Law Council
OF AUSTRALIA

SUBMISSION TO THE

SENATE

LEGAL AND CONSTITUTIONAL

LEGISLATION COMMITTEE

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004

6 May 2004

Summary

The Law Council of Australia is opposed to the amendments proposed in the Migration Amendment (Judicial Review) Bill 2004 ("the Judicial Review Bill"). It considers it to be an attack on both the rule of law and the fundamental human right to access the courts for the vindication of legal rights. It is also regressive in that the Bill would make legislation that is already too complex virtually incomprehensible.

1. Context

The Judicial Review Bill represents the latest in a series of attempts to stifle access to the federal judicial system for aspiring migrants and refugees. The Bill will not succeed in its stated aims, and is only likely to make a bad situation worse.

The Law Council also considers that the repeated attacks on judicial review indicate a focus on the wrong end of the immigration process. In simple terms, the legislative changes are targeting the messenger when attention needs to be paid to the root causes of the problem.

2. Constitutional Issues

It is the Law Council's view that the proposal to extend the definition of 'privative clause decision' in s 474 of the *Migration Act* 1958 (Cth) to include 'purported decisions' for the purpose of imposing immutable time limits on both the High Court and on lower federal Courts:

- Is demonstrably at odds with settled Constitutional principle that access to the High Court under s75(v) of the Constitution should always be available for persons aggrieved by the decisions of Commonwealth officers;
- 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; and
- Runs counter to established practice because the proposed amendments to the privative clause in s474 would operate to protect the rulings of bodies that do not have the status of courts but which nevertheless make findings that typically involve issues of both fact and law in the interpretation and application of domestic legislation and principles of international law.

3. The Judicial Review Bill is not warranted

The Law Council acknowledges that there is a continuing rise in the number of applications for judicial review but notes that these increases cannot be explained simply as an "abuse of process". The available statistics suggest that the tribunals are "getting it wrong" in a substantial proportion of cases and there is a particularly high level of dissatisfaction with the way refugee appeals are being processed by the RRT.

The Law Council notes that the government has before it the report of Attorney General's Migration Litigation Review. It calls on the government to make that review public so that the findings can be opened to public consideration and debate. Changes to the Migration legislation on the subject of judicial review made without release of this important document are premature and an inefficient use of parliamentary time.

The Law Council urges Senators to consider the problems presented by the explosion in migration litigation in the context of shortcomings that have been identified in immigration law, policy and practice. As the majority of immigration appeals relate to refugee status determinations, particular attention should be paid

to the recommendations made by the Senate Legal and Constitutional References Committee in its Report in 2000 entitled *A Sanctuary Under Review: Australia's Refugee and Humanitarian Program.*

Those applications which do not involve refugees, quite often have very deserving applicants such as International students seeking rulings on the legality of their treatment under what must be the most complex immigration legal regime for such students anywhere in the world. Other litigants are Australian citizens seeking rulings on their sponsorships of close relatives including spouses. Australian businesses too, must be allowed to retain full access to the courts to seek binding rulings on issues to do with their sponsorships of skilled staff from overseas.

The Judicial Review Bill will have undesirable results

It is the Law Council's view that the Judicial Review Bill will exacerbate the flood of applications that is already occurring in the High Court, overloading the High Court and threatening the rule of law in Australia.

It is the Law Council's view that the Judicial Review Bill may breach Australia's international legal obligations and further damage Australia's international reputation. The Law Council notes that Australia already has been the subject of sustained criticism from the United Nations Human Rights Committee and other UN bodies in its treatment of refugees, asylum seekers and immigration detainees.

4. Judicial Review is essential and should be maintained

The Law Council considers judicial review of tribunal decisions to be essential. It should be maintained because:

- Judicial Review fosters consistency of decisions and ensures correct interpretation of provisions.

- There is an ongoing need for legal interpretation of the Migration Act.

- 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.

5. Proposals for Reform

The Law Council suggests a five part approach to finding 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

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

Submission

1. Context

The Law Council of Australia is totally opposed to the Migration Amendment (Judicial Review) Bill 2004 ("the Judicial Review Bill"). The Bill seeks to further limit judicial review of administrative decisions relating to immigration and refugee matters. The Law Council considers that the proposed legislation challenges the basic foundation principle of Australian government – that is, the rule of law.

The Judicial Review Bill represents the latest in a series of attempts to stifle access to the federal judicial system for aspiring migrants and refugees. The Bill will not succeed in its stated aims, and is only likely to make a bad situation worse

The First 'Part 8' of the* Migration Act *(1958-2001)

When the *Migration Reform Act* was introduced on 1 September 1994, migration decisions were taken outside of the normal judicial review process under the Administrative Decisions (Judicial Review) Act 1977 and a new Part 8 of the Migration Act 1958 was enacted which had the effect of severely limiting judicial review by the Federal Court. Grounds of review were specified under s 476 of the *Migration Act*, which had the effect of curtailing some common law grounds and excluding others. Further, only 'judicially reviewable decisions' could be remitted from the High Court to the Federal courts, and these were narrowly defined by s 475.

