amnesty international australia

Submission to the

Senate Legal and Constitutional Legislation Committee

regarding the

INQUIRY INTO THE MIGRATION LITIGATION REFORM BILL 2005

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Submitted by

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1. EXECUTIVE SUMMARY

Amnesty International Australia welcomes the opportunity to make a submission to the Australian Senate Legal and Constitutional Legislation Committee on the *Migration Litigation Reform Bill 2005* (**the Bill**). The organisation's submission focuses on the measures contained in the Bill which:

- restrict the scope of judicial review for asylum seekers; and
- seek to deter unmeritorious applications.

Section 3 of the submission comments on measures introduced to reduce judicial review of the migration process. Section 4 provides a summary of Amnesty International's key concerns regarding the effect of the Bill on asylum seekers at risk of *refoulement*.

Amnesty International's primary concerns are that the Bill restricts the scope and levels of judicial review, imposes arbitrary time limits and threatens asylum seeker's future access to representation, in particular by lawyers and migration agents. Amnesty International believes that such measures unnecessarily limit the rights of asylum seekers and places Australia at risk of breaching the principle of *non-refoulement*. The organisation is not of the opinion that the Bill's provisions will meet the intended objectives of reducing delays and promoting efficiency in the refugee determination system. Rather it will increase uncertainty, increase the number of unrepresented litigants, increase the risk of error in decision making and, critically, place asylum seekers at risk of *refoulement* to their country of origin where they may suffer serious human rights violations.

Amnesty International urges the Committee to ensure that time is taken to correct the defects in the Bill which, if passed in its present form, will potentially lead to infringements of Australia's non-refoulement obligations and will undermine the rule of law.

2. INTRODUCTION

Amnesty International is a worldwide movement of more than 1.8 million people across 140 countries working to promote the observance of all human rights enshrined in the *Universal Declaration of Human Rights* and other international standards. In pursuit of these goals, Amnesty International undertakes research and action focused on preventing grave abuses of human rights including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Australia has contributed a number of submissions on relation to refugee issues in recent times; including the Attorney-General's Migration Litigation Review and the Migration Amendment (Judicial Review) Bill 2004 to this Committee in April 2004. The following submissions regarding related legislation and regulation are also available on request:

- Submission to the Committee on the Migration Legislation Amendment (Procedural Fairness) Bill 2002;
- Supplementary Submission to the Joint Standing Committee on the Migration Legislation Amendment Bill (No.2) 2000;
- Submission to the Committee on Australia's Refugee Determination System (June 1999);
- Submission to the Committee on Migration Legislation Amendment Bill (No.2) 1998 and Migration Legislation Amendment (Judicial Review) Bill 1998; and
- Submission to the Joint Standing Committee on Migration with respect to Reg 4.3.1B of the Migration Regulations.

Amnesty International's work aims to promote the observance by all nations of human rights set out in the Universal Declaration of Human Rights and other international treaties and standards. A particular focus for Amnesty International is the protection afforded to asylum seekers of *non-refoulement*. The principle of *non-refoulement* provides that persons seeking asylum must not, directly or indirectly, be sent back to

their country of origin if they would suffer serious human rights violations. This principle is enshrined in the Convention Relating to the Status of Refugees 1951 (Art 33(1)) and its 1967 Protocol (collectively referred to as the **Refugee Convention**) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Art 3.1): treaties to which Australia is a party. The principle is also a one of customary international law.

In light of this principle, Amnesty International calls on all governments to ensure that refugee status determination procedures are fair and comprehensive and in accordance with internationally agreed standards, including the conclusions of the United Nations High Commission for Refugees Executive Committee (EXCOM) and the broader principles of procedural fairness.

While determination of refugee status is not specifically regulated in the Refugee Convention itself, procedures for such determination must satisfy certain basic requirements. These are essential guarantees which the applicant must be provided with, including as outlined in EXCOM's 28th session (No. 8 (XXVIII) - 1977), being given 'reasonable time to appeal for a formal reconsideration of the decision'. Amnesty International considers that access to legal representation and the court system are fundamental aspects of a fair and comprehensive refugee determination process. The right to appeal against an earlier migration decision to deny asylum is essential to such a process and should be made to a judicial authority. The asylum seeker should also be able to remain in the community in the country where they have sought asylum until the outcome of their appeal has been finally decided.

