COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON MIGRATION

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

THURSDAY, 25 MAY 2000

MELBOURNE

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JOINT COMMITTEE ON MIGRATION

Thursday, 25 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 and McKiernan, and Mrs Gallus and Mrs Irwin

Terms of reference for the inquiry:

Migration Legislation Amendment Bill (No. 2) 2000

WITNESSES

Committee met at 10.38 a.m.

CHAIR—I open the public hearing into the R1026Migration Legislation Amendment Bill (No. 2) 2000. I thank the Deputy Chair for chairing the meeting in Sydney yesterday. On 12 April 2000, the committee was asked by the Minister for Immigration and Multicultural Affairs to consider the bill, and the committee is to report by 8 June 2000. The bill was introduced into the House of Representatives on Tuesday, 14 March 2000. It amends the Migration Act 1958 to:

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

The bill also corrects a number of misdescribed amendments of the act. The committee has received 24 submissions from individuals and organisations with an interest in these issues. 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 any of the committee staff. The committee will now take evidence from witnesses as listed on the program.

[10.39 a.m.]

CLELAND, Mr Bilal, Adviser, Islamic Council of Victoria

CHAIR—Do you wish to comment on the capacity in which you appear today?

Mr Cleland—I represent the Islamic Council of Victoria, which is the umbrella body for Islamic societies in this state.

CHAIR—Although the committee does not require witnesses to give evidence under oath, you should understand that these are legal proceedings of the parliament of Australia and warrant the same respect as the parliament's proceedings themselves. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Cleland, you did not put in a very large submission. It was a letter supporting other submissions. Can I inform you that, if there are things you feel should not be on the record—for example, if you wish to name particular people—if you inform the committee, we do have the option of going in camera for those particular parts of your evidence. Would you like to make an opening statement?

Mr Cleland—I realise that it is not politically correct to speak of the significance of God or religion in public affairs these days and that notions of religion have been pushed to the periphery of public affairs, but religion is important to over 80 per cent of Australian people, and the percentage which declares no religion in the census is intensely concerned with matters of justice and human rights. Refugees are also considered peripheral to major public affairs. They are people without political clout, unable to defend themselves in the public arena and without high level contact within Australian society. We Muslims are here represented to remind the joint standing committee, our political representatives, that refugees through the dignity invested in all human beings by God are worthy of respect, and their rights should be respected.

Abraham, Moses, Jesus and Mohammed, peace be upon them, were all refugees at some time in their lives because they stood for justice and against oppression and against wrongdoing. Respect for the rights of refugees and the oppressed is part of the religion of all People of the Book. The tradition of the Prophet Mohammed says, 'Help your brother, whether he is an oppressor or he is an oppressed one.' People said, 'It is all right to help the oppressed one, but what of the oppressor?' The Prophet said, 'We help the oppressor by preventing him from oppressing others.'

We ask the Joint Standing Committee on Migration to stand against the imposition of new laws which will oppress applicants for refugee status. Oppression not only brings harm to the oppressed; we believe it also brings harm to those who are responsible for the oppression. We Muslims are part of the democracy of Australia, and we share responsibility for the actions of our legislators. We must make it clear that we do not support any changes to the law which will take away the rights of people in danger, refugees. To claim that people are using our laws to rort the system does not justify the introduction of oppressive laws. If people are misusing our

system of justice, they should be weeded out, but the innocent should not be made to suffer with the guilty. We ask that justice be strengthened in this country, not weakened, for it is the order of God in the Quran:

> Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the desires (of your hearts), lest you swerve, and if you (distort) justice or decline to do justice, truly Allah is well acquainted with all that you do.

On specifics, Australia in the late 1930s and 1940s brought in large numbers of refugees as a result of Nazism and fascism in Europe. The attitudes within this country were not good. I am highly sensitive to this: I have just been researching the history of our community in Australia. We do not want any vestige of these old, racist, nasty attitudes to blight the name of our nation again. We do not have a situation in the world like in the 1930s, but there is in the Third World a humanitarian crisis. Many of the Iraqis, the Algerians and the Afghans who come to Australia illegally, seeking a safe haven, are confronted with situations in their home countries as frightening as those in Europe of the 1930s. The history of Australia's relations with refugees and its attitude to the non-European peoples of the world has not been forgotten by our neighbours, and we cannot as a nation afford to reawaken suspicion of that type of attitude from our political leadership.

On the issues, firstly, the Islamic Council of Victoria concurs with the submission of the National Council of Churches of Australia, which calls upon the Australian parliament to remain true to the 1951 Convention Relating to the Status of Refugees. It states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Secondly, the protection of innocent human life is of paramount importance to all civilised humanity. The holy Quran informs us, all who believe in God, that for whoever kills a human being for other than murder or for spreading evil in the earth it shall be as if he had killed all mankind, and that for whoever saves the life of one it shall be as if he had saved the life of all mankind. In obedience to this teaching, we as Muslims strongly support the continuation of the right of refugee claimants to have recourse to the Federal Court. The National Council of Churches of Australia states that, if it were not for judicial review, 74 cases would have been determined in error, and the applicants could have been returned to their country of origin.

Thirdly, the Islamic Council of Victoria is also concerned that the removal of judicial review is not justified, because of the merits review given by the Refugee Review Tribunal. We would like to remind the joint standing committee that it is this type of weakening of the judiciary and the growth in the power over life and death of the executive that has been the cause in many cases for these refugees to flee their home countries. The major contribution to the English speaking world of the Westminster system of government, with a balance of the powers of the executive, legislature and judiciary, should not be undermined. There are signs that the suggested amendments would do precisely this.

The Standing Committee for the Scrutiny of Bills of the Australian parliament itself has said that it is the cause for utmost caution when one arm of government—in this case, the executive—seeks the approval of the second arm of government—the parliament—to exclude

the third arm of government—the judiciary—from its legitimate role, whatever the alleged efficiency, expediency or integrity of programs is put forward in justification. We agree wholeheartedly with the National Council of Churches of Australia that judicial review is essential as a check on the undue exercise of administrative power by the executive and that administrative discretion is too wide in the area of refugee determination.

Fourthly, the Islamic Council would like to strongly object to the proposal that the minister for immigration should be given unchallengeable power to reverse a favourable decision by a tribunal on a protection visa. This places the minister and his officers in a position in which they will be subject to immense pressure, and it will create suspicion and a distrust attitude to refugees. It is essential that processes should be transparent and just.

Fifthly, we believe that the Migration Legislation Amendment Bill (No. 2) 2000 reflects the hardening of the current government attitude to asylum seekers and, if passed, will cause considerable disquiet not only within Australia but amongst those of our neighbours suspicious and distrustful of our current policies. It will do disservice to Australia and we Muslims believe will not serve justice, which is the desire of God. It is a statement of the holy prophet: 'Fear the cry of the oppressed. There is no barrier between Allah and it.' We ask you not to change the bill so that it will affect the rights of refugees.

CHAIR—Thank you, Mr Cleland. I have a couple of questions at the outset. You made reference to the refugee convention and asked us to be true to that convention. Is it your belief that we aren't being true to that convention?

Mr Cleland—As I understand it, the convention does state that no contracting state shall expel or return refugees in any manner whatsoever to the frontiers of territories where they are in danger.