Part 8 was designed specifically to limit what was perceived to be undue recourse being taken to judicial review.[1] In spite of these legislative measures, the number of migration appeals continued to mount. Cases brought before the High Court in its original jurisdiction increased as plaintiffs sought alternate avenues of redress to compensate for the reduced grounds of review available at the Federal Court. Surprisingly, the Federal Court also experienced an increase in applications for review, despite the restrictive legislative provisions. This probably occurred because of the codification of judicial review as an option for migration applicants in the *Migration Act.*

In 1999, the High Court delivered two important decisions involving challenges to legality of the first 'Part 8' of the *Migration Act* – specifically, to the constitutionality of the legislation.

In *Abebe v The Commonwealth*[2] the challenge was made that Part 8 amounted to an unconstitutional attempt to constrain the powers of the Federal Court. The argument was made that the judicial power in s 73 of the Constitution could not be divided as it was in Part 8 where the Federal Court could only consider *part* of a legal matter. Ms Abebe also sought prerogative relief under section 75(v) of the Constitution, on the ground that the tribunal's decision in her case was unreasonable and otherwise affected by legal error. By a

[1] The Joint Standing Committee on Migration, which addressed concerns arising from the Part 8 legislative reforms, stated: 'The tightly defined framework for judicial review … is intended to provide a guard against de facto merits review by the courts, and to remove the fluidity or uncertainty which has characterised the grounds for review under the common law and AD(JR).' Parliament of the Commonwealth of Australia, *Asylum, Border Control and Detention*: Joint Standing Committee on Migration (Canberra: AGPS, 1994) at 95.

[2] (1999) 162 ALR 1 [hereinafter *Abebe*].

majority of 4:3,[3] the High Court held that Part 8 was indeed constitutional, and that Parliament could legislate to prevent the Federal Court from reviewing the whole of a legal matter, confining its jurisdiction to deal with only parts of a legal problem. The majority held that the word "matter" could validly imply a part thereof, and thus some grounds (or some "matters" of a legal dispute) could be excluded from judicial review.[4] The majority of the Court further held that it was within Parliament's ability to narrow the exercise of judicial power by the Federal Court through Part 8 of the *Migration Act*, and to restrict those decisions available for judicial review.

The second important case to come before the High Court was *Minister for Immigration and Multicultural Affairs v Eshetu*.[5] This case was handed down shortly after *Abebe*, and in some senses is a companion to that judgment. The issue at stake in *Eshetu* was whether the RRT had failed to observe the procedures set out to govern decision-making under the *Act*. The *Migration Act* specified that if necessary procedures have not been followed, the Federal Court retained jurisdiction to review the decision. If the necessary provisions had been followed, there was no jurisdiction under the first Part 8 to review in the Federal Court.[6] The full High Court rejected the argument that s. 420 of the *Migration Act* constituted 'procedures' that were mandatory. Instead, the court held that s 420 was an exhortatory provision[7] and ruled that the tribunal could not be compelled to comply with its terms. Neither could the Federal Court review a decision on that basis. The effect of *Eshetu* was to uphold Part 8's ability to prevent review by the Federal Court of tribunal decisions on the broad grounds of compliance with the rules of natural justice or procedural fairness, relevance and reasonableness.

The combined effect of these two rulings was to confirm that the only Court empowered to consider the complete legality of a migration decision was the High Court of Australia. As a number of commentators had predicted would be the result, the number of applications made to the High Court in its original jurisdiction skyrocketed.[8]

In acknowledgement of the failure of the first Part 8 to meet any of the stated aims of making migration decision making more certain and efficient, the government replaced the provisions with a 'privative clause regime' introduced into the *Migration Act* by the *Migration Amendment (Judicial Review) Act 2001* (Cth).

The New Part 8 and Privative Clause Decisions

The new Part 8 of the *Migration Act* was based around a comprehensive privative clause under s. 474. This provision states unequivocally that:

> A privative clause decision:
> (a) is final and conclusive, and
> (b) shall not be challenged, appealed against, reviewed, quashed or called into question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

A 'privative clause decision' is defined in s 474(2) as a decision of an administrative character made under the Act or the Regulations. Most migration related decisions were intended to be privative clause decisions. The intent of the legislation was to exclude review not only by the Federal Court, but also by the High Court, notwithstanding its Constitutionally protected review powers. Although the government cannot

[3] The majority consisted of Gleeson CJ, McHugh, Callinan and Kirby JJ.
[4] *Abebe*, above n 9 at para 28 per Gleeson CJ and McHugh J.
[5] (1999) 162 ALR 577 [hereinafter *Eshetu*].
[6] s. 476(1)(a). The relevant procedures were contained in the former section 420.
[7] *Eshetu*, above n 12 at 588 per Gleeson CJ and McHugh J.
[8] insert stats

entirely oust the jurisdiction of the High Court,[9] it can signal its preference that the Court not intervene in certain cases. Privative clauses have been used, successfully, to this effect since the case of the *King v Hickman, Ex Parte Fox and Clinton*[10] was decided in 1945.

