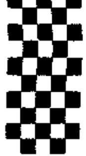

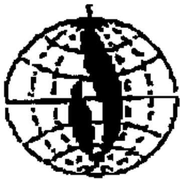

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04 April 2002

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Legal and Constitutional Committee
Australian Senate
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Dear Mr Gregory

Migration Legislation Amendment (Procedural Fairness) Bill 2002 and Migration Legislation Amendment Bill (No. 1) 2002

We thank you for inviting the ASICJ to make submissions in respect of the current inquiry on these Bills. We provide you with the following submission and confirm our interest and preparedness to attend the Committee on 9 April to provide further oral evidence at the Committee's inquiry.

<u>Migration Legislation Amendment (Procedural Fairness) Bill</u>

The fundamental concern of the ASICJ with this Bill is that it purports to remove the well-established common law principles of natural justice. The codified scheme currently established in the various sections of the Migration Act does not fully replicate the existing common law principles. Thus, to the extent that such principles are legislatively removed, applicants will be entitled to a "second-rate" entitlement to natural justice. These concerns become particularly significant having regard to the removal of access to judicial review of the Department's decisions consequent upon the amendments to Part 8 of the Act with effect from last October. We note the Minister's second reading speech recognizes

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that in fact the code of procedure does not provide the full protection of the common law requirements of the natural justice hearing rule. We suggest that there is legal uncertainty about procedures which decision makers are required to follow to make a lawful decision. With respect, this imports a suggestion that the common law natural justice hearing rules are uncertain. This ignores the fact that they have been developed over the centuries and are well-established. Administrative decision makers should not be given an excuse for poor quality decision making on the basis that they have not afforded to applicants meaningful natural justice. This is particularly significant in the refugee area where decisions affecting applicants can have the potential of a life and death significance.

It is further noted that whilst the Bill purports to remove the common law requirements in all relevant areas of Departmental decision making, the Code of Conduct contained in Subdivision AB of Division 3 of Part 2 deals with visa applications and not visa cancellations. Accordingly, applicants in such situations will find themselves denied access to the common law natural justice grounds and not entitled to the protection of a statutory code of procedure, and of course limited if any judicial review grounds.

Neither the Explanatory Memorandum nor the Preamble to the legislation indicate that the MRT or RRT Tribunal hearing is the only opportunity many applicants have to explain their claims and to put forward evidence in support of their application. It is general practice at both overseas and onshore Immigration offices that applicants at a primary level are not interviewed by departmental staff. In fact it has become rare that an applicant is given an opportunity to answer adverse information which is being used to determine the visa applications.

This is particularly significant in respect of applications for protection visas where until recently, and in the last five years, applications were routinely refused without interview. It is noted that in recent months, following the handing down of the decision of the High Court in *Mia*'s case, the Department has resumed an earlier practice of providing applicants with a letter detailing the adverse information and seeking comments.

We now make specific comments in respect of the various amendments.

Amendment 1:Section 51A

We are concerned that section 494(D) permits the Minister to provide written notice of the hearing only to the applicant's **authorised recipient**, and not to the applicant. In many instances, an applicant at the beginning of the visa process authorises a migration agent to act on his/her behalf and completes the appropriate authorisation form.

There have been many cases in which the migration agent through inadventure or negligence has not passed details about the hearing to the applicant. In addition, there are ethnic communities in Sydney who have fallen victim to unscrupulous migration agents who do not pass on information from the Tribunal and for whom it is normal practice that their clients do not attend hearings.

A simple amendment to resolve this situation would be that notice of the hearing is provided to both the applicant and the authorised recipient.