CHAIR—We do not do that, so anybody who actually has status as a refugee is certainly not returned to their own country.

Mr Cleland—Applicants for refugee status may be genuine refugees. They may be. We believe that one brother was returned to Somalia where he died, and another has been returned to Algeria where he disappeared.

CHAIR—Are you aware that the refugee status of Iraqis and Afghanistans who have sought refugee status in Australia is over 80 per cent, which is totally different from what it is in Europe, where it is a very low percentage? So on worldwide trends, Australia is in fact much more generous in awarding refugee status than other countries.

Mr Cleland—We know that, but also it is very hard for refugees to get here in the first place. There is a selection process going on in that as well. Those countries with land borders will be getting large numbers of non-genuine refugees, but the people who get here go through considerable distress and difficulty to get here. They are often very desperate cases. We do appreciate that the government is not sending back many people from those countries.

CHAIR—Is it not true for many of these refugees, whether they are genuine refugees or not, that Canada and Australia are regarded as what they describe as easy targets? We have more generous systems than other countries. Canada have now found that this has been to their detriment, and they are being much tighter on their system which allows people into the country and which determines refugees than they have been in the past to protect their own borders.

Mr Cleland—That is up to the decision of the Canadian people, but we ask that Australia be generous.

CHAIR—What is your reaction to somebody who is not a refugee but who has decided for whatever reason to come to Australia? For example, he could be running a small business in Afghanistan and hear about people who come to Australia and the opportunities here, and he could think, 'Why don't I claim to be a refugee and go to Australia?' How do you distinguish between the two?

Mr Cleland—That is up to Australian authorities to establish a process for the weeding out of non-genuine applicants for refugee status. We do not defend them, but we are very concerned that innocent refugees, people who may be killed if they are returned to their country, might get left out.

CHAIR—Obviously, the implication of your submission and what you said today is that you do not have faith in our own primary decision making and the tribunal?

Mr Cleland—We are concerned about that. In 1999 we did put in a submission that we are very concerned that some of the decisions of those tribunals had resulted in what we believe from the evidence we had to be unjust decisions. It is very important, we believe, that the judiciary should not be pushed out of the process.

Senator McKIERNAN—The implication in your presentation this morning is that the Federal Court is being pushed out of the process by this bill. Is that correct?

Mr Cleland—Yes.

Senator McKIERNAN—How?

Mr Cleland—We understand that it was stated that the High Court would become the Court of Appeal and that the Federal Courts would not be able to take appeals from refugees or take group cases from refugees.

Senator McKIERNAN—But the individual cases can still continue?

Mr Cleland—If there were 1,000 of them, it means the Federal Courts just could not cope.

Senator McKIERNAN—Sorry, the individual cases could still continue even though this bill was passed. Is that your understanding?

Mr Cleland—Presumably.

Senator McKIERNAN—Is that your understanding?

Mr Cleland—From our understanding there is an attempt to push the Federal Courts out of the process. From the Refugee Council and from the National Council of Churches submissions, we are concerned with that trend—

Senator McKIERNAN—With this bill?

Mr Cleland—With this bill.

Senator McKIERNAN—I personally do not read it like that. There is clearly an intention in the bill to remove the availability of class actions. People will not be able to engage in class actions where you get 1,000 people wanting to apply on an issue. You indicated that you supported the submission from the National Council of Churches?

Mr Cleland—Yes.

Senator McKIERNAN—So you will be supporting their contention that there are some unmeritorious cases that are taken to the court by way of class actions?

Mr Cleland—Yes, of course, there can be.

Senator McKIERNAN—There can be. There are?

Mr Cleland—There can be.

Senator McKIERNAN—They actually said that there are.

Mr Cleland—But there are also cases where people have been saved by class actions.

Senator McKIERNAN—Can you identify those cases and those actions?

Mr Cleland—We only had them from the National Council of Churches submission. They are noted specifically in there.

Senator McKIERNAN—Could you point out to me the class actions, not the individual ones, in the council's submission?

Mr Cleland—I am sorry, I cannot find it. It is here. But no doubt the National Council of Churches will address that when you ask them.

Senator McKIERNAN—We talked with the National Council of Churches in Sydney yesterday. If you care to go back to it afterwards and can identify it to the committee later, that would be appreciated. But I am not so sure that there is an identification in here of a successful—

Mr Cleland—Here it is, sorry. It is not a class action; it is a judicial review of 74 cases.

Senator McKIERNAN—Class actions are a relatively new phenomenon in the Federal Court. The first action occurred in 1993. There has been an increasing number of them in recent times, and the great majority of them are not successful in the first instance and they are not necessarily on refugee matters. I think that is a very important aspect to it. In relation to Australia's obligations overall to refugees, my understanding of what you have said is that you are quite critical of what the government is doing in the matter of refugees and refugee settlement in this country.

Mr Cleland—We are very concerned that genuine refugees may be returned to places like Algeria and Iraq, and we believe that cases have occurred. We do not want Australia to do that.

Senator McKIERNAN—Do you think that Australia, as a nation state, should be providing protection only to those who have money?

Mr Cleland—No, but we did ask in our 1999 submission, which was actually attacked at the time, that there should be short-term refugee status for people whose lives are in danger until the situation is revolved in their home country so they are able to return.

Senator McKIERNAN—There are people currently languishing, as you said yourself in your presentation, in refugee camps in Islamabad and in a number of places throughout the Middle East whose applications are on foot, whose relatives in Australia are sponsoring them. They have been put on hold. They have not been processed. Has your council said anything about that?

Mr Cleland—Yes, we believe that we should be generous with the genuine refugees.

Senator McKIERNAN—The question was: have you said anything about that?

Mr Cleland—No, we have not.

Senator McKIERNAN—But your concerns today are those people who are in Australia who should be removed, people like the individual I spoke to who have paid up to $18,000 to get illegal passage to Australia.

Mr Cleland—We do not support the people smugglers' traffic, obviously. This is a wicked traffic for which they should be punished very severely. But we are also concerned that desperate people who are genuine refugees may get here and they should not be turned back—like in the Egon Kisch case.

Senator McKIERNAN— You have not said anything about the desperate people who are in the refugee camps who cannot raise enough for food, never mind $18,000 for a passage.

Mr Cleland—One of the things we would like Australia to be doing internationally is taking action in international tribunals to prevent the creation of these large refugee populations. For

example, the sanctions against Iraq which are creating refugees should be relieved so that people are not starving and children are not dying.

Senator McKIERNAN—If you relieved the sanctions on Iraq, do you think that that might have some effect in increasing the Kurdish population of refugees as there are quite a few million of them around the Middle East regions, including many of the countries which adjoin Iraq?

Mr Cleland—No, I do not think that that is an argument. There are 150 children dying every day, according to the United Nations.

Senator McKIERNAN—In the refugee camps?

Mr Cleland—In Iraq itself.

Senator McKIERNAN—No, in the refugee camps?

Mr Cleland—We are driving them into refugee camps in neighbouring countries through those types of sanctions.

Senator McKIERNAN—We are?

Mr Cleland—We are helping to through the United Nations. We should take a stand that prevents the creation of refugees internationally.

