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JOINT COMMITTEE ON MIGRATION

Reference: Migration Legislation Amendment Bill (No. 2) 2000

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JOINT COMMITTEE ON MIGRATION

Wednesday, 24 May 2000

Members: Mrs Gallus *(Chair)*, Senators Bartlett, Eggleston, McKiernan and Tierney and Mr Adams, Mr Baird, Mrs Irwin, Mrs May and Mr Ripoll

Senators and members in attendance: Senators Bartlett, McKiernan and Tierney and Mrs Irwin

Terms of reference for the inquiry:

Migration Legislation Amendment Bill (No. 2) 2000

WITNESSES

Committee met at 9.33 a.m.

SIDOTI, Mr Christopher Dominic, Human Rights Commissioner, Human Rights and Equal Opportunity Commission

ACTING CHAIR (Senator McKiernan)—I now open this public hearing of the Joint Standing Committee on Migration to review the Migration Legislation Amendment Bill (No. 2) 2000. On 12 April 2000, the committee was asked by the Minister for Immigration and Multicultural Affairs to consider the bill and to report by the end of June 2000. The bill was introduced into the House of Representatives on Tuesday, 14 March 2000. It amends the Migration Act to: give effect to the government's policy intention of restricting access to judicial review in visa related matters by prohibiting class actions and limiting those persons who may commence and continue proceedings in the courts; clarify the scope of the minister's power under section 501 to set aside a non-adverse section 501 decision and substitute an adverse decision; and rectify an omission which allows the consequential cancellation of a visa. The bill also corrects a number of misdescribed amendments of the act.

The committee has received 22 submissions from individuals and organisations with an interest in these issues. Two further submissions have been made since the committee last met. Is it the wish of the committee that the submissions submitted by the International Commission of Jurists, Australian Section, and the Administrative Review Council be accepted as evidence to the inquiry and authorised for publication? If there is no objection, it is so ordered.

The committee normally authorises submissions for publication and they are placed on the committee's web site. If you would like further details about the review, please feel free to ask the committee staff here at the meeting. The committee will take evidence from witnesses as listed in the program. I now welcome the witness, Mr Sidoti, from the Human Rights and Equal Opportunity Commission. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false and misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Are there any corrections or amendments you would like to make to your submission?

Mr Sidoti—No.

ACTING CHAIR—The committee prefers that evidence be taken in public, but if you wish to give confidential evidence to the committee you may request that the hearings be held in camera and the committee will consider your particular request. Before we ask for questions from individual members of the committee, do you have a short opening statement you wish to make to the committee?

Mr Sidoti—The bill before the committee at the moment needs to be considered in the context of legislation dealing with immigration over the last ten years. Although this bill is a small bill, unlike many of those that have come before the parliament during that period, it does represent a further step in a policy of tightening of procedures in dealing particularly with onshore asylum seekers that has characterised refugee policy in Australia now since 1989. For

that reason, the bill needs to be considered within the broader context and not simply taken in isolation.

In his second reading speech in relation to the bill, the Minister for Immigration and Multicultural Affairs, Mr Ruddock, indicated that most of the initiatives in the bill:

> ... flow from the government's stated policy to restrict access to judicial review in visa related matters 'in all but exceptional circumstances'.

The bill itself does not represent a direct tightening of judicial review provisions such as the bill currently before the Senate dealing with privative clauses, but it is certainly seen by the government, and should be seen by the committee and by the broader community, as part of the process of tightening that I have described. The principal issue, as far as we are concerned, with questions of tightening access to judicial review relates to the provision in article 14 of the International Covenant on Civil and Political Rights, which requires that everyone has the right to a determination of rights by a fair and public hearing by a competent, independent and impartial tribunal.

For reasons set out in the commission's submission in relation to the Migration Legislation Amendment (Judicial Review) Bill 1998 [2000], which went before the Senate Legal and Constitutional Affairs Committee, we do not consider that the Refugee Review Tribunal is sufficient of itself to meet the test required by article 14 of providing for a 'fair and public hearing by a competent, independent and impartial tribunal'. Under those circumstances, the protections offered by article 14 can only be guaranteed by appropriate determinations of rights by a judicial body, and that is the courts. For that reason, the commission has been concerned about issues of restricting access to the courts precisely because it would represent a denial of rights under article 14 of the ICCPR. The attachment that we made to our submission to this committee indicates the particular concerns we have about the current processes.

The bill before the committee has two particular provisions that we would wish to draw attention to. The first relates to the prohibition of class actions. The bill provides that class actions should be prohibited before the Federal Court and the High Court in relation to immigration matters because, in the words of the minister, 'of a concern with costs and incidence of migration litigation'. Of itself there is no direct right to a class action, but certainly there is a right to access the courts. To the extent to which the provision for class actions enables individuals to have access to the courts in an affordable and easy manner to assert their rights and have them determined, then class actions do have a relationship to human rights. The major concern, though, that I have with the move to prohibit class actions is one that relates to practicality. The minister, in his second reading speech, indicated that there had been 10 class actions that had been completed, and they involved 4,500 parties. There are currently four class actions before the courts involving another 3,000 parties, a total of 7,500 people. Clearly the courts would be unable to cope with even 10 per cent of those if they were individual actions.

For reasons of sheer practicality, expediency and the costs of justice, particularly to the taxpayer, class actions provide an easy way of dealing with large numbers of cases involving the same point. A class action, of itself, need not be the basis upon which a refugee determination can be considered. Refugee determinations need to be made on the basis of individual consideration but they can certainly give rise to broader issues of general policy. Class actions

are very convenient and expedient ways of determining those. It would be ridiculous, for example, to say that, just because refugee determinations need to be decided individually, it would be necessary in the case of the Nazi regime in occupied Europe during World War II to determine whether every individual Jewish person was entitled to refugee status without considering the claims of the group as a whole. Class actions, under the current circumstances and under our current law, enable those kinds of broader issues to be determined by the courts in ways that are, as I say, expedient, convenient and accessible to the parties. If even 10 per cent of the cases went through as individual cases, the courts would be jammed and the costs would be enormous. Leaving with the courts the task of determining whether individual class actions are meritorious or not is the proper thing to do. Excluding the actions on the basis of some assumption in advance that all class actions are unmeritorious pre-empts the role of the courts and, as I say, gives rise to a possibility of clogging the courts with large numbers of actions.

The second issue relates to the 28-day limitation on making applications to the High Court. This provision may give rise to constitutional issues, and I leave it to constitutional experts to comment on those. The right to apply to the High Court for a prerogative writ is contained in the Constitution, and it may be that the High Court would consider this an unreasonable restriction on that right. My concern, though, again goes to the human right of an individual to approach the courts for a determination of rights. Those who are involved in these kinds of actions tend to be those with the least knowledge of the Australian legal system. Under those circumstances, the imposition of the 28-day limit on applications to the High Court may unreasonably prevent people from knowing their rights, from obtaining legal advice and from making the necessary applications before the court. It is a very short period of time. Even within our mainstream legal system, when we are talking about 28-day appeal provisions there are many parties, highly resourced parties with the best possible legal advisers, who have difficulty in getting their appeals in within 28 days. To expect an originating application from a refugee or an asylum seeker to be made within that period of time is, in my view, 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.

Certainly the bill before the committee at the moment, in the general scheme of legislation brought to the parliament over the last 10 years, has to be considered as a minor bill. As I have indicated, its provisions are not as objectionable as those contained in relation to privative clauses and judicial review, the bill currently before the Senate, but it is part of a long history of tightening. The provisions are undesirable and unnecessary in both cases that I have referred to and, for that reason, in my view, the bill should not be advanced.

ACTING CHAIR—Thank you, Mr Sidoti. The commission has not made any reference to the other part of our reference, which is to do with the minister's power under section 501A and 501. Do you see that as not being of concern, or is it something that the commission has not addressed?

Mr Sidoti—It is an issue that we have not considered carefully. We have focused on these other two matters. I am afraid that I cannot give either our support or our opposition to that particular provision.

ACTING CHAIR—That is for clarification on my part because there are some other witnesses who have focused on that as well. In evidence to the committee some weeks ago the department indicated that this bill could stand on its own but that it is also complementary to the judicial review bill that is before the Senate. Does the commission see the bills as being complementary to each other or as separate? Is there a linkage between the two?

Mr Sidoti—Certainly the bills can stand alone, as the department indicated, but there is a link, and the link is that contained in the minister's second reading speech where he refers, as I have quoted, to the government's concern about restricting access to judicial review. For that reason we, as with the minister and the department, see this legislation as part of a broader process of denying access to the courts for onshore asylum seekers.

ACTING CHAIR—Of the class actions that have been held or are being planned—and if you could identify them that would help—are many of them related particularly to refugee matters or asylum seeker matters rather than the general immigration matters, like the English language tests that were the subject matter of one of them that I know of?

Mr Sidoti—I am sorry; I do not have the breakdown with me. We can make inquiries into that, if you like, and give you advice.

ACTING CHAIR—Do you know whether there are any particularly that—

Mr Sidoti—Yes, I know that there are some that relate to onshore asylum seekers. In fact, I think the most notable of those is one concerning East Timorese.

ACTING CHAIR—Is that the class action?

Mr Sidoti—I think that is taken as a class action. I can check that.

ACTING CHAIR—Finkelstein's decision? I thought it was a test case. That is probably something we need clarification on. Perhaps the department when they come back to us might clarify that.

Mr Sidoti—Yes.

ACTING CHAIR—Are you thinking of the Justice Finkelstein decision on that one?

Mr Sidoti—I think that is the one that I am referring to. The minister has referred to 14 class actions that have been commenced since October 1997. So I would think the department could give you a list of what they are and the particular issues involved. We can either liaise with them or deal directly with the committee.

ACTING CHAIR—We have to go back to the department on some other matters that they have taken on notice in any case, and we can follow that one up.

Senator BARTLETT—You have made reference specifically to the International Covenant on Civil and Political Rights and I think some other submissions also referred to the Universal

Declaration of Human Rights, the refugee convention and other international instruments. I suppose I have a two-part question. One often hears that certain things are contrary to this international obligation or that one. Firstly, is there some mechanism for determining that in a solid sense? Secondly, in a legal sense in Australia, does it matter anyway? There may be a moral or political issue there, but does it matter in a legal sense?

Mr Sidoti—Our submission does not refer to the refugee convention because the commission does not have jurisdiction in relation to it. We do have jurisdiction for the International Covenant on Civil and Political Rights and for the Convention on the Rights of the Child, amongst other instruments. In not referring to the refugee convention, I do not wish to imply that the provisions are consistent with it and with the law that has been developed under it.

So far as the determination of the application of these conventions, under Australian law our commission is established as the principal adviser to government and the parliament on the application of these provisions to the Australian system. There is also a provision, which Australia has accepted, under the First Optional Protocol to the International Covenant on Civil and Political Rights which enables an individual to complain to the Human Rights Committee established under that treaty and to seek an opinion from that committee on the application of a law to the individual. It needs to be an aggrieved party in that case. But that is an international process. It is a process that people have taken from Australia over the last 10 years in relation to a number of situations, including immigration detention. I would imagine that if, for example, the privative clauses bill went through, there would be applications in relation to it. So far as Australian domestic law is concerned, the commission is established by the parliament as the principal adviser to parliament and government about these issues, and our views you have.

Is there a legal obligation? Not one that is enforceable in the Australian courts. We do not have in Australia a bill of rights, as you know, either in constitutional or statutory form. The best we have is the advice provided by the Human Rights Commission. There is a legal obligation, though, under international law. An international treaty, whether in human rights or elsewhere, is a contract. It is a contract between states. We have an obligation to honour contracts in international law. Enforceability, though, is a different issue. There the international legal system remains very underdeveloped, very immature, as a legal system. Enforceability and binding obligation are two separate issues.

Senator BARTLETT—So, in a practical and immediate sense, if the parliament were to pass this bill, even if it were found by the Human Rights Committee internationally to contravene, say, the ICCPR, that is a political or moral point but, in terms of legal rights for people here, it is neither here nor there—the government can still say, well, bad luck?

Mr Sidoti—That is correct. There is no enforceable mechanism under Australian law by which the government can be required to comply.

Senator BARTLETT—When you say that the commission is the principal adviser to government, is the commission's advice actively sought before development of legislation such as this?

Mr Sidoti—No, not at this stage.

Senator BARTLETT—Is that a normal process? You obviously provide advice when asked to or when the opportunity presents itself at a parliamentary committee. Has it normally been the practice in the past for advice from the human rights commission to be sought before the legislation is finalised?

Mr Sidoti—It was certainly a very common practice for many years after the commission was established in 1986. We were invited to comment on draft legislation and cabinet submissions on a regular basis. Our views were taken into account in the coordinating comments that went to cabinet with the cabinet submissions. I cannot recall an instance in recent years where we have been invited to comment on draft legislation or cabinet submissions.

Senator BARTLETT—On that issue of access to the courts and access to judicial review—I obviously understand the argument you are putting forward on how this bill may restrict people's rights to have access to judicial review—I would be interested in your comment on it, coming at it from the other angle: the fact that there are so many people, according to the government, who are seeking to use the judicial processes to inappropriately—from the government's point of view—prolong their stay in Australia. Does that serve to delay genuine claimants' access to judicial review?

Mr Sidoti—I do not think it delays genuine claimants' access to judicial review. But there would certainly be some who would seek to prolong their stay in Australia by access to the courts. I must say, though, as I did before at the Senate committee when looking at the 1998 bill, that there is a significant number of cases that go to the courts where the applications are upheld. There is therefore, first, a significant error rate on the part of both the primary decision maker and the Refugee Review Tribunal; and, second, some of these matters are very complex matters. The determination of refugee status can be very easy in some instances. I cited earlier the situation of Jewish people in Nazi occupied Europe. The situation of Hutus in Rwanda during the genocide there is another one where you can say there is an easy way of determining it. But often it is very difficult to determine refugee status. Those who apply to the courts, even when ultimately unsuccessful, cannot all be lumped into the category of unmeritorious claimants who are seeking to prolong their stay. There will be situations of genuine doubt as to whether or not they are entitled to the application of the law to them and are therefore entitled to go to the court and have that issue resolved.

Senator BARTLETT—On your statement about the current review process not satisfying the requirements for a fair and public hearing by a competent, independent and impartial tribunal, is the fact that the Refugee Review Tribunal—and, I think, the MRT as well—is not subject to natural justice and the rules of procedural fairness a fairly key component of that inability to meet that obligation?

Mr Sidoti—Yes, that is a key component. In the submission we made to the Senate committee, which is attached to the submission to this committee, we have highlighted three aspects: one, that the refugee review proceedings are not open—we are not saying that the party should be identified but that there should be external scrutiny and review of the process—second, that those proceedings are not fair; and, third, that members of the RRT are not

sufficiently independent. Those three issues all go to our concerns about the failure of that process alone to meet the requirements of article 14.

Senator TIERNEY—You indicated in your opening remarks that this is part of a process of tightening, and you obviously believe that it tightens it too far. What do you believe would be sufficient time in which to make applications for judicial review if you disagree with the 28 days?

Mr Sidoti—I have not actually come with a recommendation, so this is a top-of-the-head response. Given the nature of the people who are making these applications—as I described earlier, they have come here in difficult circumstances, know nothing about our legal system and often do not even know the language, let alone the law, and have difficulty in accessing legal advisers—I would think we should be erring on the side of generosity rather than tightness. I would have thought a period of even six months would not be unreasonable, and perhaps longer than that. But that is just a top-of-the-head reaction, and it does not take into account questions of constitutionality, that is, whether the High Court would have a view about what the Constitution provides. But I certainly think that at least six months would be more reasonable.

Senator TIERNEY—Wouldn't you agree that this would actually be going against the trend of what the government has been doing in recent times in terms of tightening things up so that people are not overstaying unnecessarily when their case is not valid?

Mr Sidoti—Certainly this legislation is part of that trend. No matter what time limit were to be prescribed, it would be consistent with the trend because it is a restriction of an existing unlimited entitlement to approach the High Court. So even if a limitation of 10 years were put, it would still be consistent with the trend of tightening because it is providing limit for the first time. The question is whether any limit is justifiable. Presently, there is none and there has been none, but if it is justifiable, under the circumstances of these individuals, what time limit is respectful of their rights and cognisant of their situation in being a reasonable limit? As I say, I would not have thought that any limit under six months could be considered reasonable.

Senator TIERNEY—Do you see as a major problem the current situation in relation to asylum seekers overstaying, being too long in the process before it is resolved and finished one way or the other?

Mr Sidoti—It can become a major problem, without doubt. There is no doubt that everyone, the department, the decision makers, the taxpayer and the asylum seekers themselves most of all, have an interest in the speedy resolution of claims on a proper basis. The question is balancing the speedy resolution and the capacity to determine it on a proper basis. Certainly during the early 1990s many determinations dragged out. So much so that when the law changed in 1994 to speed up the process, of those who had made application before then and were entitled to consideration under the pre-existing law, so far as I am aware, there is one case that has only just been determined. The situation of a family who were detained at Port Hedland immigration detention centre for five and a half years has only just been resolved. Now, on any basis, that period is excessive and it has been very difficult both for the department and the family during the course of that five and a half years. But since the end of 1994 the process has

been speeded up. The difficulty that we have at the moment with what I again consider to be unreasonable times in relation to those who have arrived since last July is simply a lack of processing officers. The procedure I think is fine but, again, we are back to the stage where even initial interviews and initial determinations are taking between four and six months, or sometimes longer, simply because the staff are not available to interview the larger numbers that have arrived since last July.

Senator TIERNEY—So you are saying in that last point, and I am just trying to pin it down, that that is just a staffing matter. There is no other reason for the delay. If more staff were put on, that would fix the problem.

Mr Sidoti—It would fix the problem in a way that would enable a proper balance to be struck. I have no proposals for changes to the process that would speed it up that would be justifiable beyond what was implemented at the end of 1994.

Senator TIERNEY—Just on another matter, do you believe that advertisements that have promoted class actions primarily as a means of obtaining lawful stays in Australia are acceptable?

Mr Sidoti—I am sorry, I have not seen any of these advertisements so I could not comment on them. One comment that perhaps I will make is that I know that there has been concern amongst parliamentarians, governments and departments for some years about lawyers touting for business and making a fortune out of asylum seekers. It may well be that there are some, but I certainly know many lawyers whose practices have entered into grave financial difficulty because of the pro bono work that they are doing for asylum seekers. I have not come across any that have made a fortune out of them.

Senator TIERNEY—OK. You say that you have not seen the advertisements, but what do you think of that as a practice?

Mr Sidoti—It would depend on the content of the advertisements. If there were an important principle that would be determined through a class action, as I have indicated, it seems to me that it is in everybody's interest to have those who have an interest in that principle, or who are affected by it, to be involved in the one case. So if it were simply a matter of saying: there is an action under way, it is going to be examining this principle, we need to identify all those who may be affected by it to give them a chance to appear, I would have no objection. If, on the other hand, it were an advertisement that said: 'We can manufacture a class action for you,' it would be objectionable.

Senator TIERNEY—I was referring more to the latter but I understand your point in relation to the former.

ACTING CHAIR—May I follow that one up and quote directly from one of the advertisements which says:

'Permanent Residence—Australia

Refugee Class Actions!

If you have been rejected by the Refugee Review Tribunal (RRT) you may be able to join our class actions at a very low cost. Our latest action is very easy to join (over 1200 people have already joined!)

It doesn't matter if you are illegal or that your Ministerial Review has been rejected.

Please supply your refugee and RRT decisions.

You may still qualify for a Bridging Visa and become legal.

Free Consultation—You have nothing to lose'.

How do you feel about that one? Do you have a view?

Mr Sidoti—There are some phrases in it that I would find questionable, Senator. I would need to sit down and study it more carefully. The comment I would make, though, is that, if this legislation is designed to stop objectionable advertisements, then it is directed at the wrong parties. Why, again, are we punishing those who are seeking to regularise their status in this country, if we are worried about advertisements, rather than doing something about the advertisements? If that is what the issue is, let us address the issue, but time and again we find in legislation brought before the parliament from the Immigration Portfolio that it penalises those who are entitled to our protection rather than addressing head-on the issue which they say is causing concern. If this is what the concern is, then again we are addressing the wrong issue.

