

# **DISSENTING REPORT**

## **Senator Andrew Bartlett On behalf of the Australian Democrats**

1.1 After reviewing the evidence and submission presented to this inquiry, the Australian Democrats' view is that the Bill should be opposed.

1.2 The Democrats agree with the majority of witnesses to the inquiry that there is no valid justification for the Bill. The number of migration cases before the Federal and High Courts continues to decline from the considerable increase in migration case numbers in 2002 -2003. This peak in migration applications was due to the large increase in unauthorised arrivals between 1999 and 2001. The number of unauthorised arrivals has fallen markedly since then. Also evident is the fact that the 2002-2003 increase in migration cases was also due to the policy measures pursued by the Government, especially in relation to decisions not to allow representation actions in migration cases. Also significant is the Government's continued refusal to publish the findings and recommendations of the Penfold Report, which the Government asserts form the basis of the Bill.

1.3 In particular, the case has not been made for introduction of the radical proposal to award cost orders against any person deemed to have encouraged an unmeritorious application for review of a migration decision. The Democrats share the concerns raised by many witness and submissions that such provisions are in effect an attempt to discourage lawyers, volunteers and other Australians who have a legitimate role in assisting refugees and migrants.

1.4 Similarly, the Democrats consider that provisions seeking to restrict judicial review of migration decisions by the imposition of time limits are inappropriate and unnecessary given the courts' current powers to manage their caseload and to screen out unmeritorious applications.

1.5 The proposed privative clause is equally problematic as is the Bill's reference to 'purported privative clause decisions'. Serious doubts have been raised over the constitutional validity of the latter as well as over the imposition of time limits restricting judicial review of migration decisions. Moreover, these provisions will compound the complexity already inherent in the Migration Act and provide even more grounds for appeals. This is at odds with the Bill's stated aim of reducing the number of migration appeals and the associated cost and delay.

1.6 The Bill is based on a false premise and is unworkable and potentially dangerous. As the Democrats stated in respect of the earlier Migration Amendment (Judicial Review) Bill 2004:

Once we start limiting access to the courts for particular sections of the community, we are creating a legal system that does not hold everyone equal

in the eyes of the law. It is imperative that those seeking asylum are not denied access to judicial review, particularly given the legitimate concerns about the adequacy of the existing determination process. We should be working harder to ensure that justice is delivered rather than subverted.

These comments apply equally to the Bill and now have even more force given the recent injustices wrought by the Government against its own citizens who have the misfortune to become embroiled in its immigration regime.

1.7 Consequently, the Democrats believe that the Bill should not be passed – even if it is amended in accordance with the Committee's recommendations. The Democrats appreciate the reasons for the Committee's recommendations for a report to Parliament on the operation of the Bill and for the sun setting of the summary dismissal powers. However, the fact remains that no real evidence has been presented which warrants the enactment of the Bill in the first place.

1.8 Notwithstanding the above, if the Bill is to be passed by the Parliament, it will be critical for the Committee's recommendations to be implemented. In addition, the Democrats believe that it is crucial that the Bill as a whole be subject to a sunset clause. The significant implications of this Bill for the courts, the legal profession, the rule of law and the lives of individuals at risk of persecution and seeking Australia's protection make it essential that the operation of the Bill be fully examined and debated by the Parliament if it is to continue.

**Recommendation 1:  
That the Bill be opposed.**

**Recommendation 2:  
That, if the Bill is not to be opposed, it be amended in accordance with the Committee Recommendations.**

**Recommendation 3:  
That, if the Bill is not to be opposed, it be amended to include a sunset clause which provides that the legislation will cease to have effect three years after it commences.**