain points are clarified and certain information provided. They often say, 'Don't bother doing that,' and I say, 'No; it's in your best interests that we do that.' It comes down to the fact that most review applicants do not understand the legal culture, the inquisitorial basis or the nature of the hearing itself. Most have not experienced anything like it before—other than my Chinese clients, who say that it was very similar to the Public Security Bureau interview they had when they were arrested by the police in China—so a lot will close up, be scared and be afraid to say no. As I said, some members have already formed a negative view—that is why we have the hearing—and they make quite clear what their negative view is. That also makes it quite difficult.

Senator CROSSIN—But at the moment they are required to put that in writing, aren't they?

Ms Byers—That is right. This proposal is trying to circumvent the High Court decision that made them put everything in writing. Some members were doing it before but some were not. That crystallises the situation. It is a matter of life and death for some review applicants, especially in the Refugee Review Tribunal. I think they deserve the common decency and

procedural fairness that, at that point, should be put in writing, and they should be able to seek independent advice or assistance, even if the review applicant does not really understand that.

Senator CROSSIN—You also gave us some examples about the way in which advisers can be treated inconsistently by members of the tribunal. It was raised with us this morning that whether or not to provide evidence in writing or orally is used inconsistently between members and also with an individual member—and the way to apply it to different cases. Is that a concern you would have with this legislation as well?

Ms Byers—Yes, I regularly attend a tribunal, so I know most of the members and whether it is going to be difficult before we even start with my clients, and I am able to advise them. As I said before, some were given section 424A letters in writing and some were not. Some were not even raising their concerns at the hearing, in putting their concerns to the applicant, so all of a sudden it was like an ambush with the decision—we would find that information being used, especially departmental information, interviews and airport interviews. There is no opportunity to take any notes or to have a taped copy of an interview. Expecting people to remember and understand what they said three years before and not refreshing their memory or putting the information to them is unjust.

Senator TROOD—Ms Byers, when you say that members have formed a negative view of the application, are you referring to a visa application that has been rejected or to a negative view in relation to an appeal from the original decision?

Ms Byers—It is the review application from the original decision. From all the information that has been put to the tribunal, the tribunal has formed a negative view and cannot find in favour of the applicant. That is one of the opening paragraphs of the tribunal's invitation letter to hearing. Before members have even laid eyes on the review applicant, they have already formed a negative view.

Senator TROOD—They have formed a view on the basis of the information—presumably the written material or the file et cetera—before them.

Ms Byers—That is correct.

Senator TROOD—You are saying that some members of the tribunal might provide a list of the kinds of concerns they have but that some will not?

Ms Byers—Yes.

Senator TROOD—Is it more generally the practice that members provide the matters which are exercising them or that they do not make that information available?

Ms Byers—It depends on the individual member.

Senator TROOD—You consistently make that point in relation to all of these practices, which of course is a matter of some concern. What is the tendency? Can you give the committee some sense of that? Is it more likely or more unlikely that a member would do that, or is the practice too inconsistent to make any sensible observation about it?

Ms Byers—It began by being inconsistent but now it appears that the members have become aware of the High Court decision in SAAP and the Federal Court decision in SZEEU. I think that was about an airport interview and information that was not provided in writing. The members seem to becoming more aware of that and are more in the practice of providing

in writing information which could be the reason or part of the reason for making an adverse decision. I am reviewing one client's decision today in which that has not been done. The member is one of the original members, who has been there since about 1993. He is not in the practice of giving out those letters in writing.

Senator TROOD—I have two observations or suggestions. Firstly, should the tribunal be required to provide preliminary indications of its view to review applicants? For instance, when you went into a hearing, you would know the kinds of issues that you were likely to face. They might not be the only issues but they would be the preliminary ones. Secondly, once a hearing had been concluded, should more time—say, 14 days or something like that—be allowed for further submissions to be presented? Do you think those suggestions would in some way resolve the procedural concerns that everybody seems to have about this?

Ms Byers—Yes. If the members were required to follow certain procedural steps, all in uniform, that would be fantastic. A lot of problems in dealing with the tribunal would be alleviated if the members were to follow procedural steps. Also, if the tribunal were to provide the review applicant with the information that they see as adverse, that would be a great improvement in the system.

Senator TROOD—Apart from my suggestions on how the system might work better, do you have particular views on how it could be improved and how those issues might be more fairly dealt with—apart from junking the whole system?

Ms Byers—That is my first suggestion.

Senator TROOD—I do not think we are going to do that.

Ms Byers—I understand that from today it is going to happen. I believe that there needs to be a clearer role for the adviser—not cut them out. Advisers can assist the tribunal not by performing exactly the same role as a lawyer—whereby the lawyer in a court of law presents the whole evidence—but by being able to interact more with the review applicants in answering the members' questions, especially when they know that there is a problem. For instance, an interpreter might have misunderstood a question. The adviser should be able to jump in and say: 'Let us reword that question,' or 'Ask it again because the answer is inconsistent,' or 'I know it is not correct from the information we have already given you.'

Some clients can spend an hour going down the wrong way in answering, or not understanding the tribunal member and getting themselves in knots. That then becomes an issue of credibility in that they just did not understand the question. Some of my clients have not even been able to recall the name of their daughter after they finished the hearing, they were so bamboozled. There should be more of a role for the adviser to assist the tribunal and the review applicant in keeping the review applicant on track in presenting their case so that there is not an issue of credibility.

As to being allowed to adjourn or speak to your client, when we ask some members for a break—mainly because, if the hearing has already taken three hours, you just need to go to the toilet—they will not allow the adviser and the review applicant to leave the room at the same time. Some members ask the review applicant to leave their mobile phone behind, believing we are going outside to give more information, coach or whatever. We should be able to speak to our clients in private, anyway, at the hearing. So even that comes down to the member's

discretion—whether they will let us adjourn for a toilet break or speak to the client because they are confused, upset or tired. Whatever it may be, we should at least be able to console our clients. The view of the tribunal is to cut the adviser out because they seem to think we are some sort of nuisance, and I do not believe that is the case at all.

Senator TROOD—Just as you have pointed to the inconsistencies in relation to the initial advice—and there seems to be a great deal of inconsistency, on the evidence we have heard today, about whether or not advisers may or may not speak, and you have affirmed that position—is there a general tendency on the part of members to permit interventions by advisers, or is the inclination more to restrict their role, given that there is not a right?

Ms Byers—The inclination is to restrict the role of the adviser during the hearing. Even if some of the support people interject or go 'ooh-ah' up the back when certain questions are asked, they ask them to leave. Some members will not even allow support people into the room.

Senator TROOD—There does seem to me to be a problem here, which numerous court cases have referred to. You have put it, I may suggest, somewhat pejoratively when you say they 'circumvent the rules'. One might also say that it is an attempt to address issues or a problem that has arisen and overcome an unintended consequence of the legislation. Some of the judgements that have been made in relation to these cases suggest that the court is bound to take this view, but it is probably not the intention of the legislation that the court needs to become so literal in interpretation of all of this written material. There is, after all, a right of appeal as a consequence of the decision.

Ms Byers—Yes, for most review applicants the right of appeal is to the Federal Magistrates Court. They do not like to exercise that because of the financial costs and because more time is involved. So, in the case, say, of a spouse visa, more people would go back and do another spouse visa, because that would be cheaper and quicker.

Senator TROOD—Isn't that true in relation to all court proceedings? People have choices as to whether or not they take them further.

Ms Byers—Yes, that is true.

Senator TROOD—I acknowledge the evidence that there is a unique set of circumstances in relation to the people we are dealing with, but it is our system of justice and our system of law, and people can make choices about these things.

Ms Byers—I often litigate these decisions but we should, if we can avoid using the taxpayers' money to litigate these matters, because most of the matters that I am involved in are remitted and eventually the review applicant gets their visa, so it just seems a roundabout way to get to the final migration outcome of a visa. Section 424A is simply a procedural fairness, natural justice, point. Even in our courts of law and other tribunals, if there is a reason to find against the applicant, you let them know what that reason is, and I believe in these situations that, as most of the applicants are non-English speaking persons, that should be done in writing. They are able then to seek independent advice and assistance on that.

Senator TROOD—I agree with you completely on that principle. I think it is absolutely fundamental to ideas of natural justice that people should be informed about issues that are

likely to adversely affect their circumstances. There can be nothing more profoundly important about the system. There are those requirements in this bill, but what you are saying is that orally is not enough.

