amnesty international australia

Submission to Migration Litigation Review

Introduction

Amnesty International Australia (Amnesty International) would like to thank Ms Hilary Penfold QC, First Parliamentary Counsel, for the opportunity to make a written submission to the Attorney-General's Migration Litigation Review (**MLR**). Amnesty International's submission focuses only on refugee related litigation and not general migration issues.

Amnesty International's work on refugees

Amnesty International's concern for asylum seekers arises from the organisation's work for the protection of human rights. It aims to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights and other internationally recognised standards. Amnesty International works to prevent the human rights violations which cause refugees to flee their homes in the first place.

Amnesty International bases its work on the principle of non-refoulement, which is set out in numerous international human rights treaties, including Article 33 (1) 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**); treaties to which Australia is a party. The principle of non-refoulement provides that asylum seekers who seek protection should never – directly or indirectly – be sent back to their country of origin if they would face serious human rights violations. Following this principle, Amnesty International opposes the forcible return of any individual to a country where he or she risks serious human rights violations.

Amnesty International calls on governments in countries of asylum to ensure that their refugee determination procedures are fair and in accordance with internationally agreed standards, including the principle of due process. Whilst it is acknowledged that a percentage of litigants' claims may not be successful, it is fundamental that full access to judicial review is preserved in order to ensure that refugees are recognised as such. It is precisely the role of tribunals and courts to determine which of those cases brought before them are unmeritorious.

Migration Litigation Review (MLR)
This submission has three parts:

- **Part A** provides a summary of Amnesty International's key concerns regarding reforms which may be considered in the course of, or as a consequence of, the MLR;
- **Part B** provides comments about the process of the MLR; and
- **Part C** concludes the submission and suggests measures that could be explored by the MLR and by the Government in order to improve the efficiency of refugee litigation, and the accuracy and integrity of refugee status determination decisions by courts and tribunals.

Amnesty International would be pleased to provide further submissions in relation to refugee litigation at the MLR's request. We also encourage members of the MLR to refer to our recent submissions to various parliamentary inquiries in relation to refugee matters, and in particular refugee determination, which are attached as annexures to this submission:

- 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.

PART A - AMNESTY INTERNATIONAL'S KEY CONCERNS REGARDING RESTRICTIONS TO REFUGEE LITIGATION PROCEDURES

"Refugee litigation" occurs in the context of the determination of refugee status of asylum seekers who claim to invoke Australia's protection obligations under the Refugee Convention. Amnesty International acknowledges that there is little guidance contained in the Refugee Convention itself regarding the processes and standards that state parties should follow when undertaking refugee status determination decisions. However, there is a significant body of internationally agreed standards and guidelines relating to appropriate determination procedures, including the conclusions of the United Nations High Commission for Refugees Executive Committee.

Amnesty International urges the MLR steering committee to consider the inherent risks involved in refugee status determination. Put simply, errors in refugee status determination can lead to the forcible return of refugees, which can then lead to serious persecution or death of an asylum seeker when that person arrives back in their country of origin. As a consequence of Australia's mandatory detention policy,

errors in determination for those seeking asylum may also result in detention for extended and sometimes indefinite periods.

Amnesty International submits that the refugee determination process must be underpinned by the fundamental principle of non-refoulment. Given Australia's non-refoulement obligation, that is, not to send anyone back to face serious human rights violations, it is imperative that those seeking asylum are not denied access to judicial review. Amnesty International considers that measures which are aimed at restricting access by asylum seekers to courts of law are an infringement of fundamental human rights and undermine the rule of law.

Therefore, when exploring possible mechanisms to reduce the number of 'unmeritorious cases' (Migration Litigation Review Terms of Reference, dot point 3) the government should first demonstrate that such measures will not obstruct asylum seekers from gaining access to a fair determination of their claims and result in refoulement. In order to comply with the non-refoulment obligation, the government must have in place adequate procedures to accurately identify and protect every person who seeks its protection. In this regard, Amnesty International emphasises that Australia has international obligations under various treaties to provide asylum seekers with free and equal access to court processes in relation to refugee status determination. 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 are also a retreat from Article 14 of the International Covenant on Civil and Political Rights 1966 (**ICCPR**), 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.

Accordingly, the following measures would be opposed by Amnesty International because they may increase the risk of refoulement.

- **Restriction on the scope of judicial review**

Access to judicial review of decisions made in relation to refugee claims is a fundamental mechanism for ensuring Australia's compliance with its non-refoulement obligations. Whilst the invocation of such mechanisms have been viewed by the Government as increasing delays in the refugee determination process, such mechanisms are essential to the provision of due process and ensuring people are not refouled. As such, Amnesty International continues to express its concerns in relation

to the level of access to judicial review by asylum seekers in a system which is becoming increasingly restrictive.
The grounds of judicial review have already been significantly curtailed over the past few years by the passage of a number of bills including the following:

- 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).

