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The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Provisions of the Migration Amendment (Judicial Review) Bill 2004

Thank you for the opportunity to make a submission to this inquiry.

I address two aspects of this Bill. First, the proposal to set non-extendable time limits on judicial review applications in the High Court. Second, the reference in the Bill to 'purported' decisions.

Constitutional issues raised by these aspects of the Bill are addressed in the attached article by Duncan Kerr and myself, which was recently published in the *Public Law Review*. I should also mention that I was counsel for Plaintiff S157, along with Duncan Kerr, in the recent decision of the High Court in *Plaintiff S157/2002 v Commonwealth*.

The above two aspects of the Bill ought not to be enacted. One reason is that, as per the analysis in the attached article, they may well be unconstitutional in that they may be inconsistent with the jurisdiction of the High Court guaranteed in section 75(v) of the Constitution. It may also be the reference to 'purported decisions' in the Bill is so contradictory in seeking to regulate something that is not 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.

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.

The effect of the Bill is potentially to prevent judicial review of decisions that would otherwise be unlawful. This allows for the possibility that unlawful, or arbitrary, government action might be incapable of being overturned. In any event, what possible justification can there be for

proving a scheme of regulation for a 'purported decision', and thus a decision that by its very nature is unlawful?

While I do not object to time limits, any time limit must also keep open the possibility for an extension of time in appropriate circumstances. This might include where the grounds of review do not become known due to unlawful action on the part of government such as corruption until after the time limit has expired. It should not be thought that the rule of law can be curtailed by a non-extendable time limit (however lengthy).

Yours sincerely

George Williams