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10 April, 2002

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

**BY EMAIL TO: legcon.sen@aph.gov.au**

Dear Mr Gregory,

**Amended 'Annexure "A" to Submission on Migration Legislation Amendment Bill (No. 1) 2002 and Supplementary submission on the Migration Legislation Amendment (Procedural Fairness) Bill 2002**

Mary Crock has advised our Nicole Hogg that during the hearings on the above bills, the Senate Committee pointed out an error in Annexure "A" to our submission forwarded on 4 April 2002, namely our statement in paragraph 1 that proposed s. 48(3) would apply to prevent a person on a bridging visa who had not had an application rejected by DIMIA from lodging a second application off-shore.

As the Committee correctly pointed out, this proposed section would apply only to persons who have had an application refused. We have amended Annexure "A" accordingly and ask that you accept the amended Annexure (attached) as a replacement of the original version sent to you on 4 April 2002.

In addition, we attach a supplementary submission on the Procedural Fairness Bill (Annexure "C"), prepared by Mr Erskine Rodan of our Migration Committee, which the Senate Committee might wish to take into account in its deliberations. These points provide further examples of instances where the existing code of procedures in the Migration Act falls short of the rules of natural justice, as noted in our original submission, Annexure "B" (further copy attached).

Yours faithfully,

DAVID FARAM
PRESIDENT
LAW INSTITUTE OF VICTORIA

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**ANNEXURE "B"**

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

**PREPARED BY THE LAW INSTITUTE OF VICTORIA MIGRATION COMMITTEE**

**MIGRATION LEGISLATION AMENDMENT (PROCEDURAL FