The Senate

Legal and Constitutional Legislation Committee

Provisions of the Migration Amendment (Judicial Review) Bill 2004

June 2004

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ABBREVIATIONS

the Act	Migration Act 1958
the Bill	Migration Amendment (Judicial Review) Bill 2004
AAT	Administrative Appeals Tribunal
CAT	Convention Against Torture
CRC	Convention on the Rights of the Child
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1

INTRODUCTION

Background

1.1 On 30 March 2004, the Senate Selection of Bills Committee referred the provisions of the Migration Amendment (Judicial Review) Bill 2004 to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 15 June 2004.

Reasons for inquiry

1.2 The Senate Selection of Bills Committee gave the following reasons for referring the Bill to the Committee:

- to examine the constitutionality of the provisions in the Bill;
- to examine the provisions of the Bill relating to the time limits on judicial review for lodging of applications to the High Court, Federal Court and the Federal Magistrates Court;
- to examine the effect on the jurisdiction of the Courts of privative clause decisions;
- to examine if the provisions discriminate between asylum seekers and other migration applicants in relation to their rights of appeal; and
- to examine the mechanism for review of a migration decision that may be unlawful but is outside the 84 day appeal deadline.

Purpose of the Bill

1.3 The Explanatory Memorandum states that the Bill seeks to restore the original intention of the following procedural requirements:

- placing time limits on judicial review applications (sections 477 and 486A *Migration Act 1958*);
- provide the High Court, the Federal Court and the Federal Magistrates Court with exclusive jurisdiction in relation to migration applications (section 484 *Migration Act 1958*); and
- prohibit judicial review of decisions where a review on merits is available (section 476 *Migration Act 1958*).

Conduct of this inquiry

1.4 The Committee advertised the inquiry in the *Australian* newspaper on 7 and 21 April 2004 and wrote to over 50 organisations and individuals inviting submissions. The Committee received 19 submissions which are listed at Appendix 1.

1.5 A public hearing on the Bill was held in Canberra on 12 May 2004.

Acknowledgement

1.6 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note of references

1.7 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

BACKGROUND TO THE BILL

2.1 This chapter outlines the background to the Bill and the scope of the proposed amendments.

Background to present privative clause provisions

2.2 In 1997 and 1999 the Senate Legal and Constitutional Legislation Committee reported on Bills that finally resulted in the introduction of the existing privative clause provisions of the *Migration Act 1958* (the Act).[1] The first of the Bills, *Migration Legislation Amendment Bill (No5) 1997,* was not enacted and was reintroduced into Parliament as *Migration Legislation Amendment (Judicial Review) Bill* 1998. This Bill later became the *Migration Legislation Amendment (Judicial Review) Act 2001,* receiving assent on 27 September 2001.

2.3 As noted in chapter 1, the purpose of the Bill is to restore the original intention of certain procedural requirements in relation to applications for judicial review of migration decisions. It seeks to achieve this by defining a privative clause decision for purposes other than the ground of judicial review.

2.4 The judicial review requirements which the Bill seeks to restore were first introduced into, and passed by, the Parliament in 1992. These were amended in September 2001 to operate in relation to 'privative clause decisions'.

2.5 The constitutionality of the privative clause was challenged in the High Court in *Plaintiff S157/2002 v Commonwealth of Australia*[2] (Plaintiff S157). While the High Court found the privative clause to be constitutional, it held that it did not protect decisions which contained a jurisdictional error. This means that the time limits set out in the Act only apply to lawful decisions where there is no excess of jurisdiction. In practical terms this means that, until a Court determines the lawfulness of a decision, these provisions are inoperative.

2.6 The provisions in the Bill do not change the basis of the lawfulness of a decision as they do not apply to section 474 of the Act (which means that the ban on judicial review in that section will not apply to 'purported decisions').

2.7 The provisions in the Bill re-establish time limits (28 days) on applications for judicial review with discretion to extend those limits by 56 days where that is in the interests of the administration of justice.

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1 *Migration Legislation Amendment Bill (No5)1997* report tabled 30 October 1997 and *Migration Legislation Amendment (Judicial Review) Bill 1998* report tabled 21 April 1999.

2 (2002-03) 211 CLR 476.

2.8 The Bill amends the definition of 'privative clause decision' in subsection 5(1) of the Act so that a 'privative clause decision' includes a purported decision as well as a privative clause decision within the meaning of subsection 474(2) of the Act. A 'purported decision' is a decision that would be a privative clause decision, had it not been affected by a failure to exercise jurisdiction or an excess of jurisdiction.

2.9 It is intended that by redefining 'privative clause decision' in this way, those provisions in Part 8 of the Act that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all decisions, even those that are arguably affected by jurisdictional error.

Significant provisions of the Bill

New definition of 'privative clause decision'

2.10 Item 2 of the Bill amends the definition of 'privative clause decision' in subsection 5(1) of the Act to give the term two meanings. The first is the current meaning defined in subsection 474(2). The second meaning, which applies for all purposes under the Act *other* than under section 474, also includes a 'purported decision'. A 'purported decision' is a decision that would have been a privative clause decision within the meaning of subsection 474(2), were it not affected by a failure to exercise jurisdiction or an excess of jurisdiction (ie jurisdictional error).

2.11 The effect of this amendment would be that under section 474, privative clause decisions would retain their current meaning, however for other purposes under the Bill, a decision will not lose its status as a privative clause decision due to jurisdictional error. If enacted, the Bill would have the effect that in relation to decisions that would have been privative clause decisions, but suffered from jurisdictional error:

- the time limits on making applications for judicial review to the High Court (section 486A), the Federal Court and the Federal Magistrate's Court (section 477) will apply;
- the Federal Court and the Federal Magistrate's Court will have exclusive jurisdiction to review a privative clause decision (section 484) (other than the jurisdiction of the High Court under section 75 of the Constitution); and
- judicial review of a decision is not available where merits review of that decision is available (section 476).

2.12 In relation to the term 'purported decision' the Explanatory Memorandum for the Bill states that:

> The use of the term 'purported decision' in paragraph (b) reflects the terminology used by the High Court in *S157*. The Court held that 'decision[s] … made under this Act' do not include decisions which involve a failure to exercise jurisdiction or an excess of jurisdiction. The Court referred to decisions infected by jurisdictional error as 'decisions purportedly made under the Act'. As these 'purported decisions' cannot be decisions

'made under this Act' as defined in subsections 474(2) and (3) of the Act, they are consequently excluded from the privative clause provisions in Part 8.

2.13 The second meaning of 'privative clause decision' (ie that which includes 'purported decisions') would mean that a decision that would normally be subject to the limits in Part 8 listed above will still be covered despite the fact that the decision suffers from jurisdictional error (ie it is a 'purported decision'). However because the Bill excludes this wider meaning from applying to section 474, purported decisions will not be subject to the absolute finality of being a privative clause decision under that section.

