The Parliament of the Commonwealth of Australia

Review of Migration Legislation Amendment Bill (No. 2) 2000

Joint Standing Committee on Migration

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Canberra

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Contents

Foreword

The Migration Legislation Amendment Bill (No. 2) 2000 was referred to the Joint Standing Committee on Migration for review on 12 April 2000 by the Minister for Immigration and Multicultural Affairs.

The Bill seeks to:

- restrict access to class actions in the migration jurisdiction in the High Court and Federal Court;
- limit the time within which applications for judicial review can be made to the High Court;
- narrow the 'standing' provisions for migration matters in the Federal Court; and
- clarify the Minister's power in applying the character test.

The Committee received 31 submissions on these very specialised areas of legislation. The Committee also held public hearings in Canberra, Sydney and Melbourne, at which witnesses from 11 organisations appeared.

On behalf of the Committee, I extend our appreciation for the assistance to this review by all who provided submissions or gave evidence at public hearings.

The Bill was referred at a time when the Committee had already embarked upon a fairly demanding work program with respect to two other reports. I am therefore indebted to the members of the Committee who willingly contributed their time and effort to completing the review of the Bill.

Chris Gallus
Chair

Membership of the Committee

Chair	Mrs Chris Gallus MP
Deputy Chair	Senator Jim McKiernan
Members	Hon Dick Adams MP (from 12 August 1999)
	Hon Bruce Baird MP
	Mrs Julia Irwin MP
	Mrs Margaret May MP
	Mr Bernie Ripoll MP
	Hon Dr Andrew Theophanous MP (until 9 August 1999)
	Senator Andrew Bartlett
	Senator Alan Eggleston
	Senator John Tierney

Committee Secretariat

Secretary	Gillian Gould
Inquiry Secretary	Dr Stephen Dyer
Research Officers	Sue Irvine
	Emma Herd
Administrative Officers	Vishal Pandey
	Rohan Tyler

Terms of reference

The Migration Legislation Amendment Bill (No. 2) 2000 ('the Bill') was introduced into the House of Representatives on Tuesday 14 March 2000. The Bill amends the *Migration Act 1958* ('the Act') to:

- give effect to the Government's policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances by prohibiting class actions in migration litigation and limiting those persons who may commence and continue proceedings in the courts;
- clarify the scope of the Minister's power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal and substitute his or her own adverse decision; and
- rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled under section 128.

The Bill also amends the *Migration Legislation Amendment Act (No. 1) 1998* and the *Migration Legislation Amendment (Migration Agents) Act 1999* to correct a number of misdescribed amendments of the Act.

In accordance with the Resolution of Appointment for the Joint Standing Committee on Migration, the Bill was referred by the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, on 12 April 2000 for consideration and report to Parliament.

List of abbreviations

AAT	Administrative Appeals Tribunal
ACBC	Australian Catholic Bishops Conference Committee for Migrants and Refugees and Committee for the Family and for Life
ACMRO	Australian Catholic Migration and Refugee Office (alternative identification of ACBC)
Amnesty	Amnesty International Australia
ARC	Administrative Review Council
DIMA	Department of Immigration and Multicultural Affairs
ECC	Ethnic Communities Council of NSW
FAR	Fijian-Australian Resource Centre Inc
FOI	Freedom of Information
HREOC	Human Rights and Equal Opportunity Commission
IARC	Immigration Advice and Rights Centre
ICJ	International Commission of Jurists: Australian Section
ICV	Islamic Council of Victoria
IRT	Immigration Review Tribunal
LCA	Law Council of Australia

MARA	Migration Agents Registration Authority
NCCA	National Council of Churches in Australia
RCA	Refugee Council of Australia
RILC	Refugee and Immigration Legal Centre
RRT	Refugee Review Tribunal
UNHCR	Office of the United Nations High Commissioner for Refugees

List of recommendations

3 Multiple parties – 'class actions' (section 486B)

Recommendation 1

The Committee recommends that restriction of access to class actions in the migration jurisdiction, as set out in the Bill, be enacted.

Recommendation 2

The Committee recommends that, in view of the alleged unintended consequences of section 486B, the section be reviewed to clarify:

- that test cases are not precluded; and
- multiple party actions in other jurisdictions are not affected by the Bill.

Recommendation 3

The Committee recommends that DIMA:

- actively examine judicial appeals to identify issues in common which may be resolved through test cases;
- be proactive in seeking resolution of issues through test cases; and
- publicise the test cases to maximise the number of applicants to be bound by the outcomes, and thus use the courts efficiently.

Recommendation 4

The Committee recommends that the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.

4 'Standing' (section 486C)

Recommendation 5

The Committee recommends that the 'standing' arrangements in the proposed section 486C be proceeded with.

5 Technical Amendments: 'character test'

Recommendation 6

The Committee recommends that the technical amendments in Schedule 2 of the Bill be proceeded with.

7 Section 486A - Other Issues

Recommendation 7

The Committee recommends that applicants be allowed a period of 35 days as the time limit in which appeals to the High Court in migration matters may be lodged.

1

Introduction

The Migration Legislation Amendment Bill (No. 2) 2000

1.1 The Migration Legislation Amendment Bill (No. 2) 2000 ('the Bill') was introduced into the House of Representatives on 14 March 2000. The Bill amends the *Migration Act 1958* ('the Act') to:

- give effect to the Government's policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances by prohibiting class actions in migration litigation and limiting those persons who may commence and continue proceedings in the courts;
- clarify the scope of the Minister's power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal (AAT) and substitute his or her own adverse decision; and
- rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled under section 128.

1.2 The Bill also amends the *Migration Legislation Amendment Act (No. 1) 1998* and the *Migration Legislation Amendment (Migration Agents) Act 1999* to correct a number of misdescribed amendments of the Act.

1.3 The Bill is an omnibus bill that makes a number of amendments to the *Migration Act 1958* which are set out in two Schedules to the Bill.

1.4 Schedule 1, entitled 'Jurisdiction and proceedings of the courts' makes a number of amendments to the judicial review scheme set out in Part 8 of the Act and introduces a new Part 8A into the Act. These amendments:

- prohibit class actions in migration litigation;
- limit the persons who may commence and continue proceedings in the Federal Court;
- introduce time limits for applications to the High Court under section 75(v) of the Constitution for review of migration related matters; and
- clarify the jurisdiction of the Federal Court in relation to remitted matters.

1.5 Schedule 2, entitled 'Technical amendments' makes amendments to the Act:

- to clarify the scope of the Minister's power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal and substitute his or her own adverse decision;
- to rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled under section 128; and
- to correct several misdescribed amendments to the Act.[1]

Rationale for the Migration Legislation Amendment Bill (No. 2) 2000

1.6 The Bill reflects the Government's policy intention to restrict access to judicial review in migration matters in all but exceptional circumstances.

1.7 DIMA advised that the amendments to the *Migration Act 1958*:

> seek to address a recent trend, which has seen class action litigation being used by people with no lawful authority to remain in Australia to obtain a bridging visa and thereby substantially extend their time while they are here.[2]

1.8 DIMA's submission states that the Government reached its view in the light of the extensive merits review rights in the migration legislation, and concerns about the growing cost and incidence of migration litigation. According to DIMA, this litigation has been used by many unsuccessful applicants to delay their removal from Australia.[3]

1 DIMA, Submission, p. 45.

2 DIMA, Evidence, p. 2.

3 DIMA, Submission, p. 46.

1.9 The Government has proposed restricting access to class, or otherwise grouped, court actions because it believes that:

> class actions are being used to encourage large numbers of people to litigate in circumstances where they would not otherwise have litigated. Large numbers of people are being encouraged to participate in class actions in order to obtain a visa. They do not have a lawful entitlement to be in Australia but use class actions in order to access a bridging visa.[4]

1.10 DIMA has advised the Committee that it is concerned about the increasing cost and incidence of migration litigation. Migration litigation cost the Department $11 million in the 1998/99 financial year, with a projected cost of more than $20 million in 2001/2002.

1.11 According to DIMA there were 401 applications for judicial review of migration decisions in 1994/95. In 1998/99 the number of applications for judicial review had increased to 1139. At the end of April 2000 applications in the 1999/2000 financial year had exceeded 850. On current trends, applications are projected to reach 1800 by 2001/2002.[5]

1.12 A further reason for introducing the Bill is to ensure that the standing requirements of Part 8 of the *Migration Act 1958* are extended to any challenge in the Federal Court. That is, the only person who can bring a proceeding in the Federal Court that raises an issue in connection with a visa or deportation decision or a removal action is the *subject* of the visa decision, deportation decision or removal action.

1.13 With respect to section 501A, the amendments seek to clarify, rather than change, the original policy intention behind section 501A. This policy was considered by the Parliament during deliberation on the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* which inserted section 501A. The amendments seek to ensure that the Parliament's intent in inserting that section is given full effect in the legislation.[6]

1.14 The intent of the Character Act was to:

- strengthen the Minister's personal powers to refuse or cancel a visa on character grounds:
  - ⇒ to enable the Minister to personally exercise a special power to intervene in any case to substitute his/her own decision to refuse to

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4 DIMA, Submission, p. 46. Bridging visas are intended to provide interim lawful status whilst some form of processing takes place.

5 DIMA, Submission, p. 47.

6 DIMA, Submission, p. 57.

grant or cancel a visa. This decision may be revoked if made without prior notice to the person.[7]

1.15 The amendments to section 501A seek to give full effect to Parliament's original intention by:

- removing the incorrect suggestion in paragraph 501A(1)(c) that the AAT has a power to grant a visa when reviewing a delegate's subsection 501(1) decision;
- putting it beyond doubt that the Minister can intervene under section 501A where a delegate or the AAT makes a decision not to exercise the power in section 501 because -
  - ⇒ the delegate / Tribunal is satisfied that the person passes the character test; or
  - ⇒ the delegate / Tribunal is not satisfied that the person passes the character test but exercises his or her discretion not to refuse to grant the visa or to cancel the visa; and
- ensuring that the Minister can intervene under section 501A at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether the intervention occurs immediately or after a decision to grant a visa has been made.[8]

Context of the proposed legislation

1.16 The *Migration Reform Act 1992*, which came into operation on 1 September 1994, increased and enhanced rights to independent merits review and restricted access to judicial review of migration decisions by the introduction of the present Part 8. Independent merits review was extended to many decisions previously not covered, most significantly, by the creation of the Refugee Review Tribunal (RRT) to provide independent merits review of refugee determinations under Part 7 of the *Migration Act*.[9]

1.17 The Migration Legislation Amendment Bill (No. 5) 1997, which was intended to implement the Government's policy commitment to restrict access to judicial review in all but exceptional circumstances, was introduced into Parliament in June 1997 and was subsequently passed by the House of Representatives. However, the 1997 Bill was awaiting debate by the Senate when the Parliament was prorogued for the 1998 federal election.

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7 DIMA, Submission, p. 57.

8 DIMA, Submission, pp. 57-58.

9 DIMA, Submission, p. 48.

1.18 The amendments proposed by the 1997 Bill were reintroduced into the Senate in the Migration Legislation Amendment (Judicial Review) Bill 1998 on 2 December 1998.

1.19 DIMA advised that the judicial review amendments contained in the Migration Legislation Amendment Bill (No. 2) 2000 are not a substitute for those in the Judicial Review Bill. They are complementary measures.[10]

Establishment of the review

1.20 On 12 April 2000 the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, referred the Bill to the Joint Standing Committee on Migration for consideration and report to Parliament.

Conduct of the review

1.21 The review was advertised nationally in capital city newspapers on 15 and 19 April 2000. In addition, the Committee wrote to a range of individuals and organisations inviting submissions, including the Law Council of Australia, the Migration Institute of Australia, the Refugee Immigration and Legal Centre, the International Commission of Jurists, Amnesty International, the Human Rights and Equal Opportunity Commissioner and other representative bodies.

1.22 The Committee received 31 submissions which are listed at Appendix A. Submissions which were received electronically were placed on the Committee's web-site. The Committee also received one exhibit from the Islamic Council of Victoria.

1.23 Evidence was taken at public hearings held in Canberra, Sydney and Melbourne. A list of witnesses who gave evidence at the hearings is provided at Appendix B.

1.24 In addition to the above evidence, the Committee sought expert opinion on specific issues relating to the Bill.

10 DIMA, Submission, p. 47; Evidence, p. 2.

Structure of the report

1.25 The report is structured around the main issues which were raised in evidence to the Committee. They are:

- Australia's international obligations;
- the principle of judicial review;
- class actions;
- 'standing' provisions;
- technical amendments: 'character test';
- the constitutional validity of clause 486A; and
- the limitation of 28 days for applications to the High Court.

1.26 Generally each chapter provides the background or context to the relevant part of the Bill and outlines the proposed changes. It then considers the issues raised in relation to that part of the Bill and the Committee's conclusions.

2

Broad Issues

2.1 Submissions to the Committee and evidence at its hearings discussed both the details of the Bill, and broader issues which were perceived as being relevant to the Bill. These broad issues included:

- the implications of the Bill for Australia's international obligations;
- the principle of judicial review; and
- the Bill's constitutional implications.

2.2 The constitutional implications are discussed in detail in Chapter 6, and are therefore not considered in this chapter.

International obligations

2.3 The Office of the United Nations Commissioner for Refugees (UNHCR) indicated that:

> …Australian jurisprudence has made a substantial contribution to international refugee law…the benefit…extends far beyond Australia's borders.[1]

2.4 The Committee noted the implication that the Bill could have wide consequences, and therefore carefully considered the issues drawn to its attention in relation to Australia's international obligations.

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1 UNHCR, Submission, p. 136.

Concerns

2.5 A number of submissions offered arguments against the Bill on the grounds that it may breach one or more of Australia's international obligations.

2.6 The international arrangements specifically identified were:

- International Covenant on Civil and Political Rights;
- Convention Relating to the Status of Refugees;
- Protocol Relating to the Status of Refugees;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- Convention on the Rights of the Child.

International Covenant on Civil and Political Rights (ICCPR)

2.7 The International Commission of Jurists (ICJ) drew the Committee's attention to Article 10 of the Universal Declaration of Human Rights which provides that:

> Everyone is entitled full equality to a fair and public hearing by an independent and impartial tribunal…(sic)[2]

2.8 These rights, it explained, are embodied in a number of Articles in the International Covenant on Civil and Political Rights (ICCPR).

2.9 The ICJ cited paragraph 27 of the Vienna Declaration as a recent statement of the principles in the ICCPR:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations.[3]

2.10 The submission from the Law Council of Australia (LCA) indicated that the ICCPR was central to the question of whether Australia met its obligations under a range of international conventions. LCA argued that to avoid breaching these obligations:

> …Australia must have an effective procedure to determine the validity of an asylum seeker's claims.[4]

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2 ICJ, Submission, p. 162.

3 ICJ, Submission, p. 162.

4 LCA, Submission, p. 95. The LCA submission also claimed that Australia was at risk of contravening its obligations in relation to refoulement because of doubt that the RRT satisfied the requirement to provide a fair and public hearing under ICCPR Article 14. However, that LCA observation was made in relation to provisions of the *Migration Legislation Amendment (Judicial Review) Bill 1998* not encompassed in the Bill under consideration in this Report.

2.11 The Human Right and Equal Opportunity Commission (HREOC) expanded this argument. It noted that Australia had ratified the ICCPR convention in 1980. It claimed that neither the Refugee Review Tribunal (RRT) nor the Immigration Review Tribunal (IRT) conformed to Article 14 of the ICCPR which requires:

> …a fair and public hearing by a competent, independent and impartial tribunal.[5]

2.12 As a result, therefore, HREOC claimed that Australia's obligations under international law required the retention of a right to appeal and judicial review.[6]

2.13 In their submission, LCA and Amnesty International Australia (Amnesty) noted, but did not develop the point, that Article 14 of the ICCPR provides that:

> All persons shall be equal before the courts and tribunals…[7]

2.14 The National Council of Churches in Australia (NCCA) pointed out that, by restricting the avenues of access to review of administrative decisions, the Bill seeks:

> to treat asylum seekers in a manner different to all other persons, in contravention of Article 14.[8]

2.15 More broadly, Amnesty argued that Article 2 of the of the ICCPR provides that:

> …any person…shall have his right …to develop possibilities of judicial remedy.[9]

2.16 Amnesty regarded the proposed changes as a retreat from those principles and an infringement of a fundamental right of access to the courts.[10]

2.17 The Refugee Council of Australia (RCA) implied that the Bill went against the obligation in the ICCPR:

> Articles 2, 14, and 26 …to give non citizens access to the courts on the same terms as nationals.[11]

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5 HREOC, Submission, pp. 13, 17, 18, 19.
6 HREOC, Submission, pp. 13, 17, 19.
7 LCA, Submission, p. 79; Amnesty, Submission, p. 24.
8 NCCA, p. 111.
9 Amnesty, Submission, p. 24.
10 Amnesty, Submission, p. 23.
11 RCA, Submission, p. 132.

Convention Relating to the Status of Refugees (Refugee Convention) and Protocol Relating to the Status of Refugees (the Protocol)

2.18 HREOC noted that Australia had ratified the Protocol in 1973. HREOC argued that Article 33 of the Refugee Convention, which Australia ratified in 1954, obliged Australia not to return ('refoule') a refugee to a country where their life would be threatened.[12]

2.19 NCCA also cited Article 33 of the Refugee Convention. It argued that, in the past, errors in migration decisions had been identified through judicial review. The changes proposed in the Bill reduced access to judicial review which:

> …could easily result in Australia returning a refugee to a territory where his life or freedom would be threatened, thus breaching the principle of non-refoulement.[13]

2.20 In his submission Mr Bliss argued that:

> The Bill, in further restricting judicial review, increases the possibility that individuals who meet the refugee definition will be sent back to face persecution.[14]

2.21 The Refugee and Immigration Legal Centre (RILC) claimed that if a person had been removed from Australia and had subsequently been found to be a refugee, Australia would have been in breach of Article 33 of the Refugee Convention. RILC's submission indicated that the Bill's proposed section 486A, which limited to 28 days the time available to appeal, would increase the danger of such breaches occurring.[15] Further, RILC argued, the provisions dealing with the Minister's discretion in character test cases under section 501A of the Bill would be contrary to Article 1F of the Refugee Convention.[16]

2.22 Amnesty also noted Australia's obligation under Article 33 of the Refugee Convention as the basis for opposition to forcible return, but did not pursue an argument about the Bill's interaction with that Article.[17]

2.23 The LCA noted, but did not enlarge upon, the obligation under Article 16 of the Refugee Convention that:

> A refugee shall have free access to the Courts of law on the territory of all contracting states.[18]

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12 HREOC, Submission, pp. 13, 15.
13 NCCA, Submission, p. 110.
14 Bliss, Submission, p. 125.
15 RILC, Submission, p. 38.
16 RILC, Submission, p. 42.
17 Amnesty, Submission, p. 22.

