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Broad Issues

2.1 Submissions to the Committee and evidence at its hearings discussed both the details of the Bill, and broader issues which were perceived as being relevant to the Bill. These broad issues included:

- the implications of the Bill for Australia's international obligations;
- the principle of judicial review; and
- the Bill's constitutional implications.

2.2 The constitutional implications are discussed in detail in Chapter 6, and are therefore not considered in this chapter.

International obligations

2.3 The Office of the United Nations Commissioner for Refugees (UNHCR) indicated that:

> …Australian jurisprudence has made a substantial contribution to international refugee law…the benefit…extends far beyond Australia's borders.[1]

2.4 The Committee noted the implication that the Bill could have wide consequences, and therefore carefully considered the issues drawn to its attention in relation to Australia's international obligations.

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1 UNHCR, Submission, p. 136.

Concerns

2.5 A number of submissions offered arguments against the Bill on the grounds that it may breach one or more of Australia's international obligations.

2.6 The international arrangements specifically identified were:

- International Covenant on Civil and Political Rights;
- Convention Relating to the Status of Refugees;
- Protocol Relating to the Status of Refugees;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- Convention on the Rights of the Child.

International Covenant on Civil and Political Rights (ICCPR)

2.7 The International Commission of Jurists (ICJ) drew the Committee's attention to Article 10 of the Universal Declaration of Human Rights which provides that:

> Everyone is entitled full equality to a fair and public hearing by an independent and impartial tribunal…(sic)[2]

2.8 These rights, it explained, are embodied in a number of Articles in the International Covenant on Civil and Political Rights (ICCPR).

2.9 The ICJ cited paragraph 27 of the Vienna Declaration as a recent statement of the principles in the ICCPR:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations.[3]

2.10 The submission from the Law Council of Australia (LCA) indicated that the ICCPR was central to the question of whether Australia met its obligations under a range of international conventions. LCA argued that to avoid breaching these obligations:

> …Australia must have an effective procedure to determine the validity of an asylum seeker's claims.[4]

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2 ICJ, Submission, p. 162.

3 ICJ, Submission, p. 162.

4 LCA, Submission, p. 95. The LCA submission also claimed that Australia was at risk of contravening its obligations in relation to refoulement because of doubt that the RRT satisfied the requirement to provide a fair and public hearing under ICCPR Article 14. However, that LCA observation was made in relation to provisions of the *Migration Legislation Amendment (Judicial Review) Bill 1998* not encompassed in the Bill under consideration in this Report.

2.11 The Human Right and Equal Opportunity Commission (HREOC) expanded this argument. It noted that Australia had ratified the ICCPR convention in 1980. It claimed that neither the Refugee Review Tribunal (RRT) nor the Immigration Review Tribunal (IRT) conformed to Article 14 of the ICCPR which requires:

> …a fair and public hearing by a competent, independent and impartial tribunal.[5]

2.12 As a result, therefore, HREOC claimed that Australia's obligations under international law required the retention of a right to appeal and judicial review.[6]

2.13 In their submission, LCA and Amnesty International Australia (Amnesty) noted, but did not develop the point, that Article 14 of the ICCPR provides that:

> All persons shall be equal before the courts and tribunals…[7]

2.14 The National Council of Churches in Australia (NCCA) pointed out that, by restricting the avenues of access to review of administrative decisions, the Bill seeks:

> to treat asylum seekers in a manner different to all other persons, in contravention of Article 14.[8]

2.15 More broadly, Amnesty argued that Article 2 of the of the ICCPR provides that:

> …any person…shall have his right …to develop possibilities of judicial remedy.[9]

2.16 Amnesty regarded the proposed changes as a retreat from those principles and an infringement of a fundamental right of access to the courts.[10]

2.17 The Refugee Council of Australia (RCA) implied that the Bill went against the obligation in the ICCPR:

> Articles 2, 14, and 26 …to give non citizens access to the courts on the same terms as nationals.[11]

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5 HREOC, Submission, pp. 13, 17, 18, 19.
6 HREOC, Submission, pp. 13, 17, 19.
7 LCA, Submission, p. 79; Amnesty, Submission, p. 24.
8 NCCA, p. 111.
9 Amnesty, Submission, p. 24.
10 Amnesty, Submission, p. 23.
11 RCA, Submission, p. 132.