Privative clauses operate in many jurisdictions and are accepted as valid mechanisms for defining the relationship between various bodies charged with the review of administrative decisions. In their typical manifestations, however, they conform closely with the Constitution's vision of how the powers of the executive and the judiciary should be balanced. They are inserted most often to protect rulings made by inferior courts of law established with specialist jurisdiction; or to protect bodies that are charged with making findings of fact. In this way the clauses do not offend against the notion that the bodies making final determinations on points of law should be courts.

The Law Council considers that what sets apart the privative clause in the Migration Act 1958 is that it is designed to protect the rulings of bodies that do not have the status of courts but which nevertheless make findings that typically involve issues of both fact and law in the interpretation and application of domestic legislation and principles of international law.

Plaintiff S157 and the Hickman principle

It is clear from the construction of the privative clause that the government believed it would be interpreted in light of the so-called *Hickman* principle. *Hickman* has governed the courts' approach to, and is considered the classic statement of the judicial approach to, privative clauses. The principle enunciated in that case states that a privative clause:

> is interpreted as meaning that no decision shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.[11]

In other words, a decision made under a privative clause will be legal so long as the decision was a bona fide attempt to exercise the tribunal's power; it relates to the subject matter of the legislation; it is capable of reasonable reference to the tribunal's power; the decision does not display jurisdictional error on its face; and it did not breach a statutory constraint so important as to be regarded as unprotected by the operation of the privative clause.[12] The *Hickman* Principle, in application, was understood to expand the relevant tribunal's jurisdiction, rather than acting as an 'ouster of remedies designed to enforce constitutional and statutory jurisdictional constraints.'[13] Accordingly, the argument ran that it did not make certain forms of review illegal, but brought certain decisions that would otherwise be outside the law within its purview, deeming them to be lawful.

Plaintiff S157 challenged the privative clause scheme as an unconstitutional act of Parliament that deprived him of lawful relief. He claimed that ss. 476 and 486(a) were invalid insofar as they would act to bar his application for review of the Tribunal decision to the High Court.

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[9] On the face of things, it is beyond the power of the Parliament to withdraw any matter from the grant of jurisdiction or to abrogate or qualify the grant: see *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482; *Australian Coal and Shale Employees' Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161; and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

[10] [1945] 70 CLR 598 [hereinafter *Hickman*].

[11] Id at 615 (Dixon J).

[12] Aronson & Dyer, above n 2 at 939.

[13] Id at 959.

The High Court's ruling was a curious mix of deference and assertion. While holding that the privative clause regime was indeed constitutional, the Court nonetheless stated that *any* tribunal decision evidencing jurisdictional error would fall outside the privative clause scheme and therefore be open to review by either the Federal or High Courts.[14] The crucial statement by the High Court, asserting its intention to continue to review migration decisions, was the following:

> a failure to exercise jurisdiction [or] an excess of the jurisdiction conferred by the Act … is "regarded, in law, as no decision at all." Thus, if the question cannot properly be described in the terms used in s.474(2) as "a decision made under this Act" … [it] is, thus, not a "privative clause decision" as defined in ss. 474(2) and (3) of the Act.'[15]

The effect of this pronouncement is to confirm the concept that the identification of a 'jurisdictional error' will always enliven the power of the courts to intervene because administrative action affected by such errors are deemed void or a nullity.

The deferential strain in the judgment is illustrated by the fact that the privative clause scheme was held to be constitutional. Therefore, Part 8 and the privative clause remains in place in the *Migration Act*, though the High Court has severely reduced its usefulness.[16] The real issue now is the identification of errors of law that can be characterised as 'jurisdictional errors'. As the Senate is aware, the practical impact of the High Court decision has been to re-open the courts to wholesale applications for the judicial review of migration decisions.

2. Constitutional Issues

The Migration Amendment (Judicial Review) Bill 2004 is a direct response to the High Court's *S157* judgment. Its aim is to reduce 'unmeritorious' appeals from first instance decisions to the Federal and High Court. The key amendments reinstate time limits on judicial review applications,[17] exclusive jurisdiction of the Federal and High Courts, and the ouster of judicial review where merits review of the primary decision is available. The changes would only apply to privative clause decisions, defined as:

> priviative clause decision (except in section 474) means:
> a) a privative clause decision within the meaning of subsection 474(2); or
> b) a purported decision that would be a privative clause decision within the
> c) meaning of subsection 474(2) if there had not been:
> (i) a failure to exercise jurisdiction; or
> (ii) an excess of jurisdiction;
> in the making of a purported decision.
> For the purposes of paragraph (b), ***decision***, when used in the expression ***purported decision***, includes anything listed in subsection 474(3).