Ms Byers—I do not believe so. Again, I believe there is too much discretion with the member and how they will approach that. I think it is more haphazard in delivering that procedural fairness and natural justice to the review applicant. They are put on the spot, normally through an interpreter because they are non-English speaking, to make a legal decision that they do not have the knowledge, the capability or at that point in time the understanding of how important that moment is. I do not see how it causes the tribunal any more difficulty to put that letter together, give us 14 days to reply and then make their decision. I think it is just common courtesy, to be honest.

CHAIR—Thank you very much for appearing today, Ms Byers. I think this is the first time we have met with you in the committee process. Thank you very much for your submission as well.

[11.43 am]

EYERS, Mr John, Acting Chief Lawyer, Department of Immigration and Citizenship

HADDAD, Ms Sobet, Principal Solicitor, Migration Review Tribunal and Refugee Review Tribunal

KARAS, Mr Steve, Principal Member, Migration Review Tribunal and Refugee Review Tribunal

LYNCH, Mr John, Registrar, Migration Review Tribunal and Refugee Review Tribunal

PARKER, Ms Vicki Louise, Assistant Secretary, Legal Framework Branch, Department of Immigration and Citizenship

SHORT, Mr Giles, Senior Member, Migration Review Tribunal and Refugee Review Tribunal

CHAIR—I welcome our next witnesses, from the Migration Review Tribunal, the Refugee Review Tribunal and the Department of Immigration and Citizenship, formerly known as the Department of Immigration and Multicultural Affairs when the bill was referred to the committee. Thank you all very much. The MRT and the RRT have lodged a submission with the committee, which we have numbered 12. The Department of Immigration and Citizenship has lodged a submission with the committee which is numbered 13. The Department of Immigration and Citizenship has also provided the committee with correspondence from the Administrative Review Council, which I believe is listed as submission No. 6. Do you need to make any amendments or alterations to those submissions?

Mr Eyers—No.

CHAIR—Before we begin, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions which ask for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question is one which must be made by a minister and should be accompanied by a statement which sets out the basis for such a claim. I also thank you very much—perhaps through you, Mr Eyers—for having an officer present in the room during the hearing this morning. It does assist the committee and we are grateful for it. I now invite you to make an opening statement.

Mr Karas—My colleagues and I appreciate the opportunity to appear today to assist with your inquiry into the Migration Amendment (Review Provisions) Bill 2006. As I indicated in my written submission, the tribunals consider that the proposed amendments will benefit applicants for review and enhance the ability of the Migration Review Tribunal and the Refugee Review Tribunal to meet their statutory obligations. In our experience, hearings are often the most effective place to identify and discuss the issues and information relevant to the review. Applicants are given notice of the hearings and have the opportunity to prepare for the

hearing by going through their copies of the documents and obtaining advice or assistance from their representative or from other sources. At the hearing, the applicant is entitled to be accompanied by a representative or another person and the tribunal will arrange for a qualified interpreter.

During the hearing, the tribunal must give the applicant an opportunity to give evidence and present arguments on the issues that are relevant to the review. In providing such an opportunity, the tribunal is required to ensure that the issues relevant to the review are discussed, whether or not these relate to information covered by section 359A or section 424A. There is, I believe, greater capacity to convey an understanding of the issues arising in the review and to convey the relative significance of the issues at a hearing than in writing. A member's questions at a hearing both draw out the applicant's case and convey to the applicant and representative the pivotal issues for determination and any concerns that the member may have with the applicant's claims.

The approach taken by the member takes into account factors such as the applicant's awareness of the reasons for the delegate's decision, whether the applicant has had access to copies of relevant documents and the extent to which the issues may have been addressed in written submissions provided by the applicant or his or her representative prior to the hearing. At the conclusion of a hearing, the tribunal normally asks the applicant and his or her representative whether there are any further matters that they wish to bring to the tribunal's attention. In many cases, a copy of the tape of the hearing is requested and a time frame is agreed for further material or written submissions to be provided to the tribunal. In any case, the tribunal must consider any further material that is received up until the tribunal's decision is communicated to the applicant.

Sections 359A and 424A operate to require the tribunals to invite comments in writing, even if the matters have been fully dealt with at hearing. In some cases, written invitations will continue to be appropriate for particular cases. In many cases, the necessarily detailed and lengthy nature of the letters does not, in my view, assist applicants. Many applicants, particularly unrepresented applicants, do not necessarily understand why they are being asked to comment further on matters covered at hearing or on matters that they do not consider are in dispute. As a result, much time, unnecessary duplication and anxiety may result from addressing each and every item raised by the letter and this may at times result in the applicant not focussing on the really critical issues.

These concerns are not just held by the tribunals. The failure at judicial review of tribunals' decisions has often been one of a procedural detail rather than substance. A number of judges have identified concerns with the operations of sections 359A and 424A, including Justice Weinberg in SZEEU and Justice Allsop in SZEWL. In many of these cases, reconsideration by the tribunal has not led to a different result for the applicant.

The tribunals are aware that concerns have been expressed to the committee about the operations of the tribunal and in relation to the amendments. May I say that the tribunals are committed to achieving ongoing improvements in the conduct of reviews and the quality of decision making and that members and staff perform their duties knowing that people's lives are significantly affected by our decisions and the manner in which we make them.

Over the last few years the tribunals have sought to increase awareness of the tribunals' operations, policies and procedures, including through consultations with stakeholders and by making much more information publicly available. Over the last couple of years, this has included the publication of the statements of expectations and intent exchanged with government, the *Member Code of Conduct*, the *Guide to Refugee Law in Australia*, principal member directions in relation to the conduct of reviews in the tribunals' case load and constitution policy, the *Guidance on Assessment of Credibility*, guidelines on children giving evidence, and the *Interpreter's Handbook*, a revised draft of which is currently out for consultation. These have been welcomed by stakeholders as more clearly articulating the approach that they can expect members to take in the conduct of reviews.

In conclusion, I would like to emphasise that the tribunals view the proposed amendments as positive improvements to the merits review process. We consider that applicants and their representatives would benefit from the amendments and that the tribunals would be able to more effectively and fairly discharge their statutory obligations to provide reviews that are fair, just, economical, informal and quick. My colleagues and I are happy to elaborate on these matters or answer any questions that the committee may have.

CHAIR—Thank you. Mr Eyers?

Mr Eyers—The Department of Immigration and Citizenship is grateful for the opportunity to appear before this committee to discuss and answer any questions that the committee may have about the Migration Amendment (Review Provisions) Bill 2006. As set out in our submission to the committee and in the supplementary material to the bill, the purpose of the amendments is to both provide review applicants with procedural fairness and give the tribunals flexibility in how they provide procedural fairness to clients. If I may, I would like to expand briefly on that simple statement. It is true that a motivation behind these amendments is to assist the tribunals to decide review applications more efficiently. However, it is equally true that there is no desire to reduce the ability of review applicants to know about and be able to meaningfully address material that may be adverse to their case.

We have reviewed the submissions that have been made to this committee that suggest that the amendments in this bill are designed to serve only the tribunals' administrative needs and that the amendments have the effect of reducing real procedural fairness for review applicants. We do not believe that this will be the case.

In brief, the amendments will allow the tribunals in appropriate circumstances to meet their procedural fairness obligations during hearings. If they do not do so, the tribunals will have to comply with those obligations in writing. In order to ensure that review applicants do not feel pressured into making a response, the tribunals are required to advise them that they may seek an extension of time to respond to or comment on the relevant information. We note that the tribunals will be required to adjourn the review where they consider that the review applicant reasonably needs an extension of time to respond or comment. In addition, the amendments will mean that tribunals will no longer be required to give to the review applicant, and seek their views on, material that the review applicant has already supplied to the department in the process leading to the decision under review.

This amendment will not apply to material that the review applicant supplied to the department orally—for example, during a departmental interview. This is because memories fade and the departmental officer's file notes of the interview may not have exactly recorded every nuance of what the review applicant said. Material supplied orally by the review applicant to the department will still need to be put to the review applicant and his or her comments sought if the material may be adverse to the review applicant's case. This amendment does not, as some submissions have suggested, deal with adverse information provided by a third party. It is information provided by the review applicants.

Lastly and significantly, the amendments will make explicit the requirement that the tribunals are required to meet their obligations in a way that is fair and just. This amendment is an explicit acknowledgement that review applicants must be treated fairly and justly in the conduct of reviews, including in relation to hearings and review applicants dealing with adverse information orally. We are happy to assist the committee further by answering any questions.

CHAIR—Thank you very much. Can I just get you to clarify something for me in relation to the operation of clause 359AA(b)(iv). I think you said with emphasis in your remarks that the review must be adjourned if the applicant seeks additional time to comment on or respond to the information given orally. Is that what you said?

Mr Eyers—That is correct.