ACTING CHAIR—I will come back to that. I now call Mrs Irwin.

Mrs IRWIN—Thank you. Mr Sidoti, the government has stated that the main purpose of the bill is to restrict the increasing cost and incidence of migration litigation. Do you think limiting access to class actions in migration matters would reduce the cost and incidence of migration legislation?

Mr Sidoti—No. As I have indicated, it may well have the opposite effect of increasing the cost and incidence of migration litigation.

Mrs IRWIN—What effect do you think limiting access to class actions would have on the workload of the courts?

Mr Sidoti—In my view, it could well increase the workload of the courts to an intolerable extent, imposing upon them an intolerable burden. Again, to quote from the figures from the minister, there have been 7,500 people involved in class actions. It would take only 10 per cent of them to initiate individual actions—750 people—to find our courts totally clogged.

Mrs IRWIN—I want to go back to Australia's international obligations—we were discussing those earlier. Does the bill breach Australia's international obligations under the International Covenant on Civil and Political Rights and the Convention Relating to the Status of Refugees? Why I ask this question is that, in a submission we received from the department, the

department has been advised by the Chief General Counsel of the Australian Government Solicitor that, 'Interference with judicial power would be unconstitutional and all aspects of the bill are constitutionally sound.'

Mr Sidoti—As I indicated, I am not an expert on the Constitution, so I will allow others to put evidence before the committee on that particular point. So far as the International Covenant on Civil and Political Rights is concerned, if the legislation has the effect of denying access to a determination of rights that accords with article 14—that is, the words I mentioned about the fair and public hearing by a competent, independent and impartial tribunal—or of seriously impeding that kind of access, then yes, it will be a breach of article 14 of the ICCPR. My concerns are not as great about this legislation as in relation to the 1998 bill, which was much more comprehensive in restricting rights, but I am still concerned that this legislation would have the effect of adding to an existing package and a foreshadowed package of further restrictions so that cumulatively there will be a denial of the rights under article 14.

ACTING CHAIR—To go back to the point about access to judicial review, there has been a concern by the parliament over many years now—and I say 'parliament' advisedly, rather than being party political. I was reminded of this when reading the transcript from the department when they appeared before the committee a couple of weeks ago. It was said that when the Migration Reform Bill was brought to the parliament and section 8—which restricted judicial review in some areas—was inserted, there were about 200 actions before the courts at that time, which seemed an astronomical number. Even with that legislation in place, which was eventually passed into law in 1994, there are now 1,400 actions in the courts as we speak, including some class actions which are afoot, the majority of which would obviously be individual ones. There is a parliamentary concern to restrict additional and judicial review on top of the administrative review that has been granted in all migration areas—the MRT in one area and the RRT in a secondary area. Do you have a view that it is perhaps time for the parliament to look at dispensing with the administrative review system and just leave a judicial review system in place?

Mr Sidoti—I certainly see that as an option, Senator. I certainly think that it is time for the parliament to look broadly at the question of the processing of asylum seekers on shore because, precisely as you have indicated, the various attempts to restrict, restrict, restrict, now over 10 years, have not worked in achieving the objective of limiting the number of judicial reviews, for example. Time lines are blowing out again, as indicated by Senator Tierney and in my response to the questioning from Senator Tierney. The simple fact is that the restrictive system or restrictive approach that has been taken over the last 10 years is not achieving the results that were required—that is, a proper determination of status as speedily as possible on a fair basis. If this or any other parliamentary committee were interested in reviewing the whole system, I would think it very timely.

ACTING CHAIR—I hope I did not give you the impression that I was suggesting this committee will not do it. I am only in an acting role today. I hope that clarifies matters that I was not particularly pushing that point. The point I am making, though, is that it was of grave concern some eight years ago when there were 200 cases in the courts; there are now 1,400. This bill, which complements another bill in the parliament, would restrict judicial access in a number areas—this one on class actions; the other one on a much wider area. Opposition parties

in the Senate have indicated they are not supportive of the judicial review bill. It has not been brought on for debate, despite the fact that it has been in the parliament for some 18 months or so. I think it came in in November 1998. Maybe it is time to scrap bills like this and move to a complete judicial review system like in Canada. But Canada is not without its problems as well in the protection, from your perspective, Mr Sidoti, of human rights. There has been a dramatic tightening of the system in Canada in recent times, as there has been in other Western nations which have been made to put a large number of refugee claimants in their countries.

Mr Sidoti—Yes, there has been. But the tightening in Canada is still nothing like what we have seen in this country. In Canada, there is access to the courts under the constitutional charter of rights and freedoms—the constitutional Bill of Rights—which provides full judicial scrutiny of both law and practice in that system. We do not have anything comparable to that here. I accept your point, though, that it may be preferable to move away from the specialist tribunal and let these cases go through to the courts in the first instance. I think the specialist tribunal does play a very valuable role. It can in fact reduce the number of cases going on to the courts, which are more expensive, if it is operating properly and fairly. Although the number of cases going to the courts has increased, as you have indicated, over the last six years, the fact remains still though that only a minority of cases go through to the Federal Court. The Federal Court can play an appropriate review role; the RRT plays a valuable role. But under the circumstances, I do think that it is time to consider whether this is the best processing system we can come up with.

ACTING CHAIR—If the system is being abused—you made some comment about the method in which they are tackling the adverts, for example—have you any other suggestions of how abuse could be curtailed or limited, if indeed such abuses are happening. I think I asked you a similar question in discussion on the earlier bill some time ago.

Mr Sidoti—I consider the best way to address abuses is to ensure much speedier attention to cases when they come before the court—the court, as it is doing in so many other areas of law, is taking a much more management approach to the case—but also getting on quickly to determine whether there is a prima facie case and making a decision at that level. The courts have powers to strike out litigation that is patently unmeritorious, but rarely are they invited to do so and rarely is there the opportunity for the courts to do so on an early basis. So looking at some of the internal workings of the courts is a much better way of doing this, in my view, than taking this kind of action.

ACTING CHAIR—I just had a quick glance at the Department of Immigration's submission to the committee on those class actions about which we had spoken earlier. I cannot identify one as being the East Timorese one. They have gone into some detail in explaining the various actions that have occurred over the last few years, particularly the 14 that have been mentioned, but I cannot identify one that would particularly relate to the East Timorese issue. I do not believe it was one.

Mr Sidoti—I will have a look at their lists, Senator.

ACTING CHAIR—If there is anything further you need to add on that please feel free to do so. But we will clarify that matter with the department in any case. Is there anything further from members of the committee?

Mrs IRWIN—We have had a few comments from other people whom we have had before this inquiry regarding delaying tactics. I think the chair mentioned bridging visas. Does the Human Rights and Equal Opportunity Commission feel that there have been a number of people who are using the judicial proceedings to obtain a bridging visa and therefore delay their removal from Australia?

Mr Sidoti—I have no doubt that there would be some. What the numbers may be is another matter entirely. Most significantly, though, so far as the applicants that I am most concerned for are concerned, bridging visas are rarely given—in fact hardly ever given—for those who are in immigration detention as onshore asylum seekers. That raises another matter entirely. In the case of this family with two young children who were detained for 5 ½ years, they were detained throughout that period. So to say that court action is being used by onshore asylum seekers for no reason other than prolonging their stay before they have to go home is a ridiculous argument because these people are spending the time in detention. They want to stay here permanently. They are using court action to press their claims to stay here permanently, not using it as an artificial means of prolonging the stay before compulsory foreseen repatriation.

ACTING CHAIR—There is a further question from me, Mr Sidoti, on the time limits, the restriction, on applications to the High Court. There is currently a 28 day restriction on the Federal Court. Why would it be that much different in imposing a similar restriction on the High Court?

Mr Sidoti—The 28 day provision in the Federal Court is unreasonable as well from the RRT, I have to say.

ACTING CHAIR—But even with that restriction in place, the number of actions before the court are growing year by year.

Mr Sidoti—Yes.

ACTING CHAIR—So it is not seen to be a limitation on people's access to the system.

Mr Sidoti—It is not serving the effect of stopping the number of actions going through that the government would like to stop. That is certainly true. But whether or not there are other applicants who have proper claims who are not making their applications to the court in time is another matter. I know that there are people who come to us at the commission saying that they have only found out their rights out of time or been prepared out of time and what can they do. Essentially, under the law there is nothing that they can do.

ACTING CHAIR—But in a refugee matter, in the RRT decisions communicated to a person they are told about the 28 day limitation period in that letter of refusal.

Mr Sidoti—Yes, they are told about it, whether they are then able to understand what that means is another matter. Often they do not have lawyers. They cannot take a lawyer with them to the RRT, so their ability to get proper legal advice to understand what it all means is very limited, especially if they are in detention.

ACTING CHAIR—They actually can take a lawyer with them if they choose but the lawyer may not be heard in the RRT.

Mr Sidoti—Sorry, that is correct.

ACTING CHAIR—Sorry to be picky.

Mr Sidoti—Your knowledge of these matters, Senator, is legendary.

ACTING CHAIR—What about a leave provision? That is something else that has been suggested. It was argued in the previous hearings on the other bill that, rather than restricting the access to courts in the manner that is being suggested by government, there ought to be a restriction by inserting a leave provision into the Federal Court. Where people would have to seek leave to get into the court in the first instance it would be a further hurdle to stop the abuses. Do you have a view on the insertion of a leave provision?

Mr Sidoti—I certainly consider a leave provision to be a much more desirable alternative than an unreasonably restrictive time limit or a complete denial of access. A leave provision I would consider to be much more acceptable. Whether absolutely it is the best way to go is another matter but certainly it is better than the kinds of options that have been put up at the moment.

ACTING CHAIR—Thank you very much, Mr Sidoti, for your attendance here this morning and the assistance you have given the committee in our deliberations. We are appreciative of it. Thank you.

[10.18 a.m.]

BITEL, Mr David, President, Refugee Council of Australia; and Secretary-General, Australian Section, International Commission of Jurists

NADER, Hon. John, QC, Member, International Commission of Jurists

ACTING CHAIR—I welcome witnesses from the Refugee Council of Australia and the International Commission of Jurists. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Are there any corrections or amendments you would like to make to your submission? Incidentally, we have this morning taken the decision to publish the submission from the International Commission of Jurists. Are there any corrections or amendments you wish to make to either of the submissions?

Mr Bitel—No. You said you have published the ICJ submission. What about the Refugee Council one?

ACTING CHAIR—That was published at an earlier meeting—I cannot remember the date. Sorry, I should have informed you. I invite you now to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to address questions to you.

Mr Bitel—Thank you, Senator. As the author of both submissions, I am happy to answer questions on both of them. It is a bit difficult wearing both hats, but I will try to differentiate as to which hat I am wearing in case attribution becomes important.

ACTING CHAIR—Hats will not be accepted as a defence when answering questions on a particular submission!

Mr Bitel—Justice Nader will just be speaking in relation to the ICJ. I would like to start by making a brief statement in relation to certain proceedings which are afoot between my law firm and the minister and which would probably be known to members of the committee. I wish it to be known that both organisations that I represent have considered whether there is a conflict of interest in my being present and have taken the view that they do not see a conflict, given that the issues which are raised do not pertain to any of the matters which are the subject of current proceedings between my firm and the minister.

ACTING CHAIR—Hopefully we will not be traversing the details of those actions in this hearing. It is not the role of committees to usurp the role of the courts. I am not sure of the details of what you are talking about, and I really do not want to know at this point in time. We are dealing with the bill that is before the parliament, and I will be advised by you if we are moving into areas that we should not be moving into. Please indicate to us where we might be transgressing.

Mr Bitel—I will certainly do that, Senator, but it is important that it is on the record.

ACTING CHAIR—I was not aware of the issue, so I appreciate the advice you have given. Thank you, Mr Bitel. Please continue.

Mr Bitel—I have nothing further to add to the two submissions other than to say that the two submissions are intended to complement each other. I wrote the first submission while staying in a beach house in the Philippines. I was on holidays at the time, so I did not have all the technical information and judicial documents which I had when I came back to Australia; I then drafted the second submission. The ICJ submission incorporates what was set out in the Refugee Council's submission, but it goes more into the legalities and rule of law issues, adopting a more legalistic or jurisprudential approach. The Refugee Council's submission is more tailored to the issue of refugees, they being the primary persons who have been involved in what are termed the class actions. One set of proceedings which did not involve refugee applicants certainly comes to mind as a class action which was successful, but most of the other class actions, as I understand it, relate to people from the refugee area and to issues of determination in the RSD system. The particular set of proceedings that I am referring to was the Din class action, which related to the 816.

ACTING CHAIR—English language proficiency.

Mr Bitel—Yes, and the fact that the tests were not nominated properly. The proceedings were successful.

ACTING CHAIR—Thank you, Mr Bitel. Is it Mr Nader or Justice Nader?

Mr Nader—I am retired now, Senator, so I am not entitled to the title 'Justice' any longer.

ACTING CHAIR—Do you have any opening comments you wish to make at this stage?

Mr Nader—No. What I have to say will be extremely brief. I hope to be able to give much more thought to these matters later. I have only just recently come to them. If it suits the committee, I could dispose of them fairly quickly—virtually straightaway.

They are really legal matters. They are not matters that go to the merits of the legislation as such or to the objectives that the legislation is trying to achieve. I am not directing my remarks to that except that I am a little concerned that there are two areas in the legislation, probably the two key areas, which if they stay as they are may be a great feast for lawyers and a great source of litigation. I am sure the committee would agree with me that it would be better that legislation be unambiguous and unequivocal in its form so that it does not itself lead to masses of litigation that to some extent may defeat the purposes of the legislation.

I will come to the point. Clause 486A of the bill provides for a limitation period of 28 days. There is nothing inherently unconstitutional or wrong with a legislature imposing a limitation. It has been done as long as I can remember. That is not regarded as an interference with the judicial function. For example, for many years actions for negligence were limited to six years. They had to be brought within six years. There are many other limitations of actions. There are statutes of limitations. There is no problem about that. But it does occur to me that if a limitation prescribed is so short that it amounts to an effective prohibition on litigation then the court may regard that as an intrusion into the judicial field.

Let me illustrate it with an absurdity. If the limitation were made 24 hours, whilst in a technical sense it might be within the power of a legislature to do that, one would think a court—in particular I am thinking of the High Court because that is the court that is going to have the final say in the matter—would say, 'That limitation is so short that it is an interference in the judicial function. It is too short.' I would ask the committee respectfully to have a look at whether 28 days, left in that bald, unqualified form, is not too short. I am sure there are very good lawyers looking at that question already. It may be able to be ameliorated by providing some exception to it, in the sense that leave could be granted in certain cases so that manifest injustice is not going to be perpetrated by the 28-day limitation. There is not much more that I can say about that except that it does strike me as a matter that should be looked at very closely.

I will now turn to the other matter that concerns me. This one may be more an intrusion into the judicial area. I am talking about the separation of powers. There are certain ways in which the executive operating through the legislature can intrude very obviously and directly into the judicial function. They are matters which are not permitted by the law. There are, however,

other areas. There are activities and functions which are peripheral to the direct judicial activity but so closely associated with it that, traditionally, they have been regarded as part of the judicial function. I will mention two of them: the consolidation of proceedings and the joinder of parties. The terminology is becoming a little bit loose in legislation these days because we are using what is called plain English. Unfortunately, a lot of plain English is leading to confusion. The joinder of parties was the naming of the parties at the commencement of suit. The joinder of parties was something that the parties themselves decided. If I am a plaintiff in a case and I decide to name two defendants, I and the two defendants are joined to those proceedings. Traditionally, 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. It was a distinction which may seem pedantic but there was a point to it. The parties joined were those parties joined at the very beginning of the proceedings. The parties added were those that came in later, either by agreement between the parties or by order of the court.

I am saying this for a reason. The word 'joinder' is now being used very loosely. I notice in the human rights legislation that the word 'joinder' is used to cover what used to be called joinder and what is also now called 'addition of parties'. So if the word 'joinder' has come to have that wide meaning, paragraph (a) of subsection 1 of clause 486B could be construed as prohibiting the court itself from joining parties once proceedings had started. The plaintiff or applicant would join the parties initially—join the defendant; probably the department—and the question then, though, would be whether the High Court or the Federal Court, in its wisdom, might say, 'Someone else is affected by these proceedings. Traditionally, the way you deal with that is to make them a party to the proceedings, so that they can be heard and either support or oppose the application that is being made.' That has traditionally been a judicial function, and I question whether, in the way this is worded, in due course, the legislature might not be creating a situation that is going to be confusing and costly to resolve just by not making that provision clear enough.

Secondly, it seems to me, even more difficult is the understanding of the consolidation of proceedings. It has always been very much a judicial function for a court to say, 'We have several cases before us. If we hear them all separately they will take us a year. If we consolidate them—they involve the same issues—we can resolve them in three months.' It is, of course, open to the parliament to try do that if it wishes to, but what I question is whether that is not an intrusion into very much a traditional judicial area. And I again, in relation to that matter, urge the committee to ask its advisers to look more closely at the wording of those provisions. You can see that I am not directing my remarks to the merit of what is being sought to be achieved, but to the manner in which it is being sought to be achieved.

ACTING CHAIR—Have you examined the explanatory memorandum that accompanies the bill?

Mr Nader—I have it, but I have not examined it. I have been brought into this too recently.

ACTING CHAIR—There are some provisions in 486A, B, C and D which may overcome some of the concerns that you have just put to the committee. Could I ask you to, at your leisure—but earlier rather than later—look at the explanatory memorandum and, if you still

hold the same views about the concerns that you have, come back to the committee on that matter?

Mr Nader—Certainly.

ACTING CHAIR—If I could start with Mr Nader, on the matter of the 28-day period, a similar period applies now to proceedings in the Federal Court. Persons have only got 28 days in which to make application to the court. That does not mean they have got to put forward their full case to the court in that time, merely to make application to the court. Why would the situation be so much different with the imposition of a time limit on the High Court?

Mr Nader—It may not be. I hope I was careful to say that it is something that ought to be considered. It may be that it is not an unreasonable time. I simply point out that it is a matter which could be unreasonable if it were too short. Courts have a way of getting around these things; they always have had. I notice that this is to be a limitation of 28 days from the date of notification of the decision. What I do not know is whether the 28 days with respect to the Federal Court has ever been challenged judicially.

ACTING CHAIR—Mr Bitel.

Mr Bitel—That is what I was going to say. To my knowledge, there has been no judicial challenge or decision on the issue certainly in this area. The committee's legal advisers would be able to confirm that. I am not aware of any action having been commenced querying the validity. The current time constraint applies only to the Federal Court; it does not apply to the High Court. There might be different issues applying in relation to legislation which purport to limit the time to commence proceedings in the High Court in an area which is constitutionally vested in the High Court. There could well be a distinction. Section 73 of the Constitution vests original jurisdiction to the High Court in administrative law appeals. To the extent that this attempts to restrict the right of people to approach the High Court in its original jurisdiction, it could well be challenged on constitutional grounds.

Mr Nader—The High Court is the court of last resort. 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 of that might not be quite so serious as when it is imposed on the court of last resort.

ACTING CHAIR—If, as has been suggested in some of the submissions, the High Court was given leave in its own right to extend that time limitation, would that be more satisfactory to both organisations that are appearing before the committee now? Have you addressed your minds to that?

Mr Bitel—I do not think it is an issue which the Refugee Council specifically would address, because it is more of a fundamental legal issue than an issue as it affects refugees. From my perspective, wearing both hats, certainly it is a more favourable approach in that it leaves the ultimate discretion to the High Court, which would develop its own jurisprudence on the issue and its own rules of court.

ACTING CHAIR—Turning to the matter of section 501A of the act and the minister's powers, the council has not said very much in its submission about that.

Mr Bitel—We have not looked at that issue. We do not see it as directly impacting on refugees. If there is an impact on refugees, which has been raised, then I would be happy to address it. But, when we looked at it, we could not see how it impacted on refugees.

Mrs IRWIN—I would like to ask a question of Mr Nader. I think you may have been in the room when the Human Rights and Equal Opportunity Commission was here and I asked a question about Australia's international obligations. I ask you the same question: does the bill actually breach Australia's international obligations under the International Covenant on Civil and Political Rights and the Convention Relating to the Status of Refugees?