2.24 Submissions from NCCA, RCA and Mr Bliss argued that, by denying refugees access to the courts, the Bill contravenes Article 16 of the Refugee Convention.[19] This provides that:

> A refugee shall enjoy…the same treatment as a national in matters pertaining to access to the Courts.[20]

2.25 Amnesty also claimed that Article 16 of the Refugee Convention also applies to asylum seekers. Amnesty regarded the changes proposed in the Bill as an infringement of that right.[21]

2.26 UNHCR noted that Article 1 of the Refugee Convention specified the definition of a refugee. It provided a 'complete prescription' of the grounds on which a person could be excluded from being considered a refugee. The submission notes that the 'character test':

> …introduces an element of subjectivity to exclusion issues that is not contemplated by the Convention.[22]

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

2.27 HREOC argued that under Article 3 of the CAT, which Australia ratified in 1989, Australia was obliged not to return ('refoule') a person to a country where they were:

> …in danger of being subject to torture.[23]

2.28 HREOC noted that the right of the person to resist expulsion was not dependent on them satisfying the Refugee Convention definition of 'refugee'. HREOC was concerned that restricting access to judicial review by asylum seekers breached the CAT.[24]

2.29 Amnesty also raised protection from refoulement under CAT Article 3(1) as the basis for opposition to forcible return but did not pursue this point.[25]

2.30 In relation to the concerns expressed, the Committee noted that the right to appeal AAT decisions remained, as did access to judicial review.

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18 LCA, Submission, p. 79.

19 NCCA, Submission, pp. 111-112; RCA, Submission, p. 132; Bliss, Submission, p. 126.

20 NCCA, Submission, p. 111.

21 Amnesty, Submission, p. 23.

22 UNHCR, Submission, p. 137.

23 HREOC, Submission, pp. 15-16.

24 HREOC, Submission, p. 13.

25 Amnesty, Submission, p. 22.

Convention on the Rights of the Child

2.31 HREOC noted that Australia had ratified the Convention on the Rights of the Child in 1990 and that the provisions of Articles 3 and 22 require that

> …all its actions towards children, including asylum seeker children, make their best interests a primary consideration.[26]

2.32 HREOC argued that because Article 37 of the Convention on the Rights of the Child protects children from torture or cruel, inhuman or degrading treatment or punishment and Article 6 recognises a child's inherent right to life, Australia is obliged not to return a child to a country where they are at risk of torture or death. It was concerned that restriction of access to judicial review breached the Convention on the Rights of the Child.[27]

2.33 The Committee noted that access to judicial review of migration decisions, including those affecting children, was retained under the Bill.

DIMA response

2.34 DIMA acknowledged that Article 14 of the ICCPR indicates that judicial review should be available, and noted that Australia provided multiple levels of judicial review. DIMA advised that, according to the Attorney General's Department, the Bill's provisions relating to class actions did not break any conventions.[28] However, the Committee did not sight the advice.

Conclusion

2.35 The Committee considered that the questions raised concerning the operation of the RRT were outside the immediate scope of its review of the Bill. It did, however, note that RRT decisions were still subject to judicial review and that it was only class actions which were being restricted.[29]

2.36 The Committee noted Amnesty's comment that:

> …individual countries do have the right to determine how they operate their system.[30]

2.37 In the Committee's view the Bill did not breach the specific international obligations brought to its attention. The evidence presented to the Committee did not clearly demonstrate a definite breach of Australia's

26 HREOC, Submission, p. 16.
27 HREOC, Submission, pp. 13, 17.
28 DIMA, Evidence, p. 8.
29 See Appendix C.
30 Amnesty, Evidence, p. 78.

international undertakings. Access to judicial review, the central concern of submissions, remained.

2.38 Indeed, UNHCR commented that Australia's refugee determination procedures complied with its standards, and welcomed:

> …the specific preservation of the possibility for individuals to petition courts for judicial review.[31]

Principle of judicial review

2.39 A number of the submissions to the Committee raised the principle of judicial review generally, highlighting:

- its role acting in lieu of a constitutional Bill of Rights (HREOC);[32]
- its importance in strengthening and improving administrative decision making (Mr Bliss and Amnesty);[33]
- its function in providing guidance and establishing precedents (RCA);[34] and
- its role in ensuring public confidence in the refugee determination system (Mr Bliss).[35]

2.40 In the narrow migration context[36] it was argued that, in making complex administrative decisions, judicial review was an important part of the migration determination system.

2.41 NCCA and LCA both drew attention to the fact that access to judicial review was needed because the merit review system may be perceived as not being independent because the government appointed the members.[37]

2.42 HREOC claimed that a small proportion of decisions would be in error and this was a reason for judicial review.[38]

2.43 LCA, Mr Bliss and UNHCR advised the Committee that tribunals such as the RRT had no clear system of precedence for their own decisions and

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31 UNHCR, Submission, p. 135.

32 HREOC, Evidence, p. 39.

33 Amnesty, Submission, p. 24; Bliss, Submission, p. 127.

34 RCA, Submission, p. 132.

35 Bliss, Submission, p. 126.

36 Judicial review in relation to specific provisions of the Bill is considered in the relevant chapters.

37 NCCA, Evidence, p. 58; LCA, Submission, pp. 76-77; Evidence, p. 130.

38 HREOC, Evidence, p. 34.

that the precedents provided by judicial review gave significant guidance to them.[39]

2.44 NCCA provided the Committee with an example of the role that judicial review can play. It argued that 424 RRT cases would have been decided in error since 1993 had it not been for the judicial review mechanism.[40] RCA claimed that judicial review had saved 49 lives.[41]

DIMA response

2.45 DIMA did not directly address the broad issue of the principle of judicial review. Its focus was on the practicalities of the application of judicial review in the migration jurisdiction, noting that :

> Successive governments have attempted to streamline the review processes in the immigration jurisdiction by reducing the need for judicial review by enhancing rights to merits review and limiting access to judicial review.[42]

2.46 With regard to the importance of the role of judicial review in testing the decisions of the merit review system, DIMA provided data for the outcome of 25,299 cases decided by the RRT between 1/7/93 and 30/6/99. This is summarised in Table 1.

Table 1 RRT decisions and Judicial Review: 1/7/93-30/6/99

RRT DECISIONS		**JUDICIAL REVIEW OF RRT DECISIONS**						
		Total applications	**In progress**	**1,730 finalised and:**				
				no data	RRT decision not affected	Reconsidered by RRT and:		
						RRT affirmed	RRT set aside	Other
Number	25,299	**2,106**	376	100	1,279	171	62	118
% RRT decisions	100	***8.32***	*1.49*	*0.39*	*5.06*	*0.67*	*0.25*	*0.46*

Source DIMA Submission, p. 215; "Other" includes cases in progress, withdrawn and those otherwise finalised.

39 LCA, Submission, p. 95; Bliss, Submission, p. 126; UNHCR, Submission, p.135-136.

40 NCCA, Submission, p.110. Examination of the RRT website quoted by NCCA indicated that the figure of 424 RRT cases which NCCA identified as having been decided in error in fact referred to RRT decisions set aside *for further RRT consideration.* At this stage in the review proceedings only the *possibility* of error had been identified. See Appendix C for full data.

41 RCA, Submission, p. 132.

42 DIMA, Evidence, p.2.

2.47 Over the six-year period there were 1,730 judicial reviews of RRT decisions completed, with 1,279 RRT decisions unaffected (73.9 per cent of cases reviewed). Of the 351 decisions returned to the RRT for reconsideration, the original RRT decision was set aside in 62 cases.[43]

2.48 In summary, judicial review resulted in the setting aside of 0.25 per cent of RRT decisions and the confirmation of 1,450 (5.7 per cent)[44], with a further 583 (2.3 per cent) still to be resolved.[45]

Conclusion

2.49 The Committee noted that the judicial review process can only identify errors in law, it can not reverse an actual decision. It is the subsequent re-examination of the case by the tribunal, in the light of the judicial review which may lead to a different decision. In the six years to 30/6/99 this had occurred in 62 cases.

2.50 The Committee accepted the validity of many of the comments in the submissions about the removal of judicial review. However, it noted that the Bill was not removing access to judicial review. Access to class actions was being restricted. The Committee noted that individuals retained access to judicial review through pursuing individual case and through test cases.

43 Appendix C.

44 Appendix C: comprised of 1,279 cases where the RRT decisions were unaffected by judicial review and 171 cases where, subsequent to judicial review and referral back to the RRT, for reconsideration, the RRT affirmed its original decision.

45 Appendix C: Cases to be resolved include 376 judicial review still in progress; 100 no details; and 107 returned to RRT and yet to be determined.)

3

Multiple parties – 'class actions' (section 486B)

The concept

3.1 The *Explanatory Memorandum* indicates that the proposed section 486B

> …bars class, representative or otherwise grouped court actions.[1]

3.2 Grouped actions, in which the outcome affects all those who have elected to be associated with it, include:

- *class action,* which allows

  > …the claims of many individuals against the same defendant, which arise out of the same or similar circumstances, to be conducted by a single representative.[2]

- *representative* action, where

  > …numerous parties to a court proceeding who have the same interest in the proceedings are represented by one of the parties.[3]

- *test case*[4], which is one

  > …selected from a number of similar ones to be tried first, with all persons involved in the other cases agreeing to be bound by the decision.[5]

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1 *Explanatory Memorandum*, p. 5.

2 Butterworths *Australian Legal Dictionary*, Sydney, 1997, p. 198.

3 Butterworths *Australian Legal Dictionary*, Sydney, 1997, p. 1013.

4 The Committee was advised by the Law Council of Australia that one case (*Lay Kon Tji*), described as a "test case", was a representative action. LCA, Evidence, p. 115.

5 Butterworths, *Australian Legal Dictionary*, Sydney, 1997, p. 1162.

3.3 DIMA advised the Committee that the term "class action" was used

> …to refer to any grouped court actions, however the members may be grouped or joined.[6]

3.4 The Committee was concerned that the Bill specifically referred to "representative or class actions".[7] To the Committee this indicated that, although "class action" may be used generically, it has a legal meaning separate from representative action.

3.5 The Committee noted that in two separate Federal Court judgements, one cited a case as a *representative action*, and the other characterised the same case as a *class action*.[8]

3.6 In view of this, and the Committee's inability to obtain a clear explanation of how the two concepts differed, it has taken the two terms, class and representative actions, to mean the same, with test cases having a distinct and separate meaning.

Background

3.7 The Minister's speech for the second reading of the Bill implied that the way in which class actions were being used by litigants was an abuse of the migration appeal process:

> Class actions have been taken out allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter. All 10 of the class actions decided so far…have been dismissed by the courts.[9]

Proposed provisions

3.8 The proposed new sections 486B and 486C of the Act concern multiple parties in migration litigation. The proposed section 486B would not permit:

> joinder of plaintiffs or applicants;

6 DIMA, Submission, p. 48.

7 Para 486B(1)(c).

8 Commonwealth Case Law, (www.scaleplus.law.gov.au); *Siahaan* (1998) and *Fachruddin* (2000), respectively, citing *Kagi v Minister for Immigration and Multicultural Affairs.*

9 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14268.

consolidation of the proceedings with any other proceedings;

representative or class actions;

a person in any way being party to the proceeding jointly with, or on behalf of, for the benefit of, or representing, one or more persons, however this is described.[10]

in either the High Court or the Federal Court.

3.9 These changes aim to exclude class and representative actions and prevent the creation of grouped actions.

3.10 Exceptions to the proposed new provisions would be:

- members of the same family (if the regulations provide a definition for the purposes of the paragraph);
- a person performing statutory functions;
- Attorneys-General of the Commonwealth, State, or Territory; and
- any other person described in the regulations.[11]

Arguments for the Bill

3.11 DIMA advanced a number of reasons for restricting access to class actions:

- test cases are better suited to deal with migration decisions which have a common issue in law;[12]
- class actions are inappropriate in migration matters because the court's decision on the issue common to the cases does not resolve the particulars of each case, which must be considered individually;[13]
- class actions are inappropriate in the Federal Court in migration matters because of a tension between the provisions of Part IVA of the *Federal Court Act 1976*, (under which individuals do not have to individually nominate to join a representative action),[14] and the practical requirement that they have to identify themselves in order to obtain a bridging visa;[15]

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10 Proposed subsection 486B (1)

11 Proposed subsection 486B (4)

12 DIMA, Submission, p. 216.

13 DIMA, Submission, p. 212; Evidence, p. 170, cite the 1993 *Zhang De Yong* case as an example.

14 Section 33 states that the consent of a person to be a group member in a representative proceeding is not generally required.

15 DIMA, Submission, pp. 210-211.

- class actions create specific administrative problems, in particular DIMA encounters problems ascertaining whether or not each member of a class action is in possession of a bridging visa;[16]
- persons are included in class actions who would gain no benefit from a positive outcome;
- people can join class actions despite not having made applications to the Federal Court in relation to their own visa decision within the allowed time (97 per cent in one case);[17]
- appeals have been lodged without the applicant being aware that their name had been added to the class action;[18]
- successive governments, Coalition and Labor, have been concerned about the increasing workload in the Federal Court in the migration jurisdiction[19] and class actions are being used in the migration jurisdiction in numbers not seen before, rising from 401 in 1994/95 to 1139 in 1998/99;[20]
- a significant proportion (in excess of 20 per cent and possibly 40 per cent in one action) of members of class actions move from class action to class action;[21] and
- the fact that participants in class actions are entitled to a bridging visa entitling them to remain in Australia legally is used to encourage people to litigate, eg an advertisement submitted by DIMA announced:

> you may be able to join our class actions… It doesn't matter if you are illegal or that your Ministerial Review has been rejected… You may still qualify for a Bridging Visa and become legal.[22]

3.12 Submissions from Mr Bullen and Mr Dorricott, both given in a private capacity, similarly claimed delay of removal was the motivation for court action.[23]

16 DIMA, Submission, p. 52.

17 In one case one quarter had their last visa decision 3 years prior to joining the class action: DIMA, Submission, pp. 53-54, Evidence, pp. 16-18.

18 DIMA, Submission, p. 52.

19 DIMA, Evidence, p. 14, referring *inter alia* to: Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System*, 1992, p. 54; Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, 1994, p. 104.

20 DIMA, Submission, p. 47.

21 DIMA, Evidence, p. 3.

22 DIMA, Submission, pp. 49, 59-61, 66; Evidence, p. 5.

23 Bullen, Submission, p. 2; Dorricott, Submission, p. 5.

Potential benefits of the proposed section 486B

3.13 The key benefit which DIMA expected to flow from restricting access to class actions was that it would remove an abuse of judicial review arrangements by stopping:

> …the use of a ***process*** that is being used merely to extend a person's stay in Australia for lengthy periods of time.[24]

3.14 Limitation of access to class actions, DIMA asserted, might bring "substantial savings" to the Commonwealth because:

- litigation in class actions was lengthy, complex, and therefore expensive (currently the average litigation cost of a class action was $77,000 compared with $10,000 for an individual action);[25]
- there would be less litigation; and
- there would be a reduction in costs currently incurred to establish the migration status details of those who are parties to class actions.[26]

3.15 DIMA, however, observed that cost was not a significant motivating factor.[27]

3.16 DIMA also claimed that test cases were a more efficient use of the courts to decide specific issues. The average time for such a case was about five months compared with 18 months for a class action, and the outcome enabled speedy resolution of other similar cases.[28]

Opposition to the proposed section 486B

3.17 Arguments against the proposed restriction on multiple parties in migration litigation matters focussed on:

- **Flaws in the concept -**
  - ⇒ interference with judicial review;
  - ⇒ conflict with international obligations; and
  - ⇒ lack of conclusive proof of abuse of process.

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24 DIMA, Submission, p. 209 (emphasis added).

25 DIMA, Submission, p. 218; DIMA, Evidence, p. 188 indicates this includes barristers' and solicitors' fees and the litigation area within DIMA.

26 DIMA, Evidence, pp. 7-8.

27 DIMA, Evidence, p. 178.

28 DIMA, Evidence, pp. 6-7, 16.

- **Flaws in the proposed section -**
  - ⇒ questionable effectiveness;
  - ⇒ unintended consequences; and
  - ⇒ retrospectivity.
- **Implications of the section for -**
  - ⇒ efficiency of the courts;
  - ⇒ affordability of judicial review;
  - ⇒ monitoring the review process;
  - ⇒ Commonwealth costs; and
  - ⇒ equity.