CHAIR—But, when trying to read it all together, the clause says that the tribunal can orally give to the applicant clear particulars of any information that the tribunal considers would be the reason or part of the reason for affirming a decision. But, if the tribunal does so, the tribunal must ensure that, as far as is reasonably practicable, the applicant understands what the consequences are. Then it must orally invite the applicant to comment or respond and advise the applicant that they may seek additional time. Then, if the applicant seeks additional time to comment, they must adjourn the review if the tribunal considers that the applicant reasonably needs additional time. So, if the tribunal decides that the applicant does not need additional time, they do not have to adjourn the review—is that correct?

Mr Eyers—Yes, and that is what I said.

CHAIR—I thought your emphasis was on trying to persuade the committee that, in circumstances where the applicant sought additional time, a review had to be adjourned.

Mr Eyers—Yes, where they reasonably need an extension of time to respond.

CHAIR—So what is a reasonable need for an extension of time? How will the applicant know that?

Ms Parker—Can I intervene on this question. Basically, that provision on the reasonableness of the need is there in order to avoid any possible abuse by applicants seeking time when it is not reasonable. Obviously, it will depend on the circumstances of the case. Perhaps someone from the tribunal would like to intervene here. But if it is a fairly simple matter that can be addressed and seems to be able to be addressed fairly readily, it may not in fact be reasonable for the applicant to seek an adjournment. If it appears that the applicant is having some difficulty or it is clear that further information needs to be obtained then it would

not be reasonable not to allow the adjournment for the applicant to seek that further information if they do not have it to hand, as an example of how that provision would work.

CHAIR—I look forward to rereading that in the *Hansard* just to try to get my head around what you just said then. The point is that the applicant has no capacity to know what a 'reasonable need' is.

Mr Lynch—If during the course of a hearing the applicant indicates that he or she has evidence overseas that might establish without question a particular point at issue which has arisen during the hearing, the member would ordinarily say, 'Yes, I allow you three to four weeks to obtain evidence overseas,' assuming it is readily available and the applicant can simply have a relative mail it to the applicant. That happens currently. Where a member is faced with issues during a hearing which clearly require an adjournment if justice is to be done and the applicant's case is to be properly heard and made out, the member would adjourn the matter and permit an opportunity to obtain the evidence.

On the other hand, where an applicant is clearly buying time—and there are applicants before both tribunals who do lodge applications for review just to buy time in Australia—if the member makes that judgement based on the quality of the evidence that has been provided by the applicant—that is, perhaps, the lack of coherence or the inconsistencies and discrepancies in the applicant's evidence before the tribunal—the member may be disposed not to exercise that discretion. That is expressly provided for here. Members currently have that capacity in the course of conducting a fair hearing. That requirement to provide a fair hearing is closely supervised by the courts. Where it is clear that there has been a shell of a hearing or no meaningful hearing, the courts will happily overturn a decision of the tribunal.

We like to think though that most members, when faced with an applicant who has put a reasonable argument for an extension or an adjournment to obtain other evidence or simply to make further submissions, would grant one. That is often the case: applicants and their advisers seek additional time for submissions, and sometimes with those submissions request a further hearing, in which case the member has to consider whether to grant that request for a further hearing and/or for further time for further evidence to be supplied. I do not know if that helps.

CHAIR—Regarding the discretion which is provided to be exercised by the member in determining whether they will give the information or invitation orally while the applicant is appearing or in written form, where is the guidance as to how that will be used by the member?

Mr Lynch—The principal member may wish to talk to this too. We are proposing that a principal member direction, which has the force of law under the Migration Act, be issued to members. The principal member has already issued directions which govern members and staff as well as the industry—the migration practitioners—in terms of how they must engage and conduct their business with the tribunals, from both the practitioner's point of view and also from the member's point of view. The principal member intends to direct members once the precise terms of the amendment are settled. If passed, we will have a principal member direction that will instruct members on how they will perform their duties in relation to the provisions as passed through the parliament.

CHAIR—What do you envisage that will contain, Mr Karas?

Mr Karas—That will contain directions subject to the amendments being passed in whatever form they are. There will be a briefing session and a training session for members to acquaint them with the amendments. At the same time, as John has indicated, we intend to issue a principal member direction, which has the force of law that guides the members on how to deal with certain situations.

I suspect that the Senate committee and most people are aware that there are a number of principal member directions out now in relation to members' conduct of reviews. It was interesting to hear that it was alleged that some members would conduct a hearing for three hours and not grant comfort breaks et cetera. It has been said time and again that, where interpreters are involved, particularly, and, generally, in relation to cases, cases should not go more than an hour or an hour and a half to enable breaks to occur. My own practice would always be that if an adjournment was sought I would grant it, even if it was for five minutes for a comfort break or for the representative to confer with their client. Oftentimes I have said to the representatives that I think we should have a short adjournment for them to confer with their client in relation to whatever the particular matter might be.

CHAIR—Given the decision the committee needs to make in relation to this legislation, I am keen to get a better understanding of what would be included in a principal member direction as to guidance for use of this discretion. How will the member know who should be dealt with orally and who should be given written information? How will there be any development of consistency of practice amongst members of the tribunals?

Mr Karas—Subject to the wording of the act, the intention would be to give clear directions to members as to circumstances of particular cases where they may feel that an adjournment to enable the applicant to think about things or to confer with the representative whilst at the hearing for a number of minutes might be sufficient, or alternatively—

CHAIR—That is if the advice is the information or invitation has been given orally.

Mr Karas—Yes. If in fact the member feels that the circumstances of the case are such that they would require a longer adjournment, because of the information being sought, or the member would like to adjourn the review to enable what we call now a 424A letter to occur—a number do occur after hearings—then it will be the member who will decide it under the principal member directions, subject to, as I said, the passing of the act and the final terms of the clause, which would give the directions to the members as to how to interpret or activate that particular section.

I should say that I think it is true—and if members from non-government organisations and elsewhere were here they would indicate this—that principal member directions and general information also being put out by the tribunals have been done on the basis that we are trying to demystify, if I could use that expression, the processes and procedures, and make applicants and their advisers a bit more aware of the procedures and processes and what goes into it.

CHAIR—You are not really demystifying this for me, though. We understand—over an extended period of time in dealing with legislation that pertains to migration review in its many forms—that many of the cases which come before your tribunals, particularly the RRT, are extremely complex and that the information which is dealt with and which is inevitably

put to applicants is complex and may be coloured by cultural and linguistic difficulties. It may also be coloured by trauma experiences and a whole range of other examples which you yourself talk about regularly in material to do with the operation of the tribunals. So I cannot get a handle on the sort of applicant who is going to fall into the category of probably being able to give the oral advice versus the sort of applicant who is still going to need to have written advice so that matters can be dealt with in a considered way and in a manner removed from the on-the-run concept, which is referred to in a number of submissions. And I still cannot get a grip on how you will ensure that tribunal members approach this in a consistent manner and that it will not be a lottery. I have no idea how an applicant will know if they will have to deal with matters orally or will have the opportunity to manage matters with written submissions.

Mr Lynch—I would like to add to what the principal member was saying in trying to respond to what you are raising. The individual circumstances of applicants' cases are often not fully brought to the tribunal's attention until the hearing itself, despite the principal member issuing directions in 2005. It was often the case that advisers' submissions were being faxed to the tribunal not only on the morning of the hearing but during the hearing.

CHAIR—That is if there is an adviser.

Mr Lynch—Yes. In a high percentage of cases, in both tribunals, there are advisers. Applicants are represented. I think it is in the region of 70 per cent for both tribunals. You mentioned that it is a complex environment, particularly in the RRT. Often applicants, in their applications for review, will only say, 'I don't like the delegate's decision and wish to appeal it.' They will not add to it, and that is all we have. So it is difficult. I was listening to Michaela Byers's evidence earlier. It would be an ideal position if the tribunal could identify issues for applicants at the very beginning of a hearing—and that is the practice currently—or certainly before, but in many cases the tribunal member does not know what aspect of the claim for refugee status or what elements of persecutory grounds they are going to rely on. Sometimes it is on a completely different basis to the one put to the primary decision maker.

We had a crack at drafting a principal member's direction well before the current amendment, in its current form, was approved. Picking up on some of the concerns you have about looking for consistency so that members on both tribunals apply, as far as possible, a consistent approach so that applicants and advisers know how to deal with the tribunal, we said something along these lines—if I may be permitted to read from a very early draft. Its initial paragraphs talk about the responsibilities to make decisions and the obligations to make decisions that are fair, just, economical, informed and quick.

