CHAPTER 6

JUDICIAL OVERSIGHT OF ADMINISTRATIVE DECISIONS

Introduction

6.1 Term of reference (e) of this Inquiry requires the Committee to consider:

> The importance of maintaining full judicial oversight of any administrative process that directly affects Australia's compliance with its international legal obligations.

6.2 This Chapter details the degree of judicial review that is currently available to asylum seekers and considers Australia's compliance with international legal obligations with regard to the level of judicial oversight available to asylum seekers. The main issues to be addressed in this Chapter are concerns expressed to the Committee about limited judicial review available to asylum seekers to oversee the existing administrative review process. Government proposals to further limit access to judicial review of refugee and migration matters are also examined.

The current provisions for judicial oversight of the refugee determination under the Migration Act 1958

6.3 Judicial oversight of the refugee determination process occurs when the Federal Court and the High Court of Australia are accessed by asylum seekers through appeals from review decisions made by the RRT. The role of the RRT, which is explored in detail at Chapter 5, is to provide review on the merits of refugee status decisions made by DIMA. The Tribunal is not empowered to determine issues of law. The courts examine a decision from the RRT to discern whether it is legally flawed. At present, judicial review may be undertaken when:

- Either party, the Minister or the person subject to the decision, appeals the RRT decision to the Federal Court of Australia, which has the defined capacity to exercise judicial review of a decision of the RRT under Part 8 of the *Migration Act 1958*;[1]
- Either party, if unsuccessful in the Federal Court, appeals to the High Court under section 73 of the Constitution to access a higher level of judicial review; or
- Either party appeals to the High Court of Australia under its original jurisdiction in section 75 of the Australian Constitution.

6.4 When the applicant receives notice of an RRT decision affirming the DIMA delegate's decision to refuse a protection visa, an application for judicial review of the

---

1 *Migration Act 1958* (C'th), Part 8 is reproduced at Appendix 4 of this Report

legality of the RRT decision must be lodged with the Registry of the Federal Court within 28 days of the notification of the decision.[2] There is no opportunity to seek an extension of that time, even if there are exceptional circumstances.[3] If an applicant has missed the opportunity for review of a Tribunal decision in the Federal Court, judicial review may still be sought directly in the High Court.

6.5 If the Federal Court finds an error of law, the Court may make an order:

- affirming, quashing or setting aside the decision, or a part of the decision;
- referring the matter to the decision-maker for further consideration;
- declaring the rights of the parties; or
- directing the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from doing, of which the Federal Court considers necessary to do justice between parties.[4]

6.6 A further avenue for judicial review of a decision on refugee status is in the High Court. No special leave of the High Court is required in relation to the appeals made pursuant to the original jurisdiction of the High Court. Under s75(v) of the Constitution, the High Court has original jurisdiction with respect to decisions made under the Act "in which a writ of mandamus or prohibition…is sought against an officer of the Commonwealth."[5]

Compliance with international legal obligations

6.7 Australia's international obligations to asylum seekers have been discussed at length in Chapter 2 of this Report. It is noted here that there is specific reference in some of the international instruments to review of refugee determinations in the courts.

6.8 Article 16 of the Convention on Refugees (reiterated in the Convention Relating to the Status of Stateless Persons, Article 16) frames this requirement in the following terms:

---

2 *Migration Act 1958* (C'th), s478

3 See *Migration Act 1958* (C'th), s478(2)

4 *Migration Act 1958* (C'th), s481

5 Prerogative relief is available by way of mandamus or prohibition. Mandamus compels the performance of an unfulfilled public duty at the instance of a person having a sufficient interest. Prohibition stops the decision-maker from proceeding towards, taking or implementing an illegal decision (Colin D Campbell, 'An Examination of the Provisions of the *Migration Legislation Amendment Bill (No 4) 1997* Purporting to Limit Judicial Review', *Australian Journal of Administrative Law*, Vol 5(3), 1998, p. 135 at 139). Campbell noted that mandamus and prohibition will, in defined circumstances, be available against the Minister and his delegates, and members of the Refugee Review Tribunal, in relation to decisions made under the *Migration Act 1958* (C'th)

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

6.9 However, the international legal instruments do not provide detailed administrative prescriptions for the form of judicial oversight of refugee determination to be implemented in any sovereign nation. These international instruments have chosen to phrase the provision of review in a less precise way. They are constructed to ensure that the State parties provide effective avenues for a person to seek a remedy from a 'competent authority' for review and judicial oversight of issues concerning their legal rights.[6]

6.10 In a submission to the Inquiry, the United Nations High Commission for Refugees (UNHCR) notes that the Executive Committee of the UNHCR "has provided guidance for States concerning the procedural guarantees to be observed in assessing and adjudicating refugee claims".[7] The Commission explained:

> UNHRC's general position is that asylum claims should be examined by a fully qualified and competent authority and an independent review/appeal process should be provided to review negative decisions, with suspensive effect. According to Conclusion No 8 (XXVIII) of the Executive Committee, the review authority may be administrative or judicial, according to the Contracting State's prevailing system.[8]

6.11 In this context, DIMA submitted that "[t]he Australian refugee determination system is recognised as a highly developed one" and that the regional office of the UNHCR has commented that:

> …the Australian RSD [refugee status determination] system, as presently constituted, is a high quality one which reflects a strong commitment to Australia's international obligations relating to refugee protection. The present system currently offers a RSD process which provides a fair and effective first instance and appeal procedure ... (and) …is widely held to be a model structure for the determination of refugee status applications.[9]

6.12 The UNHCR also acknowledged that:

> …Australia's system is in compliance with the provisions of Executive Committee Conclusion No. 8 (XXVIII), which simply require access to appellate procedures in the event of a negative decision at the first instance.