Mr Nader—Without shirking that question, Mrs Irwin, I know that David Bitel has dealt with that somewhere in his submission specifically. I will ask him to respond to that.

Mr Bitel—Paragraph 5 of the Refugee Council submission expresses the view that the bill as framed does in fact offend Australia's obligations under both international instruments. The relevant articles are set out. For example, article 16 of the refugee convention, which I have with me here, provides that:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

The term there, of course, is 'refugee', but I think it has been accepted that that also applies to people who are seeking the status of refugee. I have scanned the ex com recommendations, which do not form part of the international instrument, if you like, but which are the annual recommendations from the executive committee of the UNHCR, and I have not been able to come across any formal recommendations that address this particular point. It is an area of some lack of clarity, in fact.

Mrs IRWIN—It is, definitely. This is one aspect of the bill that I am very concerned about: that it could, and by the looks of it does, breach Australia's international obligations.

Mr Bitel—I have also made reference to the sections of the ICCPR, which I will not read into the record.

Senator BARTLETT—Firstly, I have a question that I think would be for the Commission of Jurists component of the witnesses before us. I just want to be a bit more clear on the nature of class actions and how much of a fundamental legal principle they are, beyond just being a convenient way to do things. The government is obviously suggesting that people are misusing class actions and joining up to them solely to prolong their stay in Australia. Indeed, your submission makes mention that 'judges maintain a control over class actions so that

inappropriate actions can be dismissed' or that particular people who should not be part of a class action can be disconnected from it. How common is that and how much scope is there for that? I would see that as fundamental if there is abuse of class actions. Does the court have the ability to check an individual person? The government has said, for example, that some people are attaching themselves to class actions that are not even going to be affected by the outcome, which does not make sense to me. Does the court have the ability or the resources to identify people when they latch themselves onto a class action and say, 'you are not actually subject to what the point at issue is about'?

Mr Bitel—My understanding of that latter point is that, if a person joins a class action, loosely termed, who does not have claims which fall on all squares with the points at issue, that could lead to a contamination, if you like, of the proceedings, and it could impact adversely on the proceedings. Practitioners who would be responsible for running the class would normally ensure that only those people who are joined to the class or parties to the class have a claim which is directly on point to the issue of the proceedings. That is a fairly important point. Given that I am not aware of any class action which has been run by people without assistance of lawyers, I would think that lawyers, given their obligations to the court, would be anxious to ensure that abuse does not take place in the joining or addition of persons to the proceedings as applicants.

In relation more broadly to the issue of the control by the court of the proceedings, I have made some reference in the submission to comments which have been made by Justice Sackville and Justice Wilcox. There are not that many class actions which have gone through. Of course, the facility to have class actions in the Federal Court area is relatively recent. Before that they were representative proceedings. The history of it flows to a certain extent from the Law Reform Commission recommendations in 1988, I think it was. The way the legislation is framed in the Federal Court of Australia Act is to provide a fairly broad control to the court. As I mention at the top of page 4, for example, the use of the term 'substantial', which is a component feature of the class action requirements, has been taken seriously by the courts. In other words, they are not going to allow a misuse of court time by frivolous proceedings.

Senator BARTLETT—The class action might be quite substantial. When you have these ones where you have more than 1,000 people joined to them—and that can be quite legitimate if it is a procedural issue of how the tribunal has made all its decisions—are they able to check that all those 1,000-plus people have actually had a decision rejected by the tribunal, for example?

Mr Bitel—I do not know, to be honest. I do not know whether the court has had a hands-on involvement in vetting the particular applicants.

Senator BARTLETT—They would leave that up to the—

Mr Bitel—Up to the lawyers who are representing the proceedings. A question of a similar nature was asked of Mr Sidoti earlier. It occurred to me to respond that, in addition to what Mr Sidoti said, remember of course that there do exist both the Migration Agents Registration Authority and the courts themselves as bodies which are designed to supervise the conduct or misconduct of lawyers and migration agents.

Senator BARTLETT—Without getting into the argument about the issue of impacting on genuine people, if you are going after people that are non-genuine, what sort of response should we take to this concern that has been raised about some of the advertisements that have been around the place? I do not know if you have seen some of those, but certainly the department has provided us with a couple, and one or two of them do read like they are just trawling for anybody out there that is illegal—'Just throw your name in here and you will be able to stay.' What sort of response should we take to that sort of activity?

Mr Bitel—I would endorse the comments which Mr Sidoti made previously and repeat the points that I just made. If there are problems, you do not attack the victims; you go to the perpetrators of the problem, which you can do through two mechanisms. One is by complaint to the Law Society and the second is by way of complaint to MARA. Remember that in the conduct of proceedings it is important that people be made aware of their entitlements, and sometimes the court does direct that advertisements be placed to make people aware of their entitlement to be a party or to opt out of proceedings. Without wishing to comment on the particular advertisements, I just make a general comment that it goes back to the issue of access to justice, that there has to be knowledge in the first place. If people are unaware—and you are often dealing with people who do come from disempowered non-English speaking backgrounds—it becomes necessary sometimes for the information to be brought to their attention that there are these proceedings so that people can, if properly advised, have the legal issues resolved and be determined. Certainly I had seen advertisements commonly placed in the ethnic press. The reason for it would be so that you can draw to the attention of people the existence of the proceedings. I stress that this is so that people can be properly advised. That then leads to being able to access justice. The importance of that issue of the accessibility of justice is a fundamental issue relating to the rule of law which I have raised in the submission.

Senator BARTLETT—Turning more specifically to refugee issues, the Law Council submission—we are hearing from them separately so I can pursue this with them—is the only one I have seen that makes the specific point about the potential impact on so-called turnarounds at airports, people that are held up there, not actually admitted at all and sent back, and people wanting to challenge that. The submission says that the changes proposed would mean that people who are being held incommunicado at airports would have no access to the courts through Australian friends or relatives who could challenge that situation.

Mr Bitel—I am not sure that that would necessarily flow from this legislation. It might more properly flow from the other bill that has not yet been brought to the Senate for discussion. This addresses the issue of class actions, and I am not sure that the border turnarounds would fall into the class action characteristic. Secondly, to the extent that people might seek to access the High Court, in the nature of things the 28-day time limit would not be a problem because you would be up there within a couple of hours. I have not seen the particular comments of the Law Council submission. Indeed, I have not read the Law Council submission as yet. That would be my preliminary response.

Senator BARTLETT—I will put that to them tomorrow. I have a broader question about comparative practices in other countries. The government has made it fairly clear that this is one of a whole range of different measures as part of an ongoing policy direction they are trying to implement. I do not think anyone would disagree with that statement, even though they might

disagree with the policy direction itself. Is this harsher than other countries? You have suggested that it contravenes a range of international requirements, particularly in terms of access to fair, independent and open review. Or is this part of a trend that is happening around the world and we seem to be engaged in some sort of competition to see who can be the harshest and most unwelcoming nation in the world so that people will go somewhere else?

Mr Bitel—I really would not be in a position to answer that. Margaret Piper would probably be better placed to do that, she being the person who, from the council's perspective, has her hands on what is happening in other jurisdictions. I am happy to take it on notice and to try to get a response from her to that question if you wish. From an anecdotal perspective, certainly Australia does seem to be up there in the forefront of countries which are seeking to deny access to judicial review and to a fair hearing by asylum seekers. There was—I do not know whether you have seen it—an interesting paper that was presented in March by Erica Feller, who is in a very senior position with UNHCR. I think she is in charge of the resettlement desk in Geneva. She is an expat Australian. She presented a paper to a conference at the ANU earlier this year and she did touch on that issue. If you like, I can forward a copy of that to the committee.

ACTING CHAIR—We would appreciate receiving that, thank you.

Mr Bitel—It is a public document, so I am not breaching any confidences.

Senator BARTLETT—That would be good. We do actually have UNHCR later on this afternoon as well to raise some similar points. You are probably aware, but we should mention it in case you are not, that for any follow-up stuff we are on an extremely tight time frame.

Mr Bitel—I am not sure that I will be able to. I will speak to Margaret and see if it is possible for her to do a response. I am not sure, given that it is a bit unfair to bring people back from well earned holidays to have to respond to parliamentary committees, even given the importance of parliamentary committees.

ACTING CHAIR—Thank you. Your response to Senator Bartlett's question about the Law Council submission intrigued me somewhat. I looked through the submission from the Refugee Council of Australia and noted point 20, which says, 'The Refugee Council notes and supports the submission of the Law Council of Australia.'

Mr Bitel—I said I was the author of the submission; in fact, I did not pen paragraph 20. Perhaps that is the explanation. As I said, I drafted that submission overseas. A draft of it was sent back to Margaret by fax and then she typed it and sent it off. I can only answer that comment by saying that, presumably, she had read the Law Council submission at the time it was written. Whilst it has come across my desk, I do honestly say that I have not read it.

ACTING CHAIR—I will replace the black hat, then, and not have a go at you about misleading the committee. It was the Law Council of Australia that raised the matter of turnarounds at airports. We will address that with them tomorrow in Melbourne. Transactions themselves are a relatively new concept for Australia. It is only since the early 1990s that they have been able to the heard in the Federal Court of Australia, which of course is a new court in itself, relatively speaking. Do you know when the first class action was ever heard in the High

Court of Australia, which is the longest standing court within the jurisdiction that we are talking about?

Mr Bitel—Within the migration jurisdiction, no, I do not know. It was probably the Macabenta set of proceedings, but I cannot be certain. There might have been others which went to the High Court or sought leave from the High Court earlier, but it is probably the Macabenta set which was disposed of by the High Court last year.

ACTING CHAIR—So we are not dealing with something which the founding fathers—there were no mothers around, one guesses, in those days—addressed their minds to when they were developing the Australian Constitution?

Mr Bitel—To my understanding, certainly in doing some research for this presentation, there were references in English courts to representative proceedings or to the value of joining people for common sets of proceedings in the early 19th century. I am not sure that the founding fathers, the drafters of the Constitution, would not have not had that in mind. The term 'class action' is a fairly recent genesis.

Mr Nader—The consolidation of actions is something that has gone on for as long as I can remember. Certainly from when I came to the bar in 1962 and for as long as I can remember courts have consolidated actions, which is just an ordinary power that does not require any special language or procedure. The legislation here is careful to prohibit the consolidation of actions as well as what might be called class actions. It seems to me that if it were only the abolition of class actions they could be got around by consolidating cases, by getting 100 people each to commence an action and the court ordering that they all be consolidated. That procedure is not new at all.

ACTING CHAIR—But then it is argued that the alternative to that system or process is the test case, where an individual is brought forward as a test case—and this happens in migration matters as well. A number of recent very important decisions will play on in years to come. Would that not be a more economic way for both the government which, in the main, are defendants in these actions and the litigants themselves? Would that not be a more economic way of proceeding around the course of test case litigation rather than class action litigation?

Mr Nader—It would work if all of the other litigants agreed to treat it as a test case. The court may say, 'This will be a test case, and you can take it that the result of this case will be the result which you will get if you brought an action.' But, in the end, a test case does not have any sanction in relation to the other litigants. The consolidation of proceedings or the joinder of parties is an effective way of doing that. I understand what you are saying. The test case is not uncommon. Again, as long as I can remember there have been cases treated as test cases. As long as I can remember, though, the other persons who are wondering about their rights and what the outcome is going to be have agreed to treat it as a test case. That especially arises in industrial law, for example. I remember an area I used to practise in many years ago where I represented the AWU. I am talking about back in the sixties. We would bring an action for something and all of the other unions, parties and employers would say, 'That is the test case. We will follow it.' Even the national wage case was a test case.

ACTING CHAIR—I was with the AMWU. We were involved in a number of test cases ourselves. Perhaps we might leave that area.

Mr Bitel—You could say there has been an important consideration in the migration area post 1994 with the issue of bridging visas. Unless people can obtain a bridging visa, then they are unlawfully in Australia. Whatever happens in the Federal Court will be of academic interest potentially to those people unless, of course, they then seek to make claims against the Commonwealth for improperly requiring them to depart. This could raise other issues if the test case was the way in which it ran and the proceedings were ultimately successful and they had been forced to leave Australia against the law. It seems that since 1994, since the Migration Reform Act, the only way in which people can maintain their lawful status in Australia is by having proceedings on foot in the court. It is important, and I have made reference to this in the ICJ submission, to remember that a substantial disincentive to frivolous proceedings was the change in the regulations to deny permission to people who were members of class actions to work. It is a fairly salutary position to have to say to somebody, 'Yes, you can join the case, but you can't work.' So you are dependent upon the support of others during the period of the prosecution of those proceedings unless you are independently wealthy.

ACTING CHAIR—I am aware of joinders which have occurred, particularly in detention cases in the migration area, where a person's removal from Australia was stayed because they had joined an action another person in detention was engaging in, and therefore the person was not subject to removal in the short term until the case came on. Is it possible, in the general wider immigration area, that a person's removal from Australia was stayed because of other actions than the class action?

Mr Bitel—What would be the legislative basis of staying people's removal if there is an obligation to remove people unless they have lawful status in Australia?

ACTING CHAIR—I do not think it was stayed on a legislative basis; it was more because of the mechanics of the actual removal that they just were not removed. Of course, their being in detention made control of it a lot easier.

Mr Bitel—That leads to all sorts of corollary problems, one of which, with substantial financial implications, is that the new detention centres which have been proposed in the budget would not be able to house all the people who would potentially have to be housed in detention pending determination of these sets of proceedings. The cost blow-out to the Commonwealth would be huge. In addition, you do have the question of whether or not people have been unlawfully detained if in fact the proceedings result in favour of the applicants, and I can see the same arguments being raised as those raised in relation to the Cambodians some years ago that they were unlawfully detained.

ACTING CHAIR—I think that case has only gone back to our referring—

Mr Bitel—That case was pre-1994.

ACTING CHAIR—It was pre-MRA, the migration format. That is the next matter I want to come to. The Migration Reform Act, which was developed in 1992, came into force in 1994.

That act was about curtailing judicial review. I know the ministers of the day were horrified that there were some 200 actions on foot in the courts at that time, and that was the incentive to bring the bill to the parliament and for the parliament to pass the act at the time, even with substantial amendment the second time around. Currently, there are said to be 1,400 actions in the courts in the migration area. A cynic might say that the MRA, the Migration Reform Act, is not working and that the bill we have before us is probably doomed to the same fate as the judicial review bill which is before the Senate. Would you agree with what a cynic might say about this matter?

Mr Bitel—With all due respect, I do not think you can bring it to such a simple equation. If the bulk of the complaints which lead to actions in the Federal Court emanate from the refugee jurisdiction, the issue has to be: is there a problem in the determination system which is causing all these people to make the complaints? I think it was this committee—with respect, I am confused with the number of committees which deal with this—which last year heard that there were 49 people who had ultimately been approved following judicial review.

ACTING CHAIR—Same chair, different committee.

Mr Bitel—That ignores the number who may have been approved following the commencement of proceedings which were, by consent, set aside. That bespeaks to me a problem in the determination system, and therefore I think it is somewhat simplistic to say there has been a blow-out; therefore the legislation is not working. As I see it, the legislation substantially restricts the ability of people to access the Federal Court. The only area where probably the legislation has led to a blow-out that immediately springs to mind would be the number of proceedings which have been commenced in the High Court because of the inability to access the Federal Court due to the failure to come within the section 476 grounds.

ACTING CHAIR—You mentioned the very persuasive arguments that were given to another committee—I think it was last year or the year before—that persuaded the opposition parties not to lend support to the bill. The minister referred to that in his second reading speech on this bill, as indeed has the department in their evidence. So the bill is still there and is receiving the attention of the government from time to time in certain public pronouncements that they make. It still does not move away from the fact, though, that about half the persons who seek to litigate walk away from that litigation on the steps of the court when the case is brought on, which adds fuel to the claims that there is abuse of the system.

Mr Bitel—As does the minister from time to time.

ACTING CHAIR—Possibly.

Mr Bitel—As does the minister from time to time—having commenced proceedings appealing the decision of the RRT and withdraws those proceedings on the day before the hearing. You might like to question the minister about the number of times that has happened.

ACTING CHAIR—I think I have done that in a different forum. But the number of occasions do not equate—they are not equal—and that is a problem. The other thing that we have to take into account is that Australia is a very generous nation in its treatment of refugees.

In terms of our refugee program, per capita, we are taking in more than any other nation. We do have a problem onshore, and it is a very expensive problem for the taxpayers of this country.

Mr Bitel—The Refugee Council has made submissions in respect of the determination process. To the extent that the question seeks me to open up that issue, I am happy to do that, but I am not sure whether it specifically relates to this particular inquiry. The issue of detention, of course, is something that the Refugee Council is violently opposed to, as is the ICJ, and is a substantial cause of the costs associated with the onshore determination system. To the extent that there are problems with the refugee determination process itself, again there are problems on which the council has made submissions which are the subject of the other inquiry. To the extent that Australia has adopted a generous approach in the resettlement of refugees, we certainly would not cavil with that statement and we applaud Australia's actions and plead with Australia to continue to take the same approach.

ACTING CHAIR—I am going to resist the temptation to get into an argument or an exchange of words on detention—as I did with the previous set of witnesses—but I do go back to the comment that you again highlighted on the 49 people who were granted refugee status following a judicial review application. I put it to you that none of those 49 achieved success through the class actions that we are talking about in this particular bill.

Mr Bitel—There is one major set of proceedings at the moment. I guess one would have to analyse each of the class actions to be able to respond to that. I can say that there have been successful proceedings.

ACTING CHAIR—Yes, two.

Mr Bitel—There have been more than two successful proceedings. To the extent that they have been successful, people have been able to stay. There is the Din case—not directly related to refugees but as a result of which some people were able to stay. There is also the Ali Motahir case, which was run by my law firm in the early 1990s before the class action set of proceedings were initiated. It was run as a test case, which was possible in those days. As a consequence of the Ali Motahir case, the interpretation of the old section 6A was reopened and a substantial number of people—running into probably many thousands—were found to be eligible to stay permanently and were in fact granted status.

That was the case where the Federal Court held that in assessing 6A—it is old law, of course, but it is addressing the issue—where people made applications for refugee status under 6A(1)(c) of the old law and those applications were refused, the department had an obligation also to consider the application under 6A(1)(a), (b), (d) and (e). If the people had claims under any of those subsections—most of them came in under 6A(1)(b) or 6A(1)(e)—they were then allowed to stay. A substantial number of people, including Mr Ali, obtained their residence as a consequence.

ACTING CHAIR—On the advertising, which I was going to go to earlier, one which I quoted to the previous set of witnesses said:

If you have been rejected by the Refugee Review Tribunal (RRT) you may be able to join our class actions at very low cost. Our latest action is very easy to join (over 1,200 people have already joined!)

It doesn't matter if you are illegal or that your Ministerial Review has been rejected.

Please supply your refugee and RRT decisions.

Do you, as a practitioner, agree with advertising of that nature to attract clients to class actions?

Mr Bitel—I repeat the comments I made earlier. I do not know that that advertisement has not been put in consultation with the courts because it is not uncommon for the courts to have an input into the wording of advertisements which are published. I note the comments of Mr Nader before about the modern tendency towards plain English. It may be that some of the comments which the committee might find offensive are an attempt by the author of that advertisement to publish something in simple English to bring it to the attention of the market. However, to the extent that the committee does find it objectionable, I repeat what I said before: there are proper avenues of complaint, to the Law Society, to MARA and, indeed, to the court. The minister being a party to the proceedings, if he considers that the court's process is being abused in part by the advertising, it would be quite proper for him to draw that to the attention of the court.

ACTING CHAIR—As a practitioner, do you have a view?

Mr Bitel—Perhaps if I were the person running the proceedings, I might have framed it slightly differently, but in a general sense, as a practitioner, I guess it is important to get the message through. If you are running proceedings and people who are illegal are eligible to join, and for whom the issue relates, then it might be that that is the way you would have to frame it.

ACTING CHAIR—If you were running proceedings, and a person who is illegal did join those proceedings, are there any obligations upon you or your law firm to address the illegal status of the individual?