New time limits

2.14 The Bill introduces new time limits for applications for judicial review. If enacted, the Bill would require that applications for judicial review be made within 84 days of the applicant receiving deemed notice of the decision (ie 28 days with discretion to extend the period by a further 56 days if an application is made within 84 days of notification and the court is satisfied that it is in the interests of the administration of justice to do so). This time limit would apply to the Federal Court,[3] the Federal Magistrates Court,[4] and the High Court.[5]

2.15 The effect of these amendments would mean that the Federal Court, Federal Magistrates Court and the High Court would be unable to grant an extension of time after 84 days from the date the applicant was notified of the decision.

Deemed vs actual notification

2.16 Item 10 of the Bill would amend subsection 486A(1) so that the time limit for applications to the High Court for judicial review would begin to run after *deemed* notification of the applicant. Currently the time limit runs from *actual* notification. This would mean that if enacted, the absolute time limit of 84 days would apply in the Federal Court, Federal Magistrates Court, and the High Court, and would commence from the moment of deemed notification of the decision to the applicant.

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3 Proposed subsection 477(1AA)

4 proposed subsection 477(1B)

5 Item 10 of the Bill

CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the reasons for the Bill, its objectives and how they are to be achieved, and the concerns raised in submissions and evidence.

3.2 Matters covered in this chapter include:

- the need for legislation;
- objectives of the Bill and how they will be achieved;
- arguments against the Bill;
- the likely impact on the High Court;
- the constitutional validity of provisions in the Bill; and
- possible alternatives to the Bill.

Need for legislative amendment

3.3 In his second reading speech the Minister for Citizenship and Multicultural Affairs and Minister Assisting the Prime Minister stated:

> The government has grave concerns about the growing number of unmeritorious judicial review applications being made. These have led to increasing costs and delays in the judicial review process. Increased delays have encouraged many applications to litigate to the maximum regardless of the legal merits. This is solely to delay their departure from Australia.
>
> …
>
> In 1995-96 there were 596 judicial review applications before the Commonwealth courts, compared with approximately 6,900 in 2002-03.
>
> The amendments being made by this bill to the *Migration Act 1958* follow the completion of the Attorney-General's recent migration litigation review. These changes are straightforward and will have a significant impact on reducing the large numbers of unmeritorious migration related judicial review applications. The government will be announcing its response to other matters in the review shortly.[1]

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1 *House of Representatives Hansard*, 25 March 2004, pp. 27212-27213.

3.4 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) advised the Committee that 'since February 2003 there had been considerable growth in the number of applications being made outside the time limits contained in the Migration Act'.[2] They also advised that, in the last 12 months, the periods between the date of a decision and the filing of an application seeking judicial review were as follows:

- 1790 applications, or 44% of the total number of applications, were made within 3 months;
- 270 applications, or 6%, were made within a year, and
- 2043 applications, or 50%, were made more than a year after the decision.

3.5 In the most extreme cases, applications had been made more than 6 years after the visa decision was made.[3]

3.6 In relation to the outcome of applications for judicial review, DIMIA advised that, between 1 July 2003 and 30 April 2004, only 7% were set aside by the courts, either by way of an actual order or by consent following departmental withdrawal. This meant that 93% of all applications were dismissed.[4]

3.7 In answer to a question from the Committee on whether it considered all unsuccessful applications for judicial review to be unmeritorious, DIMIA said they were unable to draw a distinction between an unsuccessful application and an unmeritorious one.[5] However, they went on to say that the percentage of unsuccessful applications formed the basis of the government's view, as expressed in the Minister's second reading speech, that such applications were unmeritorious.[6]

3.8 DIMIA advised the Committee that, should the Bill be enacted, they would expect, on a conservative estimate, a 25% reduction in the number of applications seeking judicial review.[7]

Objectives of the Bill

3.9 The Explanatory Memorandum states that:

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2 *Committee Hansard* 12 May 2004, p. 16.

3 *Committee Hansard*, 12 May 2004, p. 16.

4 *Committee Hansard*, 12 May 2004, p. 21.

5 *Committee Hansard*, 12 May 2004, p. 21.

6 *Committee Hansard*, 12 May 2004, p. 23.

7 *Committee Hansard*, 12 May 2004, p. 24.

> The Bill restores the original intention of the following procedural requirements:
>
> - time limits are imposed on judicial review applications (sections 477 and 486A);
> - the High Court, the Federal Court and the Federal Magistrates Court have exclusive jurisdiction for migration applications (sections 484); and
> - judicial review of a decision is not available where merits review of that decision is available (section 476).[8]

How will the objectives of the Bill be achieved

3.10 The Explanatory Memorandum states that the purpose of the Bill will be achieved '…by defining a privative clause decision for purposes other than the grounds of judicial review'.[9]

3.11 The need to redefine 'privative clause decision' was brought about by the decision of the High Court in *Plaintiff S157/2002 v Commonwealth Australia* (2003) (Plaintiff S157).[10] While the High Court upheld the constitutional validity of the privative clause in section 474 of the Act, it held that it did not protect decisions which contained jurisdictional error. This meant that the time limits set out in the Act for seeking judicial review did not apply to such decisions. The practical effect of the High Court's decision meant that, until a court determines the lawfulness of a decision, the time limit provisions of the Act are inoperative.

3.12 The proposed amendments seek to overcome the effect of the decision in Plaintiff S157 by amending the definition of 'privative clause decision' in subsection 5(1) to include a 'purported decision'. A 'purported decision' is defined as being a decision that would be a 'privative clause decision' if it had not been affected by jurisdictional error.

3.13 The Explanatory Memorandum states that:

> [B]y redefining 'privative clause decision' in this way, those provisions in Part 8 that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all migration decisions, even those that are arguably affected by jurisdictional error.[11]

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8 *Explanatory Memorandum*, p. 2.

9 *Explanatory Memorandum*, p. 2.

10 (2002-03) 211 CLR 476.

11 *Explanatory Memorandum*, p. 2.

Arguments against the Bill

3.14 With the exception of DIMIA, submissions and evidence before the Committee was unanimous in opposing the Bill. The concerns expressed related to the following matters:

- the Bill may actually lead to an increase in applications for judicial review in the High Court;
- the Bill is considered to be premature as the findings of the Attorney-General's Migration Litigation Review have not been released nor has public comment on its findings been sought;
- by seeking to undermine judicial review in the manner proposed, the Bill has the potential to seriously undermine the doctrine of the separation of powers between the Executive, Judiciary and the Legislature;
- the constitutional validity of provisions in the Bill are questionable and will almost certainly be challenged in the High Court
- the introduction of deemed notification as opposed to the current requirement of actual notification for applications in the High Court; and
- the Bill possibly breaches various United Nations conventions to which Australia is a signatory.

Likely effect on the High Court

3.15 While one of the aims of the Bill is to reduce the number of applications for judicial review being made to courts, some submissions argued that it could have the opposite effect, particularly in relation to the High Court.[12]

3.16 The Law Council of Australia said:

> [O]ne of the most objectionable aspects of Judicial Review Bill is the potential for applicants for judicial review to turn *en masse* to the High Court, just as they did after the decision in *Abebe* confirmed that the judicial review powers of the Federal Court could be constrained.