The most recent amendment introduced by the Migration Legislation Amendment (Procedural Fairness) Bill 2002 has removed the fundamental common law rules of natural justice from the grounds of judicial review, thereby increasing the risk of breaching the principle of non-refoulement.

The passing of these bills into legislation has had the effect of strengthening the power of the administrative decision-makers and the Refugee Review Tribunal (RRT), while limiting the power of the higher courts in providing judicial review. Any further restriction on the scope of judicial review would impact adversely on the rights of asylum seekers. Amnesty International recommends that access to the courts and to the remedy of full court review for asylum seekers be preserved in accordance with international law.

Additionally, the evolving and highly complex area of international and domestic refugee law requires constant interpretation and review. In clarifying how the law is to be interpreted in Australia, the courts can determine the application of legal principles at all levels of the refugee determination process. In limiting the role that the judiciary plays, the correct application of the law may be compromised, resulting in further and unnecessary litigation.

- **The imposition of time limits for bringing reviews of migration decisions**

It remains of concern to Amnesty International that a merits review of the claims of asylum seekers to the RRT is denied to many asylum seekers on the basis that they are not notified of the 28 day time limit and find themselves unable to appeal an administrative decision. Amnesty International believes that consequently such persons have not been through a fair and satisfactory asylum procedure in Australia and could risk refoulement to their country of origin. The imposition of further time limits would be a blunt instrument which could lead to the premature rejection of claims by refugees who may be refouled.

- **Increased costs for bringing applications and decreased availability of fee waiver provisions**

Amnesty International remains concerned that the imposition of a post-decision fee creates a perceived and/or financial burden on all applicants, regardless of the bona

fides of their claim. The fee effectively deters asylum seekers from appealing negative primary decisions.

A further increase in costs for bringing applications, or a decrease in the availability of fee waiver provisions would lead to meritorious claims being rejected in an arbitrary way. A refugee's risk of refoulement may increase if access to review of refugee status determination is denied because of an applicant's inability to pay due to their circumstances.

- **The reduction of levels of appeal**

The reduction of ascending levels of appeal could compromise notions of the rule of law, which is fundamental to the exercise and enforcement of human rights. Should asylum seekers be denied from appealing their claims to a higher court through the elimination of further review mechanisms, there may be a greater risk of error in the determination process and of refoulement.

- **Disincentives for lawyers to assist asylum seekers**

Amnesty International would oppose measures which are designed to limit access to justice by creating disincentives for lawyers to assist asylum seekers. Provision of legal advice to asylum seekers is a fundamental component of a proper and comprehensive judicial process.

It is important to note that in many cases litigants are either taking their cases to court through their advisers who may not be lawyers, or they are appearing on their own behalf. In these cases, litigants are less likely to be able to navigate their way through complex areas of law and legal procedure, thereby making their proceedings unnecessarily complicated. As Wilcox J in *Muaby v Minister for Immigration and Multicultural Affairs* (1998) 1093 FCA (20 August 1998) commented:

> '*The solution is not to deny a right of judicial review. Experience shows that a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease*'.

Any measures to penalise lawyers and migration agents who act on behalf of asylum seekers, such as an increased power to award costs against pro bono counsel who assist asylum seekers, are unnecessary and inappropriate. Such measures would be counterproductive to the object of increasing efficiency in relation to refugee cases, and unduly penalise asylum seekers. Amnesty International recommends that the government ensures that asylum seekers have better access to legal assistance, if necessary by the provision of public funds to those who are impecunious. Not only would increased access to legal assistance reduce the risk of refoulement, it would

help potential applicants or appellants make better informed decisions about whether or not to appeal their cases.

PART B – THE PROCESS OF THE MLR

As indicated in Part A above, Amnesty International is concerned that as a result of the MLR, the Attorney-General may further restrict the rights of those seeking asylum within Australia. The MLR terms of reference and media conference announcing the MLR of 27 October 2003 suggest that an intention to limit these rights may already have been formed. Amnesty International is also concerned about the use of statistics which may unnecessarily raise community alarm about the costs of migration litigation, rather than address the issues of the efficiency of justice. For example:

- statistics referred to in the Attorney-General's media release of 27 October 2003 do not accurately reflect refugee litigation and, are in fact misleading. The Attorney-General's press release stated that '[i]n 2002-2003, more than one third of migration applications in the Federal Court and the Federal Magistrates Court were withdrawn by applicants before the court reached the decision'. There are range of reasons why an application may be withdrawn. For example, Amnesty International is aware of a number of cases where the strain of prolonged detention has lead to claimants abandoning their applications. Therefore, the claim that more than a third of applicants withdraw their cases before a hearing should not be construed as evidence that such applicants are unmeritorious.