Mr Bitel—Of course, by joining the proceedings, the person becomes legal because they then get a bridging visa. Indeed, in some respects, by joining the proceedings, practitioners are assisting the department because they are bringing to the attention of the authorities people who are otherwise out in the community illegally.

ACTING CHAIR—But do they actually bring it to the attention of the department? Is the person named in the class action, and is their status named?

Mr Bitel—Yes. Each person is named and then has to make a formal application for a bridging visa. My understanding of current departmental practice is that the individual must personally attend a compliance office and be issued with that visa personally. In other words, they come forward voluntarily to the department to identify themselves to be counselled and then, presumably, to be put on the department's compliance records. That is an issue which, of course, a practitioner would explain to the applicant. It is one of the consequences. Ultimately, I suppose, if the proceedings are unsuccessful, then the practitioner has assisted the department in its statutory duties.

Mr Nader—May I ask this question before I go. If after reading the explanatory memorandum I think I ought to add to or change something, is there a mechanism by which I can make a submission to the committee in writing about that? I live in the country about four hours drive from Sydney. I know that publicity of proceedings is important. If I made such a submission and it were placed on the table, would that be—

ACTING CHAIR—We would appreciate it if you could do that, if you think it necessary. We leave it to your judgment. We could receive it by email. We could receive it by fax. The only limitation we have is a very tight reporting date. My recollection is that we are obliged to report to the parliament by 8 June, so it is very short for us.

Mr Nader—So the next day or so?

ACTING CHAIR—If you could do, and we will receive it either by fax or email or, indeed, if you communicated it to David. I do not know what your internal mechanisms are, but we would certainly appreciate you addressing your mind to that matter. Mr Bitel and Mr Nader, thank you very much for your attendance here today. If there are any other matters we need additional information on, the secretary will write to you. You will be sent a transcript of the proceedings and, if you have any alterations in sense to what has been said today, we would appreciate hearing from you on that matter too.

Proceedings suspended from 11.22 a.m. to 11.37 a.m.

CONROY, Sister Loreto, Manager, National Program on Refugees and Displaced People, National Council of Churches in Australia

HARRIS, Ms Susan Gail, Education/Advocacy Officer, National Program on Refugees and Displaced People, National Council of Churches in Australia

ACTING CHAIR—I welcome the witnesses from the National Council of Churches in Australia to the table. Although the committee does not require witnesses to give evidence under oath, you should understand that these proceedings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Are there any corrections or amendments you wish to make to your submission?

Sister Conroy—No.

Ms Harris—No.

ACTING CHAIR—Thank you. The committee prefers that evidence be taken in public, but if you wish to give confidential evidence to the committee you may request that the hearings be held in camera and the committee will consider your particular request. Before I invite members of the committee to address questions to you, do you wish to make an opening statement?

Sister Conroy—The National Council of Churches in Australia opposes the passage of the Migration Legislation Amendment Bill. We have general fears about the winding back of all forms of judicial review for asylum seekers as seen by this bill and by a rush of recent bills. Christian World Service, a commission of the National Council of Churches works for refugees and displaced people in Australia through advocacy, education and resettlement. As we have already heard today, the bill aims to prohibit class actions in protection visa litigation in the Federal Court, introduces a 28-day time limit for applications to the High Court and gives the ministers unchallengeable powers to set aside an earlier, favourable decision by the Administrative Appeals Tribunal on character assessments and substitute his or her own adverse decision.

We believe these measures will reduce the ability of the courts to review the decisions the Australian government is making on who will be recognised as refugees. The National Council of Churches wants the system to be fair, and the Christian churches cannot condone Australia sending back genuine refugees to be tortured or worse because our legal system is totally geared towards keeping people out instead of giving them a fair hearing. It is like presuming all people on criminal charges are guilty. The NCCA believes that the judicial review by the Federal Court and High Court is essential to ensure that a refugee claimant is not forcibly returned to a territory where his life or freedom would be threatened.

Under the refugee convention, which Australia has signed, refugees should have the same access to courts as nationals. Judicial review is also essential as a check on the undue exercise of administrative power by the executive. Recently, the High Court was unable to review the

minister's discretionary decision to forcibly return Kosovar refugees because the safe haven legislation excluded judicial review. The Commonwealth must accept that sometimes its officers make errors and that judicial review is vital for ensuring that justice prevails.

Class action is generally a cheap, efficient way for asylum seekers with the same set of circumstances to seek judicial review. If there are problems with the use of class actions in the Federal Court, the minister could access the reasons behind such problems such as the lack of funding and access for asylum seekers to competent legal advice. Cutting off that avenue for review completely is an overreaction—to use the vernacular, 'The minister is keeping the whole class in because one talked.' Attempts to place time limits on access to the High Court could be unconstitutional. Even if it were valid, many asylum seekers are in detention and have difficulty in accessing translators and lawyers, not to mention the money to afford filing fees. So a 28-day time limit could be extremely difficult for many to achieve. It is the backdoor way of preventing access to the High Court. Constant legislative changes to the refugee determination process are having a detrimental effect on asylum seekers, many of whom are already traumatised by their experiences. The NCCA is also concerned about the erosion of good faith between NGOs trying to assist refugees and the Australian government by the lack of political support shown to refugees recently.

Concluding our themes today are those of administrative justice, proper checks and balances and adherence to obligations under international law. We echo the sentiment of a leading academic in refugee law, Ms Savitri Taylor, at La Trobe University. She writes:

> The Migration Act 1958 (Cth) contains substantive provisions which purport to give effect to Australia's protection obligations under the Refugee Convention. "Look at us", we say, "Universal human rights are important to us."
>
> The devil is in the procedural detail. It is in the boring technical stuff that is not part of the big picture, and is easy to gloss over. It lies in ... having inflexible time limits for review, and in dozens of other procedural pitfalls—some legislated and some just a matter of administrative practice. It lies above all in ensuring that asylum-seekers need the assistance of expert advisers to get through the system, and then making it as difficult as possible for them to get that assistance.

We thank the committee for this opportunity to present our concerns today.

ACTING CHAIR—Thank you. Ms Harris, do you wish to add anything to the submission?

Ms Harris—No, thank you.

ACTING CHAIR—We will firstly go to your recommendations. Your first recommendation is that the Council of Churches believes that judicial review by the Federal Court is essential to ensure that a refugee claimant is not forcibly returned to a territory where his or her life and freedom would be threatened. Is that on top of the administrative review mechanisms that are currently in place?

Ms Harris—Certainly. I think we made a bit of a wrong turn when we took the migration litigation outside of the AD(JR) Act. There is a strict difference between merits and judicial review. Both are equally important. In legal terms it is very important to have both proper merits review and judicial review. We all know that the RRT in itself has various factors that mean it does not have the same sort of independence as a court would have, and it has particular

problems. It is very difficult to make refugee determinations. As a practitioner in that area previously in the field, I can tell you it is extraordinarily difficult to make refugee determinations. There will be mistakes made because a of lot of factors: country information, credibility of witnesses due to cultural factors—all kinds of reasons. RRT members, as far as I know, are on one-year contracts, which to my mind does not give an appearance of independence, particularly. So there is an excellent reason why we need judicial review in this country.

ACTING CHAIR—Are you saying there should be two tiers of review?

Ms Harris—I think that the winding back of grounds for review to the Federal Court was quite a big mistake.

ACTING CHAIR—Can we have a look at your second recommendation, which talks about equal access. Isn't it the case that some Australian citizens in the administrative law area have only one avenue of review of their cases?

Ms Harris—You mean with the AAT?

ACTING CHAIR—Yes.

Ms Harris—Yes, I would be very interested to see the direction taken by the new Administrative Review Tribunal when, if, it begins.

ACTING CHAIR—But isn't it the case now that a person, an Australian citizen, who is aggrieved in administrative law has only, in some cases, one course of action open to him—that is the administrative law system through the various tribunals?

Ms Harris—Everybody has a right to go to the High Court in its original jurisdiction. So that is a form of judicial review. I do take your point, but we have to consider the consequences of these decisions on asylum seekers. If an Australian is not getting the right social security payment, that is not quite as important as somebody facing death or torture if they are returned mistakenly.

ACTING CHAIR—Well done. You argue for equality on the one hand and yet you argue for greater equality on the other hand. You put forward that argument on the basis of the consequences of the decision, which is fine, but it really does distort the equity argument though, doesn't it?

Ms Harris—Actually, I think that is an excellent point because I am very concerned the way that we are dealing with administrative justice in relation to refugees will be passed on to those disadvantaged people of our own community in the future. So that is a very, very good point.

ACTING CHAIR—I want to address one further area and then pass it to my colleagues—that is the matter of 501 and 501A and your submission about the consequences of that. There is a counterargument to your claims, the counterargument being that this is just a tidying up of what is currently the case and what is meant to be the case. You are arguing the opposite and

doing that quite forcibly. Do you want to expand on that particular element? Then I will pass it to my colleagues.

Ms Harris—I have had the benefit of looking at DIMA's oral submissions on this point. I find they are quite confusing on the intention of section 501A. They claim that they are just clarifying something that has already been changed. If that is the case, I do not really see why it is important to do it again. But if it is not the case, and this makes very clear the minister's power to substitute an adverse decision, we are concerned that it is going to become a very circular way for the minister to override the AAT's decisions on character. That is, there are certain grounds under the refugee convention on which somebody will have been of bad character if they have committed crimes against humanity or things like that. These are fine and we understand that this is very important. However, if there are things about 'complete disregard for immigration laws' or 'consorting with people known to have a criminal record or of conducting criminal activities, i.e. people smugglers', you can see where our concerns are starting to arise. People could have managed to get themselves here only because of people smugglers; then the minister decides that their consorting with people smugglers means that they are a person of bad character and therefore they cannot apply for refugee status. You can see why we are quite concerned about the use of those particular definitions of character.

ACTING CHAIR—If you were given assurances that this was not an extension of the minister's powers which are currently in the act, would that alleviate your concerns?

Ms Harris—Actually, no. We are very concerned that the minister for immigration has an extraordinary amount of discretionary powers for a minister—the safe haven legislation and increasing problems. I do not think that is good for a minister and it is certainly not good for the system. Whether his discretion has been exercised is reviewable by the Federal Court, I believe, but not reviewable in the same way an AAT decision is reviewable. Frankly, we think that is quite dangerous, generally speaking, as a legal construct. It is dangerous to keep giving a minister lots and lots of discretionary powers.

ACTING CHAIR—Where I am coming from in this is that he is not being given the power in this bill. The power has previously been given to him in earlier legislation that has been through the parliament and then reinforced with the strengthening of the border protection. I read this merely as a technical amendment in the way that the department explains. You were not until this point accepting that it was perhaps a technical amendment?

Ms Harris—We understand that DIMA thinks it is a technical amendment and it might be something that needs a case to be run on it for us to be certain. But, obviously, any time the minister appears to be getting more discretionary power we have to oppose. It is something that is important to us.

Senator BARTLETT—In relation to your reference to the Kosovar safe haven visa, I am assuming you are using that more by way of example.

Ms Harris—Yes. It is not on the point; we realise that.

Senator BARTLETT—That one excludes administrative review as well as judicial review and any sort of other review you want.

Ms Harris—Yes.

Senator BARTLETT—That is something for another day perhaps. You have outlined it a bit in your submission, but how much on-the-ground experience do you have with asylum seekers in Australia?

Sister Conroy—The structure of the national council is that Susan and I are in our national office and in each of the states we work with state ecumenical bodies, where we have employed refugee workers. So in every state and territory we have someone who then works at the churches in the actual resettlement, visiting detention centres, et cetera. We do have a lot of contact with refugees and asylum seekers.

Senator BARTLETT—People's ability to access the judicial system—this 28-day time limit—affects a whole range of asylum seekers in Australia, both at detention centres and elsewhere, which are probably two fairly distinct groups. Are you linked in with most of those people pretty much right from the start of the process or do you link into them at all stages, from people who have been here for ages and are just about to be deported to people who have just arrived or are just submitting their first claim to the department?

Sister Conroy—Probably at all stages. We also work closely with Amnesty and the Refugee Council. We are linked in with them.

Ms Harris—We do not actually do case work, though. We do not run the claims of particular asylum seekers. Even though I am a lawyer, I do not do case work. But I sit on the board of the Refugee Advisory Casework Service, so we know from the legal side of the situation how it runs.

Senator BARTLETT—I am trying to get a sense of how many asylum seekers are floating around out there who do not have access to advice or assistance and whether 28 days is enough time or whether oftentimes it is just by accident that they bump into people and it could otherwise have taken three months, six months or whatever. I am trying to get a sense of how big a grouping that is, how much asylum seekers are channelled into such advice or assistance as is available from various community organisations and how many of them are free floating, for want of a better term.

Ms Harris—The problem has certainly got worse with the introduction of temporary protection visas, because most migrant resource centres are a point-of-referral contact for asylum seekers or refugees who are in the community; they are not funded to look after temporary protection visa people. It does not mean that they do not still try to help them, but they are not funded to. They are often a point of referral for the Refugee Advisory Casework Service or places like that. We would certainly agree with Chris Sidoti that six months is a lot more reasonable. Accessing free migration advice is like any other free community legal service. There are long waiting lists, and there are also translation problems. You have to wait

for translators and are constantly being told that there are long delays in getting translators—not at the DIMA interview level but later on when they are looking at their casework.

On the question of funding, not all the refugees understand that or that their fees will be waived at the Federal Court level. They do not understand why Legal Aid can take some cases but not others—and generally no Federal Court cases anymore. They do not understand what the Federal Court will be able to do for them or not. They do not necessarily understand the difference between merits review and judicial review; they just know that the Federal Court is a more important body than the RRT. They think that it can overturn the tribunal's decision rather than it going to just the process of the decision being made. That is a real problem for people in detention.

Again, these are people who are often very fearful and traumatised, and there is a lot of psychological evidence to say that they are further traumatised by their experience of detention. So everything is just that bit harder, and we certainly do not make it any easier for them. Whilst I can see the demagogic benefits of more coastal surveillance and more detention centres in the recent budget, we would much have preferred that sort of money to go into proper legal advice. We have lots of judicial statements saying that if people were properly advised and knew what they were doing there would be fewer vexatious or unmeritorious cases. I suppose it is a question of what DIMA and the minister want to be seen to be spending money on.

Mrs IRWIN—I am sorry to interrupt Senator Bartlett, but I want to follow on from that 28-day time limit we are talking about. DIMA—you have most probably read their submission—feel that it is a reasonable time in which to access legal advice. The previous people speaking stated it should be up to six months. Can you run through what activities an asylum seeker would have to undertake to meet that 28-day limit? Where would they go first?

Ms Harris—For the Federal Court it is very difficult. If we concentrate on the High Court, which is the basis of this bill, 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 before they can go to the High Court. There is a lot of misunderstanding about when they should go to the High Court or not. So their figuring out which is the actual decision that means it is the end of the road for them is often quite difficult. Basically, if they are in detention, they have to try and access a lawyer, and there a lot of problems with external access for people in detention—phones, et cetera. They have to find a migration agent or a lawyer. It cannot be just any lawyer; it has to be a lawyer who is registered as a migration agent, which I find ridiculous. That, again, cuts down on the amount of pro bono access you can get. Hopefully, they will be able to get access to RACS or, if they are absolutely sublimely lucky, they will get access to Legal Aid. 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. They have to do all kinds of things. Really, legally speaking, it could be possible for even a normal, savvy Australian to get something into the High Court in 28 days. But I think it would be quite tough for the average Australian person who is not legally trained to lodge an action.

Mrs IRWIN—Most probably impossible.

Ms Harris—I would think it would be very difficult, even with complete freedom of access and a bit of money.

ACTING CHAIR—Can you bring your remarks back to the context of this bill, which is class actions. I do not believe there has been a class action embarked on in Australia which has not been legally represented.

Ms Harris—The 28-day time limit on the High Court does not apply just to class actions, does it? My understanding is that the 28-day time limit to the High Court applies to migration litigation.

ACTING CHAIR—You are right. Thank you.

Sister Conroy—To add to what Susan said about asylum seekers, the very first thing they need when they arrive in Australia is some kind of mental stability and accommodation. Time is usually spent on that. The next thing is to be put in touch with people of their own ethnic background, and that is usually done by word of mouth. Sometimes it can take them down the wrong road. It takes more than 28 days then to bring them back and put them through the proper process. We have to look at the way they are looked at when they first arrive in Australia. They are very different from the ones who are in detention.

Ms Harris—Has the committee received any evidence from RILCs in Melbourne? I saw that they had made a submission. They are really the experts in this field.

ACTING CHAIR—No, we will not be hearing from them.

Ms Harris—Those types of organisations are the ones with expert experience in what it takes to run class actions. I think they do not do it very often either, which leads me to think that the problem might be more one of regulation of migration agents and lawyers rather than the claimants.

Senator BARTLETT—I have one more question about class actions. How much knowledge of or involvement with class actions to date have you had? Have some of your people been involved?

Ms Harris—No, we have not. I understand there have been some legitimate concerns with class actions on the part of the department. I do not know of a single NGO that would support asylum seekers being exploited by unscrupulous people in this country. They are often very fearful. They are very vulnerable people and we certainly do not want to see them have their expectations raised and then probably dashed by an expensive and time consuming process. When the department speaks of people wanting to delay their departure, if they are in detention and unable to work and face $1,000 penalties if they are unsuccessful, frankly I find that very difficult to swallow. I am sure there are some people who are not genuine asylum seekers who are abusing the system. I think we should be focusing on them, not closing the door for genuine asylum seekers.

ACTING CHAIR—Thank you for correcting me on the matter of the class actions and the limitations on the High Court. There is currently a 28-day limitation for action to the Federal Court. What is different about an application to the Federal Court and an application to the High Court?

Ms Harris—I think a 28-day time limit on the Federal Court which has no special leave discretion is awful as well. I guess the grounds of review in the Federal Court are so limited to the ground of error of law that perhaps it is easier to know very quickly whether you have a case, but I do not think there is much difference. I think they are both bad.

ACTING CHAIR—Is it that you have to put the application in within the 28-day period rather than putting forward your argument within the 28-day period? One of the things that concerns me about this whole judicial review in the migration area is the number of people who walk away from the process at the court door—that can be many months after the initial application has started—which is reinforcing the claims made constantly by the minister and by the department that people are abusing the system. If the 28-day provision was inserted into the High Court, wouldn't it still give people the opportunity to make an application within the 28-day period or do they have to put their whole case in that 28-day period?

Ms Harris—I see what you mean about the application part of it. What concerns me is that surely the people more likely to be unscrupulous and abuse the system will be the ones that get in before the 28-day time period. They are going to be the ones that are savvy to the tricks and loops of the system, not necessarily your genuine, traumatised asylum seekers. Unscrupulous people are not going to be disadvantaged and genuine asylum seekers will. Also, if we are trying to stop unmeritorious claims, surely it would be better to have class actions by leave or even time limits with leave provisions. They would not be objectionable to us because we are quite happy to assist DIMA and the minister as far as we can in making sure the system is streamlined and not abused. That is fine. It is simply taking out that little harshness—mitigating the harshness for genuine people who have not got their act together. Frankly, it seems to me, the way it has been set up, that if you are a cashed-up unscrupulous person you have got a much better chance of getting through the system than a genuine refugee, and that should not be the aim of the refugee determination process.

ACTING CHAIR—The minister, with this bill, is about closing the door on those unscrupulous people and those who are profiting from perhaps those unscrupulous people.

Ms Harris—We have no problem in cracking down on people who are profiting. But these people can still bring individual claims for people. I would have thought that is another cash cow waiting to clock up the High Court, which they are not going to enjoy.

ACTING CHAIR—I was going to develop this further and ask you what you thought about a leave provision to extend the 28-day period and also a leave provision to take cases into the court itself. You partly answered those. In themselves they are not going to stop some abuse that is occurring in the system. Generally everybody agrees that there is some abuse occurring which is of great cost to the taxpayers of the country.