Claimed flaws in the concept

Interference with judicial review

3.18 The Immigration Advice and Rights Centre (IARC) pointed out that, at Federal Court level, procedures for class actions generally were introduced relatively recently (1992) in response to the recommendations of the Australian Law Reform Commission. In view of this, and the Parliament's previous legislation to improve judicial processes, IARC urged that the Parliament should be satisfied that there are sound reasons for reversing existing arrangements which permit class actions in the migration jurisdiction.[29]

3.19 According to the ICJ, the limitations in the proposed subsection 486B(1) could, as written, intrude into the judicial area, because:

> …when other parties were added by the direction of the court, those other parties were said to be added to the proceedings rather than joined…in [some] legislation…the word 'joinder' is used to cover …'addition of parties'. So …paragraph (a) of subsection 1 of clause 486B could be construed as prohibiting the court itself from joining parties once proceedings had started.[30]

3.20 This would prevent the courts from using their established practice of adding parties to proceedings once they have begun, if they felt that this would permit efficient use of judicial resources. The effect, therefore, of section 486B would be to prevent the courts from creating a class action where they felt one was appropriate.[31]

29 IARC, Submission, pp. 104-106.

30 ICJ, Evidence, p. 44.

31 ICJ, Evidence, p. 45.

3.21 The Committee noted that this effect was consistent with the overall aim of the section to bar class, representative or otherwise grouped actions in both High Court and Federal Court proceedings. Further, although the court could not create class actions, it was still open to consider test cases representing individual applications with a common issue of law.

Conflict with international obligations

3.22 More broadly, submissions from Amnesty, LCA, NCCA, and RCA argued that asylum seekers and refugees should have free access to the courts under Article 16 of the 1951 Convention relating to the Status of Refugees.[32] LCA and NCCA also claimed that under the ICCPR all people should be equal before the courts.[33] Further, Amnesty, NCCA, and RCA argue that the Bill's intention to remove one avenue of appeal to the courts runs counter to the ICCPR provisions by treating asylum seekers and refugees differently from other persons.[34]

3.23 The Committee, however, noted that:

- according to HREOC, there is no direct right to class action of itself in the international agreements;[35]
- the ICCPR indicates that one level of judicial review must be available, and Australia has multiple levels;
- fewer than half those in class actions were seeking protection visas as refugees; and
- those seeking review could still apply individually.[36]

3.24 The Committee also noted DIMA's claim that advice from the Attorney-General indicated that the Bill did not break any conventions, but the Committee did not sight this opinion.[37] The Committee did however sight advice provided to DIMA by the Chief General Counsel of the Australian Government Solicitor.[38]

3.25 The Committee considered that the arguments using international agreements as reasons for not restricting class actions were not sufficient by themselves to warrant rejection of the proposed section.

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32 Amnesty, Submission, p. 23; LCA, Submission, p. 79; NCCA, Submission, p. 111; RCA, Submission, p. 132.

33 LCA, Submission, p. 79; NCCA, Submission, p. 111.

34 Amnesty, Submission, p. 23; NCCA, Submission, p. 111; RCA, Submission, p. 132.

35 HREOC, Evidence, p. 30.

36 DIMA, Evidence, p. 8.

37 DIMA, Evidence, p. 8.

38 DIMA, Submission, pp. 237-238.

Lack of conclusive proof of abuse of process

3.26 A number of submissions challenged the central justification for limiting access to class action; ie that the process was being used merely to extend a person's stay in Australia for lengthy periods of time.

Class actions are not, of themselves, abuse of process

3.27 Submissions from LCA and IARC disputed the implication that the dismissal of class actions by the court meant that the actions were an abuse of process or lacked merit.[39] LCA pointed out that, even where the legal challenge had failed, the courts had conceded the significance of the issues raised.[40]

3.28 LCA, NCCA, and RCA rejected the Government's claim that since October 1997:

> …all 10 of the class actions decided so far – involving about 4000 participants – have been dismissed by the courts.[41]

3.29 They pointed out that the class action *Fazal Din*, begun in February 1997,[42] was upheld by the Federal Court in August 1998.[43] LCA also identified *Lay Kon Tji* as a representative action upheld by the Federal Court.[44]

3.30 The *Fazal Din* case was a Federal Court class action filed in February 1997 disputing whether or not the Special Test of English Proficiency (STEP Test) was properly nominated by the Minister. On 14 August 1998 the Court found that the STEP test had not been properly nominated by the Minister and the class members were allowed to sit an additional English test and have their 816 visa decision reviewed. The class involved 16 members and a further 5 individual Federal Court applications on this issue were set aside by consent.[45]

3.31 The *Lay Kon Tji* case was based on an issue of dispute over whether or not Mr Lay, an East Timorese national, had 'effective nationality' in Portugal (if he did he was not owed protection obligations under the Refugees

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39 LCA, Submission, p. 76; IARC, Submission, p. 106.

40 LCA, Submission, p. 76.

41 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14268.

42 DIMA, Submission, p. 50.

43 NCCA, Submission, p. 115; RCA, Submission, p. 133. LCA, Evidence, p. 119 corrects its Submission (pp. 75, 82) that *Fazal Din* was a "representative" action. DIMA, Submission, p. 53, views it as a class action.

44 LCA, Evidence, p. 119. DIMA, Submission, p. 216, regards *Lay Kon Tji* as an individual test case.

45 DIMA, Submission, p. 222.

Convention). The Chief General Counsel advised that this case was a suitable vehicle for testing further issues associated with this question. In each of the other 28 similar cases, the court, the applicant and the Minister agreed that the cases should be adjourned pending the outcome of *Lay Kon Tji*.[46]

3.32 Mr Lay was successful in the Federal Court and the Minister then appealed to the full Federal Court. However, in November 1999, the Minister agreed to discontinue the appeal due to developments in East Timor. Mr Lay's case was remitted to the RRT.[47]

3.33 The Committee considered that some genuine issues may have been raised in class actions that were unsuccessful, but questioned whether this constituted sufficient justification for continuing to permit access to such broad actions where applicants received no direct benefit.

3.34 The Committee also considered that migration class actions were not, of themselves, an abuse of process. However, the Committee considered that the process itself could be subject to abuse.

Litigants are not necessarily abusing the process

3.35 Some submissions conceded that there might have been some apparent abuse of process by litigants in some class actions. However, they argued that the evidence was equivocal.

3.36 NCCA argued that unmeritorious claims might be evidence of the applicants' lack of competent legal advice, rather than their intention to exploit the review process.[48]

3.37 RILC advised the Committee that cases may be driven by the actions of the service providers, rather than by initiatives of the applicants themselves, eg the migration agents or solicitors may encourage applicants to 'buy' time.[49]

3.38 DIMA's investigations indicated that some individuals were unaware of the process in which they had become participants, and it was unclear what advice they had been given.[50]

3.39 The Committee considered that some individuals wanted to remain in Australia and subsequently joined a class action without necessarily

46 DIMA, Submission, p. 278. According to LCA, however, (Evidence, p. 115) the case "has been looked upon as a representative action. You can call it a test case or whatever you like, but it is a representative action".

47 DIMA, Submission, p. 278.

48 NCCA, Submission, p. 116.

49 RILC, Submission, pp. 40-41.

50 DIMA, Evidence, p. 185.

understanding whether or not it was relevant to their situation, or whether its outcome could benefit them. The Committee believed that this constituted an unwitting abuse of the process by the litigants.

Soliciting participation is not an abuse

3.40 In the case of advertisements encouraging individuals to join class actions[51] the Committee was advised by RCA, Migration Agents Registration Authority (MARA), and NCCA that advertising the existence of class actions assists with ensuring access to justice by providing information of possible relevance to individuals.[52] In addition RCA informed the Committee that:

- the advertisements may be ordered by the courts;[53]and
- it was arguable that the invitation to participate in a class action and consequently receive a bridging visa assisted DIMA in locating persons illegally in the community.[54]

3.41 The Committee's view was that the courts were unlikely to order the type of advertisements which had been drawn to its attention. DIMA generally knew the identity of persons in the country without appropriate authority, and the legal process was not likely to reveal their addresses. Whether or not DIMA might benefit was questionable and could be considered a by-product of the process, not its core rationale.

3.42 The Committee examined advertising which promised, for example, that:

> You still may qualify for a Bridging Visa and become legal;[55] or
>
> Permanent Residence – Australia…Our latest action is easy to join (over 1,200 people have already joined!).[56]

3.43 The Committee was also shown a letter advising the client of an immigration adviser that:

> Your class action has now finished. By law you should depart Australia within 28 days, or else compliance action may take place.
>
> However, you might be able to immediately qualify for our new class action, and to obtain a further Bridging Visa.
>
> It is very easy to join![57]

51 Advertisements are at DIMA, Submission, pp. 59-61, 67.
52 RCA, Evidence, p. 48; NCCA, Evidence, p. 64; MARA, Evidence, p. 135.
53 RCA, Evidence, p. 54.
54 RCA, Evidence, pp. 54-55.
55 DIMA, Submission, p. 59.
56 DIMA, Submission, p. 67.
57 DIMA, Submission, p. 66.

3.44 Clearly the aim of such invitations was to encourage individuals to approach the promoter. Some applicants would be motivated by the apparent promise of at least short-term legal residence in Australia through a bridging visa.

3.45 It was also possible that some, convinced that they had a right to remain in Australia, could be included in a class action which might not have any potential to benefit them in the long term. As the Committee noted previously, this could promote unwitting abuse of the process by the litigants.

3.46 DIMA claimed that the majority of participants in class actions were indeed using class actions solely to delay removal from Australia.

3.47 DIMA's chief evidence was that many participants in class actions:

- would not benefit from the positive outcome of the class action;[58]
- had not sought to challenge decisions within the permitted time;[59] and
- moved between class actions.[60]

3.48 The Committee accepted that it was not possible to estimate the numbers whose motivation for joining a class action was merely to gain a bridging visa. However, the Committee noted that the possible 18 month duration of a class action, compared with approximately five months for an individual Federal Court action,[61] offered a considerable attraction to those wishing to prolong their stay in Australia.

3.49 Overall, the Committee concluded that, although not quantifiable, there was abuse of the class action process and that this abuse should be addressed.

Unwitting inclusion in class actions

3.50 DIMA's concern that individuals had been included in class actions without their knowledge[62] was addressed by LCA and MARA, who pointed out that this could occur legitimately.[63] Under Part IVA of the *Federal Court Act 1976*, individuals do not have to elect to join a representative action.[64]

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58 DIMA, Submission, p. 53.

59 DIMA, Submission, pp. 53-54, 209-210.

60 DIMA, Submission, p. 54.

61 DIMA, Evidence, p. 16.

62 DIMA, Submission, p. 52.

63 LCA, Evidence, p. 127; MARA, Evidence, p. 149.

64 Section 33 states that [subsection 1] the consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person, and

3.51 The Committee agreed that the inclusion of persons in proceedings without their knowledge was an outcome of a specific provision of the law.

Claimed flaws in the proposed section

Questionable effectiveness

3.52 Submissions from LCA and RCA queried whether the proposed restriction on multiple parties in migration litigation was an appropriate response to the perceived problem. It was argued that even without access to class actions, individuals could still initiate proceedings, qualify for a bridging visa and remain in Australia. As such, the proposed restriction was not a remedy.[65]

3.53 The Committee believed that this argument neglected to give sufficient weight to the fact that class and representative actions enabled individuals to engage in litigation to qualify for a bridging visa, even when the outcome could not affect them.

3.54 Further, the Committee noted that the ability of litigants to move from one class action to another provided them with the opportunity to gain access to a sequence of associated bridging visas. The Committee considered that this opportunity was less likely to be available in the case of individual actions, where all the applicant's claims might be tested at once, and their case finalised.

Unintended consequences

3.55 The LCA claimed that section 486B is poorly drafted and, in attempting to exclude class actions in the migration area, has the potential to exclude multiple party proceedings other than migration matters (including human rights of detainees, social security matters and criminal law matters).[66]

3.56 LCA also claimed that 486B(1)(d) could preclude test cases. It argued that:

[subsection 2] None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so: (a) the Commonwealth, a State or a Territory; (b) a Minister or a Minister of a State or Territory; (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

65 LCA, Submission, p. 78; RCA, Submission, p. 133.

66 LCA, Submission, p. 82.

> subsection (1)(d) talks about a person in any other way being a party to the proceeding jointly with, or on behalf of, or for the benefit of, or representing one or more other persons, however this is described. Our submission is that that is way broader than the definitions in the Federal Court rules, for example, of class actions representing. And that is a provision that would well and truly touch a case like Lay [Kon Tji]. It would touch any test case, in the breadth with which it is currently drawn.[67]

3.57 The Committee considered that the question of the status of test cases under the proposed section was significant in view of DIMA's stated position that:

> …migration decisions can be adequately dealt with by way of a test case;[68] and
>
> Test cases will, of course, remain possible if the bill is passed.[69]

3.58 The Committee noted that if class and representative proceedings were to be excluded in the migration area then there would need to be further reassurance that test cases would not be excluded by this legislation.

Retrospectivity

3.59 LCA and the Australian Catholic Bishops Conference (ACBC) expressed concern about the intention to apply the limitation on class actions from 14 March 2000,[70] and the practical implications of that action for the ability to offer sound legal advice.[71]

3.60 The Committee accepted that a cut-off date is necessary to avoid the initiation of more class actions in reaction to the Bill's proposals. Different categories of claimant were an inevitable and predicted outcome, recognised in the Bill's provision for the application of amendments and its transitional provisions.[72]

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67 LCA, Evidence, p. 116.

68 DIMA, Submission, p. 216.

69 DIMA, Evidence, p. 163.

70 LCA, Submission, p. 83; ACBC, Submission, p. 146.

71 LCA, Submission, p. 83.

72 Migration Legislation Amendment Bill (No. 2) 2000, Schedule 1, Part 2, Items 7-11.

Implications of the section

Efficiency of the courts

3.61 The Ethnic Communities Council of NSW (ECC), RILC, LCA, IARC, NCCA, Mr Bliss, and RCA argued that class actions constituted an efficient use of the courts for judicial review. The court, instead of deliberating on a series of individual cases, is required to consider only one.[73]

3.62 Submissions by IARC, Mr Bliss, RCA, ACBC, and RILC, claimed that restriction of access to class actions would have a negative effect on the court system. They argued that this would occur because the number of cases coming before the courts would proliferate as people previously able to pursue a class action applied for hearings of their individual cases.[74]

3.63 A related claim by NCCA was that the predicted increased costs of pursuing an individual case would mean that individuals would appear before the court possibly poorly advised and/or unrepresented, which would further tie up court resources.[75]

3.64 DIMA argued that in the two cases it had analysed, *Muin* and *Lie,* only one in ten of those listed in the class action had initiated individual actions prior to joining the action.[76] This information suggested that fewer individuals were inclined (for whatever reason) to take individual actions than to pursue class actions.

3.65 The Committee considered that the evidence, although not exhaustive, indicated that individual actions were not pursued because:

- applicants, for whatever reason, had not appealed within the 28-day time period for individual applications; and/or
- applicants lacked grounds, or 'standing', on which to lodge an appeal for judicial review.

3.66 The Committee received evidence from DIMA that most applicants for class actions had already exceeded the time during which they could have appealed as individuals.

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73 ECC, Submission, p. 28; RILC, Submission, p. 39; LCA, Submission, pp. 77, 81; IARC, Submission, p. 106; NCCA, Submission, p. 114; Bliss, Submission, p. 130; RCA, Submission, p. 132.

74 IARC, Submission, p. 106; Bliss, Submission, p. 130; RCA, Submission, pp. 132-133; ACBC, Submission, p. 146; RILC, Evidence, pp. 30, 37.

75 NCCA, Submission, p. 114, cites Justices Wilcox and Madgwick on the costs of responding to "hopeless cases" and paying judges to decide them.

76 DIMA, Submission, p. 210.

3.67 DIMA's examination of migration matters before the High Court, lodged under original jurisdiction, revealed that 90 per cent of applications were made more than 35 days after the decision being challenged.[77]

3.68 However, the Committee considered that such delays in applying to the High Court reflected the current absence of time limits. The evidence of current delays was not proof that, in future, applicants would be unable to make their appeals within the proposed fixed timeframe.

3.69 In addition, the Committee noted the argument that, because under proposed section 486C they might not have grounds to pursue a case, fewer individuals would initiate individual actions than would have participated in class actions.

3.70 DIMA noted that 11 of the 27 class members initially in the *Fazal Din* action were excluded because they would not benefit from the outcome.[78]

3.71 Issues arising from changes in 'standing' under proposed section 486C of the Bill are discussed in Chapter 4 of this report.

3.72 The Committee viewed the evidence advanced concerning the potential effect of the Bill on the courts as equivocal. It was not proven that the elimination of class actions would lead to the increased demand on court resources which was predicted in some evidence.

3.73 The Committee concluded that the court's administrative caseload could increase because applicants who might previously have been covered by a single class action would now put in individual applications.

3.74 However, the Committee considered that the possible increase in applications would not necessarily significantly increase the number of court hearings. This was because, where multiple applications existed concerning a common issue of law, the hearing of all other applications could be stalled pending the outcome of a test case. Such test cases could permit similar efficiencies in judicial review as were claimed for class actions.

Affordability of judicial review

3.75 A key advantage of class actions cited by HREOC, ECC, RILC, LCA, IARC, and the Fijian-Australian Resource Centre (FAR) was that they reduced the cost to individuals of litigation. Consequently, this opened

77 DIMA, Submission, pp. 209-210 cites specific cases and the overall proportion.

78 DIMA, Submission, p. 53. 1 had not applied for the visa class at issue; 1 had applied but withdrawn his IRT application; 3 had not applied to the IRT for a review of the decision; 4 had not applied for judicial review within 28 days, and 2 had yet to receive a decision for merits review. As these people fell outside of the group affected by the outcome, the court reduced the number of people included in the class action to 16.

up judicial review to more people than would otherwise be able to access it.[79]

3.76 DIMA stated that the Department could not provide information on the costs to an applicant, as costs vary from case to case, depending on the level of representation, complexity, number of hearings and the number of levels of appeal. An applicant's costs will also depend largely on the fees negotiated with the applicant's representative.[80]

3.77 The ECC and LCA pointed out that affordable access to judicial review had become more important since the virtual abolition of legal aid for migration litigation in 1998.[81]

3.78 DIMA confirmed that:

> The Government's changes mean that legal aid is no longer widely available for migration matters… consistent with the Government's policy objective of limiting publicly funded legal assistance to exceptional and deserving cases…[82]

3.79 According to LCA, a further financial incentive for grouped applications was that, in the event of failure, the applicants are liable for the other party's costs, and a class action spreads that liability.[83]

3.80 DIMA claimed that most applicants to the Federal Court for review of migration decisions had their filing fees waived. In addition, according to DIMA, "many" applicants were self-represented and therefore did not incur legal practitioner's fees.[84]

3.81 Against this it was argued that there was a de facto cost barrier because an unsuccessful litigant could be liable for the defendant's costs. The Commonwealth, the defendant in class actions, seldom waives its costs that average approximately $77,000 for each class action. Its average litigation cost per individual case is $10,000. The prospect of bearing the defendant's cost would be more of a deterrent to an individual than to a group.[85]

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79 HREOC, Submission, p. 13; ECC, Submission, p. 28; RILC, Submission, pp. 39-40; LCA, Submission, p. 76; IARC, Submission, p. 106; FAR, Submission, p. 139.