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[14] Further, the High Court took pains to make clear that the construction of s. 474 has implications for remitter of actions by it to both the Federal Court and the Federal Magistrates Court. In short, 'The limitation, … of the jurisdiction otherwise enjoyed by the Federal Court and the Federal Magistrates Court … will be controlled by the construction given to s. 474. Decisions which are not protected by s. 474 such as that in this case, … will not be within the terms of the jurisdictional limitations just described; jurisdiction otherwise conferred upon federal courts … will remain, to be given full effect in accordance with the terms of that conferral.' *S157*, above n 1at para 96-97.

[15] Id at para 77.

[16] On a practical level, it is important to note that while the High Court's decision in *S157* has been hailed as a victory for the institution of judicial review, it is not necessarily a victory for individual applicants. *S157* was handed down with a companion case, *Re Minister for Immigration and Multicultural Affairs & Anor; Ex Parte Plaintiff S134* [2003 HCA] 1, and it is notable that this companion case did not result in success for the applicants, despite the expanded grounds of review once again available.

[17] See Migration Amendment (Judicial Review) Bill 2004 Schedule 1. The time limit would be 28 days, but could be increased by court order to 56 days if further time requirements are met and the court holds the extension to be in the interests of the administration of justice.

This definition is designed not to affect the grounds of judicial review, and has been expressed as purely procedural in its aims and content.[18] However, as the Labour Opposition stated in the Bill's second reading in the House, by seeking to extend its procedural aims to *purported* decisions, 'the bill seeks to get around the *S157* High Court decision. … The phrase "purported decision" is simply a very elegantly drafted way of saying that the bill covers unlawful decisions.'[19] Thus the Bill, though procedural in nature, raises important substantive Constitutional issues.

It is the Law Council's view that the proposal to extend the definition of 'privative clause decision' in s 474 of the *Migration Act* 1958 (Cth) to include 'purported decisions' for the purpose of imposing immutable time limits on both the High Court and on lower federal Courts:

- 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;
- 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; and
- Runs counter to established practice because the proposed amendments to the privative clause in s 474 would purport to operate to protect the rulings of bodies that do not have the status of courts but which nevertheless make findings that typically involve issues of both fact and law in the interpretation and application of domestic legislation and principles of international law.

Given the High Court's stern warning regarding further legislative and executive attempts to curtail its function as 'the ultimate decision-maker in all [constitutional] matters,'[20] the following statement from S157 shows continued currency:

> The centrality, and protective purpose, of the jurisdiction of this Court … places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.[21]

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.[22] 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*,[23] 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.

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[18] Migration Amendment (Judicial Review) Bill 2004 Second Reading Speech, Mr. Hardgrave, Minister for Citizenship and Multicultural Affairs, House Hansard 27212, Thursday March 25 2004.

[19] Migration Amendment (Judicial Review) Bill 2004 Second Reading Speech, Mr. Smith, Member for Perth, House Hansard 27680, Wednesday March 31 2004.

[20] *S157,* above n 1 at para 105.

[21] Ibid.

[22] *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J, 421 per Murphy J; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 250 per Mason CJ; *Re Australian Railways Union; Ex parte Public Transport Commission* (1993) 67 ALJR 904 at 910; 117 ALR 17 at 25; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194 per Brennan J.

[23] (1997) 143 ALR 55. The case concerned the grant of the Sydney casino licence. The applicant sought to have the grant of the licence to a competitor set aside. The decision to grant the licence was protected by a privative clause which provided that a decision of the Casino Control Authority was final and conclusive.

3. The Judicial Review Bill Is Not Warranted

Judicial Review and the Rule of Law: Entitlement to a Correct Decision

The first key point raised by the government's repeated intention to reduce 'unmeritorious' appeals in migration cases – of which the Bill outlined above is the most recent incarnation – is the government's apparent inattention to the fact that each visa applicant is entitled under law to a *correct* decision. The government's focus on 'unmeritorious' decisions is both disquieting, and in some respects disingenuous.

The disquiet stems from the trend of the government to ignore the vital functions that judicial review performs in ensuring that the Constitution is upheld. It is properly the function of the courts, and ultimately the High Court, to determine the lawfulness of administrative action – including decisions of DIMIA officials and administrative tribunals. To put this into practice in migration matters (since the decision in *S157*) is to recognise the following, as explained by one of Australia's foremost barristers:

> an applicant for a visa entitling him or her to enter and remain in Australia has a procedural right to have the application determined according to law. If that course has not been properly undertaken, relief will flow to ensure that it is, and that the Commonwealth, through its officers, does not take steps on the basis that an adverse decision has been made, when that is not the case.[24]

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.

The government's disingenuity stems from the use of the word 'unmeritorious.' The common law (now codified) has always been equipped to deal with legal claims that have no merits. Such claims may be struck out as frivolous, vexatious, or as an abuse of process. The Federal Court Rules state, for example:

> 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.[25]

Similar powers to dismiss actions are available to the Federal Magistrates Court.[26] Cases can only come before the High Court with leave, which gives that Court the opportunity to deny special leave applications where the claim involved has no merits. 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.

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[24] John Basten, QC 'Judicial Review under Section 75(v) Unpublished paper prepared for the 2004 Constitutional Law Conference, February 20 2004. At http://www.gtcentre.unsw.edu.au/Basten-Paper.doc accessed May 4 2004 at p 12.

[25] Federal Court Rules – Order 20 Rule 2, Frivolity. Order 20 Rule 1 allows the Court similar powers where a person institutes a vexatious proceeding in the Federal Court, or where he or she has habitually or persistently instituted such proceedings in any Australian court. Order 11 Rule 16 deals with pleadings that disclose no reasonable cause of action or are otherwise an abuse of process of the Court.

[26] See Federal Magistrates Court Rules 2001 Rule 13.10, Frivolous Proceedings and Rule 13.11, Vexatious Litigants.

The first of these options merely illustrates inefficiencies and redundancies in the drafting of legislation. The second is much more problematic, and when joined with government statements on the Migration Amendment (Judicial Review) Bill, such as that of Mr. Haase, Liberal Member for Kalgoorlie, illustrates a very casual attitude to the existence of the rule of law:

> I find that [my electorate] are simply interested in their elected representatives obtaining outcomes that they believe will change situations, will right what they perceive to be wrongs in the main and give solace to those people who deserve it. I am therefore disappointed to learn that there is such deep concern for the legalese of this situation and so little concern for the necessary outcomes.[27]

The old adage – that two wrongs do not make a right – would indicate that an attitude of outcomes over legality is not in accordance with 'righting the wrongs' in Australia's migration laws.
The impetus for the privative and ouster clauses in Judicial Review Bill is the rise in the number of migration cases that are going to the Federal Court. The growth in reliance on the courts was a primary reason for both the codification of migration decision making in 1989 and the later introduction of the present Part 8 of the Act[28].

Reflections on the Source of judicial review applications

What is of interest is the *source* of the applications for judicial review. The statistics reveal that the phenomenon of litigious migration applicants is not generalised. Rather, it is highly specific to refugee claimants and persons in refugee-like situations. Of the three migration review bodies, it is the RRT that dominates the statistics as the source of most applications to the Federal Court.

The Minister asserts that very few applications for judicial review result in a change in the decision made by the review bodies and that, for this reason, broad based access to judicial review results in a waste of everyone's time and resources. The Minster makes the point that migration applicants have a particular interest in prolonging any process that allows them to stay in the country longer than their strict legal entitlement. While this is true, it is also axiomatic that a person with genuine fears for his or her safety or that a family members will use all available avenues to seek redress of a decision that he or she considers wrong or unjust.

Rather than simply draw conclusions from the statistical data, the Law Council considers that Senators should look deeper into the types of complaints being made about the decision making process.

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[27] Migration Amendment (Judicial Review) Bill 2004 Second Reading Speech, Mr. Haase, Member for Perth, House Hansard 27685, Wednesday March 31 2004.

[28] See M Crock "Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?" (1996) 18 *Syd L Rev* 267

4. The Judicial Review Bill will have undesirable results

- ***The Judicial Review Bill will most probably exacerbate the flood of applications to the High Court, threatening the rule of law in Australia***

The Law Council considers that one 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.

As the highest judicial body in Australia, the High Court is responsible for determining the most contentious and significant legal issues in Australia. At present, the court finalises less than 100 cases each year and applicants are subjected to lengthy delays. The number of migration applications before the High Court is already at a record level. If only a small proportion of litigants before the Federal Court decided to try their hand in the High Court, the impact on the productivity of the High Court could be catastrophic. The detriment from the arrangements would have a disproportionate impact on the Court itself: as the Minister is quick to acknowledge, applicants will often gain more than they lose from delays in hearing their cases.

The High Court, on the other hand, would be faced with the logistical problems of handling a large volume of cases dealing with matters that are most appropriate for first level appellate authorities. The need to free the Court from the grind of original jurisdiction work was one of the prime motives for the establishment of the Federal Court in 1976. As the High Court said itself so expressively in 1975:

> "A court which has the ultimate responsibility for interpreting the Constitution, and for the development of the law throughout Australia, cannot afford to occupy its time with the consideration of cases which raise no questions of substantial importance. If the Court is to be deluged with appeals of no real significance, its efficacy will inevitably be impaired, since the members of the Court will be deprived of that time for depth of study and maturity of deliberation without which a final court of appeal cannot adequately perform its functions..."[29]

In an exchange between Mr Gotterson QC and the then Chief Justice in the case of *Re The Minister for Immigration and Multicultural Affairs; Ex parte Ervin* (B29/1997, 10 July 1997) Brennan CJ was highly critical of attempts to turn the High Court into a court of first instance. He pointed out that the High Court is "singularly unfitted" to exercise a jurisdiction that requires the consideration of what might be contested questions of fact.

