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NSWCCL**NSW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC**

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2 April 2002

Mr Noel Gregory
Acting Secretary
Legal and Constitutional Legislation Committee
Australian Senate
Parliament House
Canberra ACT 2600

**By facsimile 6277 5794**

Dear Sir,

Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 and of the Migration Legislation Amendment Bill (No 1) 2002

I refer to your letter dated 25 March 2002 addressed to Mr Cameron Murphy, the President of this Council, inviting a submission in relation to inquiries on the above legislation.

Thank you for your invitation. The NSW Council for Civil Liberties makes the submission set out below.

General observations

1. In making this submission, the Council asks the Committee to note the short time frame allowed for the making of submissions (less than 1 week, during which the Easter break occurred), which the Council considers to be unreasonable and unsatisfactory. The impression we have is that this legislation is to be pushed through Parliament without affording the community a reasonable opportunity to comment on it. The Council wishes to reserve an opportunity to make further submissions within a reasonable time.
2. The significance of this observation is heightened by the nature of the legislation being amended, which is designed to ensure compliance by Australia with international obligations of a humanitarian character which Australia has voluntarily accepted.
3. The amending legislation is designed to reduce the rights afforded to persons facing potentially severe risks to their lives and physical safety in their dealings with the Australian bureaucracy and to further protect the Australian bureaucracy and government from proper scrutiny and accountability. The persons affected face potentially severe risks to their lives and physical safety and perhaps their family and associates. The NSW Council for Civil Liberties is opposed to this reduction of rights, and believes that all fair minded people who believe in the rule of law as the foundation for our civil society should be similarly opposed.

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Migration Legislation Amendment (Procedural Fairness) Bill 2002

4. The Bill will result in the “codes of procedure” specified in the *Migration Act* becoming an exhaustive statement of the process applicable to various dealings in relation to visas and reviews of decisions by the Migration Review Tribunal and Refugee Review Tribunal, to the exclusion of the common law principles of natural justice.
5. The “codes of procedure” specified in the *Migration Act* provide a substantively lesser standard of fairness than the common law principles of natural justice.¹
6. Specifically, the “codes of procedure” provide that the decision-maker is not required to invite submissions on a matter regarded as potentially adverse to an applicant's case.² This is contrary to the common law requirement of natural justice, which entitles an applicant to have an opportunity to answer such matters.
7. In the specific circumstances of *Miah's case*, the decision-maker relied on information concerning a change of government in Bangladesh to support his rejection of an application for a protection visa based on fears related to the former government.
8. There are presently significant numbers of applicants for protection visas from countries where there have been recent changes of government.³ Accordingly, this Bill could have a significant impact on a significant number of people. This Bill will have the effect of authorising the processing of protection visa applications from Afghanistan by regard to information concerning the state of affairs in that country to which the applicants cannot respond.
9. Further, the exclusion of natural justice principles from the processes of the Review Tribunals, from which there are very limited rights of appeal.
10. *Miah's case* exposed a standard of public administration which was less than desirable.⁴
11. This Bill will perpetuate an undesirable standard of public administration, and protect it from legitimate scrutiny and criticism.
12. This Bill will detract from the standard of fairness which is a necessary part of a civil society subject to the rule of law.
13. The title of the Bill could well have been devised by an Orwellian Ministry of Truth. This Bill does not promote procedural fairness. It detracts from it. The Minister's second reading speech is deceptive in stating that the “codes of procedure” state the requirements of the natural justice or procedural fairness

¹ See *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22, where but for the safety net of common law natural justice, Mr Miah's application for a protection visa would have been determined in accordance with the “code of procedure” without any opportunity on Mr Miah's part to respond to the material on which the Minister's delegate based his decision.

² See *Miah's case, supra*, at [54], referring to *Migration Act* s54(3), read subject to ss 56 and 57, and together with s69.

³ Afghanistan being the most obvious example.

⁴ See *Miah's case*, per Kirby J at [155].

- hearing rule. As demonstrated in *Miah's case*, the "codes of procedure" derogate from those requirements.
14. The NSW Council for Civil Liberties supports the rule of law. The rule of law is a guarantee that individuals will not be subject to arbitrary injustice at the hands of the State or others. This Bill derogates from the rule of law. The NSW Council for Civil Liberties is strongly opposed to it, and urges the Senate to reject it.
 15. In addressing this issue at this fundamental level, the Council seeks to highlight the perniciousness of laws of this kind. While the targets of the reduced standard of legal protection in this case are non-Australian citizens, and the argument could be put solely in terms of seeking to properly implement Australia's international convention obligations to such persons, the perpetuation of a reduced standard of public administration in one area can easily spread to others. The logical consequence of laws such as the present Bill is to reduce the rights of all Australians. The essential nature of the Bill is fascist, in the sense of tending to promote totalitarian government. Consequently, all Australians should be concerned about them.

Migration Legislation Amendment Bill (No 1) 2002

16. The Council for Civil Liberties is opposed to Schedule 3, Item 2 in this Bill.
17. Schedule 3, Item 2 renders the rules of natural justice inapplicable to certain declarations of the Minister to ban individuals or classes of persons who hold "special purpose visas" from travelling to, or remaining in, Australia.
18. The stated justification is that persons affected by such decisions often cannot be contacted to afford them an opportunity to make submissions in relation to the decision.
19. However, the amendment is not limited to such situations. No justification is provided for the proposed blanket abrogation of natural justice principles.
20. As a matter of principle, executive decisions should not be made without giving the person affected an opportunity to answer adverse material used by the decision maker. To do otherwise invites arbitrary, discriminatory and unaccountable decision making. As set out above, the proposed style of decision making is more consistent with totalitarian regimes rather than democratic processes.
21. Cases where the person affected is unable to be contacted for the purpose of answering adverse material should not involve abrogating natural justice, in such cases a decision maker is protected by having made reasonable efforts in the circumstances to contact the person affected. If such efforts are unsuccessful, the decision maker should be able to proceed. This approach would not involve any abrogation of the principles of natural justice.

Signed for and on behalf of the
Committee of the NSW Council for Civil Liberties

Stephen Blanks