Amendment 4 - Provisions to be inserted before s. 28 dealing with cancellation of visas outside Australia

We are concerned that this statement of the exhaustive provisions of the natural justice hearing rule will discriminate against visa holders who are resident in countries with limited postal services, such as off-shore spouses and refugee applicants, resident in refugee camps. These provisions may be triggered when adverse information has been provided by known or unknown persons and which could be used to cancel an off-shore spouse or refugee visa prior to departure for Australia. For example, a person in a refugee community in Australia may give adverse information about a woman who is applying for a woman at risk visa perhaps indicating that she has a spouse resident in the same country. Natural justice requires that the applicant is given to opportunity to answer such allegations.

However, we are concerned by the proposed provision to give notice of the hearing only to the authorised recipient. In a refugee camp situation, this may be the UNHCR representative, who may be absent from the camp for significant periods. We would suggest that there needs to be some additional provision to ensure that an off-shore applicant has in fact received notice of the hearing or that direct oral contact should be made by the overseas post staff.

Amendment 6 - Insertions relating to review by the Refugee Review Tribunal

We suggest that reliance on s. 416 should be questioned as it provides that only new information is to be considered in later applications for review by the Refugee Review Tribunal. There are situations such as remittal from the Federal Court in which it may be in the applicant's best interests to have the information from the first application considered along with current information .

Situations relating to second applications to the RRT are complex as they refer to applications under section 48B or following remittal from judicial review. It is difficult to prescribe exhaustive natural justice provisions. We suggest that the section needs to be modified to allow the discretion of the Tribunal to consider all relevant material in determining the application.

Migration Legislation Amendment Bill (No. 1) 2002

We make the following comments in respect of the amendments.

Amendment 1 – Relating to immigration clearance following birth in Australia

We suggest that there needs to be an similar amendment following 172(c) This would provide immigration clearance for children who were born in Australia to parents who bypassed immigration clearance who were subsequently granted a substantive visa.

Under the current legislation, a child born to a person who arrived as a stowaway, or on a false document, and was later granted a substantive visa, is not immigration cleared. The child is not covered by the visa if he/she was born prior to the date of the visa.

Amendment 3 – Relating to Special Purpose Visas

Migration Regulation 2.40 indicates the classes of persons who are eligible for special purpose visas including spouses and dependent children as well as airline crews and members of the armed forces.

There may be a number of reasons by which a person belonging to one of these classes may lose the prescribed status. This could include evidence from one partner of relationship difficulties, implying the spouse and children are no longer members of one family unit.

Our concern is that the amendment does not provide for a notification process by which persons facing possible cancellation of their Special Purpose visa are given an opportunity to answer any adverse information. In fact, s. 2 providing for an amendment to s. 33 of the Act would indicate that it is the government's intention that such persons will not be permitted an opportunity to respond to the proposed cancellation. This may result in unjust cancellations for family members, or members of foreign armed forces whose commissions are suddenly terminated in Australia.

Amendment 6 –Strict Liability for Persons Involved in People Smuggling

We suggest that if strict liability is to apply, there should be a requirement of criminal intent from both the smuggler and the illegal entrant. The current amendment indicates that only the non citizen needs to have an intent to enter Australia illegally.

Amendment 7 – Relating to the Strict Liability in Assisting People to Form De Facto Relationships

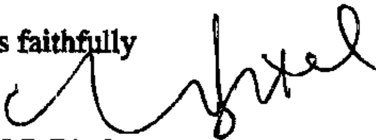
We are concerned that many legal advisers may fall under this strict liability provision if the legislation is interpreted narrowly.

There are many couples who are not de facto spouses (for the purposes of the Regulations) as they have not lived together for twelve calendar months. Many will contact a legal adviser at the commencement of a de facto relationship in order to get information for a future visa application. This amendment could catch lawyers who assist a couple to take out joint tenancies, make joint wills or gather evidence to be used in a de facto visa relationship.

We would suggest that there should be an amendment that a strict liability applies when the person is acting with intent to create a false de facto relationship. The current s. 241 is quite uncertain.

We make no comments in respect of the other matters the subject of this Bill.

Yours faithfully



David L Bitel
Secretary-General