In a pointed reference to the first attempts to introduce the privative clause that now graces the *Migration Act*, the former Chief Justice commented:

> "The policy of withdrawing jurisdiction from the Federal Court can only produce embarrassment for the High Court which, as is commonly known, is already overburdened by its case load and the need to discharge the appellate and constitutional functions imposed upon it by the Constitution. The rule of law is not maintained by burdening the High Court with an impossible caseload. Administrative expediency must not undermine the foundational principle on which a free society depends. If, in particular cases, it be thought that a judge of the Federal Court has overreached his or her jurisdiction in setting aside a decision made under the Migration Act, the remedy is to appeal, not to endeavour to immunise all decisions under that Act from operation of the rule of law. Indeed, it is unacceptable in a society governed by the rule of law to deny jurisdiction to enforce the law in a particular area to the court fitted to exercise jurisdiction in that area knowing that the capacity of the only court with jurisdiction is already fully extended. It is even more unacceptable when the known consequence of the withdrawal is to prejudice the capacity of the High Court to perform with due deliberation its constitutional and appellate duties that are essential to the rule of law throughout the Commonwealth.
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> Regrettably, it seems that the Executive Government contemplates further legislation to withdraw from the Federal Court even more jurisdiction to review decisions under the Migration Act. Governments generally are particularly sensitive to

[29] *Moller v Roy* (1975) 6 ALR 321, 330.

> review of migration decisions, but it is earnestly to be hoped that mature reflection on the implications of the proposed legislation will lead to its discard and to repeal of the jurisdiction-denying provisions."[30]

It is the Law Council's view that anything that operates to over burden the High Court is a threat to the rule of law in Australia.

- ***The Judicial Review Bill may contravene Australia's international legal obligations***

It is the Law Council's view that the Judicial Review Bill may contravene a number of its international obligations. The Law Council notes that Australia already has been the subject of intense criticism from the United Nations Human Rights Committee ("the UNHRC") in its treatment of immigration detainees. In the case of *A v Australia* the UNHRC found the detention of Applicant A, an applicant for refugee status, contravened the International Covenant on Civil and Political Rights and that the system of judicial review of his detention was inadequate.[31]

The introduction of a privative clause for all migration decisions would only serve to compound Australia's real and perceived shortcomings in the international arena. It is of particular concern in the context of the other legislation before Parliament which would further constrain external scrutiny of detention practices: see Migration Legislation Amendment Bill (No 2) 1998.

The Judicial Review Bill places Australia at risk of contravening the following international treaties:

- International Covenant on Civil and Political Rights, Articles 6, 7 and 9.
- Convention Relating to the Status of Refugees, Article 33.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.
- Convention on the Rights of the Child, Articles 6, 22 and 37.

In summary, these relate to Australia's obligations regarding the non-refoulement (non-return) of persons in certain circumstances. To avoid breaching these obligations Australia must have an effective procedure to determine the validity of an asylum seeker's claims. It is the Law Council's view that the Refugee Review Tribunal may not satisfy the obligation to determine a person rights "in a fair and public hearing by a competent, independent and impartial tribunal"[32].

Australia already has been the subject of intense criticism from the UNHRC in its treatment of immigration detainees. It is the Law Council's view that the Judicial Reform Bill may breach Australia's international legal obligations and further damage Australia's international reputation.

5. Judicial Review is essential and should be maintained

The Law Council reiterates the following comments that it made when first discussing the merits of introducing a privative clause regime into the *Migration Act*:

- ***Judicial Review fosters consistency of decisions and ensures correct interpretation of decisions***

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[30] Former Chief Justice of the High Court of Australia, the Hon. Sir Gerard Brennan AC KBE, "The Mechanics of Responsibility in Government" The 1998 Sir Robert Garran Oration, Institute of Public Administration Annual Conference, Hobart, 25 November 1998.

[31] See *A v Australia* Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

[32] International Covenant on Civil and Political Rights, Article 14.

The IRT is a tribunal that deals with a wide range of matter arising under legislation that has become notorious for its complexity and the frequency with which it is amended. The RRT similarly deals with complex legal issues - over the last 10 years, the jurisprudence on refugees has grown exponentially both in Australia and around the world in other refugee-receiving countries. The courts provide interpretation of legislative provisions and on the relationship between old and new laws. Both the RRT and the IRT, like most tribunals, often sees differences of opinion arise between the way particular members interpret the relevant legislation. The Law Council notes that court decisions are normative and binding on tribunal members. The fostering of consistency between members and the knowledge of the correct interpretation of a certain provision are benefits for all those involved in the immigration process, from applicants, departmental decision makers through to reviewer officers.

- ***There is an ongoing need for legal interpretation of the Migration Act***

The work of the tribunals consistently involves a mixture of fact finding and findings on questions of law. Although some members of the tribunals are qualified lawyers, this is not true of all members. For this reason alone, judicial oversight of tribunal decisions would seem to be of critical importance.