3.17 The Council went on to say that 'the impact on the productivity of the High Court could be catastrophic.'[13]

3.18 Parish Patience Immigration Lawyers stated that:

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12 Refugee Advocacy Service of Australia Inc., *Submission 16*, p. 5; Law Council of Australia, *Submission 17*, p. 10.

13 *Submission 17*, p. 10.

> [A]ll (the) Bill will achieve will be to again clog up the High Court with applications to overturn decisions infected with jurisdictional error, which might have otherwise been brought in the Federal Court or the Federal Magistrates Court. This would be an unacceptable state of affairs.
>
> Why should our learned High Court Justices have to deal with matters that are more appropriately dealt with by the lower Courts? Prior to *Plaintiff S157*, the High Court made numerous remarks about that (unsatisfactory) situation. That was resolved by *Plaintiff S157*, but the government seeks to have, through the current Bill, the High Court again dealing with all these matters at first instance.[14]

3.19 When DIMIA was asked by the Committee if the Bill will merely lead to a whole raft of applications seeking to test the constitutional validity of its provisions a representative said:

> I do not believe it will, any more than the applications that are currently being made to the courts. …if somebody wishes to seek judicial review outside the time frame and they make an application to the High Court outside that time, it will be a matter for the High Court to hear argument on (it) in order to decide the constitutional lawfulness or otherwise of the provision. In consequence of that decision, those other applications will be determined to be outside the time limit if it is upheld as being constitutionally valid. If it is not, I do not think we will be in a situation that is terribly different from the one we have now, where we have a considerable number of applicants seeking judicial review 12 months or more after the decision has been made.

He went on to say:

> I do not think that the situation will really change. There will be no more backlog than there is now.[15]

Is the Bill premature?

3.20 The Committee notes that while the proposed amendments to the *Migration Act 1958* are said to follow the completion of the Attorney-General's Migration Litigation Review, the findings of that review have not been published nor have public comments on the findings been sought.

3.21 Amnesty International Australia considered that:

> It is premature to introduce the Bill prior to the public release of the [Migration Litigation Review] report and the necessary ensuing discussion

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14 http://www.ppilaw.com.au/immigration/JudRev04.htm accessed 28 May 2004

15 *Committee Hansard*, 12 May 2004, p. 20.

on refugee review procedures in Australia and therefore the merits of the Bill.[16]

3.22 The Law Council of Australia expressed a similar view stating the proposed changes are 'premature and an inefficient use of parliamentary time', until the findings of the Attorney-General's Migration Litigation Review are released and open for 'public consideration and debate'.[17]

3.23 Some of the submissions received by the Committee advised that they had also made submissions to the Migration Litigation Review. Copies of these submissions were provided to the Committee.[18]

3.24 DIMIA advised the Committee that the Migration Litigation Review had been requested by the Attorney-General and that 'he had made a public comment to the effect that he does not intend to release it publicly because it was a report to him that contained information that was going to be used in cabinet deliberations'.[19]

The Committee's view

3.25 The Committee considers that the release of the Migration Litigation Review findings for public comment may have provided support for some of the Bill's provisions and may have allayed some of the concerns. The Committee notes the Minister's comments in his second reading speech that the government would be 'announcing its response to other matters in the review shortly'.[20] The Committee urges the government to release the findings of the review for public comment before it seeks to further amend the Migration Act.

The Bill undermines the doctrine of the separation of powers

3.26 The Law Council of Australia submitted that judicial review of tribunal decisions is essential for the following reasons:

- Judicial Review fosters consistency of decisions and ensures correct interpretation of provisions.
- There is an ongoing need for legal interpretation of the Migration Act.

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16 *Submission 8*, p. 4.

17 *Submission 17*, p. 1.

18 HREOC, *Submission 5*; Amnesty International Australia, *Submission 8*; Refugee & Immigration Legal Centre Inc., *Submission 18*.

19 *Committee Hansard*, 12 May 2004, p. 22.

20 *House of Representatives Hansard*, 25 March 2004, p. 27213.

- 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 against the development of a narrow (rejection) mindset.[21]

3.27 The Refugee & Immigration Legal Centre Inc in their submission argued:

> Laws which seek to preclude judicial review in the manner mentioned above (by setting absolute time limits) are undesirable in the context of any case in which an individual is seeking review of alleged injustice of an administrative decision. They have the potential to seriously undermine the doctrine of the separation of powers between the Executive, Judiciary and Legislature. The importance of judicial review of administrative decision-making is deeply rooted in the doctrine of the separation of powers, and in particular, the fundamental necessity of ensuring that the executive is made accountable for decisions affecting the rights and entitlements of individuals.[22]

3.28 The Law Council of Australia submitted that:

> [T]he proposal to extend the definition of 'privative clause decision' … to include 'purported decisions' for the purpose of imposing immutable time limits on both the High Court and on lower federal Courts:
>
> …
>
> Is contrary to the spirit of the Constitution's vision of the rule of law in Australia because it runs counter to presumptions that final determinations on points of law are to be made by courts in exercise of the judicial power.[23]

3.29 Professor George Williams in expressing his objection to the provisions of the Bill that relate to 'purported' decisions and 'non-extendable time limits' said:

> The other reason they should not be enacted is because they are inconsistent with good public policy and the rule of law. The rule of law suggests that government may only act in accordance with the law and that people who believe that the government has acted unlawfully ought to be able to take this to the courts for review.[24]

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21 *Submission 17*, p. 2.

22 *Submission 18*, p. 3.

23 *Submission 17*, p. 7.

24 *Submission 1*, p. 1.

Constitutional validity of provisions in the Bill

3.30 Evidence before the Committee expressed doubts as to the constitutional validity of the following provisions of the Bill:

- the redefinition of 'privative clause decision' in subsection 5(1) of the Act to include a 'purported decision'; and
- the time limits set for seeking judicial review of a decision.

Redefinition of 'privative clause decision'

3.31 In his second reading speech in relation to the redefinition of 'privative clause decision' in subsection 5 (1) of the Act, the Minister said:

> The definition of 'privative clause decision' for the purpose of section 474, which has been interpreted as setting the judicial review grounds for migration matters, is specifically excluded from the broader 'privative clause decision' definition in section 5. This means that the grounds of judicial review are not affected by these amendments.[25]

3.32 As previously noted, the Explanatory Memorandum states that the intention behind redefining 'privative clause decision' in subsection 5(1) of the Act to include 'purported decision', is to ensure that:

> [T]hose provisions in Part 8 that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all migration decisions, even those that are arguably affected by jurisdictional error.[26]

3.33 Professor George Williams submitted that reference to 'purported decision' in the redefinition of 'privative clause decision':

> [M]ay well be unconstitutional in that (it) may be inconsistent with the jurisdiction of the High Court guaranteed in section 75(v) of the Constitution. It may also be … so contradictory in seeking to regulate something that is not (a) decision at all that the amendment would be invalid because it could not be seen as a 'law' that could be enacted by Parliament under section 51 of the Constitution.[27]

3.34 Professor Williams, in a joint article with the Hon Duncan Kerr, MP, considered the High Court had clearly indicated, in *obiter dicta*, that attempts to extend privative clause decisions to include purported decisions involving jurisdictional error would

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25 *House of Representatives Hansard*, 25 March 2004, p. 27214.