The draft states: 'In conducting hearings tribunal members are to comply fully with the procedural fairness provisions in the act. Hearings must be conducted courteously and in an informal way and must provide a genuine opportunity for the applicant to present his or her case. Members must inform applicants of any adverse information or issue which to the member's knowledge is relevant to their assessment of the review application and explain to the applicant why that information is relevant and the consequences of it are being treated as adverse. If an applicant needs more time to respond to the information, the applicant may ask for an adjournment of the hearing to respond to that information. Adverse information relied upon in a member's decision should not come as a surprise to an applicant. Members should

clearly and unambiguously raise with an applicant the critical issues upon which his or her application may depend, while taking care to ensure that the testing of the evidence and exposure of any weaknesses does not result in the applicant being overborne or intimidated. As far as practical, members should ensure that applicants appreciate the issues that may be determinative of the review.' That is currently the statutory obligation on the tribunal. The draft continues: 'There are a number of factors or circumstances that may affect an applicant's ability to provide oral evidence or present his or her claims at a hearing. It is important that consideration be given 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 in a fair manner and the opportunity for the applicant to fully present his or her case.'

Those words were drafted before the terms of the bill were settled. The additional requirements about adjournments being reasonably requested and reasonably given were not then available to us. So we would look to provide for the principal member a very clear direction that accompanies and complements the parliament's intentions—if it were to pass the bill in its current form—to ensure that that level of awareness and that level of consistency that you are talking about, would be achieved as far as reasonably possible. It is a very difficult environment, responding to the range of claims and the level of representation made.

We have all sorts of quality of representation coming before the tribunals. Some migration practitioners are woeful. Some are extremely good. And some have the very best relationships with the tribunal and particular members in terms of knowing what to present to the tribunal and what is expected of them. It goes to their levels of competence and their compliance with the principal member directions, as much as anything else. The two directions I mention are PMDs 2 and 3 of 2005. They explicitly require certain business processes from practitioners to ensure that their clients are adequately represented before the tribunals.

CHAIR—In drafting a direction such as that, what endeavours do you make to avoid the circumstance which even the Administrative Review Council has referred to, saying that they 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?

Mr Karas—Members are trained in and experienced with the use of interpreters. I think it is common knowledge that the majority of cases which come to hearings before the tribunals involve interpreters—I think some 90 per cent of the cases before the RRT. The members are experienced in working with interpreters, and they are provided with training in relation to that. At the same time, the evidence is usually given on oath or affirmation. So, as a result of that, oftentimes the member may give more weight to evidence that is given under oath; whereas written comments may not carry as much weight in certain circumstances.

Where a member is conducting a hearing, if the member wants to elicit information, test the evidence—as they are required to do to see whether the person does meet the requirements as set out in the legislation—they have the use of an interpreter. The interpreter is there, able to discuss and able to raise matters. If the interpreter is having difficulty with the way that the member is asking the questions or the language which the member is using, they will usually say to the member, 'Look, the language you're using may need to be rephrased,' or, 'The question might need to be rephrased,' and so on. I remember one occasion where I had said that I thought a person was 'having a lend of me' and the interpreter came back and

said, 'Look, you'll have to use not the colloquialism but other words.' The interpreters are not backwards in relation to that.

So, overall, I think the hearing as such is a venue where the applicant is usually at ease, because the members take time in the introduction to indicate to the applicant what they are about and the questions or areas of concern that they may have. Oftentimes they will indicate to the representative that at the end of the hearing, if there is an area that they think the member has not covered and that they might need some elaboration or expansion on, the representative is allowed to address the tribunal in relation to that, to elicit the information from the applicant.

Often there is a concern about letters that may be sent to applicants. They are in English. The High Court has said that the legislation and the way the legislation is framed means that that is something that is able to be done—in other words, we do not have to send translations of everything. On occasions when a letter goes to the applicant I am concerned that perhaps they use others who, unlike the qualified interpreters at a hearing, may not be qualified to translate the contents to them, and that by doing so do they may not get the whole point which the member is driving at or understand the information that is being sought. It may not occur in the same way because, as I said, they may rely on people who are unqualified. Translations are expensive and often applicants do not seek to get them, whereas at the hearing you have the interpreter, the member and the applicant. The applicant would be fully aware of the nature of the matters before the tribunal and about which the tribunal is asking questions or trying to elicit information. It is being done through an interpreter and under oath, as I said earlier, so the tribunal member may feel confident that the information they are seeking is coming in the best possible form.

CHAIR—Thank you for that, Mr Karas. I have to say that the evidence the committee has received, both in submissions and from witnesses today, does not accord completely with your observations about the operation of the tribunal and all of your members—are there in excess of 150 if you include all the part-timers?—across the tribunal.

Mr Karas—I think it is 97.

CHAIR—There are certainly occasions where applicants would be a very long way from your phrase 'fully aware of the nature of the matters before the tribunal', whether because of a lack of comprehension, difficulties with interpreters—some of those cases go to court, so we are more than aware of those—and a range of other areas. The committee is obviously concerned to make sure that in addressing the questions of the operation of the tribunal we end up with decision making processes which are, as the legislation says, 'fair and just'. Your submission says:

> The absence of a discretion to provide adverse information to the applicant orally or in writing has led to cases being prolonged, including for applicants in detention.

I would be interested to know what sort of time frames that refers to. It then goes on to say:

> There is often a duplication of effort for members and for applicants and their representatives, leading to unnecessary costs and increased stress and inconvenience to applicants.

I wonder whether the tribunals have received any complaints or had any concerns raised in relation to that point. We would be grateful if you could come back to the committee on that.

Mr Lynch—We will take those on notice. I might respond briefly, if I may, on the prolongation of detention. The High Court decision concerning the female applicant in that case, SAAP, is a classic example of long detention. That detainee had been in custody or detention, at Port Hedland I think, for nearly two years.

CHAIR—Certainly the most extreme examples end up in the court, but in general terms I would be interested in the time frames that your submission refers to.

Mr Lynch—I recall that case; I was the member in that case. The interesting thing in that case was that the adviser—it was the second adviser—in the case was perfectly happy with the hearing and did not want further correspondence, mainly because the applicant was illiterate and subnormal intellectually and was out of reach of an interpreter and the adviser in Port Hedland.

CHAIR—In the department's submission in paragraph 11, we were very taken with the sentence that begins:

> However, due to the Government's priorities, not all of those comments could be fully taken into account in preparing the Bill.

I think that could become a standard across all departments actually. But you do refer to consultation with the Migration Institute of Australia. I would like you to advise the committee as to what sort of consultation that was. When we asked the Migration Institute to respond in relation to this inquiry, they indicated that they were a nonpartisan body, which was not news to the committee, and that they had adopted a convention that they do not comment on matters of political debate. So they are not able to make a submission on matters such as these, which the committee finds a little difficult to understand. I do not expect you to answer on behalf of the Migration Institute; we will follow that up with them in due course. They have made many submissions to the committee over time on a range of contentious and non-contentious legislation, so I do not quite understand but I would be interested to know the nature of the consultations.

Ms Parker—We wrote to the Law Council of Australia, the Administrative Review Council and the Migration Institute of Australia advising them about the proposals and the policy reasons for the amendments and providing them with approximately four to six weeks to comment. During the course of that four to six weeks the government's priorities changed somewhat and the passage of this legislation became more of an imperative for the government, so we wrote again to those bodies to advise that the deadline that we had given them for making submissions was in fact a hard deadline. We received comments from all three but, due to the status of the bill and the need to introduce it towards the end of the last sittings, their comments were unable to be taken into account. We advised those bodies of what had occurred and that the government's priority was to introduce the bill. We indicated that we would be happy if they wished to make submissions to forward those submissions on to the committee. In fact, we did that in the case of the ARC.

CHAIR—Thank you for that and thank you for forwarding the submission as well. I am trying to understand a couple of the observations in the department's submissions which are preceded in, I think, both cases with the phrase 'the department understands'. In the

paragraphs the department does not actually explain how it comes to those understandings. The second of them is in paragraph 36 where it says:

> The Department understands that following the enactment of amendments the Tribunals will in many cases invite the applicant orally to comment on adverse information, as well as continue to issue written invitations to comment.

That is not really apparent to me from the evidence we have taken from Mr Lynch and Mr Karas so far. How and why does the department form that understanding in their submission?

Ms Parker—I think that was based on our understanding of how the information would be dealt with by the tribunal. There may be cases where all the information is dealt with orally but there may also be a continuation of the current practice where there is a need and it is appropriate, indeed, to issue written invitations to comment. I think that was the basis of the information given by Mr Lynch and Mr Karas this morning which was that there would continue to be a mix of both written and oral invitations to comment.