80 DIMA, Submission, p. 82.

81 ECC, Submission, p. 28; LCA, Submission, p. 75; DIMA, Submission, pp. 215-216 indicates that Legal Aid "continues to be available for matters where there are differences of judicial opinion…or where proceedings seek to challenge the lawfulness of detention".

82 DIMA, Submission, p. 216.

83 LCA, Submission, p. 82.

84 DIMA, Evidence, p. 6.

85 DIMA, Submission, p. 218. LCA, Evidence, p. 117 cites Commonwealth costs ranging upwards from $10,000 for a single action.

3.82 The Committee was unable to reach a firm conclusion in relation to the affordability issues because it could not obtain data on the financial costs to individuals seeking judicial review through a class action. However, the Committee considered that class actions would involve some initial cost to the applicant and even a small expense would deter or preclude some potential applicants. The Committee therefore considered that the cost barrier argument for the retention of class actions was not decisive.

Monitoring of the review process

3.83 LCA argued that, under the Bill:

- generalised administrative actions which might be unlawful would be more difficult to challenge; and
- the knowledge that appeals would have to be launched by individuals would provide less incentive for the administration to remedy shortcomings.[86]

3.84 The Committee noted the concerns of LCA, but also noted that avenues remained open through which to test administrative decisions, namely through individual judicial review and test cases in particular.

Commonwealth costs

3.85 LCA claimed that class actions reduced the Commonwealth's legal costs by reducing the total number of court cases required to be heard and defended.[87]

3.86 DIMA informed the Committee that in the three-year period between January 1997 and December 1999, there were 10 class actions for which the average cost was $77,000.[88] Individual cases cost DIMA an average of $10,000.[89] These figures include the cost of running the DIMA litigation and include fees paid to external solicitors and barristers, and the costs of the Department's litigation case officers (including salary, office, administrative and travel costs).

3.87 DIMA also indicated the most expensive class action could cost fifteen times that of an individual action.[90]

86 LCA, Submission, p. 76.
87 LCA, Submission, p. 77.
88 DIMA, Submission, p. 282.
89 DIMA, Submission, p. 218.
90 DIMA, Submission, p. 218.

3.88 Submissions from IARC, Mr Bliss, and ACBC claimed that the restriction on class actions would increase DIMA costs as individual cases proliferated.[91]

3.89 When considering arguments concerning the effect of the Bill on the efficiency of the courts (see above), the Committee was not convinced that limiting class actions would result in a significant increase in individual actions.

3.90 The Committee, however, found it significant that the Explanatory Memorandum for the Bill was equivocal concerning its financial impact. It said that, depending on what effect the amendments have on applications for judicial review,

> broad costs to the Commonwealth…may be reduced. However…there may be an increase in litigation costs.[92]

3.91 Similarly, DIMA was unable to say categorically whether barring class actions would, or would not, save money.[93]

3.92 The Committee had no basis on which to estimate how many individuals might pursue individual appeals in the absence of class actions. However the Committee used the DIMA data on costs to estimate how many individual actions might have been contested for the total cost of the class actions between January 1997 and December 1999. The total cost of class actions covering 4,458 individuals over that period was approximately $770,000.[94]

3.93 In contrast, the average cost of an individual action was $10,000. At that cost per individual action, the expenditure on contesting 77 individual cases would have been $770,000 (the same as the expenditure on class actions covering 4,458 individuals). This suggested to the Committee that if more than 78 (ie 1.7 per cent) of the participants in class actions had pursued their cases individually, the cost to the Commonwealth would have exceeded the actual expenditure on class actions.

3.94 The Committee therefore considered that there was merit in the argument that retaining class actions would be more economical than restricting them.

3.95 Against this, DIMA claimed that although in class actions:

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91 IARC, Submission, p. 106; Bliss, Submission, p. 130; ACBC, Submission, p. 146.

92 *Explanatory Memorandum*, p. 2.

93 DIMA, Evidence, pp. 8, 20; Submission, p. 218.

94 DIMA, Submission, p. 282 indicates the average cost for each of ten class actions was approximately $77,000, ie a total cost of $77,000 x 10 = $770,000.

> …there are cheaper costs per individual…However, that is not the only determinant of the public policy issues.[95]

3.96 The Committee drew attention to the potential for the Commonwealth's migration litigation costs to increase as a consequence of restricting access to class actions.

Equity

3.97 HREOC considered that those who would be precluded from class actions by the section and who decided to proceed with individual actions would be disadvantaged because they:

- were unfamiliar with appeal and court procedures; and
- faced a language barrier.[96]

3.98 The Committee believed that these were perennial problems in the justice system. Because they were not issues which would arise uniquely from the removal of access to class actions, they did not provide strong arguments for the retention of class actions.

Alternative proposals

3.99 The Committee also noted suggestions for alternative approaches to perceived abuse of class actions and considered a range of proposals including:

- clear identification of abuses;
- elimination of bridging visas;
- the need for better advice for applicants for judicial review;
- better filtering of cases; and
- increased use of test cases.

Identification of 'abuse'

3.100 RILC and LCA urged that the abuses claimed as justification for the Bill should be clearly identified.[97]

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95 DIMA, Evidence, p. 174.

96 HREOC, Submission, p. 13.

97 RILC, Submission, p. 33; LCA, Submission, p. 87.

3.101 The Committee noted that the information provided to it by DIMA indicated the use of class actions for purposes other than the pursuit of judicial review. However, it also noted that the DIMA evidence indicated that detailed examination of the individuals in class actions had not been undertaken systematically, apparently because of the volume of applications.[98] This meant that its data were only indicative, rather than conclusive evidence of the scale of apparent abuse.

3.102 The Committee considered that it was unlikely that reliable evidence could be gathered concerning individuals' motivation for joining class actions.

3.103 Nevertheless, the Committee noted that joining a class action gave bridging visas to persons who were in Australia without appropriate authority. This benefit was itself an invitation for some to pursue litigation. Further, the fact that many class action participants had not been subject to the visa decision being appealed and/or had not applied for review in the time allowed, also strongly suggested to the Committee that class actions were being used for purposes other than a resolution of the claimed substantive issue.

Elimination of bridging visas

3.104 One solution to the use of the class action in order to obtain a bridging visa would be to eliminate that visa. The visa was devised in order to permit individuals engaged in litigation to remain in the community, rather than being detained.[99] DIMA pointed out that, if there were no bridging visas, section 189 of the *Migration Act 1958* requires that persons without visas be detained. A practical impediment to taking that action was that Australia lacked facilities to house the estimated 8,000 involved in class actions if their bridging visas were removed.[100]

3.105 The Committee considered that if it was true that some individuals pursued a class action solely to obtain a bridging visa to remain in Australia and work illegally, the attractiveness of pursuing a class action for that purpose would be lessened if the person were in detention.[101] The number of potential detainees might, therefore, not be such as to overload Australia's detention capacity, which is currently being expanded.

98 DIMA, Evidence, pp. 20, 282.

99 DIMA, Submission, p. 49.

100 DIMA, Evidence, p. 19.

101 DIMA, Evidence, p. 5, indicates that an unspecified number want to stay because they want to work.

3.106 However, the Committee considered that removal of the bridging visa was not appropriate. It would increase the numbers of people unlawfully in Australia against whom action would have to be taken, thus increasing Commonwealth costs.

Better advice

3.107 Poor, or poorly prepared, individual cases going forward were seen as contributing to the courts' workload. This was one of the concerns underlying the proposed section 486B. A number of suggestions were made in connection with improving the quality of the advice available to applicants, with the aim of minimising this problem.

3.108 Both RILC and ACBC mentioned closer regulation of the activities of migration agents or solicitors with a view to reducing the apparent exploitation of the migration process.[102] This would be in line with an earlier recommendation by the Committee that the migration agents' registration body:

> be proactive in monitoring the activities of migration agents…including advertising.[103]

3.109 The Committee was disappointed that the MARA representatives giving evidence were apparently unaware of advertisements inviting individuals to join in class actions, such as those cited by DIMA.

3.110 DIMA advised the Committee that:

> There is the concern with the conduct of some members of the legal profession in relation to how they promote class actions…
>
> The Australian Law Reform Commission has made recommendations in relation to the operation… and we are in the process of going to the Attorney-General's Department and notifying it of the outcome of the Law Society's investigation.[104]

3.111 LCA and NCCA suggested the restoration of legal aid funding so that applicants are better advised about the merits of their case, and better represented if they proceed.[105]

3.112 The Committee's view was that this had the potential to greatly increase the costs to the Commonwealth, and did not support it.

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102 RILC, Submission, p. 40; ACBC, Evidence, p. 100.

103 Joint Standing Committee on Migration, *Protecting the Vulnerable?*, 1995, p. xlii.

104 DIMA, Evidence, p. 184.

105 LCA, Submission, p. 87; NCCA, Submission, pp. 114-116.

Better filtering of cases

Prior to court

3.113 DIMA claimed that some class action members were using class actions to delay removal. It argued that evidence of this was the fact that many class action members had not sought review of decisions affecting them within the allowed time. The overwhelming majority of applicants in class actions had not made an appeal to the High Court within the 28-day time limit applicable to appeals to the Federal Court.[106]

3.114 The Committee examined whether this perceived abuse might be addressed by imposing a time limit on joining class actions, rather than by restricting access to class actions themselves.

3.115 The Committee considered that the current delays by applicants in appealing for High Court judicial review resulted from the lack of a set time limit. Consequently, if a time limit was imposed, the Committee expected that applicants would attempt to meet it.

3.116 The Committee therefore concluded that the imposition of a time limit would not serve to significantly filter the perceived abuses.

By the courts

3.117 RILC and LCA suggested to the Committee that class actions could be kept, and their potential for abuse minimised, by requiring that the court give permission for each action to be brought (a 'special leave' provision). This would enable the court to exercise a closer oversight of the merits of issues involved early in the proceedings.[107]

3.118 DIMA contended that a 'special leave' provision:

> …could effectively double the number of hearings before the Federal Court, thus increasing costs and delay.[108]

3.119 The Committee considered that creating a new avenue of appeal by the courts would be at odds with the overall intent of the Bill, which was to limit the role of judicial review.

More use of test cases

3.120 DIMA emphasised that the proposed changes did not remove access to test cases as a means of deciding numerous similar appeals.[109] DIMA

106 DIMA, Submission, p. 210.

107 RILC, Submission, p. 41; LCA, Submission, p. 87.

108 DIMA, Submission, p. 220.

stated that often the Court will determine that several cases could be delayed pending the outcome of a specific 'test' case. Usually this involves the consent of both the applicant involved and the Department. If the applicant does not agree to have their application stood over pending the outcome of another case, the court can still stand a matter over.[110] The court may also decide that the issue subject to the test case is not the only issue relevant to an applicant's case, and decide not to stall it until the resolution of the test case.

3.121 DIMA stated that it has a vested interest in identifying cases with a common issue so that a larger number of cases can be resolved through one test case. DIMA indicated that it was well placed to identify potential test cases and persons who may be affected by them. DIMA stated that they had:

> …a single litigation centre in the department, if the applications are lodged in different registries of the court, for example—some in Melbourne, some in Sydney, some in Brisbane— registry offices of the court may not be aware that what is happening in Sydney is also happening in Melbourne…whereas, of course, the minister as respondent to the action, with a single centre of legal handling and advice in Canberra, may become aware of what is happening in the various centres.[111]

3.122 The identification of test cases would not reduce the number of applications to the courts, as each person affected by a test case must put in separate and individual applications. As such there might not be a reduction in the initial caseload of the courts. But, as the courts would suspend all related cases pending the outcome of the test case, the Committee considered that this would represent an increased efficiency in handling the courts' workload.

3.123 The Committee observed that test cases did not carry the risk of perceived widespread abuse attached to class actions. There is no joining of common actions in a test case, and each person's case is an individual and discrete application. In order to be covered by a test case, an individual had to have commenced proceedings. They were therefore required to show that the test case was applicable to their individual circumstances,[112] unlike a class action.

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109 DIMA, Submission, p. 216.

110 DIMA, Submission, p. 277.

111 DIMA, Evidence, p. 172.

112 LCA, Evidence, p. 115.

3.124 Having commenced proceedings they could obtain a bridging visa to permit them to stay to gain any benefit from the outcome, as was the case with the class action.[113]

3.125 In the Committee's view, test cases appeared comparable to class actions in that they may be an effective means of reaching decisions relating to issues which a number of applicants had in common.

Conclusions

3.126 It is clear that the incidence of class actions in the migration jurisdiction is increasing.

3.127 The Committee found that the main arguments against limiting class actions fell into the following areas:

- Australia's international obligations (see Chapter 2);
- enhanced judicial review and the efficient use of court's time; and
- cheaper access to review for applicants.

3.128 The Committee concluded that:

- it had not been convincingly demonstrated that removal of class actions would breach Australia's international obligations (see Chapter 2);
- judicial review of migration matters would be retained under the Bill, as would the ability of individuals to pursue such review;
- financial benefits could exist for some, but not all, possible litigants;
- a significant number of applicants were using the process to extend their stay in Australia and that there was sufficient evidence of abuse of class actions to merit legislative action;
- some migration agents and lawyers were exploiting the procedure;
- some applicants were joining class actions without full awareness of the details of the case;
- class actions gave false hope for genuine applicants unaware that the case would not affect their individual decision; and
- judicial review would still be available to applicants through the lodgement of an individual appeal.

113 One of the criteria for obtaining a bridging visa is that the applicant for the visa is pursuing a court action as an individual. DIMA, Evidence, pp. 170-171.

3.129 Further, the Committee considered test cases were a legitimate way for applicants to pursue a common issue through judicial review.

3.130 However, the Committee was concerned by claims that the Bill may exclude test cases through poor drafting.[114]

Recommendation 1

3.131 **The Committee recommends that restriction of access to class actions in the migration jurisdiction, as set out in the Bill, be enacted.**

Recommendation 2

3.132 **The Committee recommends that, in view of the alleged unintended consequences of section 486B, the section be reviewed to clarify:**

- **that test cases are not precluded; and**
- **multiple party actions in other jurisdictions are not affected by the Bill.**

Recommendation 3

3.133 **The Committee recommends that DIMA:**

- **actively examine judicial appeals to identify issues in common which may be resolved through test cases;**
- **be proactive in seeking resolution of issues through test cases; and**
- **publicise the test cases to maximise the number of applicants to be bound by the outcomes, and thus use the courts efficiently.**

114 LCA, Evidence, p. 116.

Recommendation 4

3.134 **The Committee recommends that the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.**

4

‘Standing’ (section 486C)

The concept

4.1 ‘Standing’ is the entitlement of a person or organisation to bring a judicial review action to challenge administrative action which is justiciable or to bring a merits appeal.[1]

Background

4.2 Currently, any person can apply to the Federal Court for a review of a migration decision or of a failure to make a decision. This means that it is possible for individuals to commence actions on issues which do not necessarily have a bearing on their own circumstances. DIMA cited the *Fazal Din* and *Capistrano* cases as examples of class actions in which many participants would not benefit from the outcome (although they could qualify for a bridging visa while they were parties to the case).[2]

4.3 The Bill, through the proposed section 486C, intends to close off this style of appeal by limiting the ‘standing’ of persons commencing or continuing actions in the Federal Court in migration cases. The aim of the section is, in brief, to limit access to judicial review to those who stand to benefit from the outcome of the review.

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1 *Butterworths Encyclopaedic Australian Legal Dictionary* (http:online.butterworths.com.au).

2 DIMA, Submission, p. 53.

Proposed provisions

4.4 The person's 'standing' is to be assessed against two requirements:

- the interest of the person in the proceedings; and
- the issue involved.

4.5 The Bill's definition of those who come within the proposed new section 486C is detailed. In effect, to bring an action concerning a particular issue, the applicant has to be the subject of that issue.[3]

4.6 A further limitation of the proposed arrangements pertaining to 'standing' is that the person must have a 'relevant issue' to raise with the court.

4.7 Subsection 486C(1) requires the person's proceedings (in the Federal Court only) to raise a 'relevant issue', defined as an issue:

- in connection with -
  - ⇒ visas (including if a visa has been not granted or cancelled);
  - ⇒ deportation; or
  - ⇒ removal of unlawful non-citizens
- and which relates to -
  - ⇒ the validity;
  - ⇒ interpretation; or
  - ⇒ effect

  of a provision of the Act or regulations.

Concerns

4.8 The proposed changes to the 'standing' of persons attracted limited comment, which related to:

- uncertainty about status of proceedings;
- lack of justification; and
- exclusion of legitimate claims.

3 DIMA, Submission, p. 54.

Uncertainty

4.9 LCA argued that the proposed changes to the arrangements relating to 'standing' would create three separate types of litigants because of the imposition of a cut-off date of 14 March 2000. There would be those who:

- were covered by existing rules because they commenced proceedings before that date;
- those who receive a substantive hearing before the new rules are proclaimed; and
- those who commenced proceedings after 14 March 2000.

4.10 LCA's view was that such a variety of arrangements would make it difficult to advise applicants during the transition from the old to the new rules, a situation exacerbated by the need to clarify what constituted a 'substantive hearing'.[4]

4.11 The Committee considered that these issues were not unique to the Bill and were not significantly different from issues which could be expected to arise whenever legislation encompassed a transition stage.