In the Australian context, the importance of the right to appeal has been highlighted by the recent figures regarding Refugee Review Tribunal (RRT) decisions. Recently released figures show that 89% of RRT decisions regarding applications by Afghani Temporary Protection Visa holders seeking further protection set aside previous determinations by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA).[1] In the period from July 2004 to February 2005, 427 of 480 DIMIA decisions were found to incorrect by the RRT. The capacity for RRT review has resulted in 427 individuals correctly granted protection and not placed at risk of return to Afghanistan

[1] Refugee Review Tribunal caseload figures presented to the asylum seeker interagency meeting February 2005

where they were undoubtedly at risk of human rights violations. Limitations on the right of appeal and the capacity to have an earlier decision reviewed at any level of the determination process in turn limits the capacity for the determinations process to be fair and comprehensive.

3. GROUNDS & PROCESS FOR AMENDMENT

While supporting the objective of efficient processing of refugee claims, Amnesty International Australia (herein referred to as Amnesty International) maintains that efficiency should not be achieved at the expense of procedural fairness or by restricting asylum seekers' access to review on legal or meritorious grounds.

Amnesty International has become increasingly concerned over the past seven years about the consequences of the significant number of amendments made to the Migration Act 1958 (**the Act**). In this respect, Amnesty International accepted an invitation to present a submission to the Attorney-General's Migration Litigation Review which is to provide insight into the effect of Australia's previous amendments to judicial review of migration decisions. Amnesty International's submission to that process maintained that measures aimed at improving Australia's refugee determination system would be better directed at focusing on the initial stages of the process rather than the final stages of judicial review. Any focus on increasing the efficiency of the process should not be to the detriment of Australia's adherence to its international human rights obligations.

Unfortunately, the Migration Litigation Review report has not been released. Amnesty International submits that it is premature to introduce the Bill prior to the public release of the Migration Litigation Review report and the necessary ensuing discussion on refugee review procedures in Australia and therefore the merits of the Bill.

4. AMNESTY INTERNATIONAL'S KEY CONCERNS REGARDING THE EFFECT OF THE BILL ON THE HUMAN RIGHTS OF ASYLUM SEEKERS

Australia is obliged under international law to ensure asylum seekers' free and equal access to court processes. In particular, Article 16 of the Refugee Convention provides:

1. *A refugee shall have free access to the courts of law on the territory of all Contracting States.*
2. *A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.*
3. *A refugee shall be accorded in matters referred to in paragraph 2 in countries other than that in which he has habitual residence the treatment granted to national of the country of his habitual residence.*

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) 1966 also requires Australia to ensure that all persons are equal before the courts and tribunals, and entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

4.1 Judicial Review

Judicial review of decisions made in relation to refugee claims is an essential part of ensuring that Australia meets its obligations of *non-refoulement*. Judicial review meets the criteria of competence, independence and impartiality and is critical in establishing a body of legal principles necessary for the proper interpretation of a highly complex and changing area of law.

The recent amendments to the Migration Act contained within the Migration Legislation Amendment (Procedural Fairness) Bill 2002 removed procedural fairness from the grounds of judicial review in migration matters. This was clearly in derogation of Australia's international obligations. Similarly, in seeking to restrict the scope of judicial review, the Bill presently before the Committee may, in effect, increase the risk of error

in decision-making and the likelihood of a person's continuing detention or of being refouled.

Of particular concern to Amnesty International are the following proposed amendments in Schedule 1 Part 1 of the Bill:

- Imposing time limits of 28 days within which to apply for a review of a migration decision, with the option of applying for a 56 day extension within a maximum of 84 days, provided the court considers it is in the interests of the administration of justice.

  Amnesty International is concerned that these arbitrary time limits seek, in effect, to restrict the discretion of the courts to determine whether and what extension of time may be appropriate in each instance and may result in asylum seekers being denied judicial review. As a consequence, those asylum seekers will not have been through a fair and comprehensive asylum procedure in Australia and will be at risk of *refoulement*.

- Seeking to legislate that Parts 8 and 8A of the Migration Act and all relevant time limits will apply to 'purported privative clause decisions' and 'non-privative clause decisions'.

  These amendments aim to reverse the effect of the High Court's decision in *Plaintiff S157 & Anor v Minister for Immigration & Multicultural Affairs* (2003) 211 CLR 476. In that decision, the court held that section 474 of the Migration Act, which sought to prevent judicial review of migration decisions, could not have the effect of ousting the original jurisdiction of the High Court under section 75(v) of the Constitution. In relation to decisions infected by jurisdictional error and thus beyond the power of the decision maker, section 474 would not be relevant, and the decision could therefore be reviewed by the courts.