Ms Harris—Definitely. I do not really understand why MARA is a self-regulating body and I do not understand why a lawyer can interpret every other piece of legislation but the Migration Act. I think perhaps that is actually our problem. Not to say that it is just migration agents that do dodgy things, but I definitely think that there has got to be a review of the migration agent regulatory regime. Perhaps it would have been better to give the Federal Court more powers rather than take their powers in the refugee jurisdiction away. There are certainly many comments from the Federal Court. They obviously are a very competent court to manage their own caseloads. If given the opportunity I am sure they would welcome the chance to dismiss claims they think are unmeritorious. Refugee determinations are tricky things. In limiting the Federal Court to errors of law—an error of law is probably the most difficult ground of review—as Christ Sidoti said, the restrictive view does not seem to be working and it seems to me to be illogical. I do not understand how it is going to stop unscrupulous people getting in one way or another. The concept of limiting it to people who actually have a benefit in the outcome, allowing class actions but only for those who actually have a benefit in the outcome, seemed to be something that DIMA highlighted quite often—stopping people who do not actually even have a protection visa decision or something like that. That could be a compromise situation.

ACTING CHAIR—How could that be controlled? I would have thought you would need some DIMA input at the beginning of the process. If they are going to be a defendant in an action, how would you give them input at the very beginning of the process?

Ms Harris—If the legislation is changed to say only people who are aggrieved or will have a benefit from the outcome of the case—only people who have visa applications on foot or something like that—the problem might be overcome. I guess I am very old-fashioned. I really believe that these things should be monitored by the lawyer's duty to the court. Every unscrupulous case or unmeritorious case that goes before the Federal Court reflects badly on asylum seekers, and we certainly do not need any more bad reflections in the public on asylum seekers. It is certainly not something we want. I do not understand why lawyers make the decisions to bring those types of claims.

ACTING CHAIR—The department has given evidence, rather than our getting evidence ourselves, where individuals have been included in class actions without their knowledge. Are you aware of that occurring?

Ms Harris—Yes, I read that in the submission. I find that very scary.

ACTING CHAIR—What about the advertising that some agents or some lawyers are engaging in to get people to join class actions? I have quoted them. I do not want to read them again. You would have heard them.

Ms Harris—Both David Bitel and Chris Sidoti are right in that there has to be some way of accessing those people in the community who have legitimate legal recourse. It is an access to justice issue. We certainly do not think that migration agents or lawyers should be unable to advertise. From our point of view—from a pastoral care type of view—they have to be aware that these people are very vulnerable emotionally and very fearful of their situation, and there has to be an attempt to sort out people who are asylum seekers from people who are perhaps

overstayers. Personally—and it is easy for me to say because I am not actually doing any case work—I think the practice is very dodgy. I think it is much better to save class actions for people who all have a genuine, obvious set of circumstances that are the same, such as boatloads of people who arrive together and the issue is to do with their country and those sorts of things.

ACTING CHAIR—Would that not be better handled—and this was a question I was addressing to David earlier on—on a case law precedent basis rather than a class action basis? I think we have had an instance of that in law.

Ms Harris—I understand DIMA's use of test cases and I think they are very good. But, as David said, you have to have something on foot or you are going to be deported. Test cases are not going to allay the need for people to have their own action or to be a part of their own action in the Federal Court, and the class actions are the most cost-effective and accessible way of getting to the Federal Court. Maybe those actions could be stalled while the test case goes ahead. I think test cases are very important, but there also has to be some cooperation by DIMA, I would have thought, to agree that that case is a test case—

ACTING CHAIR—I do believe that that has occurred in the past. I do not want to name names of individual actions, but I understood that, a number of cases having actually been argued through the courts, people were not removed until that case was finalised. It does bring up those other things about the legality of the detention of the individual. They are part of the action. Some are running through my mind—it is a named person or even a pseudonym—and others. Even though they are not necessarily named, they have not been removed whilst that action is on foot. I would have thought that that was a better way of handling those actions and dealing with the individual or particular boats than going into a class action.

Ms Harris—If there is absolutely no fear that they will be deported while this is happening, then I do not see any problem with it. I guess our fear would be that, while the test case is on foot, there would be lots and lots of plane trips back to Somalia or wherever. That is probably a technical—

ACTING CHAIR—But we have not had boats from Somalia to my knowledge.

Ms Harris—Just as an example.

ACTING CHAIR—We have had planes and legal action with regard to some who have come in together, but I do not believe they have been joined in those proceedings—certainly not in the ones that I am aware of.

Ms Harris—That was just an example; I did not mean Somalia necessarily. I really do not know. Somebody from DIMA would be a better person to ask. There would have to be a level of good faith there. But I still think class actions are not, in and of themselves, evil and that they are not, in and of themselves, abusive. Whether they are appropriate to the refugee context as opposed to the consumer case context is another debate.

ACTING CHAIR—I would suggest that some members of the community might see them as being abusive. If a person who has illegal status and has been here for a number of years seeks, when there is no other avenue available to them, to become a member of a class action, members of the community might see that as being an abuse of the system. I think the department has put forward some of that argument in their submission to us. I am not necessarily saying I accept all that the department has put forward, but from a community point of view—and this is where it becomes difficult for people like me and my colleagues—we do have to be accountable to our constituents as well.

Ms Harris—Yes, I agree. But unless we can be assured that genuine asylum seekers will still have access to the Federal Court in a cost-efficient manner, and if the only way for them to access the Federal Court and to afford a Federal Court or a High Court action is through a class action and we take that away from them—do you see our point as well? It is a matter of compromising those two positions.

ACTING CHAIR—There are avenues open to an asylum seeker now. Maybe there is not enough assistance, but there is assistance available to them, including the informal assistance given by organisations like yours. They are provided with assistance at the application stage and at the review stage, and many get other advice to proceed to other processes after that, including judicial review and ministerial discretion. Why would they then run out of time and seek to use a class action as a means of getting a bridging visa or a lawful status afterwards? Without naming names, do you have any instances of a failed asylum seeker, rather than an overstayer, being able to use the class action system for their or their family's benefit?

Ms Harris—I guess we focus on those whom we consider most in need, and most of the people we focus on are onshore asylum seekers who are in detention. I do not think there are as many of those here.

ACTING CHAIR—I personally do not think that many have benefited from the class actions that have been held or who have been party to the class actions that run the test cases for them.

Ms Harris—No. That is true. They do have the IAAAS scheme for the department and the RIT, but their knowledge of the Federal Court and the High Court process is pretty woeful, which is something we are trying to remedy. Again, I do not know exactly how many genuine asylum seekers can even access the Federal Court. That is another issue for us. The statistics are very skewed I think. That is what we are extremely concerned about. We do not want the only people who can get to the Federal Court and the High Court to be those who are trying to abuse the system.

Sister Conroy—I think one of the things required is an education process of why the courts are there. This is something we are trying to work on at the moment with Immigration and with the Federal Court. We see that some of the money from the budget could go into some sort of wider education process, instead of going into deterrent policy, so that people understand what they are going through. I agree with you: I think that sometimes people think that going into class actions can prolong the length of time they stay in Australia, through ignorance. They are not advised correctly and, through some education program, which part of our organisation works in, we could try to remedy some of those ideas too.

ACTING CHAIR—Do you think that it is just ignorance, though? If you listened to Mr Bitel, one of the previous witnesses, he said that an illegal can get a bridging visa. So it is a distinct advantage for a person who has an unlawful non-citizen status, who is in the community—I have met them from time to time—and who is fearing that, in their next move, they might come into contact with the authorities, be found out and removed. But this provides them with an avenue where no other avenue is available—to join in a class action and get a legal status which, with the bridging visa, may give them other avenues in which to make application. So isn't there a distinct advantage for some people?

Sister Conroy—I take that point: for some.

Ms Harris—If people had more confidence in the outcome of the merits review, perhaps it would not be such a problem.

ACTING CHAIR—I am not going to take that one further! Sorry, I do not want to be hogging all the questions. I have one more question that I want to put to you. In regard to the Kosovars, you have talked about the minister and DIMA being above the law. But surely they were acting within the law as passed by the law makers of this country and the parliament. How could they be above the law?

Ms Harris—We have a refugee determination process and we are a signatory to the refugee convention, but there was a large danger that, even though the safe haven legislation was lawful, the legislation could mean that people arrived here who were never given the chance to apply for refugee determination, who were then maybe refouled—that is a question of evidence. In that sense, we have placed them outside our ordinary legal regime of determining refugee status—for what reason? It is tricky for us because obviously we really support proactive measures by the Australian government in providing a safe place for people. But we wonder about the practice of providing a safe place for people but not allowing them to necessarily apply for refugee determination. I say 'necessarily'; the minister did let some apply for refugee status, but he did not have to—I guess that is the point. We find that a feature of arbitrary government. When it comes down to the minister's whim as to whether people come, whether they stay or whether they are refugees, that is obviously arbitrary government, surely.

ACTING CHAIR—But it is still within the law, isn't it?

Ms Harris—We could get into arguments about natural law and so on.

ACTING CHAIR—We can, but what we are talking about is in the context of the law. We are talking about a bill which, if it is passed by the parliament, will become law and will not allow these class actions. That is the law that I am talking about. That is what we have to talk about.

Ms Harris—I think it is lawful under Australian law, but I think it breaches international law. It breaches the refugee convention and the ICCPR.

ACTING CHAIR—What we did was done in association with, and on the advice of, the UNHCR.

Ms Harris—Yes, we know. We understand that.

ACTING CHAIR—So how can it be tested?

Ms Harris—In the Kosovo situation, the advice of the UNHCR had certain grey areas about not forcing back people who were very traumatised, who had mixed marriages or who had been internally displaced. I would argue that that did happen. Perhaps the UNHCR guidelines were not followed in the spirit that they were given, but that is a question for debate. It is a political question. It was not something that the High Court was able to review, so it is a bit academic.

ACTING CHAIR—I understand the political debate, but I also understand a little about the law. That is the argument that I was putting to you. The parliament had passed the law. It had been enacted, it had received government assent and, therefore, it was the law. We may not have liked what happened. We may hopefully learn some lessons from what occurred. It was in that context that I was asking the question.

Ms Harris—The safe haven legislation would not have caused me any problems if we had not forced Kosovars to return as we did, when it was unsafe. If people had left even not voluntarily but when it was safe to go, I do not think we would have breached any law. But I take your point—it was certainly a validly enacted law.

Senator BARTLETT—We should not get into a debate on the Kosovars, but the safe haven law still prevents access to review. There are ICCPR aspects that people have drawn attention to.

Ms Harris—A group of Ambonese are in Adelaide on safe haven visas at the moment. That concerns us, given that we have had problems with the Kosovars' return. It really needs to be analysed as to whether or not the administration of the legislation is effective, and yet the Ambonese were placed on safe haven visas. I really do not understand the legal reasons why they were not given the opportunity to apply for refugee determination status like anybody else. It seems very strange, but that is a little bit off the issue. But I do think this is a precedent that needs to be examined.

ACTING CHAIR—Yes, indeed. There being nothing further from us, I thank you very much for your attendance here today. If there are any matters about which we need additional information from you, the secretary will write to you. You will be sent a copy of a transcript of your evidence, to which you can make editorial corrections if any are needed. Thank you very much for your attendance and the assistance you have given to the committee.

Proceedings suspended from 12.25 p.m. to 2.06 p.m.

GEE, Mr Alistair, National Refugee Team, Amnesty International Australia

HUTCHINGS, Mr Matthew, Lawyers Network, National Refugee Team, Amnesty International Australia

MORTIMER, Miss Georgie Louise, National Refugee Team, Amnesty International Australia

THOM, Mr Graham Stephen, Refugee Convenor, National Refugee Team, Amnesty International Australia

ACTING CHAIR—I welcome the witnesses from Amnesty International. Thank you for your attendance this afternoon. I am pleased that I do not have to interpret for the rest of the committee, as I normally do when Amnesty International appears before the committee. But we will miss Mr Hogan's presence here this afternoon, no doubt, and please pass on to him the best regards of the committee.

The committee does not require witnesses to give evidence under oath, but you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Are there any corrections or amendments you would like to make to your submission?

Mr Hutchings—No.

ACTING CHAIR—The committee prefers that evidence be taken in public, but if you wish to give confidential evidence to the committee you may request that the hearing be held in camera and the committee will consider your request. I invite you to make an opening statement, and at the conclusion of your remarks I will invite members of the committee to address questions to you.

Miss Mortimer—I would like to commence by thanking the committee for asking Amnesty International to make a submission on the Migration Legislation Amendment Bill (No. 2) 2000. You have before you our submission. I will make a brief opening statement, and we will be happy to answer any questions the committee may have.

Amnesty International, working from our mandate, opposes the forcible return—refoulement—of any person to a country where he or she would face torture, the death penalty, extra-judicial execution, disappearance or incarceration as a prisoner of conscience. Amnesty International believes that each country of asylum must have a fair and satisfactory refugee determination procedure to ensure that every refugee is identified and afforded protection. Amnesty International believes that the refugee determination procedure must reflect minimum international standards, including rights of appeal.

The present system of refugee determination is as follows. The applicant first applies to the Department of Immigration and Multicultural Affairs for recognition of refugee status and then, in the event that recognition is not granted, there can be a review of the department's decision by the Refugee Review Tribunal, with a final avenue of appeal to either the minister or to the Federal Court. This may on paper appear satisfactory. However, Amnesty International believes there are flaws in this system. We ask the committee to consider whether further restrictions should be made or whether the system should not be strengthened by incorporating risk analysis at the DIMA and RRT stages to prevent anyone being returned who would face torture or death for any reason; in other words, to incorporate into domestic law the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights—treaties that Australia has ratified. As the committee may be aware, we made these recommendations to the Senate Legal and Constitutional References Committee in June 1999. These recommendations are attached to our submission.

We think that it is positive that there is judicial overview of administrative decisions, which can only improve decision making. At the same time, we do not condone abusive actions where they do occur, but we would ask DIMA to confirm evidence of abuse and not merely indications of an anecdotal nature. We would, however, support some class actions, for example, that of the East Timorese asylum seekers in the 1990s.

With respect to the character provisions of the bill, we draw the attention of the committee to article 1F of the refugee convention which provides broad exclusion clauses for people not considered deserving of international protection. Amnesty International believes that article 1F of the convention as interpreted in the United Nations High Commissioner for Refugees *Handbook on procedures and criteria for determining refugee status* should be the only grounds upon which an applicant is excluded from protection, and that the proposed ministerial discretion on the basis of character is unwarranted and strays beyond international standards. That concludes our oral statement. We are now happy to answer any questions that the committee may have.

ACTING CHAIR—Thank you. Perhaps I could start with the questions. Is it Amnesty's contention that, upon passage of this legislation that is before the committee and before the parliament at the moment, a person's right to access the court will be curtailed or limited?

Mr Thom—Yes is the straight answer to that. We are concerned that already the availability to seek judicial review of a decision by DIMA or the RRT is very narrow based as it is, and we think this would further undermine the right to the courts, which is an important part of our international obligations and the rights of people seeking asylum.

ACTING CHAIR—Surely in regard to the High Court that right is not being removed but only being limited in that it has to be accessed within a period of 28 days, which of course is the period that is now currently applicable to actions in the Federal Court.

Mr Hutchings—Whilst we note that it does only bring the period in which an application can be brought into line with the Federal Court period, Amnesty argues that the amount of time is insufficient in respect of some of the appeals that may be brought to the court, and also I think

the comment was made that due to the amount of information that may be required for an appeal to be lodged that more time may be needed for parties to present an appeal to the court.

ACTING CHAIR—That 28-day limitation period, if it were to come into law, only requires the application to be made within that time; it does not require the whole of the case to be prepared and put forward within that time limit, does it?

Mr Hutchings—That is correct. However, we did argue, and we would argue, that to present a case that should be heard by the court, to lodge the appeal, a further period than 28 days would be preferable.

Mr Thom—The time limit is only part of what we are objecting to. The right under the refugee convention is that those seeking asylum have the same rights as everyone else, and this limitation is obviously a move away from the rights that Australian citizens have with regard to the courts. This is where our objection is primarily.

ACTING CHAIR—An equity argument.

Mr Thom—Yes.

ACTING CHAIR—But in some areas where an Australian citizen is going through an administrative law matter they are also restricted from going into the judicial process if they have taken their grievance to the administrative law area. Why should there be an additional stream for people who are non-nationals or non-citizens?

Mr Thom—I do not see it as an additional stream, a right to the courts.

ACTING CHAIR—On an equity basis, on which you were arguing, I am putting forward the counter argument that Australian citizens, dealing with an administrative law matter, are restricted as to where they can take their grievance.

Mr Thom—But this is where the difference between an Australian citizen who is brought up in this legal culture and has easy access to lawyers as opposed to someone who has been mandatorily detained and does not have the same access needs to be taken into account.

ACTING CHAIR—That is not an equity argument, though, is it?

Mr Thom—I think—

ACTING CHAIR—You are arguing advantage.

Mr Thom—I do not think it is arguing advantage where a law has now been put in place that would place an extra burden on those seeking asylum. We are putting an extra restriction now—

ACTING CHAIR—I think we may be on different lines and not meeting each other. I thought you were forward an equity argument that people should be treated the same as

Australian citizens. In administrative law, which migration is, there are restrictions. You cannot follow the administrative law basis and then move into the judicial review area. Similarly, many Australian citizens who get involved in administrative law matters are restricted from moving into the judicial stream as well.

Mr Thom—I think the question is, if we are looking at equity, that it has to be taken beyond whether the time limits are equitable as opposed to whether people's rights to lawyers and their ability to access lawyers is equitable. I think that has not been taken into account.

ACTING CHAIR—Some of the other submissions that the committee has received on this inquiry have argued that the court ought to have the ability to extend the time limit of 28 days or whatever time limit is imposed. How would Amnesty feel about the insertion of such a provision?

Mr Thom—We would certainly support such a provision. We have previously raised our concerns with the time people have to appeal to the Refugee Review Tribunal and the fact that there is no flexibility there either. I think a level of flexibility certainly would be warranted, but still we think that the 28 days, although it is not our primary concern with this bill, is too short. But such an introduction of flexibility would certainly be a step in the right direction.

ACTING CHAIR—I note your concerns about the section 501 powers of the minister. Do you see those amendments as contained in this bill as being minor in nature? How do you treat them? What weight do you attach to the amendments being proposed under sections 501 and 501A?

Mr Hutchings—We perceive this to be crucial to the bill. We do not think that our concerns in this respect are incidental to our objection to the bill overall. The handbook on procedures for the criteria for determining refugee status, published by the UNHCR, makes comment on article 1F of the convention. Article 1F of the convention prescribes in very broad terms the categories under which people can be excluded from international protection. We believe that those exclusion clauses that are provided in article 1F are sufficient and that any further rejection of people's entitlement to protection on the basis of character grounds—for example, the broad discretion proposed in the bill—is unnecessary and unwarranted.

ACTING CHAIR—You do not see that broad discretion is already contained in the bill and that this is now merely a tidying up of those provisions that are already there? This is the case that the department and the minister would argue.

Mr Hutchings—We do not see that. We believe that the amendments actually give the minister unfettered discretion in this area. I was not aware that the minister already had that discretion in the bill as it presently stands. So we would disagree with the department's submission on this issue.

ACTING CHAIR—Are you aware of the minister's second reading speech on this?

Mr Hutchings—I think I have seen it. I do not have a copy of it at hand.

ACTING CHAIR—Would you care to re-examine that, because that is part of the argument that is being put forward?

Mrs IRWIN—Does the bill actually breach Australia's international obligations under the International Covenant on Civil and Political Rights and the convention relating to the status of refugees? Some submissions that I have sighted state yes, others no. What would Amnesty's views be on that breach to Australia's international obligations with this bill?

Mr Gee—If I could bring up your point on the Universal Declaration of Human Rights, I refer you to article 14(1): everyone has the right to seek and enjoy in other countries asylum from persecution. The International Covenant on Civil and Political Rights provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.

We believe that to be one of the articles in international law which this bill would contravene. There is another article—I will move through this quickly because I am aware that other submissions have talked of these actual articles, particularly the Human Rights and Equal Opportunities Commission's submission—and that is article 26 of the ICCPR. One I do not believe the Human Rights and Equal Opportunities Commission did speak of was article 16 of the refugee convention. It relates to access to courts:

Refugees shall have free access to the courts of the law on the territory of all contracting states.

The third point says:

A refugee shall be accorded in the matters referred to in paragraph 2, in countries other than that in which he has his habitual residence, the treatment granted to a national of that country of his habitual residence.