Senator BARTLETT—I was wondering how much direct contact your organisation has with asylum seekers in Australia. Do you have regular contact with them yourselves or through member bodies?

Mr Cleland—We have chaplaincy to the prisons and detention centres here in Victoria. That keeps us in contact with some of the cases. Some of them have been here a long time waiting for processing, but it is better for them to be here in detention than have been murdered in Algeria or Iraq.

Senator BARTLETT—Would you or people associated with the council have regular contact with, say, asylum seekers who have tried to access judicial review of their cases in the Federal Court or High Court?

Mr Cleland—Yes, cases in the Maribyrnong detention centre have been for some years in the legal process. RACS, the Refugee Advisory Case Service, was handling those cases.

Senator BARTLETT—So if you come in contact with people, whether they are in detention centres or in the community, you would steer them in the direction of people like RACS, for example, rather than provide—

Mr Cleland—We don’t have the resources to provide legal support.

Senator BARTLETT—Have you or people in your organisation had contact with people who have or are party to class actions in relation to any migration matter?

Mr Cleland—No, we have not been directly involved in any such things.

Senator BARTLETT—I am just trying to get a feel from people who have contact on the ground about what is out there. One of the issues from the government side of things is they are alleging that some legal practitioners or migration agents are basically trawling for business using class actions.

Mr Cleland—We have heard that there are corrupt legal advisers and corrupt migration agents who are trying to make money out of the desperation of refugees.

Senator BARTLETT—Do you have much connection with migration agents or legal professionals?

Mr Cleland—No.

Senator BARTLETT—Again I am just trying to get a picture of what the reality is out on the ground. Would some of the people you have worked with, asylum seekers for example, had had bad experiences with migration advice or refugee advice which you then had to pick up the pieces of?

Mr Cleland—We have found that RACS is the best source of help. Although it is underfunded and the people are stressed out of their brains, they are very good. We steer people to them rather than to these migration agents, who we are suspicious of.

Senator BARTLETT—It is probably more an editorial comment, but one of the other areas of potential targeting of behaviour might be some of those migration agents. I am sure it would be a small percentage but—

Mr Cleland—But if there is any cleaning up to be done it might be done there.

Senator BARTLETT—The only other thing—and I think you mentioned it in your submission—relates to the minister's power to reverse earlier decisions by a tribunal on a protection visa. I have two questions on that. Firstly, my understanding of the power which currently exists in the act, separate to this particular bill, is that it relates to decisions by the Administrative Appeals Tribunal, not the Refugee Review Tribunal. So it is not an overturning of the vast majority of protection visa grantings by that tribunal. I am assuming that you base the concern that you have expressed on your interpretation of the other submissions by the Refugee Council, et cetera.

Mr Cleland—Yes. But it is dangerous to extend the power of the executive too much. That really is the source of a lot of refugee trouble in the world.

Senator BARTLETT—In terms of the particular power that that aspect of the bill goes to—it basically relates to ministerial discretion on character and conduct and removing people from

Australia on character grounds—a lot of the power is already there in the act. Whether it is with refugees or other people, have you had much direct knowledge of people who have been excluded from Australia through that power?

Mr Cleland—When they are excluded, we do not hear from them again unless it is a report of their death.

Senator BARTLETT—I am not sure how much you want to go into detail about those two cases you mentioned at the start, but were the Somali person and the Algerian you mentioned people who applied through the Refugee Review Tribunal?

Mr Cleland—We understand that they were illegal migrants into this country and were expelled.

Senator BARTLETT—Are you able to provide more detail about that? It might be slightly outside the scope of this bill.

Mr Cleland—Not at this moment, but I can get material.

Senator BARTLETT—It is probably more for the longer term. Unless they were a party to class actions, it is probably not directly relevant to this bill. But it is relevant to some of the broader concerns that you expressed because what happens to people when they are returned is one of the broader issues. I might leave it there.

Mrs IRWIN—Mr Cleland, I would just like to ask you a question about the 20-day limit on applications to the High Court. The Human Rights and Equal Opportunity Commission, who we had before us yesterday in Sydney, argues that the bill 'restricts access by asylum seekers, removes High Court discretion to hear an application which has not met the 28-day limit for a good reason, and these are significant issues for many asylum seekers least familiar and least able to access justice'. They thought that it was a very short time frame. What is the feeling of your council?

Mr Cleland—We concur with the Council of Churches, which is also worried about that 28-day limit being put on the High Court.

Mrs IRWIN—What time frame would you like to see in place?

Mr Cleland—Can the executive imposed a time frame on the judiciary? Isn't this an upsetting of the balance of power?

Senator McKIERNAN—It can.

Mr Cleland—It can execute judges. They do that in Iraq. That is not a balance of power.

Senator McKIERNAN—There is provision in the Constitution. There are certain powers vested in the legislature as well. The advice that we have received on this particular provision is that it would be constitutional, and that is a question which we will address to later witnesses

this morning. The advice is that there is a power to do it. Of course, the ultimate authority on whether or not there is the power to do what is being proposed will be the High Court itself if somebody makes an application, subject to the passage of the bill.

Mr Cleland—We trust you will be motivated by concern for justice and the rights of the oppressed in the legislature.

Senator McKIERNAN—Yes. Honesty will be another factor in that—the truth.

CHAIR—Earlier in your testimony you were saying that the removal of class actions means that people who could be represented by class actions will not be and therefore will fall by the wayside. But isn't true that an individual test case can be also binding if other people with an interest sign up to that. Doesn't that have exactly the same outcome as a class action?

Mr Cleland—I cannot pronounce on these matters—I am not a lawyer. I really do not understand the intricacies of that.

CHAIR—Okay. Thank you very much for appearing before us today, Mr Cleland.

Proceedings suspended from 11.08 a.m. to 11.26 a.m.

HARVEY, Ms Christine Susan, Acting Secretary-General, Law Council of Australia

MORTIMER, Ms Debbie, Law Council of Australia

RODAN, Mr Erskine Hamilton, Member, Nationality and Residence Committee, Law Council of Australia

CHAIR—I welcome witnesses from the Law Council to give evidence. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are the legal proceedings of parliament and warrant the same respect as the proceedings of parliament themselves. 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 that you have already given us?

Ms Harvey—No.

CHAIR—We will ask you for an opening statement. If at any stage you want to raise a particular case where you name a person and do not want that to go on the public record, we do have the possibility of going in camera. Before we ask you questions on your submission, do you wish to make an opening statement?

Ms Mortimer—Yes, we do. The Law Council opposes the bill on the basis that is set out in our submission, but there are really three broad considerations that we see with this legislation. The first is an access to justice issue, that is, we see that this legislation has the potential to close off the last bastion of affordable litigation for people in the migration area. That is because legal aid basically is not available any more. There are routinely no work permission conditions on people's bridging visas—people who are in detention are unable to access income in any event—and so the last way in which litigation is affordable for people affected by migration decisions is class actions. We see this as a real threat to access to justice issues. Secondly, we see it as an unacceptable challenge to the rule of law, that is, one of the fundamental things about the rule of law is that the judiciary is able to supervise the conduct and actions of the executive. This bill, by limiting judicial review, both in the Federal Court and in the High Court, poses a challenge to the rule of law in that it limits—severely, in our submission—the ability of the judiciary to supervise the executive.

