



amnesty international australia

Submission to

Senate Legal and Constitutional Legislation Committee

regarding the

Migration Amendment (Judicial Review) Bill 2004

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Submitted by

Amnesty International Australia

Broadway NSW

1. INTRODUCTION

Amnesty International Australia (“Amnesty International”) welcomes the opportunity to make a submission to the Australian Senate Legal and Constitutional Legislation Committee on the *Migration Amendment (Judicial Review) Bill 2004* (“the Bill”). The focus of Amnesty International’s submission is the Bill’s introduction of time limits for applications for judicial review.

Section 2 of the submission comments on the process of the government’s introduction of further measures to reduce judicial review in the migration process. Section 3 provides a summary of Amnesty International’s key concerns regarding the effect of the Bill on asylum seekers at risk of refoulement.

Defending the rights of uprooted peoples, including refugees and asylum seekers, is a global priority for Amnesty International. Amnesty International’s refugee work is based on the principle of non-refoulement, the fundamental principle of international refugee law. Asylum seekers who seek protection should never – directly or indirectly – be sent back to their country of origin if they risk serious human rights violations on return. Further, Amnesty International works for the prevention of human rights violations which cause refugees to flee their homes in the first place.

The principle of non-refoulement is set out in Article 33 of the *Convention relating to the Status of Refugees 1951* and its *1967 Protocol* (collectively referred to as the “Refugee Convention”) and Article 3.1 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (“CAT”). Australia is a party to these treaties.

Amnesty International consistently calls on governments to ensure that refugee determination procedures are fair and in accordance with internationally agreed standards, including the principles of due process. Amnesty International believes that judicial review of decisions and access to the court system are fundamental aspects of a fair refugee determination process.

Amnesty International’s mission is to promote and defend all the human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments.

Amnesty International is the world's largest independent human rights organisation, comprising more than 1.5 million members and supporters in over 150 countries and territories. Amnesty International is impartial and independent of any government, political persuasion or religious belief.

2. THE PROCESS OF AMENDMENT OF JUDICIAL REVIEW BY THE GOVERNMENT

Amnesty International encourages the Australian Senate Legal and Constitutional Legislation Committee ("the Committee") to refer to recent submissions made by the organisation to various parliamentary inquiries in relation to refugee matters; and, in particular the procedural aspects of processing refugee claims.

Amnesty International's most recent submission was to the Migration Litigation Review ("MLR") in November 2003, a copy of which is attached to this submission. Amnesty International refers the Committee to Part C of that submission, entitled "Conclusion and Suggestions for Improvement of Refugee Status Determination and Refugee Litigation".

In addition, Amnesty International refers you to the following submissions which are available on request:

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

While supporting in principle the more efficient processing of refugee claims, Amnesty International is concerned that this may take place at the expense of procedural fairness and of asylum seekers' access to judicial and merits review. Amnesty International has become increasingly concerned over the the last six years by the significant number of

amendments made to the *Migration Act* 1958. The amendments may have the result of returning refugees to countries where they would face persecution.

In this respect, Amnesty International accepted an invitation to provide a submission to the MLR. Amnesty International is hopeful that the MLR report will support the contention that measures aimed at improving Australia's refugee determination system would be better directed at focusing on the initial stages of the process, rather than the final stages of judicial review. Any focus on increasing efficiency of the process should not be to the detriment of Australia's adherence to its international human rights obligations.

Unfortunately the report arising from the MLR process, which should provide some insight into the effect of Australia's previous amendments to judicial review of migration decisions, has not yet been released. Amnesty International argues that it is premature to introduce the Bill prior to the public release of the MLR report and the necessary ensuing discussion on refugee review procedures in Australia and therefore the merits of the Bill.

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

Amnesty International's primary concern is that the Bill restricts review of migration decisions by imposing time limits, without allowing the courts any opportunity outside of those time limits to assess whether that decision is imbued with jurisdictional error.

3.1 Limiting the Jurisdiction of the Courts to review Migration Decisions

If the Bill is passed, Amnesty International is of the view that the government is purporting to oust the jurisdiction of the courts in certain circumstances. This is particularly so given the fact that the Bill imposes time limits on review of unlawful or "purported decisions". The Bill defines "purported decision" to mean a decision that would otherwise be considered a privative clause decision, but for the fact that it is imbued with jurisdictional error. In other words, even where the decision maker is not empowered to act, this Bill has the effect of legitimising that decision or action after the expiry of the limitation period. The exclusion of refugee decisions from the purview of the courts after the limitation period directly challenges the concept of the *rule of law* - a

fundamental foundation of Australia's system of governance, a prerequisite for a democracy and a principle enshrined in international law.

The grounds of judicial review for refugee claimants have already been significantly curtailed over the past six years through the passage of a number of bills including:

- The Migration Legislation Amendment (Procedural Fairness) Bill 2002;
- The Migration Legislation Amendment Bill (No. 6) 2001;
- The Migration Legislation Amendment Bill (No.1) 2000;
- The Migration Legislation Amendment (Judicial Review) Bill 2001;
- The Migration Legislation Amendment (Judicial Review) Bill 1998;
- The Migration Legislation Amendment Bill (No. 4) 1997; and
- The Migration Legislation Amendment Bill (No.5) 1997.

Amnesty International opposes a legal framework which would enable administrative decision makers to take actions or make decisions which would become legitimised within a short period of time without any recourse to judicial review - even where such decisions are made beyond the power of that decision maker or without jurisdiction.

3.2 Increasing the risk of refoulement

Amnesty International argues that the imposition of restrictive and arbitrary time limitations could lead to the premature rejection of claims by refugees who may then be refouled. Errors in refugee status determination can lead to the forcible return of refugees, resulting in their persecution, torture or death.

The restrictions already in place to merits and judicial review of refugee status determinations in Australia indicate there is already an existing risk of refoulement. Australia is obliged under the Refugee Convention to provide asylum seekers with free and equal access to court processes in relation to such determinations. The underlying aim of such obligations is to ensure that States do not risk the refoulement of asylum seekers and refugees. For instance, Article 16 of the Refugee Convention provides:

- 1. A refugee shall have free access to the courts of law on the territory of all Contracting States.*
- 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.*

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

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

Where a court would otherwise be able to make a decision on an asylum seeker's right to asylum in Australia, and they are prohibited due to a measure put in place by the government solely to reduce the volume of appeals and without regard to the merits of those appeals, there is a greater risk that the refugee may be returned to a place where their human rights are in jeopardy.

4. CONCLUSION

In proposing this Bill, 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 enshrined in international law.

Amnesty International opposes the Bill which will arguably lead to an increase in the risk of breaching Australia's non-refoulement obligation. 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.

It is imperative that those seeking asylum are not denied access to judicial review. Measures aimed at restricting access by asylum seekers to courts of law are an infringement of the rule of law.