We feel that in relation to class actions Australians have a right and this bill would take away the similar and equal right from refugees.

Mrs IRWIN—I would like to get back to this 28-day time limit on applications to the High Court. Before we discuss the time limit, what does Amnesty International see as the activities of an asylum seeker who has to undertake the 28-day time limit, if it is adopted? Once they have an interpreter and lawyer, would they be able to do it in that 28 days?

Mr Thom—We would prefer to let others who deal more specifically with asylum seekers in getting their applications together to answer those questions. From our experience—and you should be reminded we are not migration agents, so we are not helping asylum seekers prepare their actual cases in that sense—we have seen where for one reason or another something has gone wrong and people have not been given their notice in time. I am referring more specifically to applications to the Refugee Review Tribunal and, because of the strict time limit, have had that option removed from them. This is where our concern is with such a short and strict period of time. What an asylum seeker has to do in that period of time I would prefer to leave to others who I know are making submissions as well.

Senator TIERNEY—Miss Mortimer, in the first part of your opening statement you suggested that all people who have a case or would like to present a case should stay. I just wonder how in our migration program we balance the different categories relating to the total. The problem is that I do not think there is any country that takes absolutely everyone. We have categories and a restricted number in the refugee category. What are you suggesting we do in that regard?

Mr Thom—It is not a question of everyone who comes here being allowed to stay. It is a question of—

Senator TIERNEY—That is what I thought the statement was saying.

Mr Thom—No. The statement was in fact saying everyone who fears persecution is entitled to have their case heard and have it heard in a system that is designed to be able to identify those people who may face persecution and should ensure that those people are not forcibly returned to a country where they risk death or torture. We are not saying everyone who comes here should be allowed to stay. We are saying those who come here fearing death or torture should be entitled to have their case heard in a fair and just manner in line with our international obligations.

Mr Gee—Many people assume that Amnesty is a bit of a bleeding heart organisation who will do anything for anyone. That is not actually true. From an audit of our own cases, we find that we turn away most applicants. We only help those who come within our mandate, and our mandate is not exactly the same as the refugee convention definition. It should be noted that we do not seek that everyone who comes here should remain and, similarly, we do not act in that manner ourselves.

Senator TIERNEY—If I could just bring the point down to a specific case where a country is concerned, I had a fair bit to do with the Kosovo refugees when they were here, the ones that were out at Singleton, where I was the patron. It seemed to me very difficult, given that you were talking about a situation in another country—and we all know what happened in Kosovo and obviously there were great dangers initially and those ebbed over time—to ascertain where the danger was for particular people who were going back. Even if you have the most correct court processes in the world, I just wonder how you establish the veracity of the argument in such distant places.

Mr Thom—There are a number of levels to that question. The first point that should be made is that, with the Kosovars and the safe haven legislation, when it was decided by the department that they should return, Amnesty International did not come out and say, ‘Let them all stay.’ We made that very clear. Our argument was that those who feared persecution at home should be entitled to the refugee determination system just the same as any other refugee. The safe haven legislation precluded the Kosovars from seeking asylum, which we felt was a fundamental flaw of the safe haven legislation.

Senator TIERNEY—Except that it did say ‘when it was safe for them to return’.

Mr Thom—Yes.

Senator TIERNEY—Therefore, if that were taken through in a proper way, the sort of problem you are talking about would not actually arise.

Mr Thom—This is where we feel there needs to be an independent system. The other problem with the safe haven legislation was that it only provided for ministerial discretion, and this gets back to our arguments about the problems that we have with ministerial discretion. It does not have any legal, overarching body, so to speak, that can judge that discretion. It is non-reviewable. We think that any system which is dealing with someone's life should come under judicial review. This is one of our major objections to this legislation, this bill, so I think that is another point that needs to be raised with that. The final point I want to make about your question is this: how do you judge what is happening so far away? That is where a strengthening of the current system would be very useful, so those in the department who are dealing with refugee asylum claims, those at the Refugee Review Tribunal, should be well aware—they should not be doing that job if they are not and if they do not have a very good understanding—of what is happening in terms of the people they are dealing with and the situation those people are facing.

Senator TIERNEY—I have actually gone through with them, in their offices, the way they search out that information. I was incredibly impressed by how detailed it was in terms of the material. They could pull out the background, the situation generally, on a country region by region. I think they do explore that very thoroughly, but it is always difficult. Take a country as vast as China, for example, and this person who wants to go back to that point in China. The extent of the danger or the lack of danger that occurs there is so personal, and it is very difficult to work out from this far away the danger to that person in that situation. How real is it? The chance of being killed: is it one in 10, one in 100, one in a thousand? I am just saying it is incredibly difficult to assess.

Mr Hutchings—We acknowledge that there is an extreme difficulty there, but I think where there is any fear of returning to adverse conditions Amnesty would object to their refoulement or their return. For this reason, we believe that judicial review is an essential part of the refugee determination procedure because the judiciary is the best hope, if you like, that these people have of an analysis of their condition being properly undertaken.

Senator TIERNEY—If I could go back to an early part of your previous answer, you seemed to be indicating that the minister's discretion should then be reviewed. Wouldn't that take away any ministerial discretion, if you set things up that way? There would not be ministerial discretion at the end of the day if that were reviewable by some sort of court?

Mr Thom—In many respects we think that would be a good thing. I think ministerial review is appropriate where it is providing for a humanitarian outcome which does not fit in within the definition. Part of the problem with the refugee determination system that we have at the moment is that they have defined who is a refugee extremely narrowly. They have only taken the five categories set out in the refugee convention. If you do not fit in with one of those five categories, then you are deemed not to be a refugee. What is worse and what we have objected to—not more strongly but just as strongly—is the government turning around now and saying that these people are abusing the system, regardless of the fact that they may face death and torture, because they do not fit within the narrow grounds; they are not deemed to be refugees.

So we believe ministerial discretion has worked when it has been used to grant section 417 visas to people who will face death or torture but do not fit within that definition. In that sense, there is scope for ministerial discretion. But where it is used as an extra tier, as it is in this legislation, above what is defined under the refugee convention to provide—

ACTING CHAIR—Where is that?

Mr Thom—At present article 1F of the refugee convention—

ACTING CHAIR—I am sorry. Where is the ministerial discretion in the legislation?

Mr Thom—Ministerial discretion enables him to substitute an adverse decision.

ACTING CHAIR—It is an adverse decision of the Administrative Appeals Tribunal, which does not make decisions on refugee status.

Mr Thom—No, but it is in terms of their credibility.

ACTING CHAIR—No. The AAT do not grant refugee status.

Mr Thom—True.

ACTING CHAIR—So where is the minister's discretion coming under this legislation on that clause? I do not see that it is and that is why I have stopped you. If you think it is, can you tell us where it says that. The actual decision on section 501 was taken two years ago under the strengthening of the character and conduct test—not now. What the department is telling us now is that it is merely finetuning what is in place. I do not think it is providing ministerial discretion on refugee matters; and, if it is, we would like to know. I think I speak for the whole committee on that.

Mr Thom—I would be happy to get back to you on that.

Senator TIERNEY—Isn't the problem with abolishing ministerial discretion and leaving it to the courts that the courts interpret laws that are formed by parliament; parliament comes to a view at a particular point in time—which might be a long way back in time—and it is always difficult to anticipate all the nuances of a whole range of cases and to design the law in such a way that will cover them? If you have your courts as the final level—and judges are bound by the law in their interpretation of the law—isn't there a danger that it just might not be finetuned enough for a particular case and, therefore, ministerial discretion that can take that into account would be more useful?

Mr Gee—You mentioned abolishing discretion. I do not think that is so much what we are about as—

Senator TIERNEY—If the minister's discretion can then be appealed it could be overturned, presumably.

Mr Gee—If I can just go back to what we see happening, the discretion is being used to abolish the rule of law, and we do not see that as satisfactory. Human rights are grounded in the rule of law. If you believe you can have a just and fair system by getting rid of judicial review and say 'Oh, they still have an opportunity; they can seek my'—

ACTING CHAIR—But to go back to this bill, how is the discretion abolishing the rule of law in this bill?

Mr Thom—We are not talking about this bill. We are talking about the system in general at present.

ACTING CHAIR—In view of the time frame, we probably should focus on the class actions, which we have not actually talked about yet.

Mr Thom—Where we are talking about class actions, which is specific to this bill, if that is being removed as an option, as an avenue of appeal, for asylum seekers, then their last level of appeal is to the minister for their refugee determination. If you are taking away their right to go from the Refugee Review Tribunal to the Federal Court—which you are not doing; I admit—they still have an individual right, but you are taking away part of the judicial system that is open to everyone else in this country, which then means you are putting more emphasis—I should not say the only emphasis—on the ministerial discretion. This is where we have a problem.

ACTING CHAIR—It has not been removed by ministerial discretion.

Mr Thom—No.

Senator BARTLETT—Our obligations towards international conventions contain two aspects I want to explore a little. You mentioned the refugee convention and also the convention against torture. We are a party to both of those. With the convention against torture, for example, we now have a situation where, even though Australia has ratified that and is a party to it, we are basically saying as a government or a nation we will determine ourselves whether or not people fit that. It is not recognised under law in any formal sense. Despite the fact that the committee in Geneva that oversees the operation of the convention may be examining a particular person's case, we will still as a country have our own discretion about whether or not to keep people in Australia whilst their situation is being examined, or we will deport them regardless. That is our choice, or the minister's choice.

I guess I am asking you, given that that is the approach we are taking as a nation at the moment, does that not basically mean we are taking an approach that we will decide for ourselves who fits the convention and who does not and that is purely a decision that government or the minister will take? Whilst it is all good and important to point to international conventions, a lot of people—probably unfortunately—in Australia at the moment would say, 'So what? It is up to the government and the parliament to decide whether we have an obligation to these people or not.' What is your response to that sort of argument?

Mr Gee—Amnesty as an international organisation and one based on international human rights dearly hopes that conventions such as CAT are brought into domestic law. Article 3 of CAT on non-refoulement—a principle which exists in a number of conventions and is considered a normative principle of international law—hopefully will be introduced into our refugee determination system. We feel that that is how to best help this system.

Senator BARTLETT—Isn't it up to each country that is a signatory to these conventions to determine for itself how it ensures that it meets its obligations under them? Or is there some sort of benchmark that they need to meet in terms of what process they adopt?

Mr Thom—I think the answer is yes and no. Yes, individual countries do have the right to determine how they operate their own system. But that system is supposed to be in line with their international obligations, of which the fundamental principle is not to forcibly send anybody to a country where they will face death or torture. I am not quite sure if that answers your question. As we see it, the way to strengthen the system is to make sure you combine into the refugee determination procedure all the treaties that deal with the rights of people who fear persecution—which is not happening at present. It is being increasingly narrowly defined. The rights of people to access the system are being removed. The rights of people once they have gained refugee status are also being removed. All these things we feel are undermining Australia's reputation in the way it faces its obligations. One of the main things that Amnesty International is trying to do is to remind the government and the parliament more broadly of its responsibilities and in particular its responsibilities to those who are going to face death or torture.

Senator BARTLETT—I want to ask a broad question, which you may not be able to answer too precisely. In relation to the situation internationally at the moment there are some indications that, given the huge numbers of displaced people around the world at the moment, there is a lot of pressure on a number of nation states as to how they deal with large numbers—much larger numbers than we have had to deal with in Australia. I get an impression—and it is no better informed than that—that there is a lot of pressure at the moment in other countries, in Canada and European countries, to wind back similar to that which Australia is doing. From your understanding as an international organisation, how important is it? What sort of impact will there be if the Australian parliament does pass laws that wind back on rights for refugees here? Does that have an impact in terms of responses overseas in other countries? Are they going to say, 'Australia is cracking down; we can crack down as well'? Does it have that sort of impact? Do you get that sort of knock-on effect in other countries?

Mr Hutchings—The danger is that it might. If Australia does 'renege' on its international obligations, then other countries may follow suit. I do not think that is desirable. Amnesty, under its mandate, stridently opposes the return of any person to their country where they may suffer torture, death penalty, extradition or execution. We therefore believe that any 'watering down' of the requirements of international law by any nation state is regrettable. There is a danger if Australia does step back from its international obligations that other countries that will follow suit.

Senator BARTLETT—Even though there may be in a literal sense a breach of international law, there is no mechanism for redress, anyway, at the moment under these conventions that you have quoted?

Mr Thom—Not as such; but there are mechanisms within the UN treaty system to monitor. Then it is often a question of whether the government invites these UN organisation treaties to come in and monitor. We have a particular concern with detention at the moment.

ACTING CHAIR—That is not a new concern of Amnesty?

Mr Thom—It is a particular concern; it is not a new concern. When governments start stepping away from that, we think it is entering dangerous territory. But, in terms of redress, it is up to each government or parliament to be a good international citizen. It is important that Australia takes that role and takes that lead instead of what it is doing at the moment, which is going in the wrong direction.

Senator BARTLETT—I can ask my next question of the UNHCR as well. I do not suppose any of you are experts on the World Trade Organisation. There seem to be mechanisms for redress when you breach that particular international law.

Mr Thom—It is beyond our scope.

Senator BARTLETT—It might be something to do with money being involved.

ACTING CHAIR—More ministerial discretion, I suspect.

Senator BARTLETT—Can I just press you a tiny bit more on the character test issue—perhaps partly on notice and you can have another look at it and come back. Speaking purely personally, I am not supportive of the provisions on character and conduct that are now in the act, but they are in the act whether I like them or not. I would like to get a clearer indication of whether what is in, I think, schedule 2 of this bill does actually extend that or whether it simply clarifies a bit of the confusion about a power that is already there—leaving aside the question of whether it is a good power. As I say, I do not think it is, but it is there already, and I would like to get a clear picture of whether it does actually extend that or not.

Mr Hutchings—Could we make a further submission on that. Taking the acting chair's earlier comments about the second reading of the bill on that particular issue, we would prefer to take it on notice and provide you with a further submission.

Senator BARTLETT—That would be good. You may not be aware that we are under a fairly tight time regime, whether we like it or not.

Mr Hutchings—We will move on that as soon as we can.

Senator BARTLETT—Finally, I want to go back to the comments made—which were, I am sure, made partly flippantly—about not being a bleeding heart organisation. Personally, I do not see anything wrong with being a bleeding heart. You were basically saying that the areas in

which you allow your heart to bleed are fairly tightly defined and have to be within your mandate.

Mr Gee—We do have a mandate, which is I believe set out in our submission.

Senator BARTLETT—You were saying that that is not specifically tied to the convention.

Mr Thom—It is tied to a number of conventions. We do not just narrowly see people defined under the refugee convention in the way that the Department of Immigration and Multicultural Affairs do in terms of race, religion, nationality or a particular social group. We take on board CAT, ICCPR and other international human rights treaties that the government has signed and decide whether, using those international treaties, an individual would face death, torture, et cetera. It is broader than that which the department is using, but we do have a mandate and we view each case on its merits, as we hope does the refugee determination system in this country.

Senator BARTLETT—Do you think there is adequate monitoring of our international obligations under those treaties that you have mentioned?

Mr Thom—At present, no. I think it could be improved.

Senator BARTLETT—I am probably in danger of going beyond the scope of the bill again, so I had better stop there.

ACTING CHAIR—I appreciate what you have said, Mr Hutchings, about taking the matter of the character testing on notice and coming back to us. We have a deadline for reporting. I think 8 June is our deadline. I would draw your attention to not only the second reading speech—where this amendment rated six lines—but also the explanatory memorandum on the bill. I think you will see from that why I am not as concerned as perhaps you are and why I was surprised at the strength of your argument on that particular matter. We would appreciate hearing from you.

I will just conclude by asking a question about the access to the judicial process relating to refugee determination matters. There are obligations to provide review for refugee matters, and the interpretation that has been put on that in various countries in the world is that it can be by administrative means or by judicial means. Governments have previously argued that they are fulfilling those obligations by providing the administrative review in the system that we have built up.

I am also mindful from my times of sitting on committees such as this of the Migration Reform Act 1994 which came from a 1992 amendment act. There were concerns that 200 migration cases were before the courts and that the government of the day was trying to limit access to the courts by bringing in that particular act. The act did eventually come in in an amended form, and there have been other amendments since then, some of which we have spoken about today. But we currently find that we have 1,400 actions before the courts. Would it be Amnesty's view that, in order to fulfil our international obligations, we really should have only one system rather than the very expensive dual system that we have in place at the

moment—the administrative system and the judicial system that many others have access to—despite the many amendments that have been brought into the Migration Act?

Mr Hutchings—Amnesty's view under our mandate is that there should be a dual system. We acknowledge it is expensive but we regard it as a necessary cost of complying with our international obligations. We note that Dr Nye from I believe DIMA in the January 1999 Senate committee hearings—

ACTING CHAIR—He is from the Refugee Review Tribunal rather than DIMA.

Mr Hutchings—Thank you. He provided figures to the committee of the number of people who succeeded at Federal Court appeal that had failed under earlier administrative determination, and the figures indicated that 48 people succeeded at the Federal Court who had failed previously under the administrative procedures. Obviously to those 48 people it is very important that there was judicial review, but we regard it as a necessary component of any determination procedure, whatever the cost may be to maintain that procedure, in order for us to comply with our international obligations.

Mr Gee—Can I say further to that that not only were those 48 lives potentially saved, as recognised in a number of other submissions to this current committee, but also it provides a mechanism whereby RRT members themselves can have an overseer, which is not the government putting any pressure on but an independent mechanism whereby you can sort of critique the system. We believe that that is useful and that that is necessary. Indeed, a submission to this committee by Michael Bliss, who used to work with the RRT, thoroughly endorsed that—that RRT members required that sort of feedback.

Mr Thom—I think another point that needs to be made from what you raised is that the initial legislation you talked about in 1994 was designed to limit the number of cases going to the Federal Court. As you pointed out, that has not been the case. While the government says it is trying to limit costs, et cetera, all this legislation is doing is placing an unnecessary burden on people who are at serious risk. The fact is that at present the Federal Court can only look at cases from the Refugee Review Tribunal where there has been an error of law, so it means that, where we feel that somebody whose life may be at risk but who does not fit the narrow definition that is put forward by the department and the Refugee Review Tribunal, they do not have that judicial right unless an error of law was made in their case.

I will use the example of someone from Afghanistan who was a dentist who, when he was doing his job, had a woman come in with toothache. He took down her veil to examine the tooth and it had to be removed. He was charged under the Taliban's law with committing adultery and was sentenced to death by stoning. Both the department and the Refugee Review Tribunal acknowledged that he would be killed if sent back to Afghanistan but told him that, because he had broken the law, he did not fit within the refugee convention and therefore he was not a refugee. What we are annoyed about—if I can use the word 'annoyed'; it might be an understatement—is that the government then refers to him as someone who has abused the system. He was rejected by DIMA and the RRT—'Obviously it is a bogus claim; he is abusing the system.' He can go to the Federal Court, but if they say there is no error of law he fails.

There was no error of law in his case. In this sense it is the minister who then has to review that case under his discretion. In this case he granted section 417, which was good.

ACTING CHAIR—I do not want to limit you in what you are saying but we are over time now. One would assume that the RRT, in arriving at the decision, did so within the law.

Mr Thom—Yes.

ACTING CHAIR—Were it to be a judge implementing the same law, isn't it likely that the judge would have arrived at the same decision? If the judge or the tribunal are implementing the laws, they have to do it in a lawful way. If the law is the definition of what the convention and the protocols are, isn't that what you arrive at? If we were to move from an administrative system to a judicial system, aren't you going to get the same decision?

Mr Gee—I think what Mr Thom was largely referring to was in relation to non-refoulement.

ACTING CHAIR—No. Remember what the question was. He was answering a question, and the question was in relation to an administrative system or a judicial system. So I have taken his answer in the context of the question rather than on the refoulement. This will probably have to be the last comment. We are over time and we have other witnesses waiting.

Mr Hutchings—With my faith in the judicial system, I think I would still prefer the judicial review because I think it is a better level of analysis of the law, and therefore it provides the applicant with the best opportunity of establishing their case. I take your point that, if the courts are bound by the law and the RRT is bound by the law, you are going to get the same result. But I am saying that the interpretation of the law by the judiciary may be more favourable to the applicant.

