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# 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.