26 *Explanatory Memorandum*, p. 2.

27 *Submission 1*, p. 1.

fail. They referred to the joint judgement of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in Plaintiff S157 where their Honours said that such an attempt:

> [W]ould be in direct conflict with s 75(v) of the *Constitution* and, thus, invalid. Further, they would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the *Constitution* that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.[28]

3.35 The Law Council of Australia submitted that:

> [It] Is demonstrably at odds with settled Constitutional principle that access to the High Court under s 75(v) of the Constitution should always be available for persons aggrieved by the decisions of Commonwealth officers;
>
> …
>
> However it is constructed, it is now well established that a privative clause cannot oust the jurisdiction of the High Court to review decisions and orders which exceed Constitutional limits. As was stated by Gaudron and Gummow JJ in the more recent High Court case of *Darling Casino Ltd v New South Wales Casino Control Authority*, the terms of s 75(v) of the Constitution would be defeated if a privative clause operated to protect against jurisdictional errors. These are a refusal to exercise jurisdiction, or excess of jurisdiction – whether by reason of the constitutional invalidity of the law relied upon or the limited terms of a valid law.[29]

3.36 The Law Council went on to say:

> To remove purported decisions from review, is to allow an unlawful decision to form the basis of governmental action, including actions that negatively affect the rights of individuals – deportation orders for example. This undermines the purpose of s 75(v) of the Constitution, which is to protect against unlawful incursions by the government.[30]

3.37 In answer to a question from the Committee on whether the Bill attempts to make lawful a decision that would otherwise be unlawful, DIMIA said:

> [I]t is seeking to provide a reasonable opportunity for people to challenge a decision. If they are unable to do it within the three-month period, the practical effect is that the decision would not be judicially reviewable and

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28 'Review of executive action and the rule of law under the Australian Constitution', (2003) 14 PLR 219 at p. 224.

29 *Submission 17*, pp. 7-8.

30 *Submission 17*, p. 8.

> the conclusion you have put forward is a conclusion that is open to people to make.[31]

The Committee's view

3.38 The Committee acknowledges the Government's concerns about the length of time taken by some applicants in seeking judicial review of adverse migration decisions. It accepts that the primary objective behind the redefinition of 'privative clause decision' in subsection 5(1) of the Act to include a 'purported decision', is to ensure that the time limits set for seeking judicial review apply.

3.39 The Committee notes that the Bill excludes the wider definition of 'privative clause decision' (ie that which includes 'purported decisions') from applying to section 474 of the Act. This means that the Bill does not seek to bar review of 'purported decisions', rather, it seeks to apply time and jurisdiction limits to such review. Notwithstanding this, the Committee is concerned that when coupled with 'deemed notification', the concept of 'purported decisions' may be problematic. As discussed below there are many circumstances where a party may fulfil the requirements of deemed notification, but may not actually be aware that they have been subject to a decision they should appeal.

3.40 Given the wide scope of the definition of 'purported decision', it is important that the time limit for appeals (at least in the High Court) only commence upon 'actual notification' of a party. If the Committee's recommendation in this report, that Item 10 of the Bill be amended to retain the current service requirements of 'actual notification' in regards to the Hight Court, those parties caught by the wide scope of the 'purported decision' definition are at least guaranteed actual notification of such a decision (in regards to appeals to the High Court).

Time limits for seeking judicial review of decisions

3.41 Unlike the existing provisions in the Act, the proposed amendments impose an initial time limit of 28 days on applications for judicial review to the High Court, thus aligning it with those that presently apply to the Federal Court and the Federal Magistrates Court. They also provide for the High Court, the Federal Court and the Federal Magistrates Court to extend the 28 day time limit by a further 56 days where the court considers that is in the interest of the administration of justice to do so.

3.42 The amendments also seek to change the date from which the proposed time limit for seeking judicial review by the High Court will commence to run. The date of notification of a decision will change from actual to deemed notification. According to the Explanatory Memorandum, this will mean that 'the issue of whether or not a

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31 *Committee Hansard*, 12 May 2004, p. 21.

person was actually notified of a decision would no longer be relevant in deciding whether or not the High Court could hear the application for judicial review'.[32]

3.43 In relation to the proposed amendments to the time limits, concerns were expressed in relation to the following matters:

- the constitutional validity of such provisions;
- the imposition of absolute time limits with courts having no discretion to extend them;
- the imposition of absolute time limits on applications for judicial review could result in decisions being legitimised that would otherwise be unlawful by reason of jurisdictional error; and
- changing the date of receipt of notice of a decision from actual to deemed receipt in relation to applications to the High Court.

3.44 While some submissions stated they did not object to time limits, nor should time limits be ignored, they were firm in the view that courts must retain a general discretion to extend any time limit where circumstances and the interest of justice support an extension.[33]

3.45 In opposing the imposition of absolute time limits on applications seeking judicial review of migration decisions, the following reasons were put forward in submissions:

- they may result in legitimising decisions that are unlawful merely because the time for seeking a review has expired;[34]
- they do not distinguish between meritorious and unmeritorious applications for review;[35]
- they are 'a crude and inflexible instrument inherently incapable of operating fairly and doing justice in many circumstances';[36]

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32 *Explanatory Memorandum*, p. 6.

33 Professor George Williams, *Submission 1*, p. 2; The Law Society of South Australia, *Submission 4*, p. 2; Human Rights and Equal Opportunity Commission, *Submission 5*, p. 7; Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme, *Submission 9*, p. 8; Refugee & Immigration Legal Centre Inc. *Submission 18*, pp. 3-4.

34 Amnesty International Australia, *Submission 8*, p. 4.

35 HEROC, *Submission 5A*, p. 1-2; Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme, *Submission 9*, p. 4.

- they do not address the difficulties faced by many asylum seekers;[37]
- they could result in increased risk of refoulement;[38] and
- they could encourage the lodgement of 'protective' appeals which may not always have merit.[39]

3.46 The Refugee & Immigration Legal Centre Inc. said, in their experience, there may be compelling reasons why applicants fail to lodge their application within the prescribed time, which are completely unrelated to the merits of the application. It listed these as including:

- Applicants lack of comprehension of their right of appeal, compounded by the fact that the law of judicial review is a highly complex and technical area of law.
- Lack of access to appropriate legal advice about their right of appeal, the consequences of and the prospects of success of an appeal.
- In relation to the above, we note that a high proportion of applicants have scarce means and are unable to pay for legal advice. In turn, there remains an endemic shortage of competent pro bono assistance in relation to the demand for legal advice.
- Poor English skills and lack of access to qualified interpreters.
- The negligence of migration and legal advisers and poor advice to applicants.
- The high prevalence of mental illness, often due to past experience of torture and trauma, which contributes to failure to exercise rights to appeal.
- The actions of third parties such as administrative officers of the Department or detention centre operators.[40]

3.47 In support of courts retaining discretion to grant extensions of time, the Refugee & Immigration Legal Centre Inc., referred to the discretionary provisions in section 11 of the *Administrative Decisions (Judicial Review) Act 1977* and Order 54, Rule 2A of the Federal Court Rules. They pointed out that the court had:

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36 Refugee & Immigration Legal Centre Inc. *Submission 18*, p. 3.

37 Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme, *Submission 9*, p. 5.

38 Australian Lawyers for Human Rights, *Submission 7*, pp. 1-2; Amnesty International Australia, *Submission 8*, pp. 5-6; Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme, *Submission 9*, p. 4.

39 Refugee & Immigration Legal Centre Inc., *Submission 18*, p. 2.

40 Refugee & Immigration Legal Centre Inc., *Submission 18*, pp. 5-6.

> [D]eveloped principles regarding the exercise of its discretion to extend the time limit. Matters which the court will take into consideration include the explanation for the delay and action taken by the applicant since the decision was made, any prejudice to the respondent which may result from the grant of an extension of time, the merits of the substantial application and the seriousness of the issues involved. It is the prima facie rule that proceedings commenced outside the prescribed period will not be entertained and the court will not extend the time unless it is positively satisfied that it is proper so to do.[41]

3.48 The Centre went on to say that they 'are not aware of other statutory schemes which impose limits on seeking judicial review without providing for judicial discretion to extend those time limits'.[42]

3.49 The Law Council of Australia, in its submission, referred to various rules of the Federal Court and the Federal Magistrates Court for dealing with frivolous, vexatious claims or an abuse of process. They referred specifically to Rule 20.2 of the Federal Court Rules which states:

> Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding:
>
> a) no reasonable cause of action is disclosed;
> b) the proceeding is frivolous or vexatious; or
> c) the proceeding is an abuse of process of the Court;
>
> the Court may order that the proceeding be stayed or dismissed generally or in relation to any claim for relief in the proceeding.[43]

3.50 In relation to cases coming before the High Court, the Council said:

> Cases can only come before the Court with leave, which gives the Court the opportunity to deny special leave applications where the claim involved has no merit. Thus, if a claim has no legal merit, all courts that currently have jurisdiction over migration matters already have the power to quickly and easily dismiss the case. Indeed, many migration and refugee cases have been correctly dealt with in this way. Those that are not struck out on these bases have legal merit, and therefore the government's new bill seeks to do one of two things: either duplicate a function which exists within the federal courts, or prevent incorrect decisions from being corrected in favour of applicants.[44]

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41 Refugee & Immigration Legal Centre Inc., *Submission 18*, pp. 4-5.

42 Refugee & Immigration Legal Centre Inc,. *Submission 18*, p. 5.

43 *Submission 17*, p. 8.

44 *Submission 17*, pp. 8-9.

3.51 The Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme stated that 'Many cases can be cited to exemplify the injustices resulting from legislative absolute time limits'. [45] They referred to the circumstances of three cases where the court rejected an application for an extension of time. These concerned:

- an application for review which was sent by the applicant's family to the Tribunal, rather than to the Court;[46]
- an applicant who did not speak English and was not informed that he had the right to judicial review of the Tribunal's decision;[47] and
- an application being handed to an officer at the detention centre within the time limit, who twice faxed it to the wrong telephone number.[48]

Constitutional validity of setting time limits for applications to the High Court

3.52 Several submissions argued that the imposition of an absolute time limit for lodging an application for judicial review in the High Court may be unconstitutional in that it may be inconsistent with the jurisdiction of the High Court guaranteed in section 75(v) of the Constitution.[49]

3.53 Several submissions referred to the judgement of Callinan J in Plaintiff S157 and to his finding and comments in relation to section 486A of the *Migration Act 1958*.[50]

3.54 In Plaintiff S157, Callinan J was the only judge to directly address the issue of the time limit in section 486A of the *Migration Act 1958*. In a separate judgement, his Honour held section 486A to be invalid to the extent that it purported to impose a time limit of 35 days within which to bring proceedings in the High Court under section 75(v) of the Constitution. However, notwithstanding his Honour's finding, he went on to say that he accepted:

> [T]he Parliament may, consistently, in my opinion, with the approach of the Court to regulation and prohibition in *Smith Kline & French Laboratories* regulate the procedure by which proceedings for relief under s 75(v) may be

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45 *Submission 9*, pp. 5-6.

46 *Al Achraft v Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 550.

47 *Guendouz v Minister for Immigration and Multicultural Affairs* [2000] FCA 766.

48 *Kucuk v Minister for Immigration and Multicultural Affairs* [2001] FCA 535.

49 Professor George Williams, *Submission 1*, p. 1; Ms Fiona Stuart, *Submission 13*, p. 2; Mr Anthony Simms, *Submission 15*, p. 4; Refugee Advocacy Service of Australia Inc., *Submission 16*, p. 3; Law Council of Australia, *Submission 17*, p. 7.

50 Mr Peter Hillerstrom, *Submission 12*; Ms Fiona Stuart, *Submission 13*; Mr Anthony Simms, *Submission 15*.

> sought and obtained. But the regulation must be truly that and not in substance a prohibition.[51]

His Honour went on to comment:

> I do not doubt that there is a power to prescribe time limits binding on the High Court in relation to the remedies available under s 75 of the Constitution as part of the incidental power with respect to the federal judicature. But those time limits must be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as s 486A in my opinion does. A substantially longer period might perhaps lawfully be prescribed, or perhaps even 35 days accompanied by a power to extend time.[52]

3.55 Mr Christopher Horan, appearing before the Committee on behalf of the Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme said:

> If there were a power to extend time then the constitutional problem would perhaps not disappear but would be greatly reduced. Alternatively, if the time period ran from actual notification then, again, that would make the time period more reasonable. A danger arises because it might be argued that the court's jurisdiction cannot be removed and the imposition of a time limit, which might be in particular cases quite unreasonable in its application, would be inconsistent with that constitutional right of review. But it does assume that the decision that is being challenged might be capable of being beyond jurisdiction.[53]

3.56 DIMIA advised the Committee that:

> [T]he government sought advice from the Australian Government Solicitor on whether, having regard to the High Court's decision in the case of plaintiff S157, it would be possible to set a time limit with a further time within which a court – including the High Court – could decide to allow an application. The Australian Government Solicitor advised that this was possible, provided that the time within which the court could permit such an application to be made was reasonable.[54]

3.57 The Human Rights and Equal Opportunity Commission (HREOC) suggested that rather than courts having discretion to extend the 28 day period by an additional 56 days, as provided for in the Bill, they should be given a general discretion to extend the period if they are satisfied that it would be in the interest of the administration of

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51 (2002-03) 211 CLR 476 at p. 537.

52 (2002-03) 211 CLR 476 at p. 538.

53 *Committee Hansard*, 12 May 2004, pp. 8-9.

54 *Committee Hansard*, 12 May 2004, p. 17.

justice to do so. The Commission suggested that a court should have regard to the following matters in exercising its discretion:

- the extent of the delay in bringing the application;
- the reasons for the delay in bringing the application;
- the prospects of success of the application; and
- any other relevant circumstance.[55]

3.58 HREOC also suggested that, in any application seeking an extension of time, the onus should be on the applicant to satisfy the court that it is in the interest of justice to grant the extension.[56]

The Committee's view

3.59 The Committee acknowledges the concern expressed in submissions and evidence as to the constitutional validity of the Bill. The Committee notes however that as discussed in paragraph 3.53 of this report, in Plaintiff S157, Justice Callinan in obiter (the only judgement to address the question of the constitutionality of time limits in relation to applications for judicial review), noted that time limits would be constitutionally valid, so long as the limit is regulatory in nature and not such as to make the right of recourse virtually illusory. He further noted:

> A substantially longer period might perhaps lawfully be prescribed, or perhaps even 35 days accompanied by a power to extend time. Finality of litigation is in all circumstances desirable.[57]

3.60 The Committee believes that the time limit imposed by the Bill (a potential 84 days), is substantially longer than the 35 days considered in the case of Plaintiff S157. The Committee is also satisfied that the time limit in the Bill is sufficiently long to ensure that the opportunity for a party to exercise their right to apply for judicial review is available and is not reduced to being 'virtually illusory'.

3.61 The Committee is, however, concerned by Item 10 of the Bill, which would make the time limit applying to the High Court run from the time of deemed notification, as opposed to actual notification as is presently the case. The Committee details these concerns below, and believes that if this Item is amended to retain the requirement for actual notification, the reasonableness of the time limits would be increased.

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55 *Submission 5A*, pp. 1-2.

56 *Submission 5A*, pp. 1-2.

57 (2002-03) 211 CLR 476 per Callinan J, at p. 538.

Deemed as opposed to actual notification of decisions

3.62 In relation to applications to the High Court seeking judicial review of decisions, the Bill provides for the time limit to commence from the deemed date of notification rather than the date of actual notification, as presently provided for in subsection 486A(1) of the *Migration Act 1958*. As was explained in the Explanatory Memorandum, this would mean the issue of whether or not a person was actually notified of a decision would no longer be relevant in deciding whether or not the High Court could hear the application for judicial review.

3.63 The Refugee & Immigration Legal Centre Inc. submitted that:

> [T]he proposed requirement of only deemed notification for High Court appeals would further compound the potential for substantial unfairness and injustice resulting from non-extendable time limits. We submit that the proposed provisions which require only deemed notification of decisions in conjunction with an absolute time limit of 28 days to appeal to the High Court is likely to lead to situations of significant injustice, and may constitute an unconstitutional limitation on the original jurisdiction of the High Court pursuant to section 75(v) of the Constitution.[58]

3.64 The Centre referred to a number factors which could result in individuals not receiving notification due to circumstances beyond their control. These include:

- the prevalence of poverty and consequential homelessness among applicants;
- restrictions on work rights and access to social security afforded to many persons as conditions of their bridging visas; and
- an applicant advising DIMIA of a change of address on the same day a decision is posted to them at their former address.[59]

3.65 The Law Society of South Australia submitted that cases may arise where an applicant, with a meritorious claim, could be 'denied access to justice' by not having received actual notice of a decision yet is outside the time limit having been deemed to have received the notice.[60]

3.66 The Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme submitted that:

> The injustices likely to flow from the impositions of absolute time limits for the lodgement of applications for judicial review are further exacerbated by

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58 *Submission 18*, p. 8.

59 *Submission 18*, pp. 8-9.

60 *Submission 4*, p. 2.

> the removal of the requirement for actual notification of the adverse decision in relation to applications to the High Court.
>
> …
>
> It is submitted that requiring deemed notification of the decision rather than actual notification, in addition to conferring absolute time limits on applications to the High Court, places unconstitutional limits upon the original jurisdiction of the High Court pursuant to s 75(v) of the Constitution.[61]

The Committee's view

3.67 The Committee acknowledges the concerns expressed in various submissions about the likely impact of changing the mode of notification from actual to deemed notification in relation to applications for review in the High Court. The Committee appreciates that by making the time limit run from the point of deemed notification, it is possible to have instances of confusion or a practical failure to effect actual notification, as detailed above. Whilst the Committee believes that the time limits imposed by the Bill (an effective 84 days) are reasonable and ensure that review is available, it is concerned that there may be instances where parties do not receive practical or effective notification, and when combined with an absolute time limit injustice could result.

3.68 As a consequence, the Committee believes that Item 10 of the Bill should be amended to retain the requirement that the initial time limit run from the time of actual notification as opposed to deemed notification. If Item 10 of the Bill were amended as detailed above (and as a result time limits in relation to High Court applications ran from the point of actual notification), those parties with claims as to whether or not they had received actual notification would still be able to seek review before the High Court. This would also increase the reasonableness of the Bill's time limits, by ensuring that there is an available forum for appeal where the time limit will only commence upon actual notification.

Restriction on judicial review of primary decisions

3.69 Subsection 476(1) of the Act provides that the Federal Court and the Federal Magistrates Court do not have any jurisdiction in relation to a primary decisions.

3.70 The Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme said they opposed the redefinition of 'privative clause decision' in subsection 5(1) of the Act in that it seeks to bar the High Court's jurisdiction to review a primary decision. They submitted that:

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61 *Submission 9*, pp. 8-9.

> There is no absolute bar upon judicial review of primary decisions at common law, nor under other statutory schemes….Rather, there is a general discretion to decline to review a primary decision in circumstances where an alternative review is available.

They further submitted that:

> [T]he common law criterion that has been developed for the exercise of judicial discretion are sufficient. The proposed amendments which confer a statutory bar on judicial review of primary decisions under any circumstances is unnecessary and unjust.[62]

3.71 Mr Horan, who gave evidence on behalf of the Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme, said the effect of the proposed amendments would mean that the present jurisdictional restriction on courts reviewing primary decisions will also apply to the High Court where a person fails to seek judicial review within the prescribed time limit.

The Committee's view

3.72 The Committee notes that the Bill does not seek to bar the High Court from engaging in primary review of decisions. Rather it seeks to apply time limits to such review. The Committee does not believe that by imposing a time limit, the Bill prevents the High Court from reviewing primary decisions. Parties will still be able to seek such review in the High Court, although they will be required to do it within the 84 day time limit.

Do the provisions of the Bill discriminate between asylum seekers and other migration applicants in relation to their appeal rights?

3.73 The Committee did not receive any evidence as to whether the proposed amendment discriminates between asylum seekers and other migration applicants in relation to their appeal rights. However, the Committee notes that the Explanatory Memorandum states that the proposed definition of 'privative clause decision' in paragraph 5(1)(b) applies for all purposes under the Act, other than section 474.[63] The Committee is therefore satisfied that there is no discrimination between asylum seekers and other migration applicants in relation to their appeal rights.

Possible breach of United Nations conventions

3.74 HREOC submitted that:

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62 *Submission 9*, pp. 10-11.

63 *Explanatory Memorandum* to the Migration Amendment (Judicial Review) Bill 2004, paragraph 10.

> [T]he imposition of strict procedural requirements, such as absolute time limits, in cases involving refugee claims creates an unacceptable risk of 'refoulement' (returning a person to a country where they face persecution) and may therefore lead to a breach of human rights.[64]

3.75 HREOC reiterated the concerns it had expressed in its submission to the Attorney-General's Migration Litigation Review that the current system for disposition of claims relating to migration status may be in breach of Australia's international obligations. It submitted that:

> [A]ny model of management and disposition of migration cases must contain adequate procedural safeguards. The Commission's submission is that a system which fails to do so will create an unacceptable high risk of refoulement. Such refoulement would obviously have consequences of the highest significance for the individual involved. It would also place Australia in breach of its obligations under the Refugee Convention as well as ICCPR, the CRC and CAT.[65]

3.76 HREOC said that special consideration should be given to the rights of children seeking protection visas under the Migration Act. It submitted that:

> One of the overarching requirements of the CRC is that in all actions concerning children (defined as being persons under the age of 18), the 'best interests' of the child shall be a primary consideration (article 3(1)).
>
> …
>
> The Commission submits that the rights of children are of particular relevance when considering procedural requirements such as time limits. The vulnerability of children seeking asylum, particularly those who are unaccompanied, may require special flexibility in relation to rules and procedures. Any measure which denies children review rights on the basis of a failure to comply with specific provisions of the *Migration Act* should be very carefully scrutinised to ensure that it does not breach article 22 of the CRC and allows for a proper consideration of the best interests of the child, consistent with article 3(1).[66]

3.77 HREOC said that it did not consider the proposed amendments to the *Migration Act 1958* addressed these concerns.[67]

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64 *Submission 5*, p. 2.

65 *Submission 5*, pp. 5-6.

66 *Submission 5*, pp. 8-9.

67 *Submission 5*, pp. 2-3.

3.78 The Australian Lawyers for Human Rights,[68] Amnesty International Australia[69] and the Law Council of Australia[70] also expressed concerns that the proposed amendments place Australia at risk of breaching its obligations under various international conventions.

3.79 When DIMIA was asked if they had a view on whether the Bill would result in Australia breaching its obligations under various international conventions, they said:

> We do not believe it does. In the context of refoulement we believe that the opportunity for judicial review is there. Also the executive committee of UNHCR has indicated that one level of review is all that is necessary – be it merits review or judicial review. We do have merits review and we would have judicial review opportunities here. We believe that access to the courts is available under these proposals so we believe it is consistent with the ICCPR requirements.[71]

3.80 HREOC said it disagreed with this view. It said:

> The Commission does not agree with the proposition that Australia's international obligations in relation to asylum seekers (which extend beyond the Refugee Convention) are necessarily met by anything short of judicial review.
>
> In particular, Article 2 of the ICCPR requires Australia to provide an effective remedy to rectify current breaches of human rights and prevent future breaches of human rights. While State Parties have some degree of choice regarding the nature of any 'effective remedy', in some cases a formal judicial appellate system is the only remedy that will meet the requirement of effectiveness. The Commission's position is that decisions which go to questions of refoulement fall within this class of cases.[72]

The Committee's view

3.81 The Committee notes the Department's comments that the Bill would not breach Australia's commitments under international conventions, as the Bill would still ensure there was one tier of review. The Committee restates its view that an effective time limit of 84 days is long enough to make review of decisions available, and does not make access to such review illusory.

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68 *Submission 7*.

69 *Submission 8*.

70 *Submission 17*.

71 *Committee Hansard,* 12 May 2004, p. 22.

72 *Submission 5A*, p. 3.

Alternatives to the Bill

3.82 Some submissions suggested that the government, rather than seeking to restrict judicial review of adverse decisions, should focus its attention at looking more closely at the types of complaints being made about the decision making process.

3.83 Amnesty International Australia submitted that:

> The introduction of the Bill risks deflecting attention from the focus that must be given to addressing existing inaccuracies and inefficiencies in the decision making process.[73]

3.84 The Refugee Advocacy Service of Australia Inc. said that there was a lack of confidence in both the initial decision-making process and also in the Refugee Review Tribunal's review of these initial decisions. They submitted that:

> … the Government should look at the quality of the original decisions being made by the decision-makers and look at the reasons why so many review applications are being made from these decisions. Perhaps if the Government would ensure a better quality of decision-making then it would be able to decrease the Court's workload as concerns review of migration decisions.[74]

3.85 The Law Council of Australia suggested the government should adopt the following approach in order to find a solution to the problems of increasing appeals from decisions of the tribunals:

- Determine empirically *why* so many applications for judicial review are being made and do not rely merely on anecdotal evidence or unfounded assumptions;

- Restore the discretion once vested in immigration officials to grant visas to individuals with strong humanitarian or compassionate grounds for being allowed to remain in Australia. In this regard, consideration should be given to adopting the regime of 'Complementary Protection' for near-miss refugee cases favoured in Europe;

- Return the judicial review of migration decisions to the mainstream of the *Administrative Decisions (Judicial Review) Act 1977* (Cth);

- Concentrate on improving the quality of primary decision making; and

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73 *Submission 8,* p. 6.

74 *Submission 16*, p. 5.

- Concentrate on improving the quality, independence and transparency of the migration tribunals, in particular the Refugee Review Tribunal (RRT).[75]

3.86 Mr Michael Clothier, in evidence before the Committee, stated that the solutions proposed by the Law Council of Australia in its submission

> [W]ill go a long way to fixing the problems. If you have had a good hearing – for example, in the AAT, where you can have your own lawyer or representative, where you can call evidence, you can cross-examine witnesses and you can do all the things that you normally do – and you lose, you are not likely to be litigating further up the road.[76]

3.87 Mr Craig Lenehan, appearing for HREOC, advised the Committee that the Commission:

> [M]aintains that an alternative measure which might both reduce the number of unmeritorious claims brought before the courts and enhance the protection of human rights would be to increase the availability of legal advice, assistance and representation available to the individuals involved in migration litigation. The commission has also previously observed that an appropriate means of dealing with unmeritorious appeals is to enhance the powers of single judges in the Federal Court to dismiss appeals which do not disclose an available ground of appeal. Importantly, such an approach focuses on the merit of the matter, not on issues of procedures.
>
> The commission has further previously observed that the risk of refoulement contrary to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the convention against torture is not presently a sufficient basis for a claim for a protection visa under the Migration Act unless the breach of the rights feared also gives rise to Australia's protection obligations under the refugees convention. This may mean that so-called unmeritorious claims for a protection visa are brought for want of another basis for seeking protection. The introduction of a system for dealing with claims in relation to refoulement under the ICCPR, the Convention on the Rights of the Child and the convention against torture may relieve some of the pressure on the system caused by those cases being brought as protection visa applications.[77]

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75 *Submission 17*, pp. 2-3.

76 *Committee Hansard*, 12 May 2004, p. 5.

77 *Committee Hansard*, 12 May 2004, pp. 12-13.

The Committee's view

3.88 The Committee acknowledges that some of the suggestions for improving decision making in migration matters have merit. No doubt some of these matters would have been canvassed in the Attorney-General's Migration Litigation Review. The Committee considers that it would have been in a better position to comment on these suggestions if the report of the Review had been available. Unfortunately this was not the case.