Thirdly, it poses a challenge to the independence of the judiciary, in our submission, in the sense that we are fortunate in Australia to have a strong and independent judiciary. In the migration area, it is true to say that there has been substantial engagement, in many judicial decisions in the migration area, in some criticism or some differences of opinion about the way that migration decisions are made. The parliament or the government is not able to attack the independence of the judiciary directly, but what it can do is prevent the occasion arising for that criticism to be made. It does that, in our submission, through this kind of legislation, by closing off judicial review. By doing that, it prevents the occasion arising for criticisms to be made in court by judges.

Aside from those three fundamental issues, our submission is that the bill is an overreaction to some of the problems that are raised by the department and by the minister. It is a misdirected attempt to address some of those problems. The policy considerations, we say, do not justify the kind of reaction contemplated by this bill. That basically is our position.

CHAIR—Thank you. I wish to address those three major points. You have said that, by closing off the class action here, you have closed off the 'last bastion of affordable litigation'. In saying that, you have given me the reason that there is no legal aid for these people. Basically, that is it: there is no legal aid and so an individual cannot do this. But is it not true that a test case acts in a similar way? If one person takes an action, other people can sign up to be part of that test case and can go ahead and be included under that. So, if the test case is resolved in favour of the person bringing the case, anyone who has signed up to the test case would also be covered by that ruling.

Ms Mortimer—The problem with a test case approach is that it is entirely dependent on the discretion of the other litigant involved, namely the Commonwealth. Particularly in the migration field, people's status in Australia, in terms of their access to bridging visas in order to make them lawful, is dependent often upon whether they have litigation on foot. So, what they have to do in any event as individuals is to commence litigation. That means they have to either pay filing fees, or they have to perhaps retain solicitors: they have to start the process of litigation before they can get to the stage of saying, 'I am covered by this test case.' You see, what then happens is—if you take the example of the East Timorese, the Lay Kon Tji case—that a discretionary decision is taken by the other litigant, namely the Commonwealth, to put cases on hold pending the outcome. So people are put in the position of having to depend on a discretionary decision of the Commonwealth rather than having the same kinds of rights that are given to them by a class action.

CHAIR—Taking that up, it was a case. You have stated the Kon Tji Lay case in your submission, whereas in fact that case was not a class action. It was a test case, and that is exactly what the Commonwealth did: it put on hold everybody who would have been affected by that action, and in fact they got their bridging visas. So that seems to be an argument that you can go ahead without these class actions.

Mr Rodan—I want to say one thing about that. The Lay Kon Tji case was a case which our firm ran, and it meant that a lot of people were vitally interested in that case. It also meant that the department did not actually moved on East Timorese cases. Actually, they did not move on East Timorese cases even before that. That has been looked upon as a representative action. You can call it a test case or whatever you like, but it is a representative action. And the legislation—

CHAIR—But it was not a class action.

Mr Rodan—Yes; but the legislation does not only refer to class actions, it refers to representative or class actions. That is what it does.

CHAIR—Yes; but it does not stop individuals bringing a case that can be regarded as a test case.

Mr Rodan—Yes; but it is a representative action, and representative actions are going to be banned also. If there are other cases, that means that they all, as we say, have to make application themselves to the Federal Court or to the High Court, in order for them to be allowed to stay in the country. That is what the situation is at the present moment.

Ms Mortimer—Can I make a comment specifically on the wording of the bill as it is at the moment? I am referring to 486B, subsection (1), which is the part that we are dealing with. It is probably fair to say that, if the legislation were confined to representative proceedings, for example, as those are defined and contemplated in the Federal Court rules, that is one thing. But subsection (1)(d) talks about a person in any other way being a party to the proceeding jointly with, or on behalf of, or for the benefit of, or representing one or more other persons, however this is described. Our submission is that that is way broader than the definitions in the Federal Court rules, for example, of class actions representing. And that is a provision that would well and truly touch a case like Lay. It would touch any test case, in the breadth with which it is currently drawn.

CHAIR—Can I conclude from that that, if there was a clarification of that which did not exclude text cases but just excluded class actions, then you would be happy with that? Your concern here is that it seems to be wider than it would appear that it was intended to be, and we will obviously have to clarify that with the Minister. But my understanding is that there is no objection to test cases as such; and you seem to be saying that yourself: if indeed the test cases were allowed, you would no longer have any objection to ruling out the class actions.

Mr Rodan—No.

Ms Mortimer—No, we do not make that submission. But we do say that, if the answer by the minister and the department is that test cases are not touched by this legislation, on a proper construction they are. So we maintain our general opposition, but we say that the department is wrong about this argument.

CHAIR—So, if we clarify that, it removes one of your objections because that was your main objection to the legislation. So, if it turns out that test cases can be allowed, that removes one objection.

Ms Mortimer—With respect, it does not remove it.

CHAIR—It does. It removes the objection where you said that it allows a closed off bastion of affordable litigation, and I want to address the second one, which is the lack of legal aid. I think you are claiming that people go to class actions because it is obviously cheaper than taking individual action. Is it not true that, in most cases regarding people with refugee claims and others, the court costs are waived and there are no costs to the litigant?

Mr Rodan—The filing fees maybe, but not the government costs. The government wants their costs paid by the unsuccessful refugee applicant. Is that what you are saying?

CHAIR—It is my understanding that, in the majority of these cases, costs are waived.

Mr Rodan—No. Only the Federal Court waives their costs. The government never waives their costs.

CHAIR—What are the government costs?

Mr Rodan—A single action could be about $10,000, a Federal Court appeal could be about $40,000 and a special leave application could be another $20,000. It just mounts up.

CHAIR—So from your experience in the cases that you have represented, Mr Rodan, if you have somebody—and I do not have your experience here—who is claiming refugee status, or the procedure has been wrong somehow, who comes to you and says, 'I want you to take this action for me as an individual, not as a class action', what is the total cost that that person would inevitably will get? By adding up these costs now, you are talking about $30,000, $40,000 or $50,000.

Mr Rodan—Are you talking about my costs or government costs?

CHAIR—I am talking about costs; I mean you might go pro bono.

Mr Rodan—Sometimes we do pro bono—that is quite true.

CHAIR—Let me put it more specifically: isn't it true that people have gone through the courts with very few resources, but they have still managed to go through the courts as individuals whether or not the law firm acted as pro bono?

Ms Mortimer—Of course it is true that that happens, but that does not mean that that is the appropriate and desirable way for litigation to be conducted. There is an enormous amount of generosity in the legal profession towards people that are not able to pay and have a case that ought to be heard. But no-one—and this is in our submission particularly—not parliament and not the executive ought to take advantage of that generosity to the extent that all legal work on migration matters prima facie ought to be done for nothing, because it does inevitably compromise the quality of the representation. I am speaking here from personal experience. You can only manage so many pro bono cases, as well as run your practice. The quality of litigation and the quality of representation, and the quality of the argument that the judges receive, is always compromised if people are overstretched by the amount of pro bono work they do.

CHAIR—Then this comes down to saying that we have to have class actions because people cannot afford to go ahead, although I believe that they can still do test cases. But you say this is a matter of money going into the class action. Can you tell me how much class actions cost and who bears the cost?