Convention Relating to the Status of Refugees (Refugee Convention) and Protocol Relating to the Status of Refugees (the Protocol)

2.18 HREOC noted that Australia had ratified the Protocol in 1973. HREOC argued that Article 33 of the Refugee Convention, which Australia ratified in 1954, obliged Australia not to return ('refoule') a refugee to a country where their life would be threatened.[12]

2.19 NCCA also cited Article 33 of the Refugee Convention. It argued that, in the past, errors in migration decisions had been identified through judicial review. The changes proposed in the Bill reduced access to judicial review which:

> …could easily result in Australia returning a refugee to a territory where his life or freedom would be threatened, thus breaching the principle of non-refoulement.[13]

2.20 In his submission Mr Bliss argued that:

> The Bill, in further restricting judicial review, increases the possibility that individuals who meet the refugee definition will be sent back to face persecution.[14]

2.21 The Refugee and Immigration Legal Centre (RILC) claimed that if a person had been removed from Australia and had subsequently been found to be a refugee, Australia would have been in breach of Article 33 of the Refugee Convention. RILC's submission indicated that the Bill's proposed section 486A, which limited to 28 days the time available to appeal, would increase the danger of such breaches occurring.[15] Further, RILC argued, the provisions dealing with the Minister's discretion in character test cases under section 501A of the Bill would be contrary to Article 1F of the Refugee Convention.[16]

2.22 Amnesty also noted Australia's obligation under Article 33 of the Refugee Convention as the basis for opposition to forcible return, but did not pursue an argument about the Bill's interaction with that Article.[17]

2.23 The LCA noted, but did not enlarge upon, the obligation under Article 16 of the Refugee Convention that:

> A refugee shall have free access to the Courts of law on the territory of all contracting states.[18]

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12 HREOC, Submission, pp. 13, 15.
13 NCCA, Submission, p. 110.
14 Bliss, Submission, p. 125.
15 RILC, Submission, p. 38.
16 RILC, Submission, p. 42.
17 Amnesty, Submission, p. 22.

2.24 Submissions from NCCA, RCA and Mr Bliss argued that, by denying refugees access to the courts, the Bill contravenes Article 16 of the Refugee Convention.[19] This provides that:

> A refugee shall enjoy…the same treatment as a national in matters pertaining to access to the Courts.[20]

2.25 Amnesty also claimed that Article 16 of the Refugee Convention also applies to asylum seekers. Amnesty regarded the changes proposed in the Bill as an infringement of that right.[21]

2.26 UNHCR noted that Article 1 of the Refugee Convention specified the definition of a refugee. It provided a 'complete prescription' of the grounds on which a person could be excluded from being considered a refugee. The submission notes that the 'character test':

> …introduces an element of subjectivity to exclusion issues that is not contemplated by the Convention.[22]

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

2.27 HREOC argued that under Article 3 of the CAT, which Australia ratified in 1989, Australia was obliged not to return ('refoule') a person to a country where they were:

> …in danger of being subject to torture.[23]

2.28 HREOC noted that the right of the person to resist expulsion was not dependent on them satisfying the Refugee Convention definition of 'refugee'. HREOC was concerned that restricting access to judicial review by asylum seekers breached the CAT.[24]

2.29 Amnesty also raised protection from refoulement under CAT Article 3(1) as the basis for opposition to forcible return but did not pursue this point.[25]

2.30 In relation to the concerns expressed, the Committee noted that the right to appeal AAT decisions remained, as did access to judicial review.

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18 LCA, Submission, p. 79.

19 NCCA, Submission, pp. 111-112; RCA, Submission, p. 132; Bliss, Submission, p. 126.

20 NCCA, Submission, p. 111.

21 Amnesty, Submission, p. 23.

22 UNHCR, Submission, p. 137.

23 HREOC, Submission, pp. 15-16.

24 HREOC, Submission, p. 13.

25 Amnesty, Submission, p. 22.

Convention on the Rights of the Child

2.31 HREOC noted that Australia had ratified the Convention on the Rights of the Child in 1990 and that the provisions of Articles 3 and 22 require that

> …all its actions towards children, including asylum seeker children, make their best interests a primary consideration.[26]

2.32 HREOC argued that because Article 37 of the Convention on the Rights of the Child protects children from torture or cruel, inhuman or degrading treatment or punishment and Article 6 recognises a child's inherent right to life, Australia is obliged not to return a child to a country where they are at risk of torture or death. It was concerned that restriction of access to judicial review breached the Convention on the Rights of the Child.[27]

2.33 The Committee noted that access to judicial review of migration decisions, including those affecting children, was retained under the Bill.

DIMA response

2.34 DIMA acknowledged that Article 14 of the ICCPR indicates that judicial review should be available, and noted that Australia provided multiple levels of judicial review. DIMA advised that, according to the Attorney General's Department, the Bill's provisions relating to class actions did not break any conventions.[28] However, the Committee did not sight the advice.

Conclusion

2.35 The Committee considered that the questions raised concerning the operation of the RRT were outside the immediate scope of its review of the Bill. It did, however, note that RRT decisions were still subject to judicial review and that it was only class actions which were being restricted.[29]

2.36 The Committee noted Amnesty's comment that:

> …individual countries do have the right to determine how they operate their system.[30]

2.37 In the Committee's view the Bill did not breach the specific international obligations brought to its attention. The evidence presented to the Committee did not clearly demonstrate a definite breach of Australia's

26 HREOC, Submission, p. 16.
27 HREOC, Submission, pp. 13, 17.
28 DIMA, Evidence, p. 8.
29 See Appendix C.
30 Amnesty, Evidence, p. 78.

international undertakings. Access to judicial review, the central concern of submissions, remained.