Justification

4.12 LCA commented that no justification was advanced for the imposition of the limited range of 'relevant issues' under subsection 486C(1),[5] but did not comment further on this issue.

4.13 In its submission, DIMA explained that the intention was to ensure that all legal challenges in migration matters conformed to the existing section 479 of the *Migration Act 1958,* whereby, only people who may benefit from the ultimate outcome of the matter may bring a challenge in the Federal Court.[6]

Exclusion

4.14 Both ECC and LCA informed the Committee that the proposed provisions relating to 'standing' would prevent applications on that person's behalf by Australian friends or relatives.[7] In evidence, the LCA also pointed out that solicitors, too, might be precluded from lodging a claim for a person held incommunicado.[8]

4 LCA, Submission, p. 83.
5 LCA, Submission, p. 82.
6 DIMA, Submission, p. 54.
7 ECC, Submission, p. 28; LCA, Submission, p. 79.
8 LCA, Evidence, pp. 122-123.

4.15 An example provided in the submission from RILC suggested other circumstances where an application on behalf of a person might be crucial. RILC cited the case of an asylum seeker transferred to a detention facility in preparation for his removal. An injunction by the High Court prevented their removal, and they were subsequently determined to have refugee status.[9]

4.16 DIMA assured the Committee that it was not their policy to remove an applicant whilst they have proceedings before the Federal or High Court.[10]

4.17 The evidence provided to the Committee about this case indicated that the person in question already had access to legal assistance, so the proposed changes to 'standing' would have had no effect on the case.

4.18 LCA identified two concerns:

> persons… being held incommunicado at airports and who face immediate turn-around would have no access to the Courts… [to] challenge their visa cancellation and detention;
>
> and
>
> there have been a number of cases…where applications lodged on behalf of people detained at point of entry have prevented the removal of people who were found subsequently to be genuine refugees.[11]

4.19 Under the proposed 'standing' arrangements, such persons could apply for judicial review, but no application could be made on their behalf unless the person had specifically authorised someone to do so.

4.20 DIMA confirmed that the 'standing' provisions would prevent applications from:

> people who are not representing an individual…but doing it of their own volition…it has to be a person who is directly affected.[12]

4.21 In relation to arranging the necessary representation while in custody, DIMA advised the Committee that if an individual asks to see a lawyer, DIMA is obliged to facilitate access to legal representation or advice.[13] The proposed 'standing' provisions therefore would not prevent applications by those directly representing a person in custody.[14]

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9 RILC, Submission, pp. 38-39, more details are cited in Chapter 7.

10 DIMA, Submission, p. 217.

11 LCA, Submission, p. 79.

12 DIMA, Evidence, p. 24.

13 DIMA, Evidence, p. 23.

14 DIMA, Evidence, p. 24.

Conclusions

4.22 The Committee noted the concern that the proposed changes to 'standing' might possibly adversely affect a small number of persons with potentially valid claims to refugee status who are being held incommunicado, and those refused entry.

4.23 The Committee noted that those claiming refugee status on arrival were not refused entry without a test of their bona fides. The Committee also noted that access to legal advice, which could enable action on a person's behalf, could be achieved by asking.

4.24 In view of those arrangements, the Committee considered that the issues raised related more to the question of the level of assistance which should be provided to those wishing to come to Australia, rather than to the proposed 'standing' changes. That question is outside the scope of this review.

4.25 The Committee supported the aim of the proposed changes to 'standing', which is to ensure that only those who may benefit from the ultimate outcome may bring a challenge in the Federal Court.

Recommendation 5

4.26 **The Committee recommends that the 'standing' arrangements in the proposed section 486C be proceeded with.**

5

Technical Amendments: 'character test'

Background

5.1 The technical amendments incorporated in Schedule 2 of the Bill generally attracted little attention in submissions and evidence. The exception was the proposed changes to section 501A (the 'character test'). Amnesty, RILC, IARC, NCCA, UNHCR, the Islamic Council of Victoria (ICV), ACBC, and ARC provided comment, which is detailed below.

5.2 As it stands, the current paragraph 501A(1)(c) implies that the AAT has the power to *grant* a visa when reviewing a decision made by the delegate of the Minister. The implication that subsection 501A(1) confers a power to grant a visa is incorrect, because the power to grant a visa is dealt with in section 65 of the *Migration Act 1958*.[1]

Section 501A

5.3 Section 501 of the *Migration Act 1958* deals with the refusal or cancellation of a visa on character grounds. A person is identified as not passing the 'character test' if:

- they have a substantial criminal record; or
- they have associated with someone, or a group or organisation whom the Minister reasonably suspects has been or is involved in criminal conduct; or

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1 *Explanatory Memorandum*, p. 10.

- they are not of good character in the light of their past and present criminal and general conduct; or
- there is a significant risk that the person, if allowed into Australia, would be involved in activities which are violent or disruptive.[2]

5.4 Section 501A deals with the cancellation or refusal of a visa and the substitution of a non-adverse decision under section 501.

5.5 Currently section 501A applies if:

> …the Administrative Appeals Tribunal… makes a decision (the "original decision"):
>
> to grant a visa to a person as a result of not exercising the power conferred by subsection 501(1) to refuse to grant a visa to the person.[3]

Proposed amendments

5.6 The amendment proposes to clarify the Act under paragraph 501A(1)(c) by removing the reference to granting a visa in it and also in transitional arrangements in the *Migration Legislation Amendment (Strengthening of Provisions relating to Character) Act 1998*. According to DIMA the changes do not go beyond the policy already endorsed by the passage of that Act.[4]

5.7 The amendment also proposes to clarify the power of the Minister:

- to substitute an adverse decision under section 501A even if the person passes the character test in section 501 [through an addition after paragraph (d) of subsection 501A(1)]; and
- to substitute an adverse decision at any stage after an approval on character grounds has been given [new subsection 501A(4A)].

2 Paragraph 501(6)(d) sets out these grounds in detail. They include engaging in criminal conduct; harassing / molesting / stalking another person; vilifying a segment of the community; inciting discord in the community; or becoming involved in disruptive / violent activities.

3 *Migration Act 1958*, paragraphs 501(A)(1)(b) and (c)

4 DIMA, Submission, p. 57.

Concerns

General principles

5.8 RILC voiced its opposition to the general principle of the existing section 501 of the Act, which the Bill seeks to clarify. In relation to the provision that natural justice did not apply to the Minister's actions, it submitted that:

> the Committee should use this opportunity to re-visit the wisdom of s 501A(3) and should recommend its abolition.[5]

5.9 Amnesty and RILC suggested that the 'character test' went beyond the permissible character exclusions allowed in the Convention Relating to the Status of Refugees and argued that the powers should not be extended.[6]

5.10 NCCA claimed that the Minister's ability to substitute an adverse decision contravened the doctrine of separation of powers.[7]

5.11 Amnesty, RILC and NCCA drew attention to what they saw as evidence of the unsatisfactory outcomes of ministerial discretion in relation to the special arrangements for the Kosovars and safe haven provisions, particularly in the case of those Kosovars who refused to return voluntarily.[8]

5.12 The NCCA stated that these kinds of unreviewable decisions, placed in the hands of the Minister, do not allow for certainty or transparency in the decision-making process.[9]

5.13 The Committee noted these views were all comments on the existing Act, not on the particular Bill, and concluded that consideration of them was outside its immediate concern.

Enhancement of Minister's powers

5.14 RILC, NCCA, and IARC expressed concern that the amendment expanded the Minister's discretionary powers.[10]

5.15 In evidence presented to the Committee, UNHCR stated that it did not see the Bill as enhancing the Minister's powers.[11]

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5 RILC, Submission, p. 43.

6 Amnesty, Submission, p. 25; RILC, Submission, p. 42.

7 NCCA, Submission, p. 118.

8 Amnesty, Submission, p. 25; RILC, Submission, p. 43; NCCA, Submission, p. 112.

9 NCCA, Submission, p. 112.

10 RILC, Submission, p. 41; NCCA, Evidence, p. 59; IARC, Submission, p. 107.

Inherent problems

5.16 The main arguments advanced against ministerial power to set aside a decision were by:

- UNHCR, RILC and ACBC, who contended that the setting aside could be subjective;[12]
- ACBC and IARC, who argued that it could be arbitrary;[13]
- NCCA, which claimed that the exercise of the power was not transparent;[14] and
- ACBC, RILC, ICV and UNHCR, who claimed that the decision was not subject to review by any court.[15]

5.17 In relation to the last claim, DIMA maintains that the Minister's decisions under section 501A are reviewable by the Federal Court.[16]

5.18 The Committee considered that issues of apparent inherent problems related to existing legislation, rather than the Bill under consideration.

Unintended consequences

5.19 RILC, IARC, NCCA, and UNHCR identified a range of potential unintended consequences. RILC and IARC considered that it would inject long-term uncertainty into the visa process because the Minister could overturn a favourable decision at any time, even if the person had been settled in Australia for many years.[17]

5.20 The Committee considered that this was not a strong argument against the Bill because the power already existed under the Act. Further, DIMA indicated to the Committee that the original enactment of section 501A was to enable the Minister to act quickly to overturn, in the national

11 UNHCR, Evidence, p. 88.

12 RILC, Submission, pp. 41-42 notes that the Minister only requires reasonable suspicion that a person does not pass the character test and that the principle of natural justice does not apply; UNHCR, Submission, p. 137; ACBC, Submission, p. 147.

13 IARC, Submission, pp. 107-108; ACBC, Submission, p. 144.

14 NCCA, Submission, pp. 112, 121.

15 ACBC, Submission, p. 147 - "apparently unreviewable…beyond the review of the law"; RILC, Submission, p. 41-42 - "cannot be reviewed by any court"; ICV, Submission, p. 141 - "unchallengeable power to reverse earlier decisions". The UNHCR, Submission, p. 138 comment "a decision by the Minister is…[not] reviewable", was withdrawn (UNHCR, Evidence, p. 88).

16 DIMA, Evidence, p. 26.

17 RILC, Submission, p. 43; IARC, Submission, p. 107.

interest, a decision which did not reflect community standards.[18] The Committee considered that the power was unlikely to be invoked years after the decision was made and was therefore not grounds for rejection of the changes proposed in the Bill.[19]

5.21 UNHCR claimed that people smuggled into Australia could conceivably be excluded because they had clearly associated with people engaged in criminal conduct (which is a ground for 'character' rejection).[20] This, UNHCR explained, was a speculative example of a possibly unintended consequence:

> …to test the extremes of the implications of what may be found in this bill.[21]

5.22 The Committee believed that this was not likely to occur and that it was speculative and therefore not grounds for rejection of the changes proposed in the Bill.

5.23 NCCA claimed that overstayers who voluntarily leave are considered to have had "a complete disregard for immigration laws". It expressed concern that such a judgement might be made about other individuals with the consequence that they could fail the 'character test' on flimsy grounds.[22]

5.24 NCCA offered, as an example, an unsuccessful claimant for a protection visa who had formed an attachment prior to leaving. Should they make an application from their home country to rejoin their spouse, the fact that they were in their country of origin:

> without overt evidence of severe persecution (ie imprisonment or death) could be taken as evidence that their claim for protection in Australia was an abuse of process, and therefore again, a "complete disregard for immigration laws".[23]

5.25 Again, the Committee considered that this potential issue could arise under the present legislation and did not relate directly to the Bill. It was therefore not considered an argument against the Bill.

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18 DIMA, Submission, p. 288.

19 The power under section 501A would have no effect on a migrant once they had become an Australian citizen. DIMA, Submission, p. 289.

20 UNHCR, Submission, p. 137.

21 UNHCR, Evidence, p. 89.

22 NCCA, Submission, p. 118.

23 NCCA, Submission, p. 118.

Conclusions

5.26 The Committee considered that criticisms of the 'character test' related mainly to the existing Act, rather than to the Bill's technical amendments. It therefore supported Schedule 2 of the Bill.

Recommendation 6

5.27 **The Committee recommends that the technical amendments in Schedule 2 of the Bill be proceeded with.**

6

Constitutional Validity of Section 486A

Background

6.1 This chapter deals with the constitutional validity of section 486A of the Migration Legislation Amendment Bill (No. 2) 2000 which is designed to place a time limit of 28 days on the jurisdiction of the High Court to undertake judicial review of certain immigration decisions in the following terms:

> 486A **Time Limit on applications to the High Court for Judicial Review**
>
> (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a decision covered by subsection 475(1), (2) or (3) must be made to the High Court within 28 days of the notification of the decision.
>
> (2) The High Court must not make an order allowing, or which has the effect of allowing, an application mentioned in subsection (1) outside that 28 day period.
>
> (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this action.[1]

6.2 New subsection 486A(1) provides that an application to the High Court in its original jurisdiction under the Constitution for judicial review of a decision covered by subsection 475(1), (2) or (3) must be made within 28 days of the notification of the decision. This is intended to ensure that challenging a subsection 475(1), (2) or (3) decision in the High Court does

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1 Migration Legislation Amendment Bill (No. 2) 2000, loc cit.

not become a way of circumventing the time limits for applications to the Federal Court under Part 8 of the Act.[2]

6.3 New subsection 486A(2) prevents the High Court from making an order allowing an application to be made outside of the 28-day period provided for in new subsection 486A(1).[3]

Evidence concerning constitutional validity

6.4 Several submissions suggested that section 486A may be unconstitutional. For example, ECC warned that:

> It may…be unconstitutional, in which case the legislation itself is likely to be subject to challenge if passed.[4]

6.5 Amnesty also expressed its concern about subsection 486A(2):

> Whilst not seeking to provide a legal opinion on this issue, Amnesty International is concerned by this proposed limitation upon the High Court's original jurisdiction, a limitation which would appear to contravene the doctrine of the separation of powers…[5]

6.6 RILC expressed the view that:

> Although the proposed time limit on appeal could be broadly characterised as a "procedural" measure, its effect would appear to substantively interfere with the exercise of federal judicial power. These provisions specifically effect writs issued in the High Court's original jurisdiction, a jurisdiction preserved by Chapter III, s 75(v) of the Constitution…The High Court sets its own time limits on applications under the High Court rules. The High Court also has a discretion to accept applications out of time. Laws of the Parliament which restrict access to the High Court's jurisdiction, a matter which under the Separation of Powers doctrine are strictly the preserve of the Court, have clear Constitutional implications. It is likely that the proposed s 486A of the Bill would be the subject of a constitutional challenge.[6]

6.7 LCA asserted that:

> This might be tantamount to an interference with the judicial power of the High Court under Chapter III of the Australian

2 *Explanatory Memorandum*, p. 5.
3 *Explanatory Memorandum*, p. 5.
4 ECC, Submission, p. 28.
5 Amnesty, Submission, p. 275.
6 RILC, Submission, p. 38.

> Constitution. Although there are precedents for imposing time limits on actions seeking certain of the prerogative writs under the common law, the Bill seeks to limit the power of the High Court to provide remedies under s 75 of the Constitution. The Law Council predicts that one question that will arise is whether the legislation goes beyond the regulation of the judicial process to interfere with or otherwise prohibit that process.[7]

6.8 In his submission Mr Colin McDonald QC submits that section 486A is:

> arguably unconstitutional…section 486A may infringe the constitutional jurisdiction of the High Court to review officers of the Commonwealth. Arguments may well also arise concerning the inherent jurisdiction of the High Court to extend time in migration issues despite the wording of the section. Under section 75(v) of the Australian Constitution, the High Court exercises original jurisdiction and exercises powers directly conferred on it by the section. The High Court is not a statutory court. A section such as the proposed section 486A cannot prevent the High Court from exercising powers directly conferred on it by the Constitution.[8]

6.9 Mr McDonald added:

> Insofar as the argument goes that mere restrictions of time in which to access the High Court do not prevent the High Court from exercising its powers, I am still of the opinion that the section may well be invalid or may well be read down. I refer to *R v Bloomsbury Court; Ex Parte Villerwest Ltd* [1976] 1 WLR 362; [1976] 1 Au ER 897; *Samuels v Linz Ltd* [1981] QdR 115; *Re Coldham Ex Parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 522, 530. These cases, inter alia, decided that a court has a inherent power to control its own procedure and extend time after a prescribed time has elapsed.[9]

6.10 NCCA also expressed its view that:

> The right of any person to go to the High Court to seek orders against an officer of the Commonwealth is enshrined in the Constitution in section 75(v). The Parliament is unable to interfere with the Constitution directly, so the constitutional validity of the indirect limitations on the High Court's original jurisdiction in the new Part 8A would seem to be at least questionable. The High

7 LCA, Submission, p. 78.

8 Mr Colin McDonald QC, Submission, p. 179.

9 Mr Colin McDonald QC, Submission, pp. 179-180.

> Court has previously commented in obiter that time limits without the discretion to review particular circumstances might be seen as "an attempt to control the Court, and an interference with the judicial process itself."[10]

6.11 DIMA claims, however, that the 28-day time period is within constitutional power as it is a reasonable time to access legal advice and to make an application to the High Court.[11]

6.12 According to the Deputy Secretary, DIMA:

> …we made some concessions to ensure that we were within power. For example, the fact that the 28-day time limit in the High Court from date of actual notification rather than deemed notification – as is the case with the Federal Court – was done specifically on the basis of legal advice. Our advice is that imposing a 28-day time limit goes to a matter of procedure within the court and not to the fundamental right to access the High Court.[12]

6.13 DIMA stated in its submission that the Chief General Counsel of the Australian Government Solicitor advised that interference with judicial power would be unconstitutional but that, in his view, "all aspects of the Bill are constitutionally sound".[13]

6.14 The Committee was concerned that the question of constitutional validity of section 486A had been raised in a substantial number of submissions. DIMA was asked to provide the advice that it had received on the issue of constitutional validity when drafting the proposed legislation to the Committee. Excerpts from that advice follow.