Ms Mortimer—I want to direct the committee's attention to the case of de Silva and to what we considered to be a really positive outcome for the Commonwealth in a case that the applicants lost. In that case Justice Merkell, who heard the case at first instance, made an order on our application, in relation to the costs that he ordered to be paid in favour of Commonwealth, that each member of the class pay 1/167th of the costs. The effect of that order was that there was then an affordable amount of costs payable by each person, and the

Commonwealth received its costs, which I am sure you would have heard from the department can be something of an unusual occurrence. Because you are often dealing with people who are going to be removed, there is a reluctance and often an inability to pay. But here is an example where, in a class action, because of a sensible and practical approach taken by a judge—and we would say by the applicants—the Commonwealth's costs are met.

CHAIR—What would be the total cost of the class action you mentioned for 160-odd people?

Ms Mortimer—Do you mean on both sides—that is, the costs for the applicants of their represented?

CHAIR—Yes. What is the class action cost that you in the end will have to divide between all the members?

Ms Mortimer—And if we assume the class consisted of about 160 people?

CHAIR—Yes.

Ms Mortimer—And at what level are we talking about to run it? A single judge of the Federal Court or full court?

CHAIR—You tell me—you sit through those.

Mr Rodan—No. You tell us what you want.

CHAIR—Okay. Give me the top cost that you are going to have for a big class action, a proper class action, that goes to the full court.

Ms Harvey—I do not think we can answer that.

CHAIR—I think this is very relevant because, even if you were looking only at $50,000—you have given me $160,000—that is over $1,200 per person. A lot of people do not have that sort of money to enter a class action either. Your argument is that on a simple equity basis people cannot enter legal cases because they do not have the money, but I will say to you that a large majority of the people do not have over $1,000 to contribute towards this either.

Ms Mortimer—But it is findable. They see that their entire lives and the future of their children are at stake, in terms of their ability to stay in Australia, so for them that is an achievable amount, whether they have to beg or borrow. Those kinds of figures are achievable. My personal experience is that people pull out all straws to try to find that kind of money, but $50,000 is simply fantasy land for them.

CHAIR—So $50,000 would be a reasonable price for a class action, all-up costs?

Ms Mortimer—No, for a piece of litigation—that is, if you talk about an individual taking a case of judicial review to the Federal Court, a single judge, then going to the full court, and then

going on special leave to the High Court. I would have thought that person's professional costs would be in the tens of thousands, and you can duplicate that if they lose in terms of what they would have to pay the other side. I do agree that it is probably an important issue for the committee to look at, and we are capable of providing those figures in writing and we are happy to do that if that is going to assist the committee.

CHAIR—I think it would be really useful if you can give me the class actions that have taken place and the total cost on that, including lawyers' fees, and also what you would estimate in a class action. I take your point that there are variables to be taken into this, so perhaps you could give us the best case scenario on the lowest cost and the worst case scenario. That would be extremely useful.

Ms Harvey—We will see what figures we can come up with.

Senator McKIERNAN—Can I get a clarification on the East Timorese case, the Kon Tji Lay case? Is it within the court rules that this is a class action?

Ms Mortimer—No, it is not.

Senator McKIERNAN—But you consider it to be a class action?

Mr Rodan—No. I consider it to be a representative action, and that is the reason we say that section 486B is relevant to that particular case.

Senator McKIERNAN—You say on the bottom of page 2 of your submission:

This statement is inaccurate—

You are talking about the ministerial quote of 14 class actions being taken out. Then you continue:

There have been at least 2 decisions of the Federal Court which have upheld representative actions—

It is a nice little use of words but it does distort what the Law Council of Australia is saying. You are correcting a statement that the minister made in his second reading speech, which is there in quotation marks, by talking about unrepresentative actions.

Mr Rodan—That is not meant to be a misrepresentation, but I suppose you can look at Kon Tji Lay as a representative action and Fazal Din as a class action. When you look at page 6 of the department's latest submission in response, it calls Fazal Din a class action.

Senator McKIERNAN—There is no argument on Fazal Din, but there is on Kon Tji Lay.

Mr Rodan—We wrongly said Fazal Din is a representative action but we said correctly that Lay Kon Tji is a representative action because it represented all the East Timorese cases.

Senator McKIERNAN—We had evidence on that yesterday in Sydney, and it was my contention then that this matter was not a class action. You have now confirmed that it is not a class action within the rules of the court as a definition.

Mr Rodan—As a definition, but what we are saying is that there is an abolition of representative factors under 486B. We therefore want to protect those actions as well.

Senator McKIERNAN—So it is the contention of the Law Council that, if this bill were to pass in its current form, cases like Kon Tji Lay would not be allowed in the future?

Ms Mortimer—That is a construction fairly open especially under 486B(1)(d).

Mr Rodan—Which Ms Mortimer has read out.

Senator McKIERNAN—The banter you have not addressed in your substantial submission is the associated bill, which the minister in his second reading speech did identify—the judicial review bill. The bills are complementary and the department agrees on that fact. With the restrictions on class actions if it comes into law and restrictions on representative cases as well, what will be the demand for the passage of the judicial review bill, the one that has been sitting in the Senate since December 1998?

Mr Rodan—Just by looking at the minister's second reading speech, I think he is obviously still persisting with it.

Ms Harvey—Demand from whom? From any quarter?

Senator McKIERNAN—I was particularly thinking government because this is driven by government in response to what they feel there is a need—

Ms Harvey—The minister's second reading speech clearly signals that he sees this as part of a package, that this bill is complementary. But we are uncertain as to the minister's intention and the government's intention in relation to the judicial review bill. It is sort of sitting there, as you said, in limbo land.

Senator McKIERNAN—You did say in your submission that if large numbers of people are not able to do class actions they will themselves as individuals sometimes unrepresented go into court themselves.

Ms Harvey—Yes, and then there may be a reaction which is to bring on the judicial review bill.

Senator McKIERNAN—Part of the reason for the judicial review bill is the numbers of cases that are currently in the court.

Ms Mortimer—Yes, it would be fair to say that one of the likely reactions from the perspective of applicants is that there may well be a considerable increase in individual applications and we are then into a situation where the courts may become even more

overburdened with individual applications and unrepresented individuals which always pose logistic and practical problems in terms of court administration and the conduct of litigation.

CHAIR—Under administrative law, if a single case brings down a decision, and that would apply to anybody who is in a similar position, I think you are arguing that that happens but those people might have already been forced to leave the country because they do not have a bridging visa. Is that correct?

Ms Mortimer—That is right.

CHAIR—I just wanted to get that clear.

Ms Mortimer—Or be detained or whatever.

CHAIR—So it is discretion of the Commonwealth whether they agree to allow these people a bridging visa because this case would have bearing on their situation.

Ms Mortimer—Yes.

CHAIR—I just wanted to clarify that that is where you are coming from. Is it possible if somebody is taking a class action that people who have already left Australia can join that class action?

Mr Rodan—It would be beyond the jurisdiction of the migration act.

CHAIR—That is what I want to know.

Mr Rodan—Absolutely.

Ms Mortimer—I cannot see how that would operate.

CHAIR—If somebody had been admitted on exactly that case and had been removed, then there is no chance for them to join in that class action.