---

6 See the *International Covenant on Civil and Political Rights (1996),* A2 and A14.1; and the *Universal Declaration of Human Rights (1948)* A8

7 *Submission No. 83,* United Nations High Commissioner for Refugees, p. 1439

8 *Submission No. 83,* United Nations High Commissioner for Refugees, p. 1439

9 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 825; and *Submission No. 18,* United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Committee, Inquiry into the *Migration Legislation Amendment Bill (No 5) 1997*, October 1997. See also *Submission No. 83* to this inquiry. United Nations High Commissioner for Refugees, p. 1433

> Neither judicial review nor recourse to ministerial discretion are strictly required by the Executive Committee Conclusions, and the Convention is silent on this point.[10]

6.13 However, during the course of the inquiry,[11] the Committee received critical comment about the inadequate provision of judicial oversight of refugee determination in Australia.[12] Concern was expressed over the restricted scope for judicial review and the possibility of over-reliance on the RRT and the Minister's discretionary power under s417.[13]

Background to the current provisions for judicial oversight of refugee determination

6.14 The substantial growth in the number of applications for judicial review, the time taken to address appeals, and the cost of the administrative process dealing with review have been the concern of government over a number of years. A brief analysis of figures reflecting the number of cases seeking review, since the establishment of the RRT in 1993, is provided at Appendix 5.

6.15 Part 8 of the *Migration Act* was enacted by the *Migration Reform Act 1992*, in an attempt to limit the number of appeals to the Federal Court.[14] The *Migration Reform Act* introduced:

> …a detailed statutory code of procedures for most primary decisions, setting minimum standards for dealing with visa applications;
>
> Replacement of the judicial review scheme under the *Administrative Decisions (Judicial Review) Act 1977* as well as s 39B of the *Judiciary Act* with a *Migration Act* specific judicial review scheme, which removed certain grounds of review, such as the grounds of natural justice and unreasonableness; and
>
> The extension of merits review to many decisions previously not covered by merits review – most significantly, the creation of the Refugee Review Tribunal (RRT) to provide merits of refugee determinations.[15]

---

10 *Submission No. 83,* United Nations High Commissioner for Refugees, pp. 1433-1434

11 These concerns were also expressed in submissions and evidence to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999

12 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 531

13 *Submission No. 63,* National Legal Aid, pp. 737-738

14 For a more detailed discussion of this issue see the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, p. 6

15 The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP, 'Narrowing the Judicial Review in the Migration Context', *AIAL Forum,* No 15, (December 1997), p. 15

The emerging roles of the RRT and the Federal Court in the review process

6.16 The role and function of the RRT is discussed at length elsewhere in this Report.[16] However, the impact of the introduction of the RRT under the *Migration Reform Act 1992*, into the review process of refugee determination, and the relationship of its role to the Federal Court and the High Court, are important to an understanding of judicial oversight available to applicants in compliance with Australia's international legal obligations.

6.17 When establishing the RRT the then Government decided that an inquisitorial model of decision-making in the review process would have more advantages than the adversarial model that is commonly used in the judicial system. The RRT, in their submission to the Inquiry, stated:

> The fact that the RRT operates inquisitorially means that it can reach decisions quickly, and it can act according to substantial justice and the merits of the case.[17]

6.18 The RRT pointed out that, under the Tribunal's processes:

- Impecunious applicants are not disadvantaged.
- Applicants are not subject to formal time consuming procedures, including cross-examination, and the inflexibility of the strict rules of evidence.
- The Tribunal must inform itself, investigate and inquire.
- The Tribunal is not dependent upon lawyers for the two parties to identify the issues and presenting the evidence.
- The hearing procedure is informal and therefore flexible.[18]

6.19 The Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock pointed out that:

> The most important feature of the reform insofar as it related to judicial review was the removal of the common law grounds [for judicial review] for challenging decisions, of breach of the rules of natural justice and unreasonableness.[19]

16 See Chapter 5 of this Report

17 *Submission No. 62*, Refugee Review Tribunal, p. 682

18 *Submission No. 62*, Refugee Review Tribunal, p 682

19 The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP, 'Narrowing the Judicial Review in the Migration Context', *AIAL Forum*, No 15 (December 1997), pp. 15-16

6.20 It follows that natural justice has been replaced with the ground that procedures required by the Act have not been followed.[20]

6.21 It is noted that "[i]n principle, judicial review of administrative decisions is limited to declaring and enforcing the rule of law".[21] In practice it can be difficult for a reviewing Court to draw an absolute distinction between the merits and the legality of a particular decision. The view has been expressed that the courts, on occasion, may have taken an inappropriate role in the decision-making process, by intruding into what is the proper role of the administrative decision-makers.[22]

6.22 Mr John McMillan, Reader in Law at the Australian National University, in a submission to the Inquiry, added his support to this view:

> It is my opinion that the approach of the Court has been inappropriate, to the point of usurping the merit review role of the immigration tribunals.[23]

6.23 In McMillan's view "many recent decisions of the Federal Court can properly be criticised as little more than a disagreement by the Court with the fact-finding role of the RRT".[24] McMillan expanded on this point during evidence:

> Quite strikingly, in most of the decisions that have gone to the High Court in this area, the High Court has ruled 7-0 that there has been overzealous review of the immigration and refugee review tribunals. It is quite rare for the High Court to rule 7-0 on administrative law issues, and the fact that it has ruled 7-0 in cases like *Wu*, *Guo* and in the relevant aspects of *Eshetu* is telling.[25]

---

20 The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock explained: "The prescribed procedures contained in sections 44 and 140 of the *Migration Act* now set out the procedural standards for the grant and refusal of visas, consideration of an application for a visa and cancellation of a visa" (The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP, 'Narrowing the Judicial Review in the Migration Context', *AIAL Forum*, No 15 (December 1997), p. 16). The Full Federal Court in *Ozmanian v Minister for Immigration and Ethnic Affairs* ((1996) 141 ALR 293) was unanimous in its finding that Part 8 of the *Migration Act 1958* (C'th) was intended to exclude review under the *AD(JR) Act 1977* and to preclude review on grounds of denial of natural justice

21 Australian Government Solicitor, 'Judicial Review of Administrative Decisions', *Legal Briefing*, No 42 (27 August 1998), p. 1

22 The Committee noted the comment by the Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock, accusing some members of the bench of judicial activism when he claimed that: "…the Federal Court appears to be finding the means to incorporate common law grounds of review back into decisions of the Tribunals" (The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP, 'Narrowing the Judicial Review in the Migration Context', *AIAL Forum*, No 15 (December 1997), p. 17). "This is despite the clear intentions of the Act" (p. 17). The Minister detailed instances in which the courts used the term 'substantial justice' to read into the legislation various common law notions of procedural fairness (pp. 17-18)

23 *Submission No. 55*, Mr John McMillan, p. 568

24 *Submission No 55*, Mr John McMillan, p. 569

25 *Transcript of evidence*, Mr John McMillan, p. 252

6.24 In his submission, McMillan traced how, over the last decade, the Federal Court used a variety of interpretative methods to overturn immigration decision-making, noting that as each method was closed by legislation, another means was found.[26] McMillan concluded that:

> …firstly, it is simplistic and misleading to use the high rate of appeals and the number of court reversals as any kind of barometer of the quality of decision-making in the Refugee Tribunal. Secondly, …there are problems with judicial oversight. Thirdly, …the preferable way to proceed in this area is to rely less upon judicial oversight and judicial intervention and to rely more upon the augmentation and development of the system for administrative review.[27]

6.25 McMillan added that problems with judicial oversight arise because of "the delays that arise in immigration determination and enforcement by the high number of appeals" and that Federal Court judicial oversight has "usurped the merit review role of the immigration tribunals".[28] He noted that "there have been a number of Full Federal Court judgements where the Full Federal Court has confirmed that there has been intrusion at the trial level by the Federal Court judges into the merits of refugee decision-making".[29]

6.26 Further critical comment on the scope of judicial review in the Federal Court, in relation to decision-making in cases concerning refugee status, has been expressed in a number of leading cases.

6.27 In *Chan's* case the High Court found that the definition of what constituted a well-founded fear of persecution would be satisfied, provided there was a real chance of persecution - the 'real chance' test.[30] The High Court found that there did not need to be a 50 percent or greater probability of persecution to constitute a well-founded fear, merely a 'real' chance – without any specific level of probability being required.

6.28 By introducing the real chance test, the High Court limited the possibility, in relation to any individual appeal, for the Federal Court to put the wrong weight on some information about past events in a case and thereby ignore that information. For example, the Federal Court argued that there had been an error of law in *Wu Shan Liang.*[31] The High Court disagreed with this decision and supported the RRT's decision on the basis that the Federal Court had not applied the real chance test. The

---

26 *Submission No. 55*, Mr John McMillan, p. 568

27 *Transcript of evidence*, Mr John McMillan, p. 251-2

28 *Transcript of evidence*, Mr John McMillan, p. 252

29 *Transcript of evidence*, Mr John McMillan, p. 252

30 *Chan v Minister for Immigration and Ethnic Affairs* ((1989) 169 CLR 379), referred to in Australian Government Solicitor, 'Judicial Review of Administrative Decisions', *Legal Briefing*, No 42 (27 August 1998), p. 2

31 *Wu Shan Liang* ((1996) 185 CLR 259), referred to in Australian Government Solicitor, 'Judicial Review of Administrative Decisions', *Legal Briefing*, No 42 (27 August 1998), p. 2

High Court decided that the Federal Court had exceeded the proper limits of judicial review. A majority of judges said:

> [T]he reasons of an administrative decision-maker [for making a decision] are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[32]

6.29 However, Kirby J added:

> [T]he reasons of a decision-maker will usually provide the only insight into the considerations which were, or were not, taken into account in reaching the decision…It is therefore legitimate for the person affected, who challenges those reasons, to analyse both their language and structure to derive from them the suggestion that a legally erroneous approach has been adopted or erroneous considerations taken into account or a conclusion reached which is wholly unreasonable in the requisite sense.[33]

6.30 The High Court subsequently struck down the decisions in the Full Federal Court in *Minister for Immigration and Ethnic Affairs v Guo*.[34] The High Court held that the RRT had not made an error of law and criticised the Full Federal Court for:

> …trespass[ing] into the forbidden field of review on the merits.[35]

6.31 The High Court decision in *Eshetu*[36] clarified the scope of the current grounds of judicial review available under the *Migration Act*.[37] Under the *Migration Reform Act*, s420 was intended to remove RRT and judicial attention from 'processes' to ensure that the RRT focused on the merits of the case, allowing the applicant to tell his or her story.[38] The case concerned the finding of the Federal Court that the direction in s420 of the Act, that the RRT "must act according to substantial justice", imposed an obligation on the RRT to comply with legal standards.[39] The High Court

---

32 *Wu Shan Liang* ((1996) 185 CLR 259 at 272), referred to in Australian Government Solicitor, 'Judicial Review of Administrative Decisions", *Legal Briefing*, No 42 (27 August 1998), p. 4

33 *Wu Shan Liang* ((1996) 185 CLR 259 at 291), referred to in Australian Government Solicitor, "Judicial Review of Administrative Decisions', *Legal Briefing*, No 42 (27 August 1998), p. 4

34 *Minister for Immigration and Multicultural Affairs v Guo* ((1997) 191 CLR 559), referred to in John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22 (September 1999), p. 1 at pp. 2-3

35 *Minister for Immigration and Multicultural Affairs v Gu*o (1997) 191 CLR 559 at 574

36 *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] 162 ALR 577

37 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 836

38 The Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP, 'Narrowing the Judicial Review in the Migration Context', *AIAL Forum*, No 15 (December 1997), p. 17

39 *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] 162 ALR 577, referred to in John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22 (September 1999), p. 3

found that to interpret s420 of the *Migration Act* in this way was to ignore the clear intention of the Act, and that:

> What emerged was nothing more than a number of reasons for disagreeing with the Tribunal's view of the merits of the case. The merits were for the Tribunal to determine, not for the Federal Court.[40]

6.32 McMillan noted that the criticisms levelled by the High Court about inappropriate merit review by the Federal Court have also been acknowledged by the Full Federal Court itself.[41] He points out that "[i]n 1999 alone the Full Federal Court reiterated that message on at least five occasions".[42]

6.33 As a result of these developments in the case law, the role of the RRT and the administrative review process appear to have been strengthened. In contrast, the role of the Federal Court in providing judicial oversight has been challenged, in respect of over-zealous scrutiny of the reasons for a RRT decision.

6.34 The Committee received a number of submissions which did not want to see the substitution of an administrative procedure for judicial oversight.[43] The LCA pointed out that the RRT remains characterised as:

> …a quasi-inquisitorial body with sweeping powers to set the parameters of any appeal. It can determine whom it hears and in respect of what matters: s 426. The only proviso is that it must grant an oral hearing where a favourable determination of a case cannot be made on the papers: ss 424 and 425. Applicants have no right to be represented, although they may obtain the assistance of an interpreter: s 427(6) and (7).[44]

6.35 The role undertaken by the Courts in the provision of injunctions against 'turnarounds' is also important in the context of access to judicial oversight.[45] One submission expressed a belief, based on experience of his firm, that detainees should

---

40 *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] 162 ALR 577 at para 56, referred to in John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22 (September 1999), p. 1 at 3

41 John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22 (September 1999), p. 1 at 3

42 John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22 (September 1999), p. 1 at 3. See *Minister for Immigration and Multicultural Affairs v Rajalingham* [1999] FCA 719; *Minister for Immigration and Multicultural Affairs v Bethkoshabeh* [1999] FCA 980 at paras 11 and 13; *MIMA v SRT* [1999] FCA 1197 at para 57; *Minister for Immigration and Multicultural Affairs v Cho* (1999) 164 ALR 339 at para 49*;* and *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 160 ALR 543

43 *Submission No. 50,* Human Rights & Equal Opportunity Commission, p. 531; *Submission No. 58*, Australian Catholic Migrant & Refugee Office, ACT, pp. 586-587; *Submission No. 60*, Ethnic Communities Council of NSW Inc, p. 604; and *Submission No. 63*, National Legal Aid, p. 738

44 *Submission No. 73,* Law Council of Australia, p. 1084

45 See also Chapter 10 of this Report

have the time and opportunity to apply to the Federal Court for an injunction when appropriate.[46]

6.36 However, in spite of recent administrative developments in favour of merits review in the refugee determination process, the courts have taken the opportunity to reaffirm their role of offering an avenue for judicial oversight of decisions in exceptional cases. The recent High Court decision in *Chen Shi Hai* is a case in point.[47]

Ministerial Discretion

6.37 Ministerial discretion under s417 of the *Migration Act* provides applicants for refugee status with the opportunity to request reconsideration of decisions made under the refugee determination process. Chapter 8 of this Report has examined this provision in detail, but it is also useful to consider the Ministerial discretion in this Chapter as it offers a further avenue to request reconsideration of a decision following the RRT process. It is also noted that s417 provides the only opportunity for further consideration of a case, and intervention in the decision-making process, available on humanitarian, or any other grounds for asylum seekers.

6.38 The non-reviewable and non-compellable nature of this discretion is crucial in the context of any debate on judicial review.[48] The Full Federal Court has found that the Minister has no duty to exercise his discretion under s417 and that the provision contains three separate decisions:

- to exercise the discretion;
- not to exercise the discretion; and
- not to consider whether to consider exercising the discretion.[49]

6.39 Submissions to the Inquiry were critical of the fact that there are no mechanisms to provide for review of decisions made under s 417, other than the obligation that the Minister must report to Parliament with reasons for exercising his

---

46 *Submission No. 30A,* McDonells Solicitors, p. 1241. The author, Mr Hense, cited a case which he claims raises serious concerns about certain practices of the Department of Immigration and Multicultural Affairs. His practice was called upon to obtain an injunction from the Federal Court to allow a detainee to remain in Australia to lodge an application for refugee status. The injunction was granted, but the Department of Immigration and Multicultural Affairs officials at the airport chose to ignore the intervention of legal aid and put the detainee on a flight from Australia before receipt of the outcome of the application for an injunction

47 *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* [2000] HCA 19 (13 April 2000) (http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html)

48 See Appendix 7 of this Report

49 *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417; *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103; *Minister for Immigration, Local Government and Ethnic Affairs v Ozmanian* (1996) 141 ALR 322; and *Bedlington v Chong* (1998) 157 ALR 436, referred to in *Submission No. 69H,* Department of Immigration and Multicultural Affairs, Attachment B, p. 1965

discretion to overturn a RRT decision.[50] The Minister is not required to report to Parliament when he chooses not to intervene in the decision-making process or not to overturn the decision of the RRT. The Law Council of Australia points out that:

> Technically, the High Court can review this discretion under s 75(v) of the Constitution; however, practically this review is ineffective. The fact that the Minister is only obligated to give reasons when he or she substitutes a more favourable decision under s 417(4) makes it difficult to criticise his or her reasoning.[51]

6.40 As discussed elsewhere in this report,[52] the discretionary power under s417 is relied upon as the 'safety net' for persons seeking review of their status on humanitarian grounds, under CAT, CROC, and the ICCPR. It is noted that the very nature of the s417 review establishes a process in which this special class of applicant relies on a review in which the decision-making is characterised by being both non-compellable and non-reviewable. This is the essence of the ministerial discretion provided under s417.

Concern to meet the requirements of international legal obligations for judicial oversight of refugee determination

6.41 All parties in the review process of refugee determination are concerned about the costs of either operating or engaging in the system of review presently in place. Special cases for review should be eligible for judicial oversight.

Cost and time taken to provide the current appeal process

6.42 According to DIMA, judicial oversight involving litigation in the courts is a resource-intensive review process.[53] This is driven by an increasing number of appeals, litigants and flow-on rates.[54]

6.43 Concern over the cost of appeals is experienced by both DIMA and the applicant. Administrative processes which end up with court proceedings are, by their very nature, more expensive in time and resources. Similarly, for individual applicants

---

50 For example see *Submission No. 73,* Law Council of Australia, p. 1078; and *Submission No. 40,* Legal Aid Western Australia, p. 371

51 *Submission No. 73,* Law Council of Australia, p. 1078

52 See Chapters 2 and 8

53 Litigation costs for Department of Immigration and Multicultural Affairs in the years 1995 to 1998 amounted to $7,352,000 in 1995/6; $6,188,000 in 1996/7; and $9,470,486 in 1997/8 (Department of Immigration and Multicultural Affairs, *Litigation Involving Migration Decisions*, Fact Sheet 86, 28 August 1998, p. 3, reprinted with *Submission No. 60,* Ethnic Communities Council of New South Wales Inc, p. 618)

54 As the numbers of migration matters filed in the Federal Court over the past six years have steadily increased, migration cases are now a significant proportion of the Court's total administrative law caseload; from just 28% 10 years ago to 67% in 1997/98 (Australian Law Reform Commission, *Managing Justice: A review of the federal civil system*, Report No 89, 2000, AGPS, p. 493). See also Appendix 5 to this Report

in search of a review of an RRT decision, the cost of gaining access to the courts can be prohibitive unless the associated costs of representation and support is available.

6.44 Provision of legal aid to contribute towards costs of impecunious applicants is addressed in Chapter 3 of this Inquiry. Under current Commonwealth Legal Aid Guidelines, there is no legal aid for judicial review of migration matters except in exceptional cases, where:

> (a) there is difference of judicial opinion not settled by the Full Federal Court or the High Court; or
>
> (b) the proceedings seek to challenge the lawfulness of the person being in detention.[55]

6.45 The effective removal of legal aid by the Government for judicial review of RRT decisions by the Federal Court and High Court, has been condemned by Amnesty International. They referred to the links between legal aid and international obligations:

> …this action would risk Australia breaching the fundamental principle of non-refoulement, as outlined in several international treaties to which Australia is a party.[56]

6.46 However, the lack of legal aid does not appear to have significantly reduced numbers of applications to the Federal Court for judicial review of an RRT decision. Rather, asylum-seekers are representing themselves in the Federal Court.[57] As a result, Karp argued that virtual abolition of legal aid at the Commonwealth level is increasing the burden on the Federal Court and making people apply for review without adequate legal advice, "thereby clogging the court system with what are, in many cases, unmeritorious claims".[58]

6.47 The Law Council of Australia pointed out that growth in the number of litigants-in-person in the Federal Court was noted by Justice Madgwick[59] and that "[t]he Federal Court has commented upon unrepresented persons lodging applications for judicial review which are 'uninformative and bear little relationship to what the

---

55 *Submission No 73*, Law Council of Australia, p. 1069

56 Amnesty International, Press Release, 30 April 1998, referred to in *Submission No. 73*, Law Council of Australia, p. 1070

57 An Australian Law Reform Commission survey of Federal Court Cases found that 31% of sampled migration cases involved an unrepresented litigant (Australian Law Reform Commission, *Managing Justice: A review of the federal civil system*, Report No 89, 2000, AGPS, p. 493)

58 *Transcript of evidence*, McDonells Solicitors, p. 125

59 The Law Council of Australia cited two cases: *Lunardi v Minister for Immigration and Multicultural Affairs* (1998) 1091 FCA (27 August 1998); and *Kumula v Minister for Immigration and Multicultural Affairs* (1998) 613 FCA (18 May 1998), (*Submission No. 73*, Law Council of Australia, p. 1070)

applicant says at the hearing'".[60] Justice Wilcox has referred to the large number of inappropriate appeals which may reflect abuse of the appeal system:

> The number of applications filed in the New South Wales District Registry for judicial review of decisions of the Refugee Review Tribunal is running this year at a rate more than twice that of last year. It is the experience of my colleagues, as well as myself, that a large proportion of these matters are commenced by a stereotyped form of application that is uninformative and bears little relationship to what the applicant says at the hearing. It seems the filing of an application for review has become an almost routine reaction to the receipt of an adverse decision from the Tribunal.[61]

6.48 Justice Wilcox offered a solution to the problem:

> The solution is not to deny a right to judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated.[62]

Appeal to the High Court

6.49 Constraint on the grounds for review by the Federal Court, introduced in the *Migration Reform Act 1992*, has forced certain applicants to proceed to the High Court. A representative of the Law Council of Australia explained that, as a result of the decisions discussed above:

> …the judicial review of tribunal decisions in this area has become considerably constrained, so that now the Federal Court, in dealing with alleged bad decisions of the tribunal, has its hands tied to an incredible extent, so that the only thing that a refugee applicant who is faced with a bad decision of the Refugee Review Tribunal can do is to trouble the High Court.[63]

It follows that, if the scope of the Federal Court is further restricted, the High Court may face an increased workload of cases seeking judicial comment. However, access

---

60 *Submission No. 73*, Law Council of Australia, p. 1070

61 *Mbuaby Paulo Muaby v Minister for Immigration and Multicultural Affairs* [1998] 1093 FCA 20 August 1998, referred to in Australian Law Reform Commission, *Managing Justice: A review of the federal civil system*, Report No 89, 2000, AGPS, p. 494

62 *Mbuaby Paulo Muaby v Minister for Immigration and Multicultural Affairs* [1998] 1093 FCA 20 August 1998, referred to in Australian Law Reform Commission, *Managing Justice: A review of the federal civil system*, Report No 89, 2000, AGPS, p. 494

63 *Transcript of evidence*, Law Council of Australia, p. 171

to the High Court imposes high costs for both administration and applicants seeking judicial review.[64]

Individual applicants prolonging their stay

6.50 The Government has expressed concern that many individual applicants for judicial review were abusing the system by using the judicial process just to delay their departure and to secure more time in Australia.[65] DIMA also produced evidence to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998* to support the high withdrawal rate from proceedings lodged in the Federal Court prior to litigation. In the same Inquiry the RRT informed the Committee that:

> …of the 1165 cases in which the tribunal decision was upheld or not disturbed, 622 cases were withdrawn, amounting to a rate of 53%.[66]

6.51 In his submission, Mr McMillan supported the view that the current framework for review of immigration decision-making provides a stimulus to delay and abuse.[67]

6.52 However, the ALRC, in its submission to the earlier inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, pointed out that a high rate of withdrawals is the norm in all areas of litigation, and that the migration jurisdiction is in fact unusual in that so many cases go through to a hearing before the courts.[68]

6.53 The amount of time that could be gained from prolonging appeals to the courts was examined during the course of the earlier Senate Legal and Constitutional

---

64 Mr Leonard Karp noted that High Court applications are about four times more expensive for persons seeking review than Federal Court applications (*Transcript of evidence*, McDonells Solicitors, p. 125). A representative of the Law Council of Australia also pointed out that costs of High Court appeals are increased by the fact that an applicant has to fund two High Court hearings as part of the process. First, the applicant must place an application before a single judge. Second, if that judge finds that the threshold test of a *prima facie* case is reached, the case will be referred to the full bench of seven judges for consideration (*Transcript of evidence*, Law Council of Australia, p. 171). For further details of legal costs see Australian Law Reform Commission, *Managing Justice: A review of the federal civil system*, Report No 89, 2000, AGPS, Chapter 4, p. 255

65 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999, Paragraph 1.67. See also Appendix 5 of this Report

66 *Submission No. 18*, Refugee Review Tribunal, p. 1, to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999. See Paragraph 1.67 of that report

67 *Submission No. 55*, Mr John McMillan, p. 567

68 *Submission No. 14*, Australian Law Reform Commission, p. 7, to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999. See Paragraph 1.68 of that report

Legislation Committee Inquiry.[69] The Federal Court gave evidence that the Court disposes of 72.3% of migration cases within nine months. Commenting in evidence to the Committee on work undertaken the ALRC noted that:

> …as far as migration cases are concerned, that in the Federal Court, migration cases were among the shortest duration of any cases, but they were the cases that were most likely to go to a hearing. They were processed very efficiently …in the sense that they were almost all completed in under eight or nine months, but they were not cases that were clearly amenable to high settlement rate.
>
> …It was then the submission of the immigration department that cases were staying in the process just to secure time in Australia and then they were settling at the door of the court. We found on our analysis that very few cases in the Federal Court settle at the door of the Court. It is three per cent in total. Of all of the courts and agencies we looked at, it was clearly the most efficient in securing – if there is to be a settlement – an early settlement. We said that there is a withdrawal rate, but it is secured early in the process and not at the door of the Court.[70]

6.54 It would seem that the suggestion that individual applicants use the courts to gain time in Australia has some validity. Ordinarily an asylum seeker who failed to get a protection visa is required to leave Australia within 28 days of the negative RRT decision. However, should an asylum seeker have an application for review before the Courts, a bridging visa is normally issued to give the applicant lawful status in Australia whilst the review is in progress.[71]

6.55 It was also noted that many of the cases taken to appeal resulted from DIMA seeking to overturn positive findings of RRT cases.[72]

Further Government proposals to restrict judicial review under the *Migration Act 1958*

6.56 Government concern expressed above[73] has brought about the introduction in Parliament of two Bills to amend the *Migration Act.* If implemented, this legislation would have a further and significant impact on the availability of judicial oversight of refugee and humanitarian determinations.

---

69 *Submission No. 17*, Federal Court of Australia, to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, see Paragaph 1.70

70 *Transcript of evidence*, Australian Law Reform Commission, p. 510

71 This issue is being addressed in the context of the current Inquiry of the Joint Standing Committee of Migration on the *Migration Legislation Amendment Bill (No2) 2000* discussed below at Paragraphs 6.62 to 6.64

72 *Submission No 58A*, Australian Catholic Migrant and Refugee Office, p. 672

73 See above, Paragraphs 6.42 to 6.48

Migration Legislation Amendment (Judicial Review) Bill 1998 [2000]

The first of these measures is the *Migration Legislation Amendment (Judicial Review) Bill 1998 [2000]* (the Judicial Review Bill) which is at present before the Senate. Parliament remains divided on the Bill.

6.57 The legislation provides for the introduction to the *Migration Act* of a privative clause, a statutory provision which purports to limit, or completely exclude, judicial review of administrative action.[74] The Judicial Review Bill would restrict the Federal Court so that only those decisions for which there was no avenue of merits review could be brought to that Court. Challenges to most negative decisions would therefore have to be brought directly in the High Court under its original jurisdiction.[75]

6.58 The Minister explained in the Second Reading Speech that the Judicial Review Bill:

- Seeks to prevent the High Court from remitting matters back to the Federal Court [s 476(4)];
- Imposes strict time limits for applications for judicial review [s477];
- Enables decisions by the Department to have continuing legal effect, notwithstanding an application for judicial review [s481]; [and]
- Strengthens the unreviewability of the Minister's public interest powers [s476(2)].[76]

6.59 DIMA maintained that:

> The Government sought and obtained legal advice from experts in international law at the Attorney-General's Department that the Judicial Review Bill is consistent with Australia's international obligations.[77]

---

74 Dr Margaret Allars, *Introduction to Australian Administrative Law*, Butterworths, 1990, para 5.139. Mr Campbell explains that "such a clause is construed by reference to the presumption that the legislature does not intend to deprive the citizen of access to courts, other than to the extent expressly stated or necessarily to be implied (*Darling Casino Ltd v NSW Casino Control Authority* (1997) 71 ALJR 540 at 555), and consequently is 'read as narrowly as possible' (Colin D Campbell, 'An Examination of the Provisions of the Migration Legislation Amendment Bill (No 4) 1997 Purporting to Limit Judicial Review', *Australian Journal of Administrative Law*, Vol 5(3), 1998, p. 139, and Footnote 23)

75 Mr Campbell submitted that the migration privative clause provisions, in relation to the jurisdiction of the High Court: "would be interpreted in accordance with the *Hickman* principle [(1945) 70 CLR 598)] with the consequence that if the *Hickman* provisos were satisfied, the jurisdiction of the court would be more difficult to invoke than it would otherwise be" (Colin D Campbell, "An Examination of the Provisions of the Migration Legislation Amendment Bill (No 4) 1997 Purporting to Limit Judicial Review", *Australian Journal of Administrative Law*, Vol 5(3), 1998, p. 135 at 147)

76 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999, referred to at p. 3

77 *Submission No. 23*, Department of Immigration and Multicultural Affairs (Attachment A, Part 2, p. 5) to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999, see Paragraph 2.69

6.60 The Department also drew attention to the advice provided by Dr Rosalie Balkin of the Office of International Law:

> …the privative clause did not breach Australia's international obligations and contentions that it did so cannot be sustained.[78]

6.61 In April 1999 the Senate Legal and Constitutional Legislation Committee tabled a report undertaken by the Committee into the proposed Bill. The Bill remains on the Senate notice paper awaiting debate.