6.15 The Australian Government Solicitor stated:

> In my opinion, there is a real risk that the draft provision (proposed s.486A) imposing a time limit of 28 days from the 'notification' of a decision for a judicial review application to be made to the High Court will be interpreted in a way which requires actual notification of the decision. Unless the section is interpreted in this way, I consider it could be held invalid. The assumption, I understand, is that Migration Regulation 5.03, in particular, is to apply to the new section, so that a person in circumstances where they do not actually receive notification will still be precluded from seeking judicial review 28 days after the

10 NCCA, Submission, p. 119.

11 DIMA, Submission, p. 54.

12 Mr Metcalfe, Deputy Secretary, DIMA, Evidence, p. 11.

13 DIMA, Submission, p. 56.

date of deemed notification under that regulation. I consider the High Court could well hold the application of the regulation to s.486A to be beyond constitutional power, at least so far as it applied to applications for remedies provided for under s.75(v) of the Constitution.

The relationship between the similar time limit provision contained in s.478 of the Migration Act and regulation 5.03 has been considered in a number of Federal Court cases. A recent review of those authorities is contained in *Kumar v. Minister for Immigration and Multicultural Affairs* [1999] FCA 1233. In that case, Mansfield J held that the regulation as it now reads operates on s.478 so that actual knowledge or receipt of a communication is not required. The judgment refers, however, to other Federal Court cases which saw such a result as 'extraordinary' but nevertheless he felt the result was dictated by the language used in the regulation. Different considerations, however, arise where what is at issue is the right to obtain a constitutionally mandated remedy under s.75(v) of the Constitution. In an opinion I gave dated 21 July 1999, I discussed whether it was constitutionally permissible to impose non-extendable time limits on the making of applications to the High Court. I concluded that 'the risk of the High Court striking down any statutory time limit would be particularly acute if the time limit was unreasonably short and capable of operating unfairly in certain circumstances'. I do not regard 28 days as unreasonably short. However, the fact remains that the proposed section is capable, if regulation 5.03 applies, of operating unfairly in the sense that it could operate to deny a person a right to seek judicial review in a situation where they were entirely ignorant of a decision made in relation to them.

It seems to me that while draft s.486A contained in the above Bill should be held to be valid as it stands (imposing as it does a reasonable time limit after notification), any regulation under the Migration Act which purported to deem, or had the effect that, a decision was taken to be 'notified' for the purpose of that section even though not actually received, could itself be held to be unconstitutional. Consideration could be given to having a separate regulation covering High Court applications. It is possible that if reliance is placed on the existing regulation and the High Court decides the regulation is invalid it will strike down the regulation to the extent it covers Federal Court applications as well as High Court applications on the ground that it is not severable. Even in relation to s.486A as drafted, one cannot rule out at least some High Court judges finding that a time limit as proposed, that

> is not subject to some power of judicial dispensation, goes beyond constitutional power. I continue to consider, however, that a reasonable time limit for s.75(v) applications as proposed in s.486A based on actual notice would be held to be valid.[14]

6.16 Advice was also obtained from Dr John McMillan, Reader in the Faculty of Law at the Australian National University.

Section 486A and the Constitution

6.17 Section 486A has to be read in the light of section 75(v) of the Constitution, which grants the High Court a jurisdiction to issue three of the remedies referred to in section 486A. Section 75(v) provides as follows:

> 75. In all matters –
>
> …
>
> (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
>
> the High Court shall have original jurisdiction.

6.18 According to Professor Cheryl Saunders' notes on the Constitution:

> the "writ of mandamus" orders government to do something, the "writ of prohibition" and the injunction prevent things being done. These three are the most important remedies that can be sought from a court against government when someone thinks the government is acting unlawfully. There are two other remedies as well. One is the writ of certiorari to "quash" action that has been taken. The other is the declaration, which merely states the law. Neither is expressly mentioned in the paragraph but both may be sought with one of the other remedies. The effect of the section in practice is to give the High Court automatic jurisdiction in most cases in which action is brought against the Commonwealth government ("officer of the Commonwealth").[15]

6.19 The jurisdiction conferred upon the High Court by section 75(v) of the Constitution to grant three particular remedies is a jurisdiction that cannot be taken away by Parliament.

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14 DIMA, Submission, pp. 236-237.

15 Professor Cheryl Saunders, Australian Centenary Foundation, *The Australian Constitution*, 1997, p. 86.

6.20 Clearly, a law which openly declared that the High Court could not grant those remedies would be invalid. Arguably, section 486A cannot be characterised as a law which curtails the jurisdiction of the High Court.

6.21 It would appear that the purport of section 486A is to *regulate* the jurisdiction of the High Court to undertake judicial review of certain decisions, by placing a time limit within which the remedies to facilitate judicial review can be granted by the Court.

6.22 The Committee was advised by Dr McMillan that, provided an application is made to the High Court within the 28-day period, the jurisdiction of the Court to grant the remedies is not impaired by the proposed amendments.

Subsection 486A(1)

6.23 Dr McMillan argued that subsection 486A(1) could be regarded as a law which regulated the way in which the High Court's jurisdiction was to be exercised and thus was a valid enactment of the Parliament. This view is supported on the following grounds:

- Bill regulates but does not remove court jurisdiction;
- time limits are not unprecedented;
- time limits are in the public interest;
- Parliament's regulatory role; and
- policy aims.

Bill regulates but does not remove court jurisdiction

6.24 Section 486A does not have the effect of *depriving* the High Court of its judicial review jurisdiction, but of *regulating* the way in which that jurisdiction is to be exercised. There is no reason in principle why it should be beyond the capacity of the Parliament to control or regulate the exercise of the High Court's jurisdiction. This already occurs in relation to section 75, inasmuch as the High Court has accepted that the Parliament can alter the substantive law of judicial review that would be applied by the High Court in the exercise of its section 75(v) jurisdiction. Notably, Constitution section 73 provides that the right to appeal to the High Court from a State or Federal superior court shall be subject to "such exceptions and … such regulations as the Parliament prescribes". The jurisdiction of the High Court to entertain cases arising under the Constitution or involving its interpretation is also within the control of the Parliament

under section 76, and is not part of the guaranteed original jurisdiction of the Court.

Time limits are not unprecedented

6.25 Time limits on the right to initiate judicial review proceedings are an established feature of administrative law. The *High Court Rules* (which are made by the High Court: see *Judiciary Act 1903* (Cth) section 86) stipulate time limitations within which two of the remedies can be sought: *certiorari* must be applied for not later than six months after the date of the judgment etc that is sought to be quashed (O 55, r 30); and *mandamus* must be applied for within two months of the date of refusal by a tribunal to hear and determine a matter, or within such further time as the Court allows (O 55, r 30).[16]

Time limits are in the public interest

6.26 A time limit of 28 days is not unusual or unparalleled in administrative law. It is the period currently found both in the *Migration Act 1958* (Cth) section 478(2) with regard to applications for review by the Federal Court of a judicially-reviewable decision and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11(3) with respect to an application for an order of review by the Federal Court or the Federal Magistrates Court.

6.27 The justification for the imposition of a strict time limit has customarily been the public interest in clarifying the validity of administrative decision-making at an early stage, particularly where a detrimental exercise of public sector power (such as deportation) hinges on the validity of a decision. It is noteworthy that courts have not evinced hostility to time limitation periods, in the same fashion that they have to privative clauses. That is, whereas a range of interpretive principles have been developed to limit the operation of privative clauses that would deny the availability of judicial review, there is no similar trend in relation to time limitation periods that would work a similar effect.

Parliament's regulatory role

6.28 The practical considerations weigh in favour of allowing the Parliament to regulate the jurisdiction conferred by section 75(v). A broad view of

16 It is interesting to compare the different time limits that apply in some other jurisdictions: the prima facie period for seeking mandamus and certiorari varies from 60 days in Victoria and the Northern Territory; to 3 months in Queensland; and 6 months in South Australia, Tasmania, and Western Australia. As that variation indicates it would be difficult to establish a proposition that a particular time limit was inherently part of the common law substance of the remedies and was thereby incorporated as an element of the remedies under s 75(v).

section 75 which would deny that role to the Parliament would produce the consequence that the High Court's jurisdiction would often be broader than that of the Federal Court. For example, it would be open to the Parliament to amend the *Administrative Decisions (Judicial Review) Act 1977* by providing that the Federal Court could not extend the period of 28 days for commencing an action. Very likely, this would produce the consequence that applications outside that period would then be brought into the original jurisdiction of the High Court. In *Abebe*, three judges referred to the immense inconvenience for the High Court that flows from the restricted scheme of immigration review.[17]

Policy aims

6.29 The policy arguments also weigh against taking a broad view of section 75(v). As Kirk notes:

> The transaction costs of recognising constitutional rights are not insignificant. They occasion further litigation, uncertainty, cost and delay. They reduce flexibility in seeking solutions to complex problems and balancing equations. Further, a danger of recognising a 'constitutional right to X' is that the very act of recognition tends to add weight to the protected interest, inflating its true value as against other competing interests.[18]

In Kirk's view, those considerations against the extension of constitutional guarantees should be outweighed only where there is a strong constitutional or normative imperative which points in the other direction. Here there is no such imperative. The invalidation of section 486A would merely extend the period for exercising an existing right to judicial review.

6.30 The Committee has been advised that the High Court has not previously been called on to decide whether the Parliament can regulate the exercise of the jurisdiction conferred by section 75(v) in the manner proposed by section 486A.

Subsection 486A(2)

6.31 Subsection 486A(2) determines that the High Court must not make an order allowing, or which has the effect of allowing, an application

17 *Abebe v Commonwealth* (1999) 162 ALR 1 at para 50 per Gleeson CJ and McHugh J, and 207 and 237 per Kirby J.

18 J Kirk, "Administrative Justice and the Australian Constitution" (1999 Paper to AIAL National Conference).

mentioned in subsection (1) outside that 28 day period. The subsection removes any discretion of the Court to extend the period for commencing proceedings under section 75(v).

6.32 This feature of 486A is in line with the current scheme of the *Migration Act 1958* which provides in section 478(2) that:

> The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period [of 28 days specified in the section].

6.33 The Federal Court however has been critical of the injustice that can arise from the inflexibility of the provision in relation to applications for review of RRT-reviewable decisions. For example, in *Fernando v Minister for Immigration and Multicultural Affairs [1999] FCA 1375* the Honourable Justice Finn expressed his observation that in many decisions the judges have adverted, sometimes critically, to the harshness of the results that the inflexibility of the provision can occasion.[19]

6.34 The position in the *Migration Act 1958* is to be contrasted with the position in other administrative law legislation. For example, the *Administrative Decisions (Judicial Review) Act* provides that proceedings are to be commenced within the prescribed period of 28 days:

> or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.

6.35 The *High Court Rules* similarly allow the Court to extend a time period. The two months time limitation for seeking mandamus can be extended to include:

> such further time as is, under special circumstances, allowed by the Court or a Justice (O 55, r 30).

6.36 Further, Order 60, rule 6 confers a general discretion on the Court to extend any time period:

> A court or Justice may enlarge or abridge the time appointed by these Rules or fixed by an order of the Court or a Justice for doing an act upon such terms, if any, as the justice of the case requires.

6.37 The reason for allowing a court to extend a time limitation period is to avoid injustice to the parties. There can be many reasons why an application is not commenced within time, including reasons that are beyond the effective control of the parties.

6.38 Other reasons can be imagined as to why an extenuation of time may be a meritorious option, for example, a delay in commencing proceedings may

19 See para. 5, *Fernando v Minister for Immigration and Multicultural Affairs [1999]FCA 1375.*

be attributable solely to fault on the part of an applicant's legal advisers; or through illness or adversity a party may be unaware of when the time period has commenced running.

6.39 Setting a time limitation however has the advantage of focusing the attention of lawyers on the matter and ensures that proceedings are commenced in a timely fashion. Proceedings can be commenced by simply lodging an application form outlining the grounds for the appeal and the applicant's details. There is no requirement to assemble a full case or present an argument within the designated 28-day time-frame.[20]

6.40 The Committee was advised that, were the validity of section 486A to come under challenge, it is not out of the question that the High Court would rule that section 486A was invalid by imposing a strict time limit that is not capable of extension. For example, the Court could reason that the underlying purpose of section 75(v), as a constitutional guarantee, was to facilitate administrative justice by allowing questions about the legality of federal authority to be tested in a judicial forum. An unreasonable restriction on the ability of the Court to deliver that objective would contravene the spirit of the guarantee, to the point of curtailing its effective enjoyment.[21]

Conclusion

6.41 Although the Australian Government Solicitor did not regard the 28-day provision unreasonable, the Committee accepts that the 28-day provision could cause injustices if it is not made clear at the time the person is informed of the decision.

6.42 On the range of opinions given to the Committee, views were divided. The Committee concluded that, as long as the time limit is clarified to potential applicants, the Committee does not regard as onerous that proceedings commence within the time-frame. Initially, an applicant has only to lodge an application outlining the claim.

6.43 However, to ensure the safety of applicants, the Committee believes that the 28-day limit should be extended to 35 days.

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20 See para 7.27.

21 It is worth noting that in *Abebe* the High Court was narrowly split, 4:3, on an issue which in some respects was less controversial, that is, the restriction of the jurisdiction not of the High Court but of the Federal Court.

6.44 The issue of the constitutionality of the Bill is one upon which the Committee is unable to comment. The matter can only be resolved in the event of a constitutional challenge.

7

Section 486A - Other Issues

Background

7.1 In the Second Reading Speech for the Bill, the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, stated that the proposed section 486A of the Bill is intended to end the current disparity between the grounds for judicial review before the Federal Court and the High Court, making it no longer attractive for persons to go to the High Court in its original jurisdiction.[1]

7.2 DIMA states that it also addresses concerns that people are using the High Court because they have failed to make an application to the Federal Court within its prescribed time limit of 28 days.[2]

7.3 In an analysis of the 52 original jurisdiction matters before the High Court on 14 April 2000, DIMA stated that:

> Only 10 per cent of the applications had been made within 35 days of the date of decision being challenged. Only 19 per cent of the applications were made within less than 6 months of the date of the decision, and only 40 per cent of applications were made to the High Court within less than 12 months of the date of the decision.[3]

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1 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14267.

2 DIMA, Submission, p. 54. DIMA stated that there were 42 applications to the High Court as at 29 March 2000, that were ultimately remitted to the Federal Court and which would have been out of time to apply to the Federal Court.

3 DIMA, Supplementary Submission, p. 210.

7.4 DIMA further argues that by imposing the same time limit on applications to both the High Court and the Federal Court, it also partly addresses the concerns recently expressed by Judges of the High Court. These related to persons seeking to make applications to the High Court under its original jurisdiction[4] and consequently exacerbating the backlog of migration related trial work in the High Court.

Proposed provisions

7.5 New subsection 486A(1) of the proposed new Part 8A of the Act provides that an application to the High Court for a writ of mandamus,[5] prohibition[6] or certiorari[7] or declaration, or an injunction in relation to a migration visa matter, must be made within 28 days of the notification of the decision. The 28-day time limit would apply to anyone attempting to seek judicial review from the High Court.[8]

7.6 This is intended to prevent persons challenging migration decisions in the High Court as a way of circumventing the time limits for applicants to the Federal Court under Part 8 of the Act.[9]

7.7 New subsection 486A(2) prevents the High Court from making an order allowing an application to be made outside of the 28-day period provided for in new subsection 486A(1).

7.8 New subsection 486A(3) provides that the regulations may prescribe matters regarding the notification of a decision for the purposes of new section 486A.

7.9 The 28-day time limit runs from the date of actual notification of the decision and not the date of the decision.[10] DIMA states that this is sufficient time to access legal advice and make an application to the High Court.[11]

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4 DIMA, Evidence, p. 4.

5 *Mandamus* is an order issued to compel a public official to exercise a power in accordance with his or her public duty.

6 *Prohibition* is an order issued forbidding a specified act.

7 *Certiorari* is an application to have an administrative decision quashed.

8 DIMA, Evidence, p. 21.

9 Explanatory Memorandum, p. 5.

10 This is not the same as regulation 5.03 of the Migration Regulations where a person is *deemed* by law to have received notification of a decision, whether the person actually received the notification on that day or not. Under the proposed Bill, it is 28 days from the date of actual notification; there is no deeming regime. DIMA, Evidence, p. 24.

11 DIMA, Submission, p. 54.

7.10 The Committee notes that there is no requirement to assemble a full case or present an argument within this timeframe, only to lodge the application form specifying the claim and the applicant's details.[12]

Concerns raised

7.11 The Committee received evidence of a number of concerns regarding the imposition of a 28-day time limit on applications to the High Court in migration matters.

7.12 Issues which emerged included:

- concerns that 28 days was an inadequate amount of time;
- the question of equity of access to justice; and
- the total prohibition on the High Court to hear applications out of the 28-day period.

7.13 The issue of the constitutional validity of imposing immutable time limits on applications to the High Court, under subsection 486A(2) of the Bill, was examined in Chapter Six of this report.

Adequacy of time limit

7.14 A number of submissions to the Committee expressed the concern that 28 days is not an adequate period for an applicant to obtain legal advice on the likely success of an appeal, and to lodge the necessary applications before the court.[13]

7.15 The ECC stated that:

> this is not an adequate period for an applicant to get advice on the likely success of an appeal, and lodge this appeal.[14]

12 Applications to the High Court in migration matters are made through two separate mechanisms, either through an application for special leave (essentially applying for leave to have their case heard by the High Court), or through an application for prerogative relief under the original jurisdiction of the High Court. Application forms are available on the High Court of Australia web site: www.hcourt.gov.au

13 HREOC, Submission, pp. 13-14; ECC, Submission, p. 28; LCA, Submission, p. 81; NCCA, Submission, p. 119; ARC, Submission, p. 168; Amnesty, Evidence, pp. 70-71.

14 ECC, Submission, p. 28.

7.16 The LCA argued that:

> this timeframe is inadequate for an applicant to be properly advised as to whether he or she may have a cause of action.[15]

7.17 Amnesty supported this claim, arguing that:

> due to the amount of information that may be required for an appeal to be lodged…more time may be needed to present an appeal to the court.[16]

7.18 HREOC stated further that:

> this issue is significant when those concerned are least familiar with and least able to access justice, as is the case with many asylum seekers.[17]

7.19 This is considered particularly true for asylum seekers because legal aid is effectively not available to many applicants[18] and because many applicants are in detention centres.

7.20 The NCCA stated in their submission that:

> Asylum-seekers should be reasonably expected to have more problems than other administrative law claimants do in meeting strict deadlines. They may have to have the written notification of the decision in their case and their right to review translated and explained. They are often in detention where their freedom of movement, access to communication and legal advice is severely curtailed.[19]

Applications process

7.21 The Committee received evidence from the NCCA regarding the ability of asylum-seekers to meet the 28-day time limit for applications to the High Court, based on the activities it was claimed that an asylum-seeker would need to undertake to lodge an application to the High Court.

7.22 The NCCA outlined the general scope and content of these activities:

> If they are in detention - and different issues face people in detention - they have to first realise that they do not have to go to the Federal Court or wait for the Minister to turn them down

15 LCA, Submission, p. 81.

16 Amnesty, Evidence, pp. 70-71.

17 HREOC, Submission, pp. 13-14.

18 On 1 July 1998, Legal Aid was abolished for refugee applicants in all but judicial review applications where there was an unresolved legal issue which was the subject of differing judicial opinion. RILC, Submission, p. 36.

19 NCCA, Submission, p. 119.

> before they can go to the High Court…Basically, if they are in detention, they have to try and access a lawyer, and there are a lot of problems with external access for people in detention - phones etc. They have to find a migration agent or a lawyer. It cannot be any lawyer; it has to be a lawyer who is registered as a migration agent…That, again, cuts down on the amount of pro bono access you can get…Understanding what the court will be able to do for them once they get there is a big problem. They have to have translators, they have to make sure they have understood the actual reasons they were turned down in the first place and they have to be able to explain that to their lawyers. They have to be able to get the notice of the decision or they might have to lodge FOI claims if they need to get specific security information that is related to their case.[20]

7.23 For asylum-seekers who are not in detention there are separate and distinct difficulties which include arranging access to free community legal services and translation services, as well as obtaining a general comprehension of the processes and functions of the judicial review system.

7.24 The NCCA also stated that delays in engaging in the proper processes can often result from misleading 'word of mouth' advice from members of the wider community.[21]

7.25 This may be compounded by the limited time available for pro bono legal advice in the community.

7.26 RILC stated in relation to pro bono advice, that they hold an evening advice service on a weekly basis, which is often booked up weeks in advance. In addition RILC commented that Victoria Legal Aid have a number of 'advice only' appointments on one day per week, which are also often booked well in advance, and that there are no other places for impecunious asylum seekers to obtain free advice in Victoria.[22]

7.27 The Committee noted, however, that for the lodgement of the initial application to the High Court, it is not necessary for the applicant to have the entire case assembled, or to make a full accounting of all arguments. Rather the applicant need only outline the grounds for appeal and provide the factual background of the case, within the formal High Court application form.[23]

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20 NCCA, Evidence, p. 61.

21 NCCA, Evidence, p. 62.

22 RILC, Submission, p. 39.

23 Once a form containing the outline and factual background has been submitted, applicants are also able to submit an amended application containing more detail, after the time limit has

Length of time limit for applications to the High Court

7.28 The Committee heard evidence regarding the possibility of allowing a longer period of time in which to make an application to the High Court, in order to compensate for the special circumstances of applicants in migration matters.

7.29 The Committee noted that other areas of law include different periods of time in which to lodge an application. John McMillan reminded the Committee that under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the presumptive time limit for the commencement of proceedings is 28 days. In common law there is a time limit of 3 months applying to many of the prerogative writs. This compares with the presumptive time limit of 6 years that applies to most other areas of civil action.[24]

7.30 The UNHCR stated that while a longer period would be better for asylum seekers, the period of 28 days is reasonable. [25]

7.31 HREOC commented to the Committee that:

> No matter what time limit were to be prescribed, it would be…a restriction of an existing unlimited entitlement to approach the High Court. So even if a limitation of ten years were put, it would still be consistent with the trend of tightening because it is providing a limit for the first time.[26]

7.32 Furthermore, in evidence to the Committee HREOC provided a tentative recommendation of 6 months as a reasonable time limit in which to prepare an application to the High Court.[27] This was subsequently supported by the NCCA.[28]

7.33 The Committee considered that the 28-day time period constituted a restrictive timeframe for applicants to access information services and legal advice on the judicial review process. This is particularly true for asylum seekers owing to language barriers and a general lack of knowledge of the Australian legal system.

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expired. DIMA, Submission, p. 220. Application forms are available on the High Court of Australia web site: www.hcourt.gov.au

24 John McMillan, Submission, p. 172.

25 UNHCR, Evidence, p. 84.

26 HREOC, Evidence, p. 35.

27 HREOC, Evidence, p. 35.

28 NCCA, Evidence, p. 60.

Equity in access to justice

7.34 The Committee heard evidence that the question of allowing sufficient time for applicants to assemble their application to the High Court also has significant ramifications in the issue of equity of access to justice.

7.35 A number of organisations argued against section 486A, on the basis that the 28-day time limit for applications in migration matters to the High Court would severely limit the ability of asylum seekers to access the justice system.[29]

7.36 RILC argued further that it would:

> increase the already steep obstacles to be overcome by asylum seekers in accessing review processes.[30]

7.37 The Amnesty, the ECC and the NCCA all argued that special allowance should be made for asylum seekers in achieving a realistic balance between the theoretical requirements and the practical realities of lodging an appeal to the High Court.[31] Allowing sufficient time to receive advice and obtain information on the justice system is an important component of equity of access to the legal system in this respect.

Distinction between the Federal and High Court

7.38 The ICJ argued that the effect of time limits on the High Court, which is the 'court of last resort', were different from time limits for the Federal Court, and as such should be given special consideration:

> Whilst courts lower in the court hierarchy might, for administrative reasons, have restrictions placed on them that are not ideal, where there can be resort to another court, the danger might not be quite so serious as when it is imposed on the court of last resort.[32]

Australia's international obligations

7.39 Perceived imbalances in access to justice between asylum seekers and mainstream Australians emerged as an issue in relation to the potential implications on Australia's international obligations.[33]

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29 HREOC, Submission, p. 14; ECC, Submission, p. 28; RILC, Submission, p. 38; NCCA, Submission, p. 110 & 119; ARC, Submission, p. 168.

30 RILC, Submission, p. 39.

31 Amnesty, Evidence, pp. 70-71; ECC, Submission, p. 28; NCCA, Evidence, p. 61.

32 ICJ, Evidence, p. 46.

33 Amnesty, Submission, p. 24; HREOC, Submission, pp. 13-14; LCA, Submission, p. 79; NCCA, Submission, pp. 111-112; ICJ, Submission, p. 162.

7.40 The issue of Australia's obligations under international agreements had emerged as a broader issue in relation to the Committee's consideration of the Bill and is discussed in Chapter 2 of this report.

7.41 Article 14.1 of the ICCPR states that:

> All persons shall be equal before the courts and tribunals…

7.42 However, in evidence provided to the Committee HREOC stated that:

> To expect an originating application from a refugee or any asylum seeker to be made within that period of time is…unreasonably restrictive. For that reason, it may well mean a breach of rights in denying the person the opportunity of asserting rights and protections and having them determined under Article 14 [of the ICCPR].[34]

7.43 DIMA states that the Chief General Counsel of the Australian Government Solicitor has advised DIMA that all aspects of the Bill are constitutionally sound.[35]

Prohibition on hearing outside of 28 days

7.44 The prohibition on the High Court to hear applications out of the 28-day time period emerged as an issue of considerable concern in a number of submissions to the Committee. Specifically these concerns fell into three broad areas:

- the need for flexibility in accepting appeal applications from asylum seekers;
- the increasing lack of parity between rights of review of different types of administrative decisions; and
- the constitutionality of a legislative attempt to impose absolutisms on the High Court of Australia.

Flexibility

7.45 Submissions dealing with the 28-day time limit on appeals to the High Court raised the concern that the prohibition on the High Court in allowing applications to be heard out of time did not take into account the aforementioned special considerations which asylum seekers warranted.[36]

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34 HREOC, Evidence, p. 31.

35 DIMA, Submission, p. 56; and DIMA, Submission, pp. 220, 236.

36 RILC, Submission, pp. 38-39; NCCA, Submission, pp. 119-120; ARC, Submission, p. 168.

7.46 HREOC expressed the concern that the strict 28-day limit on applications to the High Court restricts the access of asylum seekers to justice by removing the discretion of the High Court to hear an application that has, for some good reason, not been filed within the 28-day time limit.[37]

7.47 The perceived 'life or death' nature of decisions for many applicants to the High Court was also cited as an important factor in allowing flexibility in permitting applications outside of the 28-day time limit.

7.48 The ARC commented that their one concern with the legislation is that if the time limits proposed to be introduced could unreasonably prejudice applicants for review who may be unable to mount a case, or to seek assistance, whether financial or administrative, within that time limit. They subsequently argue that consideration might be given to allowing the High Court a limited discretion to extend the 28-day period in special circumstances, in order to minimise the potential for injustice.[38]

Practical ramifications

7.49 RILC also argue that:

> the imposition of a 28-day appeal time limit on prerogative writs in the High Court would also exclude the possibility of obtaining relief out of time…this is because in order to obtain injunctive relief, one must have a substantive cause of action, the preservation of which is the reason for the grant of injunction. If the High Court had no jurisdiction to consider prerogative writs out of time, then there would be no basis for providing injunctive relief, which may, as it has in the past, been the only safeguard preventing the *refoulement* of genuine refugees.[39]

7.50 In support of this argument, RILC cited the case of an Iranian asylum seeker. According to RILC, the applicant had been transferred from Melbourne to a detention facility in preparation for his removal by Iranian ship that night. An urgent injunction was granted by the High Court on the basis that the RRT decision-maker in his case had been the subject of a decision of the Federal Court finding that apprehension of bias created a fatal error of law. This error of law was equally applicable to this applicant's case and hence the injunction was granted. Had the High Court not had the jurisdiction to consider this man's case out of time, RILC

37 HREOC, Submission, p. 14.

38 ARC, Submission, p. 168.

39 RILC, Submission, pp. 38-39.

claimed he would have been *refouled* to Iran where he faced a risk of persecution.[40]

7.51 In evidence provided to the Committee, DIMA commented that, for genuine cases where the applicant has missed the 28-day cut off period:

> the court is not the only place a person can go…they also have the opportunity to approach the Minister and for the Minister to consider their particular circumstances under section 417[41] or other sections of the *Migration Act*.[42]

Lack of parity between rights of review of different types of administrative decisions

7.52 The Committee received evidence of concerns that the increasing trend to excise migration matters from mainstream administrative and judicial processes would have a detrimental effect on migration decision-making.

7.53 The NCCA commented that ordinary Australian administrative law does not impose time limits that cannot be revisited by the court at its discretion if exceptional circumstances exist.[43]

7.54 In addition, Mr Bliss noted that the move to excise a category of decisions from the application of the general statutory framework which has been applied to the judicial review of all administrative decisions (the *Administrative Decisions (Judicial Review) Act 1977)*:

> not only undermined the integrity of the long-standing… framework for review of administrative decision - it made the statement that some categories of decisions (specifically, those involving non-citizens) were less worthy of careful judicial oversight than others.[44]

The Court's power over time limits

7.55 Separate from the question of the constitutionality of imposing immutable time limits under subsection 486A(2) of the Bill,[45] the issue was raised as to how effective this restriction might be in practice. Mr Colin McDonald QC

40 RILC, Submission, pp. 38-39.

41 Under section 417 of the *Migration Act 1958*, the Minister may substitute a decision more favourable to the applicant.

42 DIMA, Evidence, p. 181.

43 NCCA, Submission, p. 119.

44 Bliss, Submission, p. 127.

45 See Chapter 6.

stated that there are a number of cases which decided that a court has an inherent power to control its own procedure and extend time after a prescribed time has elapsed.[46]

Conclusions

7.56 The Committee considered that the proposed 28-day period should be sufficient time to allow applications. However, the Committee realises that the 28-day period may be restrictive in that migration matters require that special allowance should be made for unforseen circumstances in making an application to the High Court, which is the court of last resort.

7.57 The Committee notes DIMA's claim that genuine applicants with a valid reason for not meeting the 28-day time limit may appeal to the Minister, under section 417 of the *Migration Act 1958,* for ministerial intervention.

7.58 Furthermore, the Committee believes that if section 486A was modified to permit extensions of time on special circumstances, this would provide a new avenue of appeal for applicants outside of the 28-day time limit, thereby negating the stated intent of the Bill.[47]

7.59 However, the Committee notes that a longer period of time for an applicant to lodge an application to the High Court would be more reasonable, in light of difficulties migration applicants may experience.

Recommendation 7

7.60 **The Committee recommends that applicants be allowed a period of 35 days as the time limit in which appeals to the High Court in migration matters may be lodged.**

46 *R v Bloomsbury Court; Ex Parte Villerwest Ltd* [1076] 1 WLR 362; [1976] 1 Au ER 897; *Samuels v Linz Ltd* [1981] Qd R115; *Re Coldham Ex Parte Australian Building Construction Employees' and Builders Labourers' Federation* [1985] 159 CLR 522, 530. Colin McDonald QC, Submission, p. 180.

47 See Chapter 6 for comments regarding the constitutional validity of imposing immutable time limits on the High Court of Australia.

8

Conclusion

8.1 The Committee noted comment on the Bill's broad aim of restricting access to judicial review. The Committee's attention was drawn to the fact that there had been previous attempts to narrow judicial review, but nevertheless, the number of appeals to the courts had increased.[1]

8.2 DIMA noted that in 1992, when reforms to the legislation to restrict access to judicial review were examined, it was intended to examine further options if the initial changes did not achieve the aim of inhibiting applications.[2] At that time the Committee supported moves to curtail the trend to migration litigation in the higher courts.[3]

8.3 From 401 applications for judicial review of migration decisions in 1994/95, the number had increased to 1,139 in 1998/99.[4] Over the same period the number of migration matters filed in the Federal Court increased from 89 to 864.[5]

8.4 The Committee considered that although the increasing numbers of appeals may mirror a trend in litigation generally, continuing efforts to minimise migration litigation were warranted.

8.5 The Committee concluded that that the Bill should proceed, subject to the recommendations concerning:

- unintended consequences of section 486B (Recommendation 2);

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1 RILC, Submission, pp. 35-36; DIMA, Submission, p. 47.

2 DIMA, Evidence, pp. 20-21.

3 Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, 1994, p. 104.

4 DIMA, Submission, p. 47.

5 Federal Court of Australia, *Annual Report 1998/99*, Appendix 6.

- High Court time limits in subsection 486A(2) (Recommendation 7).

8.6 It also concluded that additional measures should be pursued in relation to:

- closer supervision of migration agents activities (Recommendation 4); and
- use of test cases (Recommendation 3).

Dissenting Report: Opposition and Democrat Members of the Committee

Introduction

Opposition Members and the Democrat Member of the Committee welcomed the Inquiry into the Migration Legislation Amendment Bill (No. 2) 2000 ('the Bill') and the opportunity it provided to test, in the public arena, a number of theories that have been promoted about how the System of Judicial review, in particular 'class and / or representative actions' was being abused and being used to simply delay a person's departure from Australia. Evidence to support or prove the theories was not presented to the Inquiry and it is for these reasons that the Opposition and Democrat Members of the Committee dissent from the recommendation (No. 1) that the restriction of access to class actions in the migration jurisdiction be enacted.

Class actions are an important avenue through which migration decisions can be challenged. They offer equity and efficiency. Equity comes from low costs to individuals which permits access to the courts by those who might otherwise be deterred by cost. The courts are used efficiently because they are able to resolve multiple claims at one hearing, rather than being required to make many individual judgements. Therefore restriction of access to class actions, as proposed in the Bill, should only be contemplated if there are compelling arguments for such restrictions.

If those compelling arguments exist (we note that they were not provided to this Inquiry), Opposition and Democrat Members are prepared to further examine them. We further note that even the Government Members of the Committee accept that compelling evidence is not available.

The Government Members state at 3.34:

> *The Committee also considered that migration class actions were not, of themselves, an abuse of process. However, the Committee considered that the process itself could be subject to abuse.*

The Government Member's conclusion at 3.49 is telling:

> *Overall, the Committee concluded that, although not quantifiable, there was abuse of the class action process and that this abuse should be addressed.*

Government Members further concluded at 3.101:

> *it also noted that the DIMA evidence indicated that detailed examination of the individuals in class actions had not been undertaken systematically, apparently because of the volume of applications. This meant that its data were only indicative, rather than conclusive evidence of the scale of apparent abuse.*

The Government Members concluded that class actions were not an abuse of the system, that the process could be abused and that the level of abuse was not quantified. They accept that inadequate research had been done which produced indicative figures. Yet they recommend that the Parliament remove an efficient, low cost and equitable avenue of review from the statute books. If the system is being abused surely it is possible, with all the resources available to Government, for that abuse to be quantified or measured. In this circumstance it is irresponsible for Government Members to recommend that the Bill be passed, when they recognise for themselves that the evidence of abuse is just not available.

In arriving at our conclusions, we were mindful that the Migration Legislation Amendment (Judicial Review) Bill 1998 is listed on the Senate Notice Paper. This Bill seeks to further restrict access to judicial review in migration matters by inserting a Privative clause in the Migration Act. This Bill was first introduced to the Parliament in 1997, as the Migration Legislation Amendment Bill (No. 5) 1997, but it lapsed when the Parliament was prorogued for the 1998 Election. The Bill was reintroduced, early in the life of the new Parliament (December 1998)[1], where it was the subject of an Inquiry by the Senate Legal and Constitutional Legislation Committee. The Senate Committee reported in April 1999.[2]

The grounds for our dissent from the recommendation that access to class actions be restricted are outlined below; and then discussed in more detail.

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1 See "Passage History" in Department of the Parliamentary Library, *Bills Digest* No. 90 1998-99, Migration Legislation Amendment (Judicial review) Bill 1998.

2 Senate Legal and Constitutional Legislation Committee, *Report on the Consideration of the Migration Legislation Amendment (Judicial Review) Bill, 1998*, April 1999.

Basis of dissent

The basis for dissent is that the evidence presented to the Committee did not categorically support restrictions on access to class actions in migration matters. Specifically:

- the key rationale advanced for the class action provisions of the Bill could not be sustained;
- there was no firm evidence of the claimed abuse of the process which is the rationale for restricting access;
- there was no indication that alternatives to the proposed legislative solution had even been considered;
- other options might be pursued if there is indeed abuse of process;
- the potential impact of the changes on the courts was not sufficiently addressed; and
- there was conflicting evidence about the cost implications of the proposed change.

Key rationale not sustained

The key argument for restriction of access to class actions was made in Minister Ruddock's second reading of the Bill:

> The changes in this Bill are necessary to combat the recent use of class actions…for people with no lawful authority to remain in Australia to prolong their stay and frustrate removal action.

The evidence cited was that:

> Class actions have been taken out allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter.

This implied that the primary motivation for the class actions was to obtain a bridging visa.

The Minister further claimed that:

> all 10 of the class actions decided so far…have been dismissed by the courts.[3]

3 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14268.

This implied that class actions had been shown to have no merit, and that their purpose was simply being used to obtain a bridging visa to remain in the country, rather than to resolve a point of law.

However, contrary to the claim that no class actions had succeeded, the Law Council of Australia (LCA), the National Council of Churches of Australia (NCCA), and the Refugee Council of Australia (RCA) identified *Fazal Din* and *Lay Kon Tji* as actions upheld by the Federal Court.[4] In addition LCA pointed out that the courts had conceded the significance of the issues raised in class actions which had not succeeded.[5]

The NCCA argued that the failure of a case could not be taken as proof of abuse. It could simply reflect poor legal advice rather than a lack of intrinsic merit in the case.[6]

The Refugee and Immigration Legal Centre (RILC), the Immigration Advice and Rights Centre (IARC), NCCA, and the International Commission of Jurists (ICJ) noted that the courts already have mechanisms for filtering and dismissing abusive or vexatious applications,[7] and LCA commented that the courts had not described any of the unsuccessful class actions as abusive.[8]

This evidence is telling, and is sufficient to cast doubt on the central arguments advanced by the Minister for restricting access to class actions as proposed by the Bill.

Abuse of process not proven

The Department of Immigration and Multicultural Affairs (DIMA) offered supplementary arguments to support the need to restrict access to class actions. It argued that abuse of the system existed because:

- some of those involved in class actions would gain no benefit from a positive outcome;[9]
- people had not made applications to the Federal Court in relation to their own visa decision within the time permitted;[10]
- some applicants were unaware that they were part of the class action;[11]

4 NCCA, Submission, p. 115; RCA, Submission, p. 133; LCA, Submission, p. 76.

5 LCA, Submission, p. 76.

6 NCCA, Submission, p. 116.

7 RILC, Submission, p. 40; IARC, Submission, p. 105; NCCA, Submission, p. 114; ICJ, Submission, p. 164.

8 LCA, Submission, p. 76.

9 DIMA, Submission, p. 53.

10 In a 50% sample of *Macabenta* participants, one quarter had their last visa decision 3 years prior to joining the class action: DIMA, Submission, p. 54.

- a number of members of class actions move from class action to class action;[12] and
- press advertisements indicated the potential for abuse through the claims that -

> you may be able to join our class actions…It doesn't matter if you are illegal or that your Ministerial Review has been rejected…You may still qualify for a Bridging Visa and become legal.[13]

This evidence indicated a potential for exploitation of the class action process. However, it did not prove that there was such widespread abuse as to require the legislative action proposed in the Bill.

Lack of alternatives to the Bill

DIMA offered the above as evidence to the Committee that there was a variety of potential ways that the class action process could be abused. However, they offered only one remedy to address the problem, the classic sledgehammer to crack a nut solution, that of restricting everybody's access to class actions.

If other remedies were considered and rejected, these were not brought to the Committee's notice. Yet the variety of alleged abuses identified indicates that there could be a range of more focussed approaches to the problems, rather than the blanket restriction of access proposed in the Bill.

Alternate remedies

The Bill's proposal to restrict access to class actions is aimed at the applicants, that is, those most likely to be seeking redress through the courts. This may not be the most appropriate solution, or even an appropriate solution.

More accessible legal advice

As NCCA pointed out, the lack of merit in some actions may reflect an absence of legal advice, rather than a decision to exploit the review process.[14] In such cases, it could be argued, better access to early legal advice could prove a more appropriate response than the Bill's aim of restricting access to class actions.

Better access to lawyers and ethical migration agents would enable applicants for judicial review to obtain professional advice on the avenues of appeal and the prospects of their particular case.

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11 DIMA, Submission, p. 52.

12 DIMA, Evidence, p. 3.

13 DIMA, Submission, pp. 49, 59-61, 66; Evidence, p. 5.

14 NCCA, Submission, p. 116.

Better access to professional advice would also address the existing concern of the court about:

> paying the Minister's solicitor and counsel to respond to hopeless applications and paying the judge to decide them.[15]

Improved legal advice

However, the Committee was told that the advice provided was not always appropriate. According to DIMA, some individuals involved in class actions were unaware of the process in which they had become participants, and it was unclear what advice they had been given.[16]

RILC commented on this issue, indicating that cases may be driven by the actions of the service providers, rather than by initiatives of the applicants themselves, eg the migration agents or solicitors may encourage applicants to 'buy' time.[17]

In this context, it should be noted that the press advertisements that were presented to the Committee by DIMA demonstrated that not all those offering to assist with litigation appear to focus on the merits of individual's cases.

The Committee received submissions and heard evidence from two relevant peak bodies, the Law Council of Australia (LCA),[18] and the Migration Agents Registration Authority (MARA) which has statutory responsibility for certain aspects of the regulation of the migration advice industry.[19]

Whilst both bodies commented on the advertisements, MARA initially indicated to the Committee that they were not aware of them. In evidence, LCA stated that:

> …there are other mechanisms by which the practitioners that are involved in that kind of behaviour could be advised that they ought to tone it down or they ought to desist in that kind of behaviour. The proper reaction is to deal with those matters on a case-by-case basis, not to obliterate the access to that kind of litigation… there exists such things as migration agents' codes of conduct and committees that are set up to supervise the activities

15 Quoted in: NCCA Submission, p. 114.

16 DIMA, Evidence, p. 185.

17 RILC, Submission, pp. 40-41.

18 LCA is concerned with the legal profession as a whole, not limited to practitioners or advisers in migration law. It aims to (a) represent the legal profession at the national level; (b) promote the administration of justice, access to justice and general improvement of the law; and (c) advise governments, courts and other federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. (LCA website: www.lawcouncil.asn.au)

19 Including (a) monitoring the conduct of registered agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance; and (b) investigating complaints about registered agents in relation to their provision of immigration assistance. MARA, Submission, p. 234.

> of migration agents, and the bodies that regulate the legal profession… recourse is currently available to regulate those kinds of activities.[20]

The performance of MARA, the body that is responsible for monitoring the conduct of registered agents, should be of grave concern to Government and the migration advice industry in general. Their representatives were unaware, at the public hearings on 30th May 2000, of the advertisements that had been referred to it in October 1999 by DIMA.[21] In a supplementary written submission to the Committee,[22] following its appearance before both this Committee and the Senate Legal and Constitutional Affairs Committee in Estimates hearings,[23] MARA admitted that the advertising material had in fact been previously referred to it by the Department.

The Committee, at 3.109, has recorded its disappointment with MARA in this regard. Opposition Members of the Committee agree, and we look forward to some announcement, in the near future, by Minister Ruddock on the performance and operational abilities of this regulatory body.

Improved oversight of practitioners

Rather than restrict access to class actions to correct perceived abuses, NCCA argued that:

> an examination of the practices of some agents and practitioners, and the ability of asylum-seekers to obtain good quality legal advice and assistance would improve the quality of cases appearing in the Federal Court.[24]

RILC reached a similar conclusion that:

> the obvious way for the Government to deal with what it considers to be abusive applications, is to make complaints against the practitioners who encourage people to join class actions which have no argument or merit…the answer is not to abolish right of applicants, the answer is to put resources into professional bodies that are able to more effectively monitor and regulate the ethics of the legal and migration agent professions.[25]

These suggested remedies to perceived abuses indicate that there are alternatives to the Bill's proposal to restrict access to class actions.

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20 LCA, Evidence, p. 126.

21 MARA, Evidence, p. 136; Submission, pp. 201-202.

22 MARA, Submission, pp. 246-247.

23 Senate Legal and Constitutional Legislation Committee, Consideration of Budget Estimates, Canberra, Wednesday 31 May 2000.

24 NCCA, Submission, p. 114.

25 RILC, Submission, pp. 40-41.

It is quite clear that something more needs to be done to monitor and regulate the migration advice industry. During the course of this Inquiry, MARA has proved itself to be lacking and not up to reasonable expectations.

Effect on the courts

Numerous submissions argued that restriction of access to class actions would have a negative effect on the court system. IARC, Mr Bliss, RCA, RILC and the Australian Catholic Migration and Refugee Office (ACMRO) claimed that the number of cases coming before the courts would proliferate as people previously able to pursue a class action applied for hearings of their individual cases.[26]

DIMA contested this interpretation. It argued that:

- fewer individuals were inclined to take individual actions than to pursue class actions;[27] and
- most applicants for class actions had already exceeded the time during which they could have appealed as individuals, and consequently would not be eligible to pursue their case individually.[28]

The DIMA evidence relates to the actions of applicants when they have the possibility of using a class action. It is, therefore, not necessarily an adequate predictor of what they might do if the passage of the Bill restricted access to class actions. More applicants might pursue actions as individuals than do currently, and in a more timely fashion. If this occurred there would be an increased caseload for the courts, with a consequent negative effect on their operations.

Cost implications

The uncertainty about the possible effect of the Bill on the courts' workload has produced a similar lack of clarity about the financial cost and savings to Government of the proposed restriction of access to class actions. The *Explanatory Memorandum* for the Bill stated that:

> broad costs to the Commonwealth…may be reduced.
> However…there may be an increase in litigation costs.[29]

DIMA representatives were confused on the issue and could not say whether or not there would be any savings as a result of the passage of the Bill.[30]

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26 IARC, Submission, p. 106; Bliss, Submission, p. 130; RCA, Submission, pp. 132-133; RILC, Evidence, pp. 30, 37; ACMRO, Submission, p. 146. (ACMRO is referred to as ACBC in the Report)

27 DIMA, Submission, p. 210.

28 DIMA, Submission, pp. 209-210 cites specific cases and the overall proportion.

29 *Explanatory Memorandum*, p. 2.

30 DIMA, Evidence, pp. 8, 20; Submission, p. 218.

However, Mr John Matthews, Assistant Secretary of the Legal Services and Litigation Branch of DIMA told the Committee at its first public hearing:

> I think there would probably be substantial savings for the Government. Class actions tend by their very nature to be far more complex beasts to manage and to run because of the special provisions that apply to them. There are notices and opting out and the general management of them. They take longer and they are more complex. With litigation, the longer something is on foot and the more steps and processes involved, the more expensive it is.[31]

At the same hearing, the Assistant Secretary of the Visa Framework Branch of the Department, Mr Doug Walker said:

> When we were analysing this proposal, we felt there would be overall probably fairly minor savings, if any savings at all.[32]

IARC, Mr Bliss, and ACMRO argued that Commonwealth costs would increase as individual cases proliferated.[33] DIMA, in response, stated that cost:

> …is not the only determinant of the public policy issues.[34]

It is noted that the Committee concluded at 3.94:

> *that there was merit in the argument that retaining class actions would be more economical than restricting them.*

At 3.96:

> *The Committee drew attention to the potential for the Commonwealth's migration litigation costs to increase as a consequence of restricting access to class actions.*

The Committee was unable to reach firm conclusions on the affordability issues because it could not obtain data on the financial costs to individuals seeking judicial review through a class action.[35] Amazingly the majority still recommends that the right to engage in a class action in a migration matter be removed.

Conclusion

Opposition and Democrat Members of the Committee maintain that access to class actions should be retained because they are an equitable, economic and efficient

31 DIMA, Evidence, p. 7.

32 DIMA, Evidence, p. 12.

33 IARC, Submission, p. 106; Bliss, Submission, p. 130; ACMRO, Submission, p. 146.

34 DIMA, Evidence, p. 174.

35 See above, para 3.82.

avenue through which migration decisions can be challenged. Access to class actions should therefore not be restricted without good and convincing reasons.

Opposition and Democrat Members of the Committee have examined the arguments and evidence advanced for restricting access to class actions and have not found them convincing. We are prepared to examine any evidence of abuse and we will always act to curb or stop abuse when it is proven to be happening. The evidence was not presented on this occasion.

We are also very concerned that alternatives to the restriction of access to class actions have apparently not been canvassed.

We are concerned that the likely effects on the courts and on Commonwealth expenditure were not fully examined before the Bill was introduced.

We are supporting some of the Government's initiatives in this Bill but for all of the above reasons we dissent from the Government Members' recommendation (No. 1) that access to class actions be restricted.

Opposition and Democrat Members of the Committee concur with the finding that section 486B be clarified to ensure that test cases are not inadvertently excluded by the passage of this Bill. We agree that all Members of the Committee should be suspicious of the Government's initiatives in this area.

Dick Adams MP (ALP)	Julia Irwin MP (ALP)	Bernie Ripoll MP (ALP)
Member for Lyons	Member for Fowler	Member for Oxley

Senator Jim McKiernan	Senator Andrew Bartlett
Labor Senator for Western Australia	Democrat Senator for Queensland

A

Appendix A: Submissions

1. Mr Tim Bullen
2. *Confidential*
3. Mr John Dorricott
4. St. Pauls Anglican Church, Carlingford
5. Mr S Gaskin
6. Human Rights & Equal Opportunity Commission
7. Amnesty International Australia
8. Ethnic Communities Council of NSW Inc.
9. The Refugee and Immigration Legal Centre Inc.
10. Department of Immigration & Multicultural Affairs
11. Justin Rickard & Associates
12. Law Council of Australia
13. Immigration Advice and Rights Centre Inc
14. National Council of Churches in Australia
15. Mr Michael Bliss
16. Refugee Council of Australia

17. United Nations High Commissioner for Refugees

18. Fijian-Australian Resource Centre Inc.

19. Islamic Council of Victoria

20. Australian Catholic Bishops Conference Committee for Migrants and Refugees and Committee for the Family and for Life

21. International Commission of Jurists: Australian Section

22. Administrative Review Council

23. Mr John McMillan

24. Mr Colin McDonald QC

25. International Commission of Jurists: Australian Section (Supplementary)

26. Migration Agents Registration Authority

27. Department of Immigration & Multicultural Affairs (Supplementary)

28. Migration Agents Registration Authority (Supplementary)

29. Amnesty International Australia (Supplementary)

30. Department of Immigration & Multicultural Affairs (Supplementary)

31. Department of Immigration & Multicultural Affairs (Supplementary)

B

Appendix B: Hearings

Canberra 8 May 2000

Department of Immigration and Multicultural Affairs	Mr Andrew Metcalfe Mr John Matthews Mr Des Storer Mr Douglas Walker

Sydney: 24 May 2000

Amnesty International Australia: National Refugee Team	Mr Graham Thom Mr Alistair Gee Mr Matthew Hutchings Ms Georgie Mortimer
Australian Catholic Bishops Conference Committee for Migrants and Refugees	Rev. Father John Murphy Dr Warwick Neville
Human Rights and Equal Opportunity Commission	Mr Chris Sidoti
International Commission of Jurists	Mr David Bitel Hon John Nader QC
National Council of Churches in Australia: National Program on Refugees and Displaced People	Sister Loreto Conroy Ms Susan Harris
United Nations High Commissioner for Refugees	Mr Hitoshi Mise Mr Steve Wolfson
Refugee Council of Australia	Mr David Bitel

Melbourne 25 May 2000

Islamic Council of Victoria	Mr Bilal Cleland
Law Council of Australia	Ms Christine Harvey Mr Erskine Rodan Ms Debbie Mortimer

Canberra 30 May 2000

Migration Agents Registration Authority	Mr Ray Brown Mr Andrew Cope Mr Len Holt Mr David Mawson

Canberra 20 June 2000

Department of Immigration and Multicultural Affairs	Mr Andrew Metcalfe Mr John Matthews Mr Douglas Walker

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Appendix C: RRT decisions and judicial review (1/7/93-30/6/99)[1]

In the period 36,006 cases were reviewed by the RRT. Of these:
30,208 were finalised and a further 5,798 were in progress.
Of those finalised:

- ❖ 4,909 were withdrawn and
- 25,299 were decided by the RRT

Of those decided by RRT:

- ➢ 3,050 DIMA decision was set aside
- 22,249 DIMA decision was upheld

Of those where DIMA decision upheld:

- ❖ 20,143 no further appeal was made
- 2,106 applications for judicial review filed

Of those applications filed for judicial review:

- 376 in progress
- 1,730 judicial review finalised

Where judicial review completed:

- ❖ 1,279 RRT decisions unaffected
- 100 no data
- 351 to RRT for reconsideration

Of those returned to RRT:

- ➢ 62 RRT decisions set aside
- ❖ 171 RRT decisions re-affirmed
- ❖ 8 withdrawn
- 3 otherwise finalised
- 107 in progress

❖ indicates DIMA decision unaffected (Total = 26,510)
➢ indicates DIMA decision set aside (Total = 3,112)

1 DIMA, Submission, p. 215.