Recommendation 1

3.89 The Committee recommends that Item 10 of the Bill be amended so that the new 28 day initial time limit commence upon actual notification. This would be achieved by amending Item 10 of the Bill to read: 'Omit "35 days of the actual (as opposed to deemed) notification", substitute "28 days of the actual (as opposed to deemed) notification"'. Subject to the Bill being amended in this way, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair

ADDITIONAL COMMENTS

LABOR SENATORS

1.1 Whilst Labor Senators are prepared to support the Bill if the Committee's majority report recommendation is followed, they remain concerned about the constitutional validity of the Bill.

1.2 The Bill would seek to apply a time limit (up to 84 days) to applications for judicial review of decisions that may suffer from jurisdictional error. Importantly, it would seek to apply such a time limit to the High Court. As noted in the majority report, there was comment by Justice Callinan in *Plaintiff S157* that a time limit may be applied to applications for judicial review in the High Court, although it would need to be sufficiently long such that the right to appeal was more than illusory. Whilst this may suggest that time limits can be applied to appeals before the High Court, Labor Senators note that these comments were made by a single judge in *obiter*. Furthermore, the case of *Plaintiff S157* did not consider the possibility of applying time limits to decisions that suffer from serious jurisdictional error. Given the very wide scope of 'purported decision' in the Bill, Labor Senators are concerned that where a decision suffers serious jurisdictional error, the High Court may find that imposing a time limit on such an appeal would act as a prohibition on the High Court's powers of review under section 75 of the Constitution.

1.3 Whilst Labor Senators support the recommendation of the majority report, that in relation to applications to the High Court the time limit run from actual notification (as opposed to deemed, as provided in the Bill), they remain concerned that there could still be circumstances where a party may have received actual notification but may still not be aware of their need to appeal (for example, where they do not speak English).

1.4 Labor Senators are disappointed that this Bill was introduced before the findings of the Migration Litigation Review were released. Access to this review would have been helpful in assessing the need and appropriateness of the Bill.

Senator the Hon. Nick Bolkus
Deputy Chair

Senator Joseph Ludwig

Senator Linda Kirk

DISSENTING REPORT

AUSTRALIAN DEMOCRATS

1.1 After reviewing the evidence and submissions to the Senate Inquiry, I have reached the view that the Migration Amendment (Judicial Review) Bill 2004 should be opposed.

1.2 Whilst I acknowledge the attempts other members of the Committee have made to address the flaws in the legislation, I do not believe there is any valid justification for the Bill and do not believe it should proceed. I am disappointed that the Committee has not acted in line with the overwhelming evidence of submissions arguing against the provisions of the Judicial Review Bill 2004.

1.3 My primary concern is that this Bill's main purpose is to attempt to restrict judicial review of migration decisions by imposing time limits, without allowing the courts proper opportunity outside of those time limits to assess whether that decision is imbued with jurisdictional error.

1.4 According to the Government's second reading speech, the 'statistics speak for themselves'. However, it is evident that they do not. After a considerable increase in numbers in 2002-2003, there has been a significant decline in migration cases in the current financial year in the Federal and High Courts.

1.5 What is most evident is the fact that a large part of the increase in 2002-2003 is due to policy measures of this Government itself, especially in relation to decisions not to allow representation actions in migration matters. The foreseeable side-effect of this decision is the increase in individual migration cases.

1.6 It must be put into perspective that the peak in numbers of migration applications in 2002-2003 is also due to the sharp increase in unauthorised arrivals between 1999 and 2001. The reduction in unauthorised arrivals since that time must be taken into account in assessing the future migration caseload.

1.7 In relation to the question of whether the Bill seeks to bar judicial review, the committee writes:

> 3.39 "This means that the Bill does not seek to bar review of 'purported decisions', rather, it seeks to apply time and jurisdiction limits to such review."

1.8 In my view, the effect is the same - potentially unjust and unlawful decisions will be able to stand when they should not. This is not an appropriate goal to try to achieve. We should be seeking to uphold the rule of law, not trying to find ways around it.

1.9 In relation to the Attorney-General's claim of a 92.5 per cent success rate in migration cases before the Federal Court and Federal Magistrates Court, this figure does not allow for matters withdrawn by the Government before hearing or matters remitted by consent to the migration tribunals. Nor does it take into consideration the many other reasons why applicants do not proceed with their cases.

1.10 Without the government releasing the Attorney-General's Migration Litigation Review, we are unable to know the statistics of out-of-time cases that win their appeal vs. the number of cases within the time limits. Unless the Attorney-General releases statistics to the contrary, it can only be assumed that the acceptance of the time limits will indeed stop the judicial review of cases that would have won had they had their day in court.

1.11 The seriousness of the outcomes of migration-related decisions should impose a greater reluctance on the part of law-makers to limit judicial review. While DIMIA statistics state that 92.5% of appeals fail, this means that there is a 7.5% error rate in the review level provided by the RRT. Considering the outcomes for refugees if the Australian system gets it wrong, this means we have a 7.5% error rate in a potential death sentence for people who will be returned to their country of origin.

1.12 It would appear that the priority is being given to achieving efficiency and effectiveness by limiting appeals to the courts over ensuring that decisions on visa applications and on the lives of individuals at risk of persecution are correct and in compliance with Australia's human rights obligations.

1.13 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.

1.14 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.

Senator Brian Greig **Senator Andrew Bartlett**

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1	Professor George Williams
2	United Nations High Commissioner for Refugees (UNHCR)
3	The Hon Duncan Kerr MP
4	The Law Society of South Australia
5	Human Rights and Equal Opportunity Commission
5A	Human Rights and Equal Opportunity Commission
6	Ms Lotta Ziegert
7	Australian Lawyers for Human Rights
8	Amnesty International Australia
9	Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme
10	Ms Rebecca Fawcett
11	Refugee Council of Australia
11A	Refugee Council of Australia
12	Mr Peter Hillerstrom
13	Ms Fiona Stuart
14	Mr Jamie Snaddon
15	Mr Anthony Simms
16	Refugee Advocacy Service of Australia Inc.
17	Law Council of Australia
18	Refugee & Immigration Legal Centre Inc.
19	The Law Society of the Australian Capital Territory

20 Department of Immigration and Multicultural and Indigenous Affairs

21 Attorney-General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Wednesday 12 May 2004

Law Council of Australia

Mr Michael Clothier, Member International Law Section

Public Interest Advocacy Centre and Victorian Bar Assistance Scheme

Mr Christopher Horan

Human Right and Equal Opportunity Commission

Mr Craig Lenehan, Acting Director of Legal Services

Mr Jonathon Hunyor, Senior Legal Officer

Department of Immigration Multicultural & Indigenous Affairs

Mr Des Storer, First Assistant Secretary, Parliamentary and Legal Division

Mr Doug Walker, Assistant Secretary Visa Framework Branch

Mr John Eyers, Assistant Secretary Legal Services and Litigation Branch