Migration Legislation Amendment Bill (No2) 2000

6.62 In March 2000 a further Bill was introduced to Parliament to amend the *Migration Act*, the *Migration Legislation Amendment Bill (No2) 2000*.

6.63 DIMA claimed that this legislation would complement the Judicial Review Bill discussed above, and also give effect to the Government's policy of restricting judicial review in refugee determination matters in all but exceptional circumstances.[79] The legislative amendment is intended to prohibit class actions in migration litigation and limit those persons who may commence and continue proceedings in the courts. The *Migration Legislation Amendment Bill (No2) 2000* will therefore further limit the avenues for review in the Federal Court and introduce a strict 28 day limit for original applications to the High Court in migration matters.

6.64 The Bill was referred to the Joint Standing Committee of Migration for Inquiry. The Committee is expected to report on the results of its Inquiry by the end of 2000.

Commentary on the proposed legislation

6.65 A number of submissions and evidence provided to the current inquiry drew attention to the importance of their submissions to the earlier inquiry into the Judicial Review Bill.[80] Many of the people who presented these submissions have expressed similar concerns to the Inquiry being undertaken by the Joint Standing Committee of Migration. In general these commentators were critical of the Government actions and suggested that Australia's international legal obligations were deserving of greater attention in the debate.

6.66 Claims were made that the judiciary has an important role to play in the clarification of legal concepts and principles and in setting standards for the fair

---

78 *Submission No. 23,* Department of Immigration and Multicultural Affairs (Attachment A, Part 2, p. 5) to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998,* April 1999. See Paragraph 2.70 of that report

79 *Transcript of evidence,* Department of Immigration and Multicultural Affairs, p. 2, to the Joint Committee on Migration, Inquiry into the *Migration Legislation Amendment Bill (No 2) 2000*

80 For example: *Submission No. 33,* Australian Council of Social Services, p. 229; *Submission No. 50,* Amnesty International, p. 511; and *Submission No. 60,* Ethnic Communities Council of NSW Inc, p. 604

processing of applications.[81] Judicial review can be seen as a mechanism, independent of administration, for checking or monitoring the decisions reached by administrative bodies.

6.67 The LCA also supported the above view and put forward a number of concerns:

> Judicial review fosters consistency of decisions and ensures correct interpretation of decisions.
>
> There is an ongoing need for legal interpretation of the *Migration Act*.
>
> The rights of applicants in tribunals are severely restricted, as there is no right to representation and no right to call witnesses or to cross-examine witnesses.
>
> The Migration tribunals are not truly independent of government.
>
> Judicial review fosters the true independence of tribunals and ensures the development of a narrow (rejection) mindset.[82]

6.68 A number of organisations argued that the Judicial Review Bill did not support the traditional role of the judiciary in supervising the conduct of the executive, an essential component of the rule of law and of the principle of separation of powers.[83] The LCA added that:

> …the judicial review of all migration decisions is essential to the maintenance of an administrative system based on the Rule of Law. In cases involving the determination of refugee status, the retention of judicial review is particularly important because of the human risks attached to the failure to identify genuine refugees.[84]

6.69 The Law Society of NSW argued that, because many members of the RRT are not legally trained, the guidance of the courts on the rule of law is of crucial importance. The Society felt that rights of applicants will be severely restricted if the right to representation, the right to call witnesses, or to undertake cross examination of witnesses are removed with the loss of judicial review.[85]

6.70 A number of submissions also emphasised the important role that the courts undertake in ensuring that the RRT maintains a consistent approach to decision-making, as well as providing the jurisprudence necessary for formal and binding

---

81 See for example *Submission No. 30*, McDonells Solicitors, p. 209; *Submission No. 31A*, Australian Law Reform Commission, p. 292; and *Submission No. 39, Mr John Young*, p. 360

82 *Submission No. 73*, Law Council of Australia, p. 1100

83 *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc, p. 634; and see also *Submission No. 35*, Mr Nick Poynder, p. 251; and *Submission No. 36*, Kingsford Legal Centre, p. 310

84 *Submission No. 73*, Law Council of Australia, p. 1100

85 *Submission No. 97*, The Law Society of New South Wales, p. 1601

interpretations of the *Migration Act*, the Migration Regulations and an Australian understanding of the Refugee Convention.[86] The LCA, for example, commented:

> The RRT, like most tribunals, often sees differences of opinion arise between the way particular members interpret the relevant legislation. The Law Council notes that court decisions are normative and binding on tribunal members. The fostering of consistency between members and the knowledge of the correct interpretation of a certain provision are benefits for all those involved in the immigration process, from applicants, departmental decision makers through to review[er] officers.[87]

6.71 According to the UNHCR, the effect of these rulings is not confined to Australia:

> An ancillary international benefit of judicial oversight is the considered interpretation of the Convention. Australian judicial opinion on the meaning of the Convention is cited in virtually every country in the world where refugee status determination procedures exist. Equally, Australian legal precedent informs UNHCR's own interpretation of the Convention.[88]

6.72 The Committee in the earlier Inquiry into the Judicial Review Bill concluded: "the facts presented by the Minister for Immigration and Multicultural Affairs reflect a picture that is somewhat more complicated than at first appears" and that "[c]ontinuing research and review will assist in further assessing this situation".[89] On this note, the Committee recommended that the Government should consider other avenues which would address the concerns raised in the Inquiry which included the impact of the restrictions on legal aid in litigation.[90]