In migration and refugee law there are many issues that have required judicial exposition over the years. It is ludicrous to think that the work of the courts in this regard is "finished" or has somehow become obsolete. There are many examples that spring to mind of instances where the tribunals are simply not equipped to determine the issues raised. One is the case of fugitives from the Peoples' Republic of China's "One child policy" and whether this meets the definition of refugee. Another is the status of fugitives from East Timor who do not wish to accept the offer of residence in Portugal. In the general migration field, the courts have pronounced on everything from the meaning of "marriage", through the interpretation of "special need relative", to the definition of "work". Again, it seems elementary to accept that there is a real need for contributions from the judiciary.

- ***The rights of applicants in tribunals are severely restricted***

Both the MRT and the RRT are quasi-inquisitorial tribunals. In practical terms, this means that they have more control over who they hear and in respect of what matters than most other tribunals in Australia. Applicants have a right to an oral hearing, but they have no right to legal or other representation. Advisers cannot address the tribunal. There is no right to call witnesses or to cross-examine witnesses.

Client surveys of the IRT and the low appeal rate from that tribunal suggest that the informal approach taken in that tribunal has widespread client support. What sets this tribunal apart from the RRT, however, is that hearings are open to the public. The RRT, on the other hand, hears cases *in camera* and is required by statute to remove from its published decisions any information that would reveal the identity of its clients. In practice, refugee claimants often appear before the single member tribunal by themselves, with the RRT member, a transcriber and perhaps an interpreter the only persons present in the hearing room. The powers given to the member to interrogate the claimant reinforce the sense that the tribunal is acting as an agent of the government and that the process is essentially the same as what might be expected of a first instance interview by the administration. These impressions are particularly strong for asylum seekers whose claims are rejected without interview by the Department: a practice that has become more commonplace in recent years.

The fact that over 10% of unsuccessful applicants to the RRT chose to seek judicial review provides stark evidence that many people leave the tribunal dissatisfied with the experience. Although this may not be a reflection of the efforts and good intentions of the tribunal members, it is noteworthy that a sizeable number of applications for the judicial review of refugee decisions involve allegations of actual or perceived bias on the part of tribunal members.

- ***Tribunals are not independent of government***

Although the IRT and the RRT are nominally independent bodies, the Minister retains significant control over the method of appointment, the duration of appointment and remuneration of members[33] as well as the facilities and funding of the review bodies. Members are appointed for 5 year terms and are subject to monthly audits that include scrutiny of the number of cases completed by each member and the rate at which the member is overturning decisions made at first instance by the Department. While he recognises that the tribunals should be impartial and free from bias, the Minister has argued that "it is the duty of all members of the tribunals to fully know and understand the parameters of migration policy."[34]

In December 1996, the Minister took the unusual step of initiating appeals against two decisions by the RRT in which refugee status was granted to victims of domestic violence. As well as opining that the Convention definition of refugee was never intended to cover such situations, the Minister is reported to have warned tribunal members that their reappointment prospects would be threatened by such attempts to re-write the Convention[35]. Th effect of this comment on tribunals members is unknown. However, what is known is that in 1996-97 initial statistics suggest that the set aside rate for refugee appeals in the RRT was 11.6% nationally.[36] In the month preceding the May 1997 re-appointment process the set aside rate plummeted to 3.7% nationally (2.1% in Sydney).[37] The sudden fall in decisions set aside could be explained by any number of factors: it is well to bear in mind that each case, by definition, must be decided on its facts and merits. The coincidence between the figures and the external events impacting on tribunal members act as a timely reminder of the need for judicial oversight of tribunal rulings so as to ensure the accountability and true independence of members.

- ***Judicial review fosters the true independence of tribunals and insures against the development of a narrow (rejection) mindset***

Although the specialist expertise developed by tribunals such as the MRT and the RRT is very valuable, there is a real danger in creating a system that is closed to scrutiny from persons with more generalised expertise and perspectives. Members who are used to hearing the same kinds of cases day after day can become cynical or can develop what some call "compassion fatigue". The exposition of a case to external scrutiny (or the threat thereof) can encourage members to reflect on their decision making and on the attitudes they are developing.

The safeguards provided by the standard system of legal appeals in Australia were highlighted by Kirby J in the case of *Re East & Ors; Ex parte Nguyen* [1998] HCA 73 (3 December 1998). His Honour recounted at some length the history of the proceedings in the case and commented:

> "It indicates how the applicant, within the established procedures of appeal and judicial review available to a person in his position within the Australian judicial system, fully utilised the many facilities of challenge available to him. It is within that system that complaints concerning an injustice alleged to have resulted from a refusal to permit, or failure to

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33 Sections 457-470 of the Act.

34 P Ruddock, "The Broad Implications of Administrative Law under the Coalition Government with Particular Reference to Migration Matters", Address to the National Administrative Law Forum, Canberra, 1 May 1997.