Ms Mortimer—They would have to have a substantive right that was at issue and it is difficult to see how that would be the case if they were no longer in the jurisdiction. Generally the substantive right relates to an assertion that they are entitled to remain or to make application to become a lawful citizen or whatever. It is difficult to see how, if they were outside the jurisdiction, they would be able properly to say that.

CHAIR—So if you had just recently been deported on the same basis that they cannot say, 'The court has ruled here that that was a wrong procedure by the tribunal. It applied to me just as much as it applies to people who are still in Australia.' They lose all rights once they leave the country. Is that right?

Mr Rodan—If you have been deported, you do not get back.

CHAIR—So they have lost all rights. So you cannot envisage that that would happen?

Ms Harvey—No. There are many situations where people conduct litigation in Australia from outside Australia, but in the migration area I cannot see how it would give them any advantage because they could never re-enter. That would be the problem. It is only of an advantage to people who are here.

Senator BARTLETT—I will not go further on the class and representative action I think you have covered that well. The submission you have done I think is quite comprehensive. The one issue that is mentioned in your submission that I have not found in anyone else's which I wanted to explore a bit further is your point 5, the changes to standing rules. I did ask the department about this issue based on your submission. I think they confirmed what you have here. I was wanting to clarify it a bit more. Basically you are saying that the changes proposed in this bill would mean that people who are so-called turnarounds at airports would no longer be able to have action taken for them in the courts to prevent them being turned around. As I understand it, through other committee hearings, that has actually happened where people have been prevented from being sent back at airports because of court action, and they have then subsequently been able to apply for protection and been granted it.

Ms Mortimer—The courts have at common law standing rules that do confine the types of people who can bring an action, but the difficulty in this particular kind of instance is the nature of the incommunicado detention. So the person who is the most appropriate to bring an action and to give instructions is simply not able to be communicated with. Therefore, people who under ordinary common law rules might have standing, that is relatives or organisations, ethnic organisations that are concerned about the treatment of one of their members where that is part of their charter—those kinds of situations are situations where under ordinary common law rules an organisation might well be able to bring an action and that would be seen as perfectly appropriate by the courts. What this legislation does is exclude those kinds of situations.

Senator BARTLETT—That part of the bill that does that is that that clause you were talking about before.

Ms Mortimer—That is 486C and, in particular, subsection 2(b). So it confines it to the people who are the subject of the decision, except for those statutory bodies, the minister and the attorney who may also have an interest.

Senator BARTLETT—Would that prevent a solicitor, for example, from lodging a claim for that person?

Ms Mortimer—Yes, it would.

Mr Rodan—You would not have that person's instructions. They have to ask for legal advice. Section 256 says they have to ask for legal advice.

Ms Mortimer—It is also a little difficult to know how the words 'commence a proceeding' are to be interpreted in the sense that does that mean that a solicitor cannot commence proceeding on behalf of the person who is the applicant, that is naming the detainee as the

applicant, which would appear to come within the section? But if it is actually the solicitor that commences the proceeding because he or she has not been able to communicate with the applicant, then they may well fall foul of this. So it is difficult to know how that word 'commence a proceeding' is going to be construed. If it means commence a proceeding as an applicant, then it does narrow it and exclude people who may have a concern and an interest in those held incommunicado.

Mr Rodan—I understand that nearly 2,000 people have been turned around at airports. We do not know what their substantive rights could have been if they had been granted a visa. I understand also that there are quite a number of people in the detention centres in Western Australia and South Australia that are held incommunicado. Those persons are unable to get a lawyer or a representative—even under the tendering system they have got under the IAAAS they are unable to get any kind of help at all—because they have not uttered the magic words, 'I want a lawyer. I want a representative.' A HREOC Ombudsman can't come in there. The 1993 act stops that. The government moved to change the law back in July last year to stop them from doing that.

Ms Mortimer—I don't want to digress into other areas too much, but I did want to draw the committee's attention to the fact that, when we talk about incommunicado detention, it is not just people at airports, it is not just the turnaround situation; there are people currently held at Woomera and at Curtin who are in incommunicado detention. We are talking about hundreds. It is not just the airport situation, it extends to detention situations as well.

Senator BARTLETT—Under this bill those people definitely would not be able to have someone enter proceedings on their behalf, family, community organisation and potentially not legal practitioners either.

Ms Mortimer—That is right.

Senator BARTLETT—As I said at the start, I think the department agreed with your concern when I questioned them—it is always a bit hard to be 100 per cent sure—but certainly at least in terms of turnaround at airports. They may be getting back to us a bit more on that. The only other thing which you do not mention in your submission—I do not think you have been asked a question on this before; one of my colleagues might have asked and I might not have been paying attention—is schedule 2 of the bill, the so-called technical amendments about the character and conduct provisions. You have not expressed any concern about that. Have you got any comments on that?

Mr Rodan—We concentrated just on schedule 1. I was asked beforehand whether I could talk about it. What I am saying is off the cuff, basically. I note that the section to be amended is 501A of the Migration Act, which reads by itself:

(1) This section applies if:

(a) a delegate of the Minister; or

(b) the Administrative Appeals Tribunal;

makes a decision ...

(c) to grant a visa ...

I think the whole idea is basically to stop the Administrative Appeals Tribunal from granting visas. That I suppose is a misdescription and should probably be corrected because the tribunal can't grant. But it does leave an ominous situation in one respect because the section applies if a delegate of the minister grants a visa. A delegate of the minister is generally a departmental officer so a delegate of the minister should be able to grant. That particular section looks very difficult. It is badly worded at the beginning and the amendments are badly worded. The thing is that the minister trusts his own staff or his own department to make a decision, and to take out the words 'to grant a visa' for the delegate is not what I think is intended by the amendment.

The second part to that is about the flow-on of that particular part. I have not had a great chance to look at this issue because I understood that other organisations were going to address it. I think the National Council of Churches have addressed the issue. I thought the Immigration Advice and Rights Service in Sydney were also going to address that particular issue because I had a phone call from those people. It is not part of our brief. Could we put something in writing about that?

Senator McKIERNAN—I would appreciate that. I did not have a concern about this part of the amending bill until I read the submissions that you have just mentioned. We questioned some of the persons in Sydney yesterday. I must say that I still do not have the same degree of concern that the National Council of Churches have, for example. I have now got a copy of the bill. Let me just for the record read from the Migration Act, otherwise it will be very confusing for those reading this section. 501A(1) reads as follows:

(1) This section applies if:

(a) a delegate of the Minister; or

(b) the Administrative Appeals Tribunal;

makes a decision (the ***original decision***):

(c) to grant a visa to a person as a result of not exercising the power conferred by subsection 501(1) to refuse to grant a visa ...

I have read that bit. The amendment would come in at (c), where it says 'to grant a visa to a person as a result of not exercising'. Those words would be deleted and the words 'to not exercise' would be inserted. It would read:

(a) a delegate of the Minister; or

(b) the Administrative Appeals Tribunal;

makes a decision (the ***original decision***):

(c) to not exercise the power ...