6.73 However, the Senate Legal and Constitutional Legislation Committee was divided on its support for the Judicial Review Bill. Government members supported passage of the Bill with the reservation that they agreed with the use of the privative clause only in its redrafted form, as a means of limiting judicial review. Opposition Senators, unable to accept the introduction of a privative clause into the Act in any form, expressed concern that the introduction of the legislation proposed in the Bill would impact on the availability of independent quality control over decision-making in the refugee determination process.[91] It was argued that the values encompassed in a

---

86 *Submission No. 31A*, The Australian Law Reform Commission, p. 292; *Submission No. 97*, The Law Society of New South Wales, p. 1601; and *Submission No. 63*, National Legal Aid, p. 736

87 *Submission No. 73*, Law Council of Australia, pp. 1100-1101

88 *Submission No. 83*, United Nations High Commissioner on Refugees, p. 1440

89 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, see Paragraph 1.77

90 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, Recommendations 1 and 2 at Paragraph 1.76

91 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, Minority Report, Senators McKiernan and Cooney, pp. 77-84

system which supports concepts such as the rule of law and the separation of powers should not be compromised by a desire to achieve administrative efficiency.

6.74 Senator Bartlett agreed with the arguments in the Opposition Minority Report, and, in a dissenting report, stated that the Bill was "likely to lead to an increased workload for the High Court, thus undermining one of its major stated justifications, namely to reduce delays and costs involved in the current refugee determination process".[92]

Options for refinement of the administrative review process

6.75 In evidence to the Inquiry, Mr McMillan acknowledged that the current RRT review process frequently has difficult issues which cannot be resolved by a Tribunal member sitting alone. He claimed that, in the existing system, the Federal Court, by default, becomes the second level of appeal.

6.76 Mr McMillan has recommended the development of a two-tiered tribunal structure, which he claims to be effective, efficient and economical.[93] The first tier would concentrate on provision of a speedy and informal review in the large majority of cases. The second tier would be an appeal tier which could undertake more formal and reflective analysis of complex issues of law, policy and procedure.

6.77 The Committee notes, in connection with the recommendation by Mr McMillan, that the RRT will be involved in major changes resulting from the planned amalgamation of Commonwealth tribunals into the new unified structure of the Administrative Review Tribunal (ART).

Conclusion

6.78 The weight of evidence and submissions presented to the Inquiry argued in favour of the need to maintain a judicial review system for refugee determination that has the power to pass judgement on refugee matters under the rule of law, while respecting and maintaining the ideal of the separation of powers. Some submissions also argued that judicial oversight promotes the development of jurisprudence in the migration area and encourages consistency in decision-making. Australia's international legal obligations to provide access to courts and tribunals and judicial oversight of the refugee determination, must also be met. However, according to DIMA, judicial oversight involving litigation in the courts is a resource-intensive review process. All parties in the review process of refugee determination are concerned about the costs of either operating or engaging in the system of review presently in place. The Committee is mindful of all the arguments and does not dismiss any of them.

---

92 Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, Dissenting Report, the Australian Democrats, Senator Bartlett, p. 85

93 John McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, No 22, September 1999, p. 16

6.79 Being mindful of the above matters the Committee, in other parts of the Report, has made recommendations that, if accepted and implemented, will address the Government's concerns over cost, resources and time spent on the refugee determination system. The Committee is of the opinion that further administrative initiatives to improve the review process should be considered in the first instance.

6.80 This consideration should not take place at the expense of providing a form of judicial oversight to adjudicate and rule upon the exceptional cases that arise from time to time in the refugee determination area. In light of this the Committee has considered that work should also be undertaken on the feasibility of a wholly judicial determination process. An objective of this would be to assess if such a process could be more open and transparent than the current multi-tiered system, which the majority of the Committee considers has been highly criticised.

Recommendation

Recommendation 6.1

The Committee **recommends** that DIMA maintain an up-to-date comparative database of international refugee determination systems in a number of countries which are State parties to the relevant international conventions.[94] This material should be made available in a format that is easily accessible.

Recommendation 6.2

The Committee **recommends** that DIMA commission an independent analytical report on State parties' incorporation into domestic law of international legal obligations requiring access to courts and tribunals, and judicial oversight of the refugee determination process. The Committee further **recommends** that DIMA provides that report to the Parliament.

6.81 Given the background of current Parliamentary debate on judicial review of migration and refugee decisions, and the associated determination process, the Committee decided that it would not be productive to make recommendations on matters contained within the two Bills that are now before the Parliament. However, the Committee accepts that the debate will continue and that it would be assisted by up to date statistics.

94 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 830. The Department of Immigration and Multicultural Affairs noted in the submission that the Department was updating (from June 1996) a comparison of seven international refugee determination systems. The States surveyed include: the United Kingdom; United States of America; Canada; New Zealand; Germany; and The Netherlands

Recommendation

Recommendation 6.3

The Committee **recommends** that an analysis of the cost of fulfilling Australia's international legal obligations be provided by DIMA to the Committee within three months of the completion of the inquiry referred to at Recommendation 6.2. The analysis should include a comparison of the cost of the administration of both migration and refugee applications under the current two-tiered administrative determination and judicial review system.

Recommendation 6.4

The Committee **recommends** that the Government commission an independent study on the benefits of modifying the current on-shore refugee determination process. The study should assess, among other matters, the feasibility of moving to a wholly judicial determination process, including the costs of any such process.

6.82 The Committee recognises that half a century has elapsed since Australia became a signatory to the Refugee Convention. It notes with regret that the number of people that are in need of protection, and in some cases resettlement in a country other than their own, remains at an alarming level. The world has changed dramatically in these fifty years. It is now much easier for people to move across borders from one country to another in circumstances dramatically different from those that existed when the Convention was originally conceived and signed. These changes have put enormous pressures on refugee-receiving countries and their internal refugee determination processes.

Recommendation

Recommendation 6.5

This Inquiry and Report is evidence of the fact that Australia has not escaped the pressures placed on refugee-receiving countries. In light of these developments, the Committee **recommends** that the Government continue to monitor the attitudes of other signatory nations in relation to the terms and protocols of the Refugee Convention.