35 See *The Canberra Times,* 27 December 1996, article and Editorial, at 14.

36 Note that the figures in Table 2 come out at 13.6%. This is still a huge derop from the 18.5% of the previous financial year.

37 See evidence supplied by Mr Mark Sullivan, Deputy Secretary of the Department, to the Senate Legal and Constitutional Legislation Committee. See the Minority Report, Consideration of Migration Legislation Amendment Bill (No 4) 1997, at 45-46. Note that the setting aside of a Departmental decision by the RRT represents the acceptance that a claimant is a refugee.

> provide, interpretation of the language of the court are ordinarily dealt with. The Australian judicial system properly affords protection against risks of injustice occasioned by linguistic disadvantage alleged to have affected a trial."

6. Proposals For Reform

The Law Council proposes a five part approach to finding a solution to the problem of immigration and refugee appeals.

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

Available statistical data suggests that the increased demand for judicial review is localised in the area of refugee determinations. The government's assertion is that the increases are due to an increasing tendency for non-citizens to abuse Australia's refugee determination procedures. This assertion cannot be tested without detailed empirical research. Countermanding this interpretation, however, are the statistics for the recognition of refugee claims by primary decision makers and by the RRT over the life of the present government. These reveal a sharp decline in the number of people being recognised as refugees by both the primary decision makers and by the RRT. In this context the increase in applications for judicial review is clear evidence of dissatisfaction with the refugee determination process.

The government should support research and undertake its own inquiries into why the system of merits review is not working as intended. Anecdotal evidence that is not exposed to public scrutiny and comment is a poor basis for policy formulation and is unlikely to provide real, long-term solutions.

- ***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;***

The Senate has produced a number of reports which highlight the need to expand the range of protections available to non-citizens who cannot meet the narrow definition of refugee but who nevertheless deserve protection in Australia by virtue of international human rights law. The Law Council draws attention in particular to the recommendations of this Committee in its 2000 Report *A Sanctuary Under Review*; and to the recent report of the Select Committee on Ministerial Discretion in Migration Matters.

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

The Law Council believes that the introduction of Part 8 into the *Migration Act* 1958 (Cth) (the Act) has sent a message to lawyers, migration agents and unrepresented applicants that judicial review is a natural part of the migration review process. The removal of Part 8 could restore a popular perception that judicial review is the preserve of experts.

This second recommendation makes eminent sense, as the High Court has now confirmed that judicial review is here to stay. The Law Council submits that the causes of judicial activism in migration decisions in the 1980s have now been addressed in full. The *Migration Act* is 'codified' so that the criteria for the grant or refusal of visas is spelt out in minute detail, and procedures are now prescribed for both primary decision makers and the review authorities. A return to the ADJR Act would not have any impact on the ability or likelihood of the courts to intervene in the review of migration decisions. On the contrary, it would be a healthy development on all counts to return migration law to the mainstream.

- ***Concentrate on improving the quality of primary decision making***

Given the number of cases that continue to go on appeal to the migration tribunals, some consideration needs to be given to the quality of primary decision making in the immigration area. The number of decisions set aside in the tribunals is consistently high.

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

The government has moved to institute reforms in the law, procedures and appointment mechanisms for both of the tribunals. These should pay dividends in the quality of the decisions emanating from the two authorities. What is needed to carry through with these procedural reforms is a commitment by government to stand back from the tribunals so as to allow them real independence in their operation.

7. A Final Word On The Need To Keep Judges In The System

In his play "A Man for All Seasons", Robert Bolt[38] has Sir Thomas More make an eloquent defence of the English legal system and of the Rule of Law. More's son-in-law, Will Roper, reprimands him for allowing an unsavoury character to go free because he had not broken the law. To Roper's suggestion that the end should justify the means: that he would "cut down every law in England" (to get after the Devil), More replies:

> "Oh? And when the last law was down, and the Devil turned around on you - where would you hide, Roper, the laws being flat? This country's planted thick with laws from coast to coast - Man's Laws, not God's - and if you cut them flat.... d'you really think you could stand upright in the winds that would blow then?"

Australia's system of law and government is predicated on a Constitution; the Common Law and the distribution of power between three authorities: the Parliament, the executive or administration and the courts. The judiciary has none of the primary powers of the Parliament, but it stands as a vital check on the powers being exercised by both the Legislative and the Executive arms of government. For their part the Courts operate subject to the Constitution and subject to the laws made by Parliament. The Judicial Review Bill does nothing to recognise the significance of this tripartite arrangement.

In the final analysis the Judicial Review Bill is all about power and the removal of obstacles to its exercise. It is very much about cutting down the structures of administrative law. In considering their vote on this measure, Members of Parliament should consider the ramifications of the measure and where it leads this country. At risk is the notion of accountable government and the notion that decision makers should be answerable for their actions. At risk is the Rule of Law as we know it. Members should ask themselves if they will be able to stand upright in the winds that may then blow.

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[38] See R Bolt *A Man for All Seasons* (London: Heinemann Educational Books, 1960), p 39.