CHAIR—I think that is slightly different, with respect, from the observation that is made in the department's submission. The other is in relation to litigation and the concerns about increased complexity of litigation, which I must say are consistent across submissions. When we have put questions to practitioners today they have maintained that position. In paragraph 14, it says:

> ... the Department understands that the future conduct of hearings ... will not vary greatly from how they have been conducted in the past.

I acknowledge this has been discussed by Mr Karas and Mr Lynch. The submission goes on to say:

> The Department is not of the view that lawyers and migration agents will be presented with any new or unique difficulties in properly representing their clients as a result of the Bill.

The evidence that the committee has received, both in submissions and this morning, would contradict that observation slightly. There is an assumption of representation of applicants inherent in that part of the department's submission from paragraph 12 on. But still we have about one third of applicants who are not represented, I think. Is that about right?

Mr Short—Yes.

CHAIR—So that is a considerable proportion, it is not insignificant, of people who are going to be in these hearings and reviews trying to work out what is going on.

Senator CROSSIN—I probably have just as many queries as Senator Payne, so I might try to prioritise them a bit. It has been put to us this morning that this bill is nothing more than a means to undermine the SAAP decision of the court by letting members from the MRT and RRT off the hook by now providing them with an option. What is your response to that?

Ms Parker—I will commence, and then perhaps the tribunal would like to make some additional comments. I think that the reference to 'undermine' is probably a pejorative term. I think that the decision in SAAP caused particular consequences for the efficient operation of the tribunal and has been causing some difficulty, duplication and inefficiency. So, yes, this legislation does seek to provide the discretion that the tribunal currently does not have to deal

with adverse information orally, and that was clear from the observations made in the decision of SAAP.

Mr Lynch—Can I just add that the Law Council certainly acknowledge the rigidity of the operation of the procedural fairness obligations in the act. In fact, their suggestion was an extreme one to abolish—

Senator CROSSIN—They do not agree with the bill, do they?

Mr Lynch—Nor with the current scheme. They want to get back to the old common-law rules of natural justice, which are prescribed right throughout the application provisions and review provisions for both tribunals, and a fairly comprehensive system for the tribunals and applicants to follow to try to elicit fairness—as well as having reviews that are conducted in an efficient and quick way. I will make a comment on the SAAP decision. The High Court interprets the provisions of 424A as they read as simply a literal interpretation of the legislation. What the full court had done up until then had been to work on the basis that these were procedural and technical in nature rather than obligations for the tribunal to follow in all cases. The tribunals had been trying in many cases, as far as possible, to implement 424A and issue statements or invitations to applicants in line with the legislative requirement where the particular facts warranted it and where a case could be dealt with in fairness to the applicant—and, often at the express request of applicant and advisers, cases were dealt with exclusively on the evidence given at the hearing alone and there was no follow-up with information in writing. It is interesting that in spouse cases with the MRT over 60 per cent have been set aside since 1999.

Just to discuss some of the issues that were raised a little earlier, the tribunals seek to do justice to the particular facts of the case and call on all their tools. They certainly comply with the obligations as far as they can based on current law to meet the particular circumstances of each case. The rigidity that the Law Council talks of—and that Justice Weinberg talked of in SZEEU—are the issues that have caused us to say, 'This is causing us operational difficulties.' If we have a member conducting a three-, five- or six-hour hearing, perhaps even over two days, we now have that member in strict compliance with SAAP having to rehear those tapes. I do not know if you have ever listened to tapes of a hearing or of your own speech presentations and tried to document and take notes from them, but it can take double the time of the hearings themselves. So you are adding a great deal of pressure, and time lines have the potential to blow-out. There is a great deal of pressure on members to make sure they get it right in the written information, absolutely covering every possible piece of information that might conceivably end up in their decision.

Let us be fair about this: many members do not know what their decision will be even at the close of the hearing. They may have to wait for more evidence, more submissions. They do not know what their decision is going to be right up until the time they are writing the decision. The tribunals are looking for built-in safeguards as far as possible for the hearing and to build in as many as possible to the extent that they are seen as necessary but give the tribunals a bit of flexibility and exercise that judgement that parliament has given them to conduct a very complex review. That is what is being sought.

Senator CROSSIN—Mr Lynch, thank you for that. You have just convinced me even further why this bill should not be supported when you talk about the complexities: the use of tapes, the time lines and how difficult it is—I will go to that matter in a moment. But in your response, Ms Parker, you talk about how this will make the tribunal more efficient. Isn't that the heart of what we have heard today? Seventy-three members of the tribunal are part-time; 24 are full-time. We have heard HREOC tell us that with the RRT the average turnaround time is 97 days, not 90 days. Your report says it is now 83 days, but that is not because additional resources are being given to the MRT and RRT; it is simply because resources have moved from the MRT to the RRT. We have 51 per cent of the department's decisions being overturned, which convinced me that the department still does not have its ducks in a row yet—it probably does not even have any ducks, I would suggest—and the MRT's and RRT's annual reports suggest that staffing levels are under budget: table 4.1 on page 20. Aren't we trying to fiddle around and adjust an end result rather than tackle the substantial problem, which is the underresourcing of the MRT and RRT to do the job thoroughly and efficiently and provide everybody with fairness and natural justice by giving what they need and want in writing?

Ms Parker—I will respond to that. Some of the issues that you have raised are resource issues for the tribunal, and that is a matter that I cannot address today. But, in terms of this bill leading to greater efficiencies, that is part of the aim. There is no doubt about that. We have said that, but I must emphasise that we believe it is not to be at the expense of procedural fairness. There are, as you are aware—I will not go through them—a number of safeguards in the legislation which were put in to ensure that procedural fairness is not denied, that the applicants are aware of what the case is and are given the opportunity to make their case and address any issues that may be adverse to a conclusion or a finding in their favour. So we believe that in some cases, as I think Mr Lynch has outlined, there may be advantages for applicants in being able to deal with issues which go to their credibility, where facts are in dispute, in the situation where there is an opportunity to have a conversation with the tribunal member in the presence of an accredited interpreter. So, to that extent, we do not believe that the efficiencies that would be gained from this, which will help with the issues that the tribunal is having at the moment, will be at the expense of delivering procedural fairness to applicants.

Senator CROSSIN—I have one further question, because I think we could debate the individual issues for quite a while. If you go back and have a look at all of the evidence that was presented today from national, very eminent organisations—the Australian Lawyers for Human Rights, HREOC, the Refugee Council of Australia—even the Law Council of Australia that you have consulted has come back and said, 'Don't do this.' Those bodies are all saying: this is not the way to go. They are saying that your rhetoric about efficiencies and fairness at the end of the day does not ring true.

Let me go through some on the list. The suggestions include that speed does not lead to fairness, that there will be flawed decisions in the future, that questions of jurisdictional error will be asked, that there is ambiguity in the use of oral evidence, that the interpreter's skills are lacking in some cases and that there are numerous inconsistencies between tribunal members and the way members also inconsistently deal with individual cases. The list goes on

and on. I have not heard any evidence from you today that convinces me that you are right and that all of these organisations we have heard from today are wrong.

Mr Short—Can I say something from a practical point of view?

CHAIR—Sure.

Mr Short—I am a member who conducts hearings at the moment. That is not to say that the principal member cannot—and as Mr Lynch has referred to, he was once a member of the tribunal himself—but I currently conduct hearings. If you follow the logic of a lot of the submissions you have received we would not have hearings at all because everything could be done in writing. Clearly that is not the view the parliament has taken; it is not the view that the legal system takes. The legal system takes the view that oral hearings are a way to clarify the issues involved in cases. I think there is a false dichotomy being set up between oral hearings on the one hand and doing things in writing on the other, as if the tribunal will make a decision to go down one path or the other path. In every case where the tribunal cannot make a decision in an applicant's favour on the papers, it has to hold an oral hearing and all these matters will be discussed at the oral hearing, irrespective of the decision you take on this bill. That is the case. That is what happens.

The issue is only whether we have this requirement that a certain class of adverse information—by no means all adverse information because sections 424A and 359A only apply to a particular class of adverse information—has to be communicated to the applicant in writing or whether it can be dealt with, if it is more efficient to do so. I recognise the pejorative aspect that has been applied to the term 'efficient'. That efficiency can often be to the benefit of both parties. It may be to the benefit of the applicant to have things explained to them at the hearing, as we have attempted to discuss today. That is what would happen in a lot of these cases: the matter will be discussed at the hearing. Under the current law, the invitation will then be issued after the hearing to the person to comment. If, as we have referred to, in those 30 per cent of cases where people are unrepresented, they will not have the assistance of someone who is competent or legally qualified—or even has the understanding of migration law that a migration agent has—to explain it that to them. They will be going to their friends or to people in the community to explain that to them and to help them respond to that.