When you relate that back to what was said in the second reading speech and what was said in the explanatory memorandum, I think it is a technical amendment which clarifies in law that the tribunal cannot exercise the power to grant a visa. I cannot read anything further into it than that on the words that are before us. I held back yesterday from questioning other witnesses because I knew this eminent body would be appearing before us today. That is why I alerted you prior to the hearing, Mr Rodan, that I would be following through on this question. I would have grave concerns if the amendment had a different effect from what was stated in the second reading speech or in the explanatory memorandum because it would mean that the parliament was being misled on this matter. I personally cannot see it, but I do not have the years of study in law that the distinguished witnesses before us have.

Mr Rodan—Yes, I recall our short conversation about an hour and a half ago. I understand the National Council of Churches is saying things like if a person who has failed in a refugee claim marries an Australian before he goes back to his own country and then goes to, say, the Australian embassy in Manila and says, 'I want to go ahead with my spouse application now,' they will say, 'Administrative direction 17 says that you're not a good character. You've lodged an application, and it's been a futile application, because you're back in your own country. You should never have lodged that refugee claim, therefore, we're not going to grant you a spouse visa.' I understand that has happened on a number of occasions. According to the National Council of Churches, that relates to issues of character. But that relates to overseas matters. It does not relate to matters within the country.

Senator McKIERNAN—It would be dealt with by the Migration Review Tribunal. It would not be dealt with by the Administrative Appeals Tribunal.

Mr Rodan—No. They would have failed the character test and, therefore, they would come under the AAT.

Senator McKIERNAN—From overseas? Do persons in Manila have the ability to apply to the AAT?

Mr Rodan—No. They have not.

Senator McKIERNAN—The act is in this section talking about the Administrative Appeals Tribunal. As I read it, it is talking only about that, not about the MRT or the RRT.

Mr Rodan—The spouse has the right to go to the tribunal, but only as nominator. But I do not think that would be useful, because they could go only to the MRT. But we are just thinking aloud at the moment.

Senator McKIERNAN—Yes. You have offered to look at it.

Ms Harvey—We will. We will look at what the National Council of Churches has said and then come back to you in writing.

Senator McKIERNAN—I am not sure whether the transcript will be available. I talked with them yesterday.

Ms Harvey—Is it in their written submission?

Senator McKIERNAN—It was in their written submission. But we had dialogue during yesterday's hearing. That should be available reasonably soon. If we get it reasonably soon, hopefully we can supply you with copies of that. I think there was a matter addressed to Amnesty International, as well, during yesterday's hearing.

Ms Harvey—Thank you.

Senator BARTLETT—I have one other question which is not covered in your submission, but it relates to at least part of the government's rationale for why they are going down this path with this and other bills; in this bill in particular, with the class action issue, they have alleged, and provided us a couple of copies of, advertisements which they say are inappropriately trawling for business. The advertisements are basically saying, 'Hey, anyone out there who has a class action going on, throw your name in and you will get a bridging visa.' On the surface they seem to be encouraging people to join class actions which basically are not really relevant to their situation or where they do not have much prospect of success.

There are two issues with that. Firstly, in terms of the powers of the courts currently to assess whether individuals are appropriately joined to a class action or not, the department has alleged that people are currently joined to class actions that deal with matters that, even if they were successful, still would not affect their status. It seems to me as a non-lawyer to be a bit odd that you could join a class action that does not affect you. Do you have any comments about what powers currently exist and whether we need more powers or resources or something for courts to identify that situation? I know you have talked about vexatious litigants. I know this is a long question, but I will give it to you all at once. The other issue is about the behaviour of migration agents or legal practitioners—without getting into an argument about how widespread inappropriate behaviour is. If there are people out there holding out false hope or trying to scoop everybody up into these sorts of things, what sorts of actions are currently available to bodies to address that inappropriate behaviour or should we be looking at providing more powers down that path?

Ms Mortimer—The Law Council is well aware of the department's concerns, and if there are activities that are taking place by practitioners that ought not to be, then the council would be as ready as anyone else to see those activities curtailed. And that is why there exists such things as migration agents' codes of conduct and committees that are set up to supervise the activities of migration agents, and the bodies that regulate the legal profession. If it is seen that any practitioners are behaving in a way that is inappropriate to their professional and ethical duties, then in our submission recourse is currently available to regulate those kinds of activities. In relation to the appearance of isolated advertisements—and we do not say that they are necessarily contravening any regulations, but even if they are not and are seen as being, let us say, over enthusiastic and a bit exaggerated—there are other mechanisms by which the practitioners that are involved in that kind of behaviour could be advised that they ought to tone it down or they ought to desist in that kind of behaviour. The proper reaction is to deal with those matters on a case-by-case basis, not to obliterate the access to that kind of litigation, in our submission.

That is the first point. The same is true in relation to the concerns that the government might have about the way the judicial review is being used in the courts. In our submission again there are quite adequate and proper procedures available in courts. If a litigant thinks that they are being drawn into litigation which is an abuse of process, then there are procedures in courts to deal with that. The courts regularly entertain applications by respondents for proceedings to be dismissed on the basis that they are an abuse of process, and courts dismiss them if they find that those proceedings are an abuse. In our submission, the Commonwealth is in the position of being, although a model litigant, an ordinary litigant in that sense, and it has available to it, as does any other litigants, those proceedings. So if the Commonwealth believes that people are abusing the process of the courts, then the proper forum in which to agitate that is in the courts. That is the issue about the abuse of process.

Ms Harvey—Can I just add that the Australian Law Reform Commission in its report *Managing justice*, which was released in February this year, has very squarely raised concerns about some ethical issues arising under the operation of part 4A and representative actions and class actions—and, particularly, in the context of costs agreements and litigants being adequately informed and those sorts of issues. That is squarely on the table, the Attorney is well aware of it and the Law Council is looking at that to try and see if the rules should be refined to manage these sorts of issues, particularly with burgeoning class actions across the board, not only in migration.

Ms Mortimer—If there are concerns, for example, about membership of a class action then, in our submission, that again needs to be addressed on a case by case basis. It is not the case that in all class actions in migration even a majority of the members ought not to be there. If that is happening then that, in our submission, is fundamentally the responsibility of the practitioners who are acting in relation to the class action. It ought to be dealt with on an individual basis with them, because they then obviously do not have the proper procedures in place to be scrutinising the members of the class for which they are acting. But there are practitioners that do it right, and no penalty ought to be imposed on them because some practitioners are not doing it right.

Senator McKIERNAN—Do you have any record of any action by the Law Council for inappropriate action by any of your members in this regard?

Ms Harvey—No. The Law Council does not have the power. We are not a disciplinary body. That is governed by the legal profession acts in each of the states and territories. In some cases, that is not necessarily managed by the legal professional bodies either. It is a different system in each state and territory.

Senator McKIERNAN—The other thing that has been put to the committee in regard to this is that individuals have been joined to class actions without their knowledge. Is that possible?

Ms Mortimer—I would like to be able to address this in a little bit more detail in writing. I have to go back and look at the rules specifically. But there are provisions where a class can be defined in a way that people can opt out rather than opt in to it. So that might be a situation where people fit within a class but do not even know that there is any litigation on foot. I suppose there will be people that slip through the net and that might be removed anyway, even

though they do fit into a class. But if, sometime between when they are detained and they are removed, it is drawn to their attention that they might fit into a class then that would trigger, as I understand, the kind of situation that the department is referring to in its submission—they would then point to the fact that they might fit into this class and, therefore, they have a basis on which they ought to be able to remain in Australia.