ACTING CHAIR—My difficulty in all of this is that, in most of the legislation I have spoken about since 1992, I have actually supported that and the limitation of access to the judiciary. I find now, looking at another bill that is talking about further curtailing access, doing exactly the same thing as we have done before—not doing very well, it would appear, if the numbers have grown sevenfold in that time—I am wondering whether I am on the wrong track and whether we should be moving away from the administrative system to the judicial system. That, of course, can be much more expensive for everybody concerned because the judicial system is an adversarial system and usually means hiring lawyers and various other representatives who do not come cheaply, even though some of them come very cheaply, those who do pro bono work. So I am on the horns of a dilemma, if I can say that publicly at this stage. Do you want to make a final comment, Mr Thom?

Mr Thom—No.

ACTING CHAIR—It is just that we do have other witnesses and we have gone a little over time. Thank you for your attendance this afternoon. I think you have done an adequate job on behalf of your organisation. We are very pleased with the assistance you have given the committee in our deliberations.

[3.00 p.m.]

MISE, Mr Hitoshi, Regional Representative, United Nations High Commissioner for Refugees

WOLFSON, Mr Steven, Legal Officer, United Nations High Commissioner for Refugees

ACTING CHAIR—Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false and misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Are there any corrections or amendments you would like to make to your submission?

Mr Wolfson—No.

Mr Mise—No.

ACTING CHAIR—The committee prefers that evidence be taken in public. If you wish to give confidential evidence to the committee, you may request that the hearing be held in camera and the committee will consider that particular request if you do make it. I welcome you both and invite you to make an opening statement to the committee. At the conclusion of your remarks, I will invite members of the committee to address questions to you.

Mr Mise—On behalf of the High Commissioner I wish to convey my thanks and appreciation to this committee for its invitation to make this presentation on the Migration Legislation Amendment Bill (No. 2) 2000. I understand that committee members have had the opportunity to review UNHCR's written submissions. My colleague and I are at your disposal should there be any questions arising from these submissions. As questions would be very legal, most of the questions might be answered by my legal officer.

Committee members will be aware of UNHCR's special responsibilities in respect of the convention relating to the status of refugees and the High Commissioner's function of providing international protection and of seeking permanent solutions to the problem of refugees. According to UNHCR's statute, UNHCR undertakes these functions by assisting governments and, subject to the approval of the governments concerned, private organisations. The statute also specifies that UNHCR's work is of an entirely non-political and humanitarian character. Contracting states to the convention for their part undertake the fundamental obligation of non-refoulement. This principle is the cornerstone of international protection and forms the basis of the international obligations of contracting states, as is reflected in Australia in the Migration Act 1958.

Before closing I would like to highlight a few points that are important to the work of this committee and form the context of our submissions. First, I would like to clarify that UNHCR makes no submission in respect of class actions per se. Although it is UNHCR's view that judicial review is an important element in the determination of refugee status, as reflected in our

written submission, the administration of the courts clearly falls outside the ambit of the High Commissioner's mandate. Subject to any questions which committee members may wish to raise, I do not propose to make any further submission on the class action issue.

Second, I wish to correct a statement in our written submissions which suggests that a decision by the minister to substitute an adverse decision for a non-adverse decision on character grounds is not reviewable. The submission should state that the decision is not reviewable by administrative tribunals. We are advised by the Department of Immigration and Multicultural Affairs that such a decision remains reviewable by the Federal Court as well as by the High Court under both its appeal and original jurisdictions.

Third, I wish to say very clearly that neither UNHCR nor, indeed, the convention dispute the right and duty of states to protect public security. To the contrary, the convention requires due deference to national security and public order issues which may arise in the course of or subsequent to a determination of refugee status. This being the case, nothing in our written submissions or our presentation today should be construed as questioning Australia's sovereign right to provide for the best interests of the Australian community.

Finally, I would be remiss if I did not mention the High Commissioner's profound gratitude for Australia's international leadership, assistance to refugees and support for the work of UNHCR. Australia continues to be at the forefront of the High Commissioner's efforts to provide international protection and to seek permanent solutions for the problem of refugees. For this we express our appreciation. Thank you very much.

ACTING CHAIR—Thank you very much, Mr Mise, and thank you for that clarification on your written submission. Can I ask a brief question before handing over to my colleagues. You do not want to comment in this bill on the class action element of things and matters referred to in the bill on class actions; is that correct?

Mr Mise—Yes.

ACTING CHAIR—What then is your specific view on the clauses contained in the bill to limit access to the High Court of Australia by imposing a time limit upon which applications to the court can be made? Have you got a view on that, or is that something you would not care to comment on?

Mr Mise—There is no mention of the duration of the period in the refugee convention. But I think UNHCR believes that 28 days is long enough for making an appeal. I do not think this is too short. Of course, longer is better for asylum seekers, but I think the period of 28 days is reasonable.

ACTING CHAIR—Would you put any other conditions upon that other than the fact that you think it is reasonable? Obviously, one would think people should of necessity be told that they have a limitation under which they have to appeal to another judicial body and have only limited appeal to the Federal Court after they have got a negative decision from the Refugee Review Tribunal.

Mr Wolfson—This is very much at the edge of UNHCR's mandate, so I would not want to go too far in my comments. Obviously, UNHCR is concerned that in any review procedure the period allowed is reasonable such that a person has a realistic opportunity to appeal. But beyond that I would not want to comment further.

Senator BARTLETT—Can I go the issue of international leadership, which you addressed in your opening remarks. I imagine UNHCR would have a bit of an overview of international trends. This is basically the question I asked the previous witness, which you might have heard. You mentioned in your submission that Australian jurisprudence has an impact on other countries. If Australia passes laws that are seen to be—and indeed are being quite openly advocated by the government as—restricting access to courts, does that have impact on other countries in terms of how they may shape their determination process?

Mr Mise—This is a question of international leadership. As you well know, all countries in the world are confronted with global population movement, not only refugee but also illegal migratory movements. Recently, Australia has been faced with the massive arrival of boat people. In Europe, also, there are a lot of population movements. I think you in Australia have taken a very strong initiative in tackling these problems. So I think Australia could be considered a leader in dealing with this very difficult and complex issue. In that sense, UNHCR is appreciative of such leadership by your government.

Senator BARTLETT—Would you say that, with actions that the Australian government or parliament have taken in that whole area of dealing with asylum seekers, it is reasonable to suggest that that could have an impact on other countries in how they decide?

Mr Wolfson—Yes.

Senator BARTLETT—I do not think it is too partisan a statement to say that a lot of the government's initiatives to deal with the current level of illegal arrivals—I think they have been saying it quite openly—have been aimed at making it harder for people, making Australia less attractive and not going out of its way to make it pleasant for asylum seekers or people who have been recognised as refugees. Is that direction something that the UNHCR is comfortable with?

Mr Mise—The issue of population movements is not only a UNHCR issue but I think a global issue.

Senator BARTLETT—Does the way we treat people who are asylum seekers and particularly recognised as refugees not come in your mandate?

Mr Wolfson—Certainly the UNHCR's mandate does cover all people who are seeking asylum, whether or not they are finally determined to be refugees. In answer to your question, it is obvious that other countries look to Australia for leadership. Australia has among the most developed refugee status determination procedures in the world. Many countries are now developing their own procedures, and they are going to look to the established standards. So Australia is very much on the world stage in that regard.

Senator BARTLETT—Your submission is obviously on behalf of the office of the UNHCR, but it does not have any name attached to it. Presumably it has official status. I was wondering who wrote it or under whose name it is issued. Is the actual submission we received under your authority?

Mr Mise—No, this is a UNHCR submission, not a submission of the regional office in Canberra.

Senator BARTLETT—In Geneva?

Mr Wolfson—From the UNHCR organisation as a whole.

Senator BARTLETT—Following on from your statement about Australia's system being seen as fairly advanced, in your submission you seem to go to some lengths to emphasise the importance of judicial review as part of that system that Australia has in place. It seems to me to quite specifically state that administrative review is not adequate in itself. Is that right?

Mr Wolfson—I would not put it that way; I would highlight the benefits of judicial review. There are principally two: firstly, that judicial review has the benefit of identifying error in the administrator process; and, secondly, and to some extent more importantly, the benefit of judicial review is that the international instruments concerned—the convention relating to the status of refugees—as well as all of refugee law is refined by the considered opinion of the courts. I think we made reference in our submission to the fact that that has impact not only in Australia and under Australian refugee law but certainly internationally, as well as UNHCR's own consideration of what refugee law is all about.

Senator BARTLETT—In your submission, you say:

… judicial review remains an essential avenue for the correction of error—

and, in 'error', you are talking about the error of the tribunal.

Mr Wolfson—Correct.

Senator BARTLETT—I would take that to mean that the administrative tribunal system in itself is not sufficient because you have, in your words, a central avenue of judicial review to correct errors.

Mr Wolfson—It was not meant to be an implied criticism of the Refugee Review Tribunal. We were intending to highlight the benefits of judicial review; it is not a criticism of the RRT.

Senator BARTLETT—Can I take from your comments there that you do not think judicial review is necessary?

Mr Wolfson—Judicial review is not strictly necessarily required by the convention. In fact, the convention is silent on the issue. The executive committee of the High Commissioner's program, which is our governing body, of which Australia is a member, has turned its mind to

this. Conclusion No. 8, I think it was, of 1977 refers to the processes that member states should put in place for the review of primary decisions. If I can quote from (vi) it says:

> If the applicant is not recognised he should be given a reasonable time to appeal for a formal reconsideration of a decision either to the same or to a different authority whether administrative or judicial, according to the prevailing system.

Senator BARTLETT—You would probably be aware that some of the other submissions have spoken about our obligations also under the ICCPR in terms of open, fair review. The ICCPR does not come under your mandate, I guess.

Mr Wolfson—Not strictly speaking, no. Our mandate derives from the statute of the Office of the High Commissioner for Refugees as well as implications from the 1951 convention and from time to time opinion of the General Assembly and other organs and agencies of United Nations.

Senator BARTLETT—Going again to your submission and statements about the RRT—and again I am not suggesting you are criticising the RRT but, as I read it, you are pointing out the limitations of that system—you specifically say it has no system of precedent in respect to its own decisions, that there is limited scope for peer review and has some members who are not legal practitioners. I am sure you would also be aware that the RRT is not bound by natural justice or rules of procedural fairness. I think that issue of a fair hearing is an integral component of article 14 of the ICCPR. Given those aspects of the RRT that are not part of how it operates, that administrative system, does that not again emphasise the importance of having some judicial review of their decisions?

Mr Wolfson—I do not think that is something I can comment on. It is not strictly a requirement as set out by either the convention or the executive committee. So it is not for me to say that this is required under UNHCR's mandate or in UNHCR's view, but we certainly see that there are benefits for judicial review. Without reference to the RRT at all, as an officer who has conducted over the course of the last decade perhaps 2,000 refugee status determination interviews myself, I certainly benefited from the assistance of someone who heard appeals from decisions I had made; not the least to say that, where I made a decision that was in error, there certainly was a benefit for the refugee concerned to have an opportunity for independent review.

Senator BARTLETT—A fairly significant benefit.

Mr Wolfson—I would think so, yes.

Senator BARTLETT—So are you able to say, given the way that Australia has chosen to structure the administrative aspect of its review procedure, that the judicial law review component—which we are not eliminating through this bill of course, but we are impacting on—is a beneficial aspect of our determination system?

Mr Wolfson—I think objectively speaking that is fair to say, that availability of judicial review is beneficial.

Senator BARTLETT—Can I ask you about the issue of the character tests that you have touched on in your submission. I take your correction there. If I can just clarify which bit of your submission that correction referred to, as I read it, it would be in the end of the second last paragraph, to do with 'a decision by the minister is not reviewable' with a footnote 8. Is that the bit you are talking about?

Mr Wolfson—That is correct, yes.

Senator BARTLETT—So you are basically just taking out the 'not reviewable'. So the current operation of that ministerial power under that section 501A is that it is reviewable by a court at the moment. Is that right?

Mr Wolfson—The advice that we have from the Department of Immigration and Multicultural Affairs is that it is reviewable by both the Federal Court and the High Court under its appeal jurisdiction as well as its original jurisdiction, but I am not clear as to what the scope of that review would be.

Senator BARTLETT—Fellow members might be able to correct me, but my understanding is that the AAT can make a decision and the minister can substitute a non-favourable decision for that decision of the AAT. But you are saying that the Federal Court is able to make a decision that the minister cannot substitute?

Mr Wolfson—I have sought advice from an Australian solicitor, whose advice to me was that the Federal Court would not be able to substitute a decision for the minister's but could merely confirm, for example, that the minister acted personally or that the minister acted within his powers under the act.

Senator BARTLETT—So, in that case, it is a fairly limited review that they have.

Mr Wolfson—I should stress that this is advice that I have had from an Australian solicitor. I do not know whether or not that is a correct interpretation.

Senator BARTLETT—From your understanding of what is in this bill, as opposed to what is in the act currently, does the schedule of the bill that deals with a character test significantly expand the minister's power in that regard?

Mr Wolfson—As I was listening to the previous presentation by Amnesty International, I had a chance to review our submission and I think it is a little bit ambiguous on this point. I should clarify that I do not interpret this bill as expanding the minister's powers. The second schedule simply clarifies ambiguity in the power. As I understand the concept of the Migration Act, a visa is issued by the minister, and this is simply clarifying the ambiguity as to whether the AAT or the delegate of the minister has the power to issue a visa.

ACTING CHAIR—Could we stay with this issue for a moment. It is one that is bothering me because of the concerns that various submissions have expressed, not the least of which is yours. I can understand areas where the AAT would have to rule on a refugee status within Australia. For example, if a person has been granted protection, with that comes permanent

residency. But, if that individual committed a crime for which the individual was then convicted and perhaps sentenced, there is the ability then to remove the permanent residency from that individual within a given time period, which makes the person liable for deportation. In the instance of deportation, the individual would go to the Administrative Appeals Tribunal, and even though he or she is a refugee there is still an ability—and the convention allows for this—for that person's protection to be removed from them and for them to be removed from Australia. I think we went through this debate when we were discussing the amendments to the strengthening provisions two years ago. That is why I did not share the same concerns that other submitters expressed to the committee. Is that clarifying any matter for you, Mr Wolfson, or is it confusing?

Mr Wolfson—I think your statement is correct, but that refers to section 32 of the convention, which deals with the power to expel where a person who has been determined to be a refugee is subsequently determined to be a danger to the community. That is separate from the non-refoulement provisions of the convention, which are in article 33.

ACTING CHAIR—I want to clarify something about section 501. You mentioned that traffickers might meet the definition of someone involved in criminal conduct who has been in contact with the person granted protection and that that person could be guilty by association. To my knowledge, no character test has been made on any unlawful or illegal arrival in this country who has been granted protection, or who has had protection not granted, merely because they have been brought in here by traffickers. Are you aware of any instances where that has happened?

Mr Wolfson—No, I am certainly not. That was simply meant to be a speculative example to test the extremes of the implications of what may be found in this bill, but I would not suggest for a second that it is even likely.

Senator BARTLETT—Following on from that, I want to ask about the operation of it—this may be in terms of the act as it already exists. I will use the example of a future government to make this more speculative and to depoliticise the issue more. Going to the role of the UNHCR, if a future minister wanted to invoke that section of the act to say that the person had had association with someone involved in criminal conduct—namely, a people smuggler—and their association was to pay the people smuggler to escape persecution and they ended up here, would you be able to determine that that had occurred? If a minister was to do that, would you know about it? Are you able to oversee that and to monitor that?

Mr Wolfson—The minister is empowered to give directions to his delegates as well as to the relevant tribunals under section 499, I think it is, of the act. In fact, I have seen the directions concerning this particular provision.

Senator BARTLETT—Are they operational directives rather than specific to a person?

Mr Wolfson—That is right. I do not know whether it will assist the committee, but perhaps I could read a short part of it. This is with reference to paragraph 501 (6) (b), association grounds. It reads:

The meaning of association for the purposes of the character test encompasses a very wide range of relationships, including having an alliance or a link or a connection with a person, a group or an organised body that is involved in criminal activities. Association does not require actual membership of a group or an organised body that is involved in criminal activities. In establishing criminal association, the decision maker may have regard to the following:

(a) the degree and frequency of association the non-citizen had or has with the individual group or organisation;

(b) the duration of the association; and

(c) the nature of the association.

I would say with 100 per cent confidence that this direction has been interpreted by the department of immigration, by the delegates of the minister as well as the relevant tribunals entirely to the benefit of the asylum seeker. I have no concerns whatsoever; I should say we have no concerns whatsoever because this is UNHCR's view. What we might be concerned about, as you rightly point out, is what might happen 20 years from now. That was the purpose of highlighting this admittedly very speculative example.

Senator BARTLETT—You would obviously know if those guidelines or directives changed. If a future minister took a personal decision, would you know about it?

Mr Wolfson—Would we know if the minister made a decision that was not consistent—

Senator BARTLETT—That affected someone who was a refugee or asylum seeker; if the minister chose to exclude someone on these grounds. Are there processes in place where you would automatically be made aware of that or would be able to determine that?

Mr Wolfson—We would not automatically be informed, but I think it is fair to say that we would come to know it very quickly. It would be brought to our attention.

ACTING CHAIR—As there are no further questions, thank you very much for your attendance here and for the assistance that UNHCR has given the committee in our deliberations. We are most grateful to you. You will be sent a copy of the transcript of your evidence that has been given here. If you find any problems with the sense and the words of the evidence you have given, I would invite you to make editorial comment on that. Thank you very much.

Proceedings suspended from 3.28 p.m. to 3.39 p.m.

[3.39 p.m.]

MURPHY, Reverend Father John, Director, Bishops Committee for Migrants and Refugees

NEVILLE, Dr Warwick, Research Department, Australian Catholic Bishops Conference

ACTING CHAIR—Although the committee does not require witnesses to give evidence under oath, you should understand that these proceedings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Are there any corrections or amendments you would like to make to your submission?

Dr Neville—No.

ACTING CHAIR—Thank you very much. The committee prefers that evidence be taken in public, but if you wish to give confidential evidence to the committee you may request that the hearings be held in camera and the committee will consider your particular request. I ask you now to make a short opening statement. At the conclusion of your remarks I will invite members of the committee to address questions to you.

Dr Neville—Thank you, Senator. The remarks of the former Chief Justice of the High Court of Australia, Sir Gerard Brennan, in 1986, remain apposite in relation to the Migration Legislation Amendment Bill (No. 2) 2000. The bill is yet another expensive and tortuous weapon manufactured by the executive and the bureaucracy in the pursuit of villainous hordes of refugees, that pitiful, utterly small group which continues to pose such a threat to the peace, order and good government of our menaced land. Of course, the bill will also inevitably feature in the ongoing contests between the executive and the judiciary, as the former continues to attempt to circumscribe the action of the latter. So to Sir Gerard's words in 1986:

> Judicial review under our system is and is intended to be a fetter on the executive's pursuit of its policies. It is intended to make courts the arbiter of legal propriety in the processes of administration.
>
> Judicial review has two purposes. One is to define the principles that govern administration. The other is to safeguard individual interests against the affection by illegal or irrational administrative action or by administrative action taken without proper procedures.

We support the comments made by the NCCA in its written submission to the committee. Some have suggested, although it is obviously not an official line, that the way the system is going, particularly in relation to refugees, it has the potential to become rather like the infamous episode of *Yes, Minister* where, as Sir Humphrey Appleby put it, there was 'a wonderful hospital system without patients. It works very efficiently.' We are soon to run the risk that we will have a wonderful refugee system without any refugees. Thank you.

ACTING CHAIR—I live for that day when we will not need a refugee system, when there are no refugees. I hope that we see it in my lifetime. Unfortunately, the world does not look like it is going to deliver such a system to us in the foreseeable future.

Dr Neville—Respectfully, may I agree with you, Senator.

ACTING CHAIR—We have that agreement on the record very early in the piece. What is wrong with the government wanting to restrict access to the judicial system under its policy concerns? When I say 'government', I say it without being party political, either talking now or previously. It is government having a public policy.