2.38 Indeed, UNHCR commented that Australia's refugee determination procedures complied with its standards, and welcomed:

> …the specific preservation of the possibility for individuals to petition courts for judicial review.[31]

Principle of judicial review

2.39 A number of the submissions to the Committee raised the principle of judicial review generally, highlighting:

- its role acting in lieu of a constitutional Bill of Rights (HREOC);[32]
- its importance in strengthening and improving administrative decision making (Mr Bliss and Amnesty);[33]
- its function in providing guidance and establishing precedents (RCA);[34] and
- its role in ensuring public confidence in the refugee determination system (Mr Bliss).[35]

2.40 In the narrow migration context[36] it was argued that, in making complex administrative decisions, judicial review was an important part of the migration determination system.

2.41 NCCA and LCA both drew attention to the fact that access to judicial review was needed because the merit review system may be perceived as not being independent because the government appointed the members.[37]

2.42 HREOC claimed that a small proportion of decisions would be in error and this was a reason for judicial review.[38]

2.43 LCA, Mr Bliss and UNHCR advised the Committee that tribunals such as the RRT had no clear system of precedence for their own decisions and

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31 UNHCR, Submission, p. 135.

32 HREOC, Evidence, p. 39.

33 Amnesty, Submission, p. 24; Bliss, Submission, p. 127.

34 RCA, Submission, p. 132.

35 Bliss, Submission, p. 126.

36 Judicial review in relation to specific provisions of the Bill is considered in the relevant chapters.

37 NCCA, Evidence, p. 58; LCA, Submission, pp. 76-77; Evidence, p. 130.

38 HREOC, Evidence, p. 34.

that the precedents provided by judicial review gave significant guidance to them.[39]

2.44 NCCA provided the Committee with an example of the role that judicial review can play. It argued that 424 RRT cases would have been decided in error since 1993 had it not been for the judicial review mechanism.[40] RCA claimed that judicial review had saved 49 lives.[41]

DIMA response

2.45 DIMA did not directly address the broad issue of the principle of judicial review. Its focus was on the practicalities of the application of judicial review in the migration jurisdiction, noting that :

> Successive governments have attempted to streamline the review processes in the immigration jurisdiction by reducing the need for judicial review by enhancing rights to merits review and limiting access to judicial review.[42]

2.46 With regard to the importance of the role of judicial review in testing the decisions of the merit review system, DIMA provided data for the outcome of 25,299 cases decided by the RRT between 1/7/93 and 30/6/99. This is summarised in Table 1.

Table 1 RRT decisions and Judicial Review: 1/7/93-30/6/99

RRT DECISIONS		**JUDICIAL REVIEW OF RRT DECISIONS**						
		Total applications	**In progress**	**1,730 finalised and:**				
				no data	RRT decision not affected	Reconsidered by RRT and:		
						RRT affirmed	RRT set aside	Other
Number	25,299	**2,106**	376	100	1,279	171	62	118
% RRT decisions	100	***8.32***	*1.49*	*0.39*	*5.06*	*0.67*	*0.25*	*0.46*

Source DIMA Submission, p. 215; "Other" includes cases in progress, withdrawn and those otherwise finalised.

39 LCA, Submission, p. 95; Bliss, Submission, p. 126; UNHCR, Submission, p.135-136.

40 NCCA, Submission, p.110. Examination of the RRT website quoted by NCCA indicated that the figure of 424 RRT cases which NCCA identified as having been decided in error in fact referred to RRT decisions set aside *for further RRT consideration.* At this stage in the review proceedings only the *possibility* of error had been identified. See Appendix C for full data.

41 RCA, Submission, p. 132.

42 DIMA, Evidence, p.2.

2.47 Over the six-year period there were 1,730 judicial reviews of RRT decisions completed, with 1,279 RRT decisions unaffected (73.9 per cent of cases reviewed). Of the 351 decisions returned to the RRT for reconsideration, the original RRT decision was set aside in 62 cases.[43]

2.48 In summary, judicial review resulted in the setting aside of 0.25 per cent of RRT decisions and the confirmation of 1,450 (5.7 per cent)[44], with a further 583 (2.3 per cent) still to be resolved.[45]

Conclusion

2.49 The Committee noted that the judicial review process can only identify errors in law, it can not reverse an actual decision. It is the subsequent re-examination of the case by the tribunal, in the light of the judicial review which may lead to a different decision. In the six years to 30/6/99 this had occurred in 62 cases.

2.50 The Committee accepted the validity of many of the comments in the submissions about the removal of judicial review. However, it noted that the Bill was not removing access to judicial review. Access to class actions was being restricted. The Committee noted that individuals retained access to judicial review through pursuing individual case and through test cases.

43 Appendix C.

44 Appendix C: comprised of 1,279 cases where the RRT decisions were unaffected by judicial review and 171 cases where, subsequent to judicial review and referral back to the RRT, for reconsideration, the RRT affirmed its original decision.

45 Appendix C: Cases to be resolved include 376 judicial review still in progress; 100 no details; and 107 returned to RRT and yet to be determined.)