Senator McKIERNAN—In the event of that class action going to judgment and costs being awarded against the persons who initiated the class action, would they still be liable for the costs if they were included in the class action, even without their knowledge?

Ms Mortimer—I would have to take that one on notice. I am not sure about how the costs rules operate in relation to the class actions for people that have not opted in or are not actively participating. If it is acceptable to the committee, I would like to answer that in writing.

CHAIR—Thank you. Do we have any international obligation, through our international treaties, to provide access to the courts through class action?

Ms Mortimer—The international obligations are expressed in the sense of access to justice, to the courts. In our submission, what is comprehended by that is access that is reasonable and practicable. It could not possibly be compliance with Australia's international obligations to say, for example, that every unlawful noncitizen can have unlimited access to our courts if they pay $1 million. That would not be a compliance, because it is not reasonable and it is not achievable. Inherent in any of these kinds of international obligations is the notion that the access is real. If the case is that for a number of reasons—the kinds of things that we have been discussing—the access to courts is not real, not achievable and practicable, then there may be a real question about how far that goes to complying with our international obligations.

CHAIR—Why then do you think the UNHCR has not objected to the attempt to cut out class actions?

Mr Rodan—I do not know if they haven't. Have you a note?

CHAIR—No. We have no objection from the UNHCR.

Mr Rodan—But have you got any submissions from them?

Senator McKIERNAN—They appeared yesterday in Sydney.

Mr Rodan—Article 16 of the refugee convention says that a refugee shall have free access to the courts, and that does not mean free access except with little judicial review and no class-action and no representative actions. It means free access to the courts.

CHAIR—So it is a matter of definition, of how you define that access.

Mr Rodan—Article 16 of the ICCPR says that all persons shall be equal before the courts.

Ms Mortimer—I would say one thing about that that I think is important in the discussion of class actions. Class actions in the migration area, in my experience, occur less for refugees. The protection visa application process does not lend itself to class actions nearly as well, because it demands individual consideration of each case. A lot of the class actions have to do with other visa categories, and often with policy decisions to implement time limits: 'Everyone who arrived before X date can stay, and those that did not cannot.' That is de Silva and Macabenta. They are challenges to other kinds of visas apart from protection visas.

Mr Rodan—And Fazal Din and Capistrano.

Ms Mortimer—Yes. That may well explain why UNHCR has not had that kind of concern—because a lot of refugee actions do not lend themselves to the class-action. They are often concerned with other kinds of visas.

CHAIR—Just to clarify it, they have not indicated that they think it is against our obligations, but they welcome that people should have that opportunity.

Senator McKIERNAN—On the 28-day period for which application can be made to the High Court, it has been suggested that if the court were given the power to extend the leave provision, it might alleviate some of the concerns about restriction of application. How would the Law Council feel about the insertion of giving the High Court the ability to extend that 28-day period—if indeed the 28-day period was not passed?

Ms Mortimer—It is a preferable proposition. That is, as a matter of law, it has got to reduce the strength of a constitutional challenge to that provision if the court were given a discretion to extend time.

Senator McKIERNAN—Would the Law Council's view be that there would be likely to be a constitutional challenge if the bill were carried in its current form?

Ms Mortimer—Likely to be a constitutional challenge?

Mr Rodan—It is a possibility.

Senator McKIERNAN—A possibility, as opposed to a likelihood.

Mr Rodan—Those are things which we would have to look at more seriously later on.

Ms Mortimer—I would have thought that legislation which curbs the jurisdiction of the High Court would be more likely than not to be challenged. In all aspects of litigation, that would be borne out by experience. Anything that curbs the jurisdiction of the High Court is likely to be challenged.

Senator McKIERNAN—One final question on the curbs. I have sat here on this side of the table on a number of committees, supporting legislation to curb the intrusions of the judicial system into the migration area. I remember the concerns expressed by the then minister way back in 1992 when there were 200 cases before the courts and this was an outrageous number. It

blew out to 400 by the time the MR Act was passed in 1994, and we have since had a number of other bills which have further restricted it.. But even with all that legislation that has been passed by the parliament by different governments, we now find some 1,400 actions before the courts. I am feeling somewhat of a failure in my actions to the aid to support a curb on the actions into the court. I am now dealing with yet another bill to curb the actions into the court. I am wondering—in my own mind, I have not yet formulated a final view—whether it would be better to move the migration area of law directly into the courts and remove it altogether from the administrative areas, disband the AAT, the IRT and the RRT, and let the judges do it all. Has the Law Council a view? Would we be better with just a straight judicial system in the migration area, including refugees?

Mr Rodan—We have not got an actual view as council members but I can say that, when the ADJR Act came into operation in 1977, the only process available for review was judicial review but they had a much more sympathetic act at that time. In 1984 or 1983 they changed the act to put in section 6A, which gave an opportunity for people onshore to apply on strong compassionate and humanitarian grounds, on the grounds of marriage, on asylum grounds and on a few other grounds. That was Mr McPhee's amendment when he was the immigration minister.

At that time, there were grants given to people on humanitarian grounds which are no longer available through the departmental level. The only way you can get humanitarian grounds is by going through the system of applying to a delegate, applying to the tribunal then going to the minister. It is the same for compassionate grounds, and it is a long and costly process. It worked then because the Migration Act was probably much more liberal in a way, because there were not so many criteria. It was not codified, but now it is codified and codification has brought its own restrictions. It has brought its own benefits, but it has brought its own restrictions. It has brought tribunals in and so forth to govern merits review.

That is a very difficult question. The problem is that merits review is very good if it is transparent. What people are saying about the Refugee Review Tribunal is that it is not so transparent, because it is a 96.3 per cent refusal rate at the tribunal level. You will find that there are not as many applications to court for appeal in migration review tribunal matters, because their refusal rate is much less, sometimes down to about 60 to 65 per cent. People are asking why they have been refused when they have got a humane case—a case which has humanitarian issues about it. They are confused. They are not refugees probably, but they go to court by themselves, unrepresented, or they go to a lawyer and the lawyer says, 'You can't win on this case. You can't get it remitted because you haven't got refugee claims.'

It is a very, very difficult question. Another issue of transparency is the short-term appointment of tribunal members. One member, Mr Haigh, was recently not reappointed because he criticised the government on the effort the government made between April and July in East Timor. He was one member out of 25 and the others were reappointed. So you have the problem that, if anyone does not do what the department or the minister wants them to do, they are not reappointed. That has happened on a number of other occasions, it does not matter which minister it is, and we are all aware of it. If there was absolute transparency in the merits review system, then judicial review would not be used so much but it would have to be available for supervision of the decisions made by the merits review tribunals.

That does not answer your question, but at least it shows you that there are numerous problems of transparency, and there are numerous problems about the issues of humanitarian and compassionate needs of migrants which are not really addressed properly.

CHAIR—Thank you for your attendance here today. If there are any matters on which we need additional information, we will get back to you, but you are going to give us some additional information. You will be sent a copy of the *Hansard* transcript of the evidence. If you think they have miswritten what you have said, please feel free to make editorial corrections.

Resolved (on motion by **Senator McKiernan**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.31 p.m.