Senator CROSSIN—I think that is exactly what I am getting at. I do not agree with your observations that the submissions before us today would suggest that we should never have hearings. I do not believe that is the case at all. The submissions we have heard prior to yours today are clearly saying, 'You've outlined what the current situation is, leave it as it is. Don't touch it.' That is what they are saying to us. They are not convinced that the rhetoric about efficiency and fairness will truly lead to natural justice for the applicants. They are suggesting that everybody has the right to be given whatever information or decision they want in writing—not the member deciding that, but the applicant deciding that. The department says at paragraph 36:

This is likely to be more costly than the current situation, where transcripts of Tribunal hearings are not routinely required...

There is an admission by the department that this may lead to increased costs when it gets to a litigation stage and further litigation. We have had no defence of this legislation either in respect of children or in respect of people who are unrepresented. I find that your arguments are not compelling.

Mr Lynch—Currently, children who are unrepresented are dealt with without any guidance under the act as to how the hearing is to be conducted. We have internal guidance for members in a members' procedural guide dealing with these specific issues. It is not that members are without guidance, training and some sense of direction on how to conduct these hearings where people are unrepresented.

It is part of parliament's requirement on the tribunals that we conduct reviews with speed, but we also have to be fair and just. This bill expressly requires fairness and justice in the conduct of the review. That is an additional layer of safety so that the tribunals are continually reminded that you have to be absolutely fair and just. No matter what the other obligations are, you have to be fair and just.

It is a difficult job and each case is different. We have members who have different skill bases, come from different backgrounds and have different training. Yes, there is the inconsistency that was referred to earlier in evidence this morning—that happens—but the code of conduct of members requires consistency on similar facts as far as possible. These are things we strive for. We have a strict regime of performance appraisal. We have senior member supervision of members' performance. If there are complaints, the principal member himself listens to tapes of hearings, and reviews the review that was conducted by the member himself—not to come to a different conclusion but simply to investigate the complaint. With judicial supervision we believe that what we are looking for is an element of flexibility without sacrificing any safeguards for applicants and advisers.

Mr Karas—We have brought along something in relation to children giving evidence. Would the committee like copies of that? We can leave that with you.

Senator CROSSIN—Just to clarify, that is the current situation, isn't it? It is not the situation where there will be an option for oral or written in the future?

Mr Karas—That is the current situation under the law.

Senator CROSSIN—I am not sure how useful that will be.

CHAIR—The point Senator Crossin is making is that there is a potential for a child to be asked to respond to the oral invitation for information and that is a matter of some concern.

Senator TROOD—You said that the practice direction you read out was a draft. Has that been issued?

Mr Lynch—Not at all, no. It was a very early draft which we developed as part of a proposal to the minister to consider a change in the act.

Senator TROOD—You also alluded to the problem that the tribunals face in not being aware of the grounds upon which applicants might rely. I see that that is a difficulty, but I think the evidence we received this morning was that there is an equal difficulty in relation to the applicants—that is, there is a determination made about their review, yet they are never provided with the grounds upon which a decision has been made.

Mr Lynch—There are a couple of issues here. I would certainly say at the outset that we can take up this point. I think it is an important issue. The draft direction I mentioned earlier goes some distance towards trying to recognise that as an issue. But we could expressly make provision for that—that is, where a member has sufficient particulars or information which would value-add to a hearing, in appropriate cases that should be given to the applicant.

The principal member has issued his directions, one of which says, 'As soon as possible,' or 'If not with the application for review, on its lodgement, submissions should be supplied,' and that any evidence supporting the application should be supplied on lodgement or as soon as possible thereafter—I think within two weeks. I cannot say that categorically as I do not have it in front of me. But the expectation is that advisers and applicants will as far as possible let the tribunal know what their case is, because it is their application for review after all and members often will not be in a position to be able to articulate all of the issues that are likely.

The other issue is predisposition to a particular viewpoint. The act currently says you have to form a view on the application; when it is lodged, you have got to form a view. Do you accept it sufficiently to approve it? If you do, you can do it on the papers without a hearing. If you do not, you have to have a hearing, as senior member Giles Short said earlier. You have to have that hearing—you have to invite the applicant, anyway; the applicant can choose not to come.

Senator TROOD—You are saying a view has to be formed, and if a view is formed and the tribunal member is perfectly at ease with that view then that can be dealt with and the advice communicated to the applicant. And if he or she is not entirely comfortable with the view or the preliminary position they have taken then a hearing is required. At that stage, why isn't it possible for the member to communicate with the applicant and say, 'I am tending towards this view,' and obviously there is a form of language that can be used, 'and I am disposed to not grant your application for these reasons'? Why can't that be done?

Mr Lynch—That is possible. However, in many cases, the applicant has not made out a case as such. So the member is sitting there thinking, 'Well, I couldn't approve this on the papers because the applicant hasn't made out a case.' They have not said why the delegate's decision is wrong. They have not indicated to the tribunal in the application for review why the primary decision was wrong. So the member is forced, in a sense, to say to the applicant at that stage, 'I have to invite you to a hearing because I don't know what your case is.' That is the situation in many cases.

Senator TROOD—I appreciate that point, but it seems to me it is possible for the tribunal member to say, 'I don't know what your case is, but my view is that your case is not strong for 15 reasons.'

Mr Lynch—In the MRT in particular there has been a practice among perhaps 50 per cent of the members to issue a 359A invitation before the hearing and do exactly what you are suggesting. Now, half the membership do that as a matter of course, and the other half do not because they feel that they are not sufficiently across all the issues, they have not understood the application well enough to do that, and so they invite the applicant to a hearing and say, 'Here's your opportunity,' as is the case under natural justice. The common-law natural justice

rule says if you come to a hearing, if you have the opportunity to present your case at a hearing, that is all that is required. This legislative prescription of the natural justice rule covers that in spades.

Mr Short—We may be at cross-purposes a little, Senator, because I think when you were discussing this issue earlier you were thinking in terms of pre-hearing procedures rather than natural justice as such—in other words, the tribunal defining the issues before it ever gets to a hearing.

Senator TROOD—That is a possibility.

Mr Short—Right. Well, that is one of the things that is raised in the submissions. One of the first things to say, as Mr Lynch has already said, is that there is a distinction between the MRT and the RRT. In the MRT caseload, generally speaking, the applicant will have received a decision which fairly specifically draws their attention to the particular criterion which they have failed to meet for the visa that they applied for, and that essentially dictates the starting point for the review by the MRT. So it not the case that an applicant to the MRT does not know the issue. In the RRT the issue is almost invariably—there are a few exceptions—simply whether the person is a person to whom Australia owes protection obligations. That then embodies the whole of the definition of a refugee, and you cannot really write in a letter to an applicant beforehand, 'Pick and choose between those elements.' It is the whole of the definition.

Senator TROOD—You do not disaggregate the definition of a refugee for the purposes of this exercise?

Mr Short—Not really. The point was being made by Ms Byers—we came in at the end of her evidence—about a negative view having been formed already by the tribunal. I do not think that is an accurate way to describe it. All that the legislation says is that if the tribunal cannot make the most favourable decision, it has to invite you to the hearing. That does not mean that I have actually formed a view before I invite someone to a hearing. It simply means that I have formed a view that I cannot be satisfied on the evidence before me and I need additional evidence. With respect, there is a distinction.

Senator TROOD—Philosophically, I can see that point, but we probably do not—

Mr Short—That is why we have the hearings. A lot of the time they are where you determine whether people are actually telling the truth or not.

Senator TROOD—Yes. As I said several times during this morning's proceedings, I am not unsympathetic to the department's problems here. It seems to me that there are some difficulties. But everything I have heard causes me difficulty in relation to this problem of consistency. It is even in the evidence that you have given us this morning. Now, Mr Karas, in relation to representation, in your evidence you said that applicants 'are entitled to be accompanied', but you did not say 'to speak' or anything like that. But in the submission the department made, in paragraph 17, it says on the fourth line:

Lawyers and migration agents will continue to be able to accompany and advise their clients at hearings ...

It seems to me that there is no consistency, at least in the evidence you are providing—unless you wish to correct the position you have put to us, Mr Karas. Certainly everything we have heard this morning tells us that members of tribunals, both the MRT and the RRT, consistently adopt different practices in relation to all of the matters before them in relation to evidence, in relation to the provision of information to begin with—and that was the discussion we were just having with Mr Short—and certainly in relation to the right of advocacy or the right to represent clients regarding agents. This is just unacceptable and it needs to be sorted out. I would be much more comfortable with this scheme or arrangement that you are suggesting we pass if I could be encouraged to believe that it would be applied with consistency across these two tribunals and all members who are part of them.