  Amnesty International is concerned that these amendments seek to limit the ability to have a decision reviewed which would otherwise be available with respect to an administrative decision. The organisation further believes that the

proposed amendments introduce confusion and unfairness into the refugee determination process in two main respects. First, the organisation questions whether it is possible to legislate under the Act with respect to decisions which are beyond the power of a decision maker to make under the Act. A decision that is otherwise outside of the powers conferred to the decision maker under the Act should remain reviewable. Second, how an asylum seeker will be able to ascertain what a purported privative clause decision is and when it has occurred, for the purpose of determining when time limits begin to run.

- Restricting the original jurisdiction of the Federal Court of Australia to the review of decisions to cancel the visas of, or deport, asylum seekers on character grounds and to review complex matters referred by the Federal Magistrate's Court.

  The re-direction of the majority of appeals in migration cases to the Federal Magistrate's Court was described in the second reading speech before Parliament as recognising that most migration cases are higher in volume, shorter and of less complexity than other matters. Amnesty International has concerns that this further restriction on the scope of judicial review fails to recognise the high degree of complexity associated with migration law, the consequent need for high level judicial review to be undertaken, particularly in view of the fact that a negative finding could lead to *refoulement*, and potentially increases the risk of errors in decision making.

4.2 Deterring Unmeritorious Applications

The measures proposed under Schedule 1 Part 1 of the Bill for deterring unmeritorious applications include:

- Enabling the Federal Magistrates Court, the Federal Court or the High Court, as the case may be, to summarily dispose of proceedings where they consider that the case has *no reasonable prospects of success*. In this regard it is important to note that the Bill seeks to lower the threshold ordinarily applicable to summary disposal by courts (see, for example, *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62) by providing that a case need not be

'hopeless' or 'bound to fail' in order to establish that there are no reasonable prospects of success.

- Enabling the High Court to remit matters to the Federal Magistrate's Court on the papers.

These amendments provide for truncated judicial processes and the lowering of the threshold requirements for the summary disposal of proceedings. Amnesty International believes that they are an unnecessary and dangerous intrusion into the discretion of the courts. The proposed provisions place at risk the fundamental right of a litigant to be heard and to prosecute a case that is not otherwise vexatious or an abuse of process. The organisation is concerned that this constitutes yet another derogation from Australia's international obligations to ensure asylum seekers have their claims for refugee status determined fairly.

- Prohibiting lawyers, migration agents or other advisers from encouraging the initiation or continuation of cases that have no reasonable prospects of success (the above definition applies) or for an ulterior purpose. This applies notwithstanding any obligation the person may have to act in accordance with the wishes or instructions of the litigant.
Where a court finds that a case has no reasonable prospects of success, it must consider whether a costs order should be made against the lawyer, migration agent or adviser. Where the person is a lawyer, this will comprise the reimbursement of all fees paid by his/her client, and the payment or reimbursement of all costs orders payable by his/her client to another party. Either the court or another party may apply for these costs orders.
Amnesty International opposes the penalties and disincentives contained in the Bill for lawyers, migration agents and other advisers to assist asylum seekers. In circumstances where pro bono resources for asylum seekers are already limited, these amendments will further limit their access to legal or migration advice. They are contrary to both Australia's international obligations to asylum seekers and a fundamental principle underlying our legal system which guarantees access to legal representation.

> There are adequate powers for courts to, in appropriate circumstances, award costs against a non-party and courts have done so on occasion. To introduce these amendments, however, would be to compel courts to consider making adverse costs orders either on its own motion or on the motion of another party. Given the complexity of migration matters and the consequent high risk of loss, notwithstanding that there may be valid grounds for prosecuting an appeal, such a requirement is only effective in sending a public message that migration appeals should not be pursued. Apart from deterring pro bono advocates from providing assistance, another consequence may be a dramatic increase in the number of unrepresented applicants before the courts, which puts asylum seekers further at risk and reduces court efficiency.

It is worthwhile reiterating at this stage the words of Justice Wilcox in *Muaby v Minister for Immigration & Multicultural Affairs* (1998) 1093 FCA (20 August 1998):

> *The solution is not to deny a right of judicial review. Experience shows that 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.*

Amnesty International supports the views of Justice Wilcox and calls on the Australian Government to increase funding for legal, migration and interpreting services for asylum seekers in order that their cases may assessed and any appeals prosecuted more efficiently. This would in turn meet Australia's international obligations, allow an asylum seeker to make better informed decisions about whether to appeal, and reduce the risk that an asylum seeker will be refouled.

Amnesty International also refers the Committee to Part C of Amnesty International's November 2003 submission to the MLR which details alternative means for achieving more efficient management and quicker disposition of refugee cases. The submission includes several measures which do not negatively impact upon asylum seeker rights

including the introduction of *complementary protection* for those who require Australia's protection but do not meet the strict definition of 'refugee'.