Dr Neville—As was stated with you also in the chair before the Senate Legal and Constitutional Affairs Committee last year where a similar question was asked, may I give a hopefully similar answer, that, as a matter of general principle, there is no difficulty at all with governments having policies concerning the regulation of matters that come before the courts.

ACTING CHAIR—And the implementation of those policies, providing those policies are public policies. It is not being done in an underhand or behind the door way.

Dr Neville—Certainly as a general principle, open government—another term for the kind of proposition that you are putting—namely where governments put policies on the table for consideration, is obviously an eminently reasonable and practical way of proceeding. It then becomes a question of what is reasonable about the practicalities of those policies. That is obviously where the rub comes.

ACTING CHAIR—I would contend that there are three particular elements in this bill: the class actions, the time limits for application to the High Court, and the character and conduct provisions of 501. Which of those three causes the Catholic bishops the greatest concern, so that we can deal with them in the first instance?

Dr Neville—As a matter of principle, we would say all of them but especially the first two.

ACTING CHAIR—You have made some comment on section 501. You would have heard the dialogue that went on with the previous two sets of witnesses. Is you mind at rest because of that interchange of views that occurred with those witnesses and what is contained in the bill about 501?

Dr Neville—If I understand the argument that you have been putting, as it has been put to you by others—namely, that all 501 does is simply codify what was already there—I would simply draw your attention to the explanatory memorandum under item 2, paragraph 7, which says:

It was always intended that the Minister should be able to intervene under section 501A in both these circumstances.

It does not say why or how that intention was ever formed.

ACTING CHAIR—Not in this bill but it has in previous bills.

Dr Neville—For the purposes of clarity, et cetera, on the basis of the way this reads—on its face—we query whether or not and why another attempt has to be made to bring clarity to something that has been attempted on many occasions.

ACTING CHAIR—The second reading speech is something you will have to refer to with regard to this as well. As I indicated to Amnesty International, this particular provision warranted six lines—one short paragraph—in the minister's speech. The second reading speech does have standing in law as well. If you still have your concerns, I invite you to address them again to the committee within a relatively short time. I started to get concerned as I read many of the submissions coming to the inquiry.

I will move now to the timeliness and I will ask one question and then perhaps hand over to my colleagues, Senator Bartlett and Senator Tierney. At 4(b) in your submission you say:

> it limits to an astonishing, and deliberately impractical, degree the time within which an application can be made to the High Court in relation to the three writs of mandamus, prohibition and certiorari ...

The 28-day provision already applies—and has now applied for a number of years—in the Federal Court. Despite that limitation being there, I would say without fear of correction that many thousands of individuals have been able to access that jurisdiction in order to put their views forward. As I understand it—and correct me if I am wrong—we are only talking about the application being made within the 28-day period, not the preparation, the argument and the presentation of the case. I do not know if we have a definition of what the 28 days account for—whether they include weekends. In some instances they do not. That is perhaps something we can develop further with the department. What is wrong with 28 days? It is quite a lengthy period of time.

Dr Neville—Just on the question of the 28 days and whether or not you count weekends, most rules of court provide for what constitute days for the purposes of working out a time period. It may simply be a matter of looking up the High Court rules. It is more a question of principle as to the most appropriate way of providing a system of justice to people who are refugees who are seeking to establish their claim to be refugees. My argument would be that those people warrant particular consideration—for example, they may not have access to lawyers. It is a bit hard at different times to have access to lawyers in the conditions in which they find themselves. It is as much a matter of principle as it is a matter of practicality.

Equally, you raised in previous comments with previous witnesses the question of the discretion of courts so as to allow later applications. Again, subject to checking of course, if there were a reasonable discretion, for example, in, say, the registrar of the High Court so as to allow later applications or applications out of time to be lodged, that might remedy some of the defects. For example, someone who is in the detention centre in Port Hedland or in downtown Woomera or wherever it might be is not immediately going to be able to have access to legal representation of the kind that you, I or any other Australian has in walking out this door and going to see somebody. So it is very much the practicalities that undergird much of the concerns here.

ACTING CHAIR—But what you have not addressed in my question, Dr Neville, is the fact that there is a limitation on the Federal Court system now and that many thousands of people

have been able to access that court system even with the time limitation in place, and they have no flexibility with that time limit.

Dr Neville—I do take the point and I can only really respond in the way that I have.

ACTING CHAIR—Father Murphy, do you wish to make a comment?

Father Murphy—I can only say about what I deal with fairly often at the other end of the scale where people apply for refugee status, they have to get it in within 45 days to get the benefits of working et cetera and there is often difficulty with that because a fairly complicated form has to be filled in. They have to have legal advice. They cannot just go up and say, 'I want to make an application.' I understand that what they say at that time of application very much stands. If they have made a mistake, then it can be bad luck. I only use that as a parallel because, if a similar process were there for putting in the application to the High Court and it had to be fairly exact and it were a fairly complicated form of application, 28 days would be rather limiting. But, if it is simply just to note your intention that you are going to lodge an appeal—

ACTING CHAIR—Do you know what is required with the lodgement of the application to the High Court?

Father Murphy—I do not know, I am sorry.

ACTING CHAIR—I might say that neither do I, but I will be asking a lot of questions tomorrow when we are taking evidence.

Dr Neville—If it is of any help: to actually lodge a notice of appeal in terms of the paperwork is not dissimilar to lodging appeals in any other appellate courts in this country. Usually there is a notice of motion, a notice of appeal supported by an affidavit, and sometimes not even the affidavit is formally required.

ACTING CHAIR—Are there time limits applying to appeals in the general legal system?

Dr Neville—Yes, there are.

ACTING CHAIR—Senator Bartlett?

Senator BARTLETT—I want to get a sense of how much direct contact your organisation, association or conference has with asylum seekers as a body or through your constituent groups. I notice that your submission is also on behalf of the Committee for the Family and for Life; I am not sure if that is a separate group. How much direct involvement do you have with asylum seekers? I know your organisation was speaking, just a week or two ago, about the impact of having to assist people on temporary protection visas, which is related to but outside the scope of this bill. Do you also have a widespread involvement with people who are still seeking asylum and have not yet had a positive outcome?

Father Murphy—We have a national office in Canberra, the Australian Catholic Migrant and Refugee Office, which is mainly a policy office. We do have a little bit of dealing with asylum seekers, but not too many of them because not very many come to Canberra. But there are enough to give us a little bit of a feel for the whole thing. Mainly, we have a network around the country in each of the capital cities and in those capital cities we have plenty of examples of officers all working with asylum seekers in their city, particularly Brisbane, Sydney and Melbourne.

Senator BARTLETT—What is the experience of people working with asylum seekers of their difficulty in accessing court proceedings, specifically, and who have gone through RRT and perhaps section 417 applications and who are actually seeking judicial review? How difficult do they find it? How much assistance do they need?

Father Murphy—Certainly, for the most part, they need legal advice. I belong to a group called Asylum Seekers Interagency, and I understand that there are certain lawyers who give their services pro bono. So many people are helped in that way; others, though, have to do the best they can because they certainly could not afford to pay the normal legal fees.

Senator BARTLETT—How quickly would people like that come to your attention, or would you have contact with them? Would you normally have had some contact with them before they were unsuccessful with the tribunal, for example, and already have been assisting them there, or do you frequently get people who only start to come to your attention once all those options have been exhausted and they are looking for review and you only tap into them at that stage?

Father Murphy—Our office does not have a lot of cases, but we get a lot of written and telephone inquiries from all over Australia. They come at both stages: after the refusal by the department and when they are going to the RRT, but particularly if they have had a knock-back from the RRT: what can they do then? So we have assisted quite a few to make their appeals to the minister to use his power.

Senator BARTLETT—Would they normally have got to you within 28 days of dipping out at the RRT?

Father Murphy—Yes, within the 28 days. But by the time we would do something to help them, the 28 days would be getting pretty close, to say the least.

Dr Neville—From my experience with other church agencies, some agencies which are able to go into camps would obviously become aware sooner rather than later of the various needs and applications that might be able to be made. So there is a very broad cross-section of people seeking refugee status or seeking assistance of one form or another, ranging from, say, those who come to the attention of chaplains who are able to go into the camps—assuming they are able to see everybody in the camps—to the kinds of people Father Murphy mentioned.

Senator BARTLETT—Do your chaplains have special training in legal processes and Federal Court applications?

Dr Neville—It has not happened recently, but they are learning on the job, one might say.

Father Murphy—Of course, the biggest number of asylum seekers are out in the community; they are not in detention centres.

Senator BARTLETT—Would you have had involvement with asylum seekers who have been or are currently involved in class actions?

Father Murphy—There is one case I know of at the moment. I did not advise him to do that, but he went to it in desperation when he was knocked back. He could not afford legal action, and he heard about class action, so he joined one.

Senator BARTLETT—Obviously, the government's point of view is that there is widespread abuse of the system and that people are being dragooned into these massive class actions even though they do not really have standing or much prospect of success. I am just trying to get a sense from your direct experience—if you are able to—of how much validity there is in that sort of allegation.

Father Murphy—From my experience, I agree that there have been some class actions that do not seem to have much chance of success. On the other hand, I believe that the principle should be there, because of the idea that it makes it economically possible—as in the case of the gentleman I know—for people to go to the court where it would be impossible for them if they had to pay the costs themselves for a separate case.

Senator BARTLETT—I am not commenting on this individual person's circumstance, but if it were a case that did not seem to have much chance of success—obviously if you are not the person putting the case together then it is an outsider's view—wouldn't that be seen as prolonging the person's misery in a way, stretching the case out and raising false hopes by getting them involved in a case that is almost certain to fail anyway?

Father Murphy—In the particular case I know, I think he has a good case. It would not be a fickle one. But it is unusual.

Dr Neville—I would have thought in answer to queries of the kind that you have raised that the most obvious answers are, firstly, it is not only refugees who from time to time may promote actions that have no worth. People within Australia, Australian citizens, from time to time have been known to do such things. Whoever does it, it is an abuse of the process. Secondly, those advising people—be they refugees, be they Australian citizens—also have a duty to the courts to provide advice which advises that this is or is not an abuse of process. Thirdly, the courts obviously will very quickly tell counsel whether or not it is or is not an abuse of process.

Senator BARTLETT—So you would suggest, rather than instituting a blanket restriction that hits genuine and non-genuine alike, that it be better to focus on the role and responsibility of the courts and the legal practitioners to ensure that only appropriate—

Dr Neville—Absolutely. Also, there are all the other questions. One is reluctant to use words like interference with the judicial process, but it is certainly getting rather close to making

blanket decrees at a ministerial or at a bureaucratic level, and I would respectfully suggest—obviously it would never apply to anybody in this room—that ministers have been known in the past to perhaps overstep the mark with not always the best checks and balances. Also, as we know, ministers and departments can become litigants in matters in which they have had particular interests or things said or done. So the independence of the judiciary is absolutely paramount under our system of law.

Senator TIERNEY—There has been a recent increase in class actions, or the strong perception is that that is so people can delay their possible removal from Australia. Do you think that is what is happening now with that increased number of class actions? On that basis, is it an abuse of the judicial process?

Dr Neville—May I ask, by way of clarification, is your comment about the incidence of class actions a question or is that a statement of fact?

Senator TIERNEY—I believe it is a fact that class actions have increased in recent times.

Dr Neville—So it is your belief in a fact. Sorry; pardon my impishness—

Senator TIERNEY—I do not have exact numbers of these class actions but I believe that is a correct statement.

Dr Neville—Thank you. Pardon my rudeness to you.

Senator TIERNEY—That is all right.

Dr Neville—I have no way of knowing whether class actions are on the rise or not, either in this area or elsewhere. Certainly I am aware of significant numbers of judicial statements which say that they are a most helpful tool in the hands of the court and that it is a matter for the court to determine what is and is not an abuse of process rather than have it decreed to the court what is and is not an abuse of the judicial process.

Senator TIERNEY—If there were certain individuals who were using these class actions to stay longer in Australia, you would consider that an abuse of the judicial process, I take it?

Dr Neville—It could be an abuse of the judicial process.

Senator TIERNEY—If they are using it just to stay longer, wouldn't it be categorically an abuse of the judicial process—to latch onto a class action to achieve that aim?

Dr Neville—Not if it was used with a view to allowing time for all avenues of appeal to be explored, but if it was used after all avenues of appeal had been explored it may be.

Senator TIERNEY—Of course, some people just seek various ways to stay longer, just to stop returning to their country—'Maybe if I stay a few more years something will turn up and I will be able to stay permanently.' If it is used for that purpose, surely it is an abuse of process.

Dr Neville—I can only say again that it may be. If for example a person has a genuine fear of persecution in their land of origin for whatever reason—for example, the kind of case that the representative from Amnesty International gave earlier this afternoon about the dentist where it would seem astonishing that for practising the art of dentistry, albeit on a particular person in a particular country, which thereby breached the law of that country and resulted in that person being adjudged in that country to have breached the law and faced the death penalty—following your argument to its logical conclusion, he ought to willingly and very happily go back to his country and face the death penalty.

Senator TIERNEY—It is a matter of separating wheat from chaff, I think. What we are after is the genuine refugees who are genuinely in danger, but you must surely accept that in the total cohort there is a group who are not genuine refugees who are wanting to stay in the country longer and are using this process to achieve that objective.

Dr Neville—There is no question that in all of humanity there are those of us who are wheat and those of us who are chaff.

ACTING CHAIR—One very important thing that Senator Tierney did not put into the question is refugees within the definition of the convention. I put the question to Amnesty International that, if the court were handing down the same decision that the RRT had to hand down, they would still have been bound by the definitions of the refugee convention. In all likelihood, the decision would have been the same. That is where the bind is, but there are other conventions which do come into play after that is out of the way.

Dr Neville—Yes, of course. I understand.

Senator TIERNEY—Turning to your submission, on what basis do you believe that removal of class actions will lead to increased litigation? Do you have any hard evidence to support that idea?

Dr Neville—As I tried to put it in the submission, if you remove class actions, you are not going to stop those who would otherwise join class actions from appealing to courts and rather than have one class action, those who would otherwise join the class action will simply institute individual actions.

Senator TIERNEY—Are there any studies that you have based these conclusions on or backgrounds of participants?

Dr Neville—No.

Senator TIERNEY—Why did you claim that the minister's powers under section 501A are unfettered? They are subject to judicial review. Surely they are not unfettered if there is that review. Also, persons affected can make representations as well.

Dr Neville—Indeed.

Senator TIERNEY—So that is a little bit of an exaggeration?

Dr Neville—One always tries to get one's point across as best one can.

ACTING CHAIR—Father Murphy, on the matter that you referred to, without going into the detail of the applicant who joined the class action, do you know what the class action was about and also what the individual claims were? Were they related to the class action matter?

Father Murphy—It was certainly a class action for people who had been denied refugee status. I know that much.

ACTING CHAIR—Do you know which action that was?

Father Murphy—No.

ACTING CHAIR—Could you identify the name?

Father Murphy—No. It was here in Sydney, I know that.

ACTING CHAIR—It is an important question because the courts themselves—and this has now been tested—do not have the power to grant refugee status—the court being the Federal Court of Australia. If it was an action about the grant of refugee status, it was not one that I am immediately aware of in the area of class actions.

Father Murphy—I could find out for you in general terms without revealing—

ACTING CHAIR—I do not want to go into the individuals' names.

Father Murphy—In a number of the class actions, as you would know, some people claim to have been discriminated against in the immigration decisions. That was the first one that I was aware of, where there were decisions given by the minister a few years ago in favour of certain people who were in the country by a certain date and then a class action got up—

ACTING CHAIR—Yes, lodged by national groups.

Father Murphy—by others who missed out on that as a discriminatory thing. I do not know whether this was a similar one or not, to be honest. I would have to find out.

ACTING CHAIR—It might help us in our deliberations if you could let us know at your earliest convenience.

Father Murphy—Yes.

ACTING CHAIR—The argument being put by the minister and the department to remove the applicability of class actions—incidentally, they are a very new phenomenon in law in Australia: the first class action was in 1993, and obviously they have grown in numbers in recent years, if they were not in existence prior to that on migration matters—is that the system is being abused, that the majority of the actions that have been heard and determined so far have

actually failed and that very few of them have been successful. But what it does provide for the individuals in Australia, even if they are out of time for access to the courts, is that they can go to the courts by virtue of the action and get a bridging visa, where they would have no other avenue to go and get a bridging visa. So there is a decided advantage for some individuals. In some instances, they do not even have to have their claims related to what the class action is about; nonetheless, if they are joined to it, they get a bridging visa. So that is part of the argument on abuse. Are you aware of advertising by solicitors and migration agents for people to join in class actions?

Father Murphy—Yes.

ACTING CHAIR—What do you feel about this particular one, and it is the one that upsets me the most? I will quote from it, as I have done for earlier witnesses today. It says:

Permanent Residence—Australia

Refugee Class Actions!

If you have been rejected by the Refugee Review Tribunal (RRT) you may be able to join our class actions at very low cost. Our latest action is very easy to join (over 1,200 people have already joined!)

It doesn't matter if you are illegal or that your Ministerial Review has been rejected.

Please supply your refugee and RRT decisions.

You may still qualify for a Bridging Visa and become legal.

Free Consultation—You have nothing to lose.

It talks about free consultation but, of course, joining the action is not free, and we have heard various sums mentioned. What does your organisation think about advertising, soliciting such as that, for clients?

Father Murphy—I would agree with what Dr Neville said before. I agree that there have been class actions that are rather suspicious, to say the least—like the first one that I became aware of. But it is the principle of the thing. It would seem to be an overreaction to take away the principle of it. I think the method of attack is to make migration agents and lawyers more responsible, if being more responsible is what is required, in advising people whether it is worth their joining such an action. I presume they would know whether or not they had a case. They would know whether they had a chance. Of course, there are many people who sincerely believe they are refugees but who will never get approved. The man I am talking about is a case in point. He is not insincere. He believes he has a case and I think he has a very good case, but his chances are not strong. But then there are others who have no hope and, as you say, are using the system to stay on.

Dr Neville—One of the matters that is obviously raised directly by that kind of ad, really, is more a question of the ethics of the people soliciting, as opposed to the refugees themselves.

ACTING CHAIR—Yes. In the main, the people who join that have already been through the system. They have failed the primary, have failed the review; have sometimes failed through the judicial processes themselves and sometimes, in addition to that, have failed in the ministerial discretion area, where they have made an application. They have remained in the country illegally, but then get the advantage of a class action for a bridging visa. It could be argued that there are firms exploiting these people, who are very vulnerable—the most vulnerable in our society, one would contend, because of their illegal status. They are worse off than many other groups in our community.

Dr Neville—It is exploitation, as you say. These are the things that Senator Tierney was alluding to—the exploitation and also those who have no prospect at all through the system, having been through the system.

ACTING CHAIR—Having been through it—with no further appeals and no further avenues. But you would not be approving of adverts such as that?

Dr Neville—I would be very wary. As a member of the legal profession, I would have thought one ought to be very careful as to what one says and does as an officer of the court.

ACTING CHAIR—I will conclude on this point: on another area of exploitation, we have been told by the department—not by submission—that people have been joined to class actions without their knowledge. Have you ever been aware of anything like that occurring?

Dr Neville—No, I have not.

Father Murphy—No, I have not.

ACTING CHAIR—I assume it is not a practice you would agree with if you came across it.

Dr Neville—Not at all.

Father Murphy—No.

Dr Neville—I have something to add apropos two comments made by Senator Tierney. In relation to your question about any evidence of the likely increase in costs with the abolition of class actions, I will have a look at that, if I may. If I have got something, then I can send it to the committee. Equally, apropos the comment in relation to fettered or unfettered discretion, I will look at that again and come back to you, if I may.

ACTING CHAIR—Thank you for that, Dr Neville. Thank you to you and Father Murphy for your attendance, for the submission you have already provided to the committee and, generally, for that help you have given to the committee in our deliberations. If there are any matters which we might need additional information on, the secretary will write to you about it. You will also be sent a copy of the transcript of your evidence to which you will be able to make editorial corrections if any are needed.

Resolved (on motion by **Senator Tierney**, seconded by **Mrs Irwin**):

That, pursuant to the power conferred by paragraph (o) of sessional order 28B, this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 4.17 p.m.