Mr Karas—As has been pointed out by the courts, the scheme of the legislation is that the tribunals are inquisitorial and non-adversarial in their nature. The members are holders of public offices, statutory appointees, who are entrusted with making decisions and providing a mechanism of review that is fair, just, economical, informal and quick. Of course, there is judicial oversight in relation to that. However, one of the legislative provisions says that representatives may accompany the applicant to the hearing but they are unable to address the tribunal unless there are exceptional circumstances. The black-letter lawyers will say that, unless there are exceptional circumstances, they will not hear from the representative because that is what the act says.

There are others who say—and I put myself in this category—that, because an applicant has brought along a representative, the representative may be able to assist the tribunal. Oftentimes, as I said earlier, I will ask the representative if there is something more that they should add or adjourn for a period so that they can confer with the applicant. You are right: there is inconsistency in relation to it. But that is because the legislation, as I said, says that representatives may accompany the applicant but they are unable to address the tribunal—because it was felt, I take it, when the legislation was drawn up and the inquisitorial system was set up, that the representative was not going to cross-examine or examine the witness or the people appearing before the tribunal in the way that they do in the adversarial system in the courts.

Senator TROOD—Are you suggesting to us that those members, such as yourself, that allow representation are in breach of the law?

Mr Karas—The courts have not said that we are in breach of the law. I do recall earlier—

CHAIR—I want to know if Mr Short is a black-letter lawyer.

Mr Short—It might be a mistake to say 'allow representation' if that connotes representation as it is allowed in the courts. I think all members will allow applicants to consult with their representative.

CHAIR—Apparently not, though, Mr Short.

Mr Short—What the legislation says is that you cannot address the tribunal, but you can certainly talk to each other.

CHAIR—But we have been told by lawyers today that lawyers—in the rooms of your colleagues, I assume—in reviews are not allowed to talk to their clients. In fact, they are admonished for coughing, as I understand it.

Mr Karas—I was also going to add that, if one reads some earlier cases in relation to the tribunals and their proceedings—and Mr Short may be able to remind us of particular ones if that is needed—one finds that there were judges who did say, 'When reading the transcript we can see that the applicant presented their case but there was no representation on the part of the department in relation to putting its case.' So I think at one stage there may have been a bit of confusion in relation to whether it was an inquisitorial or an adversarial system and whether there was going to be representation on the part of the department. But, as I said, generally speaking the legislation does say that people can be accompanied et cetera.

Senator TROOD—Are you saying to us that the only way this can be cleared up—that is to say, the only way we might get consistency on this point—is by way of amending the act and you have no capacity to encourage your black-letter lawyers to behave in ways in which some of you, and you in particular, wish to behave in relation to these matters?

Mr Karas—Our role is to carry out the parliament's wishes as expressed in the legislation, and we deal with the legislation that is at hand.

Senator TROOD—It seems to me that if there was consistency, saying that no-one will be allowed to speak and that the only person who is allowed to speak at these occasions is the applicant, then that would be the rule and everybody would understand that rule. But we have a situation where we have agents, lawyers and various representatives coming along who have had a lot of experience in the tribunals and they are experiencing consistently inconsistent behaviour.

Mr Karas—We have issued principal member directions that—

Senator TROOD—I know you said that. I am sorry for interrupting. Is it conceivable that a principal member direction could solve this problem or are you saying that really it needs a legislative amendment?

Mr Karas—I am in a cleft stick position here.

Senator TROOD—I do not want you to express a policy view as to whether it is desirable, because I realise that is a delicate area for you.

Senator CROSSIN—They do not seem to follow the directions consistently now so another direction is not going to ensure that, is it?

Mr Lynch—It is a misbehaviour type thing if a direction is not observed because they do have the force of law. But it is certainly possible for the principal member to issue direction that, notwithstanding the different provisions in the act affecting both the MRT and the RRT in terms of right of representation—and they are different—members should as far as possible allow representatives to present submissions. Most members get a lot of value out of representatives because they know their clients' cases, they are short, they are to the point and they articulate the cases either in written submissions or orally at the end of a hearing. Most members do not want advisers to interrupt the proceedings and interrupt the question flow because it is an inquisitorial process.

So most members say to advisers or to the applicant at the beginning: 'I know you've brought your adviser along but I'm going to ask you some questions first. At the end, your adviser will be able to raise any issues that he or she wants addressed and I will be able to ask questions of you that I haven't canvassed or that cover any ground that hasn't been dealt with.' I would be happy to say that I think most members do permit an opportunity to advisers to add to their clients' cases, if only because in many cases a lot of money is being paid to the advisers to make an appearance to represent the clients and the clients want to see some value from their representatives. Members certainly respect that as well.

Senator TROOD—I would have thought it could be immensely helpful to have those representations, but it would seem not to be consistent across the various tribunals. I have to move on to my colleagues now. Thank you for your support.

Senator BARTLETT—Regarding this requirement to be fair, just, economical, informal and quick—which is actually in the act, I think—obviously there are going to be some occasions where, with the best will in the world, you cannot be both quick and fair and just. I would assume it is acknowledged across-the-board that in that circumstance being fair and just is more important than being quick. I do not know if there is any jurisprudence about that, but it is accepted that you are not going to have the whole thing fall over just because it is not quick; even if it is in the act.

Mr Lynch—That would be the view, I am sure, of the entire membership.

Senator BARTLETT—I can appreciate that having to write out a pile of stuff and present documents back to people that you have already got them from and those sorts of things would be red tape that you could do without. But if the alternative risks are the sorts of problems we heard about today, wouldn't you accept that sometimes, for the sake of overall consistency and avoiding uncertainty, that that extra bit of red tape is, on balance, desirable?

Mr Lynch—I would agree, if it was having a beneficial effect for people, particularly applicants in detention, but it is not; it is working very seriously against their interests. When you add on the hand-down period that we have for our decision, you can see that it is an additional two weeks that applicants have to wait to get a decision. In many cases applicants desperately need a decision, whether it is for migration purposes or for other reasons. They need an early decision and here we are repeating to them what transpired at the hearing. Many are asking, 'Why are you wasting our time?' There is effort being put in there. The taxpayer is paying for a part-time member, at $640 a day, to rehearse in detail what was said at a hearing, condense that in writing and send it out to the applicant after a hearing.

That is our main concern—that this is impacting by creating duplication. It is increasing stress for members to have to become clerks—to listen to tapes and regurgitate everything that was canvassed at a hearing. And to miss one thing that might have been discussed in a hearing could end up being a jurisdictional error. It is very technical, and that is what the courts are complaining about.

Senator BARTLETT—My understanding is that there are two areas. There is the issue of having to give an invitation for further information in writing all the time, and there is also the issue of having to give the documents. How much would it alleviate the problem if you just dealt with what I think is the discrete part of this bill, not being obliged to give particulars of

information, which you got from them, back to applicants? Is it a significant part of the problem or is it really the other one that is the big one?

Mr Karas—Because of the way it has been interpreted, any information that has been given to the department and was not given specifically to the tribunal has to be included even when—I think this was the example used—a passport, for example, has been produced as part of the application for Australian protection or for a protection visa. Under the present circumstances information in relation to that, even though it might not be contested, also has to be included in the information that is put back.

I think you are asking, 'Would it be better that that information not be included because it has already been given to the tribunal by the department or direct to the tribunal, and other matters be dealt with?' That would be a course—I think that is reflected in the proposals for the amendments—that would be a good thing.

Senator BARTLETT—It does blur after a while but I know we have had the Migration Legislation Amendment (Return to Procedural Fairness) Bill 2006 and the Migration Amendment (Judicial Review) Bill, and at least one or two others that I can think of, even though I cannot remember the names of them. It seems that each time you do this it opens up the question of what it actually means and how it is going to be interpreted by the courts. We had all that with the probative clause and I think we had it with procedural fairness. Wouldn't it be better just to leave it alone for a little while?

All those things have arisen in the last five or six years. It has been pretty continual. I appreciate that it might be less than absolutely perfect, but wouldn't it be better to let it sit, for a little while at least, rather than—as I think your own submission has conceded—initially lead to another round of testing of what is just and fair each time these discretions are used?

Mr Lynch—Justice Weinberg basically said what the Law Council was saying—that is, there is such inflexibility in the current scheme that common sense in dealing with individual cases is being lost and there is a desperate need for flexibility. In fact, Justice Weinberg said, 'Why not abolish section 424A?'

CHAIR—Now there's a plan!