- The Attorney-General also referred to a recent increase in applications filed in or transferred to the Federal Magistrates Court (**FMC**). This increase is in fact more likely due to the conferring of jurisdiction on the FMC to hear such matters, than an increase in the volume of migration litigation before the FMC.

PART C – CONCLUSION AND SUGGESTIONS FOR IMPROVEMENT OF REFUGEE STATUS DETERMINATION AND REFUGEE LITIGATION

Amnesty International strongly believes that no one should be forcibly removed from Australia to face serious human rights violations on return. Therefore, Amnesty International would oppose any measures which further restrict access to judicial review and consequently increase the chance of refoulement. The object of achieving the more efficient management and quicker disposition of refugee cases is not a legitimate reason under international law for failing to comply with the fundamental principle of non-refoulement.

Amnesty International suggests the following measures to achieve efficient disposition of refugee cases without punishing genuine refugees:

- **Improved decision-making by Department of Immigration and Multicultural Affairs ("DIMIA") and the RRT**

In Amnesty International's view, improved quality of decision-making by DIMIA and the RRT may decrease the instances of judicial review of refugee status determination cases.

Amnesty International recommends that primary decision-making by DIMIA should be re-examined and should comply with minimum international standards, including face to face interviews with the asylum seeker. Amnesty International is particularly concerned that most claims are not examined in person at the primary stage.

At present, emphasis on the speed of decision-making may affect the quality of decision-making. DIMIA officers should be provided with adequate training in international refugee law and be well versed in refugee determination standards prescribed in handbooks and guidelines published by the United Nations High Commissioner for Refugees ("**UNHCR**"). Better quality decision-making at the primary level would result in the RRT having to hear fewer reviews of first instance administrative decisions.

At the RRT level, improved decision-making procedures may reduce the volume of judicial review cases. The operation of the RRT has been subject to criticisms, including:

- lack of appropriate training of members including access to current refugee law and interpretation;
- rejection of cases on the grounds of perceived lack of credibility or misrepresentation of facts, or because members of the RRT deem that someone may indeed face torture or death on return, but not for a Refugee Convention reason;
- many of the RRT members fail to make adequate use of inquisitorial powers; and
- the RRT tends to rely on country information supplied by Department of Foreign Affairs and Trade which may be out of date, and place less weight on divergent information from other sources.

Amnesty International recommends that the MLR steering committee analyse these criticisms and investigate the merits of the RRT decisions. Improved quality of decision-making in the RRT, and subsequent improved perceptions about the RRT, may reduce the number of applicants who feel that they have not had a fair review by the RRT.

- **Increased legal assistance**

Amnesty International considers that legal representation provided to asylum seekers has been inadequate. Amnesty International proposes that the MLR inquire into the possibility of increasing legal and migration assistance to asylum seekers, including the facilitation of pro bono assistance to unrepresented asylum seekers at the tribunal and court level and increased legal aid funding. Due to the lack of legal assistance, many applicants are ill-informed about the prospects of their judicial review proceedings. Thus, applicants who believe that they have not had a fair review by the RRT often institute court proceedings even when the chances of success are slim. Amnesty International submits that the most effective way to achieve more efficient

and expeditious disposition of refugee cases is to increase the provision of legal assistance to asylum seekers so that they could make better informed decisions about any appeal they may consider.

- **The introduction of a new form of humanitarian protection**

Amnesty International recommends a creation of a new form of humanitarian protection for onshore applicants with humanitarian claims that do not squarely fit the definition of "refugee" as set out in the Refugee Convention, and incorporated into the *Migration Act 1958* (Cth). There are instances where asylum seekers with legitimate fears of being subjected to serious human rights violations upon forcible return may fall outside the scope of the Refugee Convention. For example, gender-based persecution claims and claims under CAT may not fall within the ambit of the Refugee Convention, largely because it is considered that the claimants are not persecuted on the basis of the Convention grounds.

Currently, onshore humanitarian migration claimants who do not meet the definition of refugee cannot access the discretion of the Minister for Immigration to grant a visa on humanitarian grounds until a decision rejecting their primary visa application has been rejected by RRT (see section 417 of the *Migration Act* 1958 (Cth)) or the MRT (see section 351 of the *Migration Act* 1958 (Cth)). Amnesty International considers that asylum seekers in these circumstances should not be penalised and that the principle of non-refoulment should still apply. Accordingly, Amnesty International recommends the creation of a new form of onshore humanitarian protection, which should reduce the number of asylum seekers seeking a judicial review of the RRT's decision in higher courts.

Amnesty International again would like to thank Ms Hilary Penfold QC for the opportunity to make a submission to the MLR. Please do not hesitate to contact the Amnesty International Campaign Coordinator on 02 9217 7642 at Amnesty International if you would like to discuss any aspect of this submission in further detail.

25 November 2003