Mr Lynch—What he is saying, I guess, is that the tribunals have to give procedural fairness—that they should deal with the applicant at a hearing and/or in writing—and the courts will supervise what is not done fairly. Justice Weinberg is saying that we do not need section 424A. We think it is an appropriate mechanism to be used appropriately and sensibly, depending on the circumstances of the individual applicant's cases. Many applicants choose not to come to a hearing because they do not want to have a hearing. Refugee applicants may feel that officialdom is not their thing. They do not want to come to a hearing and be questioned by an official. As I said, they would prefer to put submissions in writing. They write us a note saying they do not want to come. In those cases, where it is appropriate, a section 424A letter will be sent to them. Members try to do justice on the facts of each case. I think the courts have recognised this and, in the many cases that are coming to them, they are saying, 'But for this procedural requirement that has not been complied with, there is no injustice here.' They send the case away; they refuse the application for review in the court. So I guess what I am saying is that the courts are recognising that, in many cases that are

coming before them, the overly prescriptive nature of the provision is leading to absurd results.

Ms Parker—Although there are some changes to the language in the drafting of these provisions, we did try to pick up a lot of the language that already existed in the provisions, and which has been considered by the courts, in order to avoid more litigation than would be necessary. It is inherent when you change the legislation that you have cases that consider the new wording, but we have tried to limit that.

Senator BARTLETT—This may be a little tangential but it possibly goes to the committee's future work and it follows on from the Chair's earlier question about the consultation you did, particularly with the MIA. You said you got a response from them. I presume that was more than one line saying, 'We don't comment on matters of political debate.'

Ms Parker—Apparently, we received an email from the MIA. It was not just an acknowledgement; some of the issues were covered, but not in great detail.

CHAIR—Mr Lynch, I am trying to understand the difference between what is going to happen if you miss one thing under the new system and what happened if you missed one thing under the old system. Surely, there is going to be no difference.

Mr Lynch—It will fail.

CHAIR—So how does that make your case?

Mr Lynch—If a member has not delivered procedural fairness in the conduct of a review—whatever path is pursued: if the applicant comes to a hearing or does not come to hearing or if a 424A goes out before a hearing or after the hearing—there is jurisdictional error, and a court will find that. What we are looking for is the flexibility to be able to say, 'This case clearly does not require us to both have a hearing and put into writing what happened at the hearing,' but with safeguards so that, as far as is humanly possible, the applicant is going to get the fairest shake that they can get at a hearing.

CHAIR—I honestly do not think that that advances the case that you are trying to make. If there is a mistake of procedural fairness in the current system, you are done; if there is a mistake of procedural fairness in the new system, you are done. How does it change your opposition?

Mr Lynch—It will depend on what the ground of review is. If, under the new scheme, an applicant says, 'Member, I need to get some evidence from overseas. Because of the way this hearing has unfolded it is clear that you have in your mind that you doubt I was ever arrested. I can produce a warrant of arrest. My mother has it back home in India. I just need to ring her and she will put it in the next mail.' If the member says, 'I am not going to allow that; I think you are lying to me,' and a court reviewing the facts and listening to the tape or reading the transcript of the hearing and looking at the applicant's case takes the view that the member failed here, that case is going to go down. Without the amendments, today, if senior member Short had the same hearing and refused the applicant and a court took the view that that was an unreasonable refusal, there would be a jurisdictional error.

It is the same outcome, but what we are looking for are inappropriate cases. For example, the applicant is refused an adjournment to get the evidence. The member refuses the adjournment and says he is going to go to a decision as soon as possible after this hearing. In the meantime the applicant rings home and says, 'Please, Mum, fax the warrant.' The warrant comes in. If the member wishes to rely on that warrant adversely to the applicant in the decision the member today would be required to write to the applicant. And we think that is perfectly appropriate. If the member fails to do that, there would be a jurisdictional error. The unreasonable failure to adjourn, if this bill is passed, would be clear and there would also be a jurisdictional error. I do not know if that is helping you.

Senator CROSSIN—What is the difference?

CHAIR—I had understood you to be saying that the proposed system will be better because it will remove some of the process associated with the difficulties of identifying these areas of error or mistake on the part of the member, and that this would be better. But in fact it will not be significantly different in relation to these aspects.

Mr Lynch—That is right. All we are looking for is the flexibility on the facts, on individual applicants' cases, to say, 'I can deal with this case fully and comprehensively at the hearing. Applicant, do you agree? Adviser, do you agree? We are all agreed, so I will move straight to a decision.' That is rather than, 'Thanks for the wonderful hearing, I have heard everything you have had to say. Now I am going to write it all down and send it to you and you can have three weeks to reply.'

CHAIR—I understand that, but nowhere in here does it say, 'Applicant, do you agree? Adviser, do you agree?' There is no provision for the agreement of the adviser, or even the advice of the adviser. I asked Ms Byers earlier—I think you were in the room; she was the last witness we had who had had any experience in front of your organisations—whether, if the member chooses to provide the invitational information orally and the adviser is in the room and thinks they are making a fundamental error in doing it orally, for whatever reason—they may have a crazy client, they may have a confused client, it might just be a really bad day—the adviser has an opportunity to participate and say to the member, 'I really think this is a bad idea.' Her understanding of her practice is that she does not. Is she wrong?

Mr Lynch—The response to the invitation to hearing should say, 'We do not wish to come to a hearing.' Or, if they come to a hearing, having chosen to come—

CHAIR—That is not the question I asked you. If you are in Mr Short's review and Mr Short thinks at the end of the questioning and answering and so on, 'With the opportunity given to me under 359AA I am going to provide this information and any invitation orally while the applicant is appearing,' that is Mr Short's decision and he starts to do that. If there is an adviser in the room and they think that is a really bad idea and that really it should go to a written presentation of the information and the invitation, can they take an intervention in the proceeding and say, 'Excuse me, Senior Member Short, I think this is a really bad plan, because my client cannot deal with this'?

Mr Lynch—Most advisers today, without this sort of provision, would express a view. If they thought the hearing was running badly for the client or if the client was not well or was not prepared, they would say it. Under this new arrangement, if this passes, they would be

perfectly entitled to say: 'We don't want this to happen this particular way. We'd prefer it if you put these particular aspects in writing. They are too complicated for my client,' or, 'We're not prepared today to deal with them, so could you please'—

Senator CROSSIN—But the member is not obliged to accept that request, is he?

CHAIR—No tribunal is obliged to accept in that regard. If you reflect on the evidence given today—let us take just two examples—by Mr Murphy and Ms Byers, you have two practitioners in your system, both of whom are reasonably experienced as far as I can ascertain, neither of whom seem to think they have the capacity to do that. I do not understand how that can be the case.

Mr Short—I do not understand how Mr Murphy can say that given that he routinely appears before the tribunal and is given the opportunity to make interventions.

CHAIR—He called himself—and I do not think I am misstating it—a 'note taker'.

Mr Short—And that phrase pops up in Ms Byers's submission, but to be entirely honest I simply do not see how Mr Murphy can say that. As I said, there is a problem—and Senator Trood has identified it—that there are differences of practice between different members. I cannot deny that and I would not deny that.

Mr Lynch—I will add to that. Mr Murphy's participation in Craddock, Murray and Neumann is interesting to the tribunal at the moment, because an associate of his is extremely—and I use that word carefully—interventionist and active in the conduct of hearings, with differing success with different members, as you might imagine. How the argument can be put that a person of his standing is a mere note taker is difficult, because he has a very valid and professional contribution to make. I believe many members would accept that and have in the past heard him fully at the hearing and/or in writing, because he makes very comprehensive and substantial submissions.

CHAIR—Having opened this up I may now need to give Mr Murphy the opportunity to reflect again on this evidence, but you can see how the committee may find itself in some confusion at the end of a day's discussion like this, with the sorts of evidence that we have had. The point of consistency in the application of the operations of the act and in the work of the tribunal has come through in questions from all four of the members of the committee who are here today—from Senator Trood, from Senator Crossin, from me and from Senator Bartlett.

I ask you to examine the transcript, and if there are matters arising from evidence given earlier today that are appropriate to pursue upon reflection on the committee's questioning then we would be grateful for your doing that. At least on this occasion we do not have a three-day turnaround on report drafting and tabling. Once we have considered the transcript, there may be other questions on which we need to come back to both the tribunals and the department, if that is acceptable. We may, of course, send further questions on notice.

We need to conclude. If there is nothing further, I thank you very much for appearing and for assisting the committee with its discussions. It has been a more complex morning than I was expecting, so we look forward to perhaps receiving some further information, and the committee will draft its report accordingly.

Committee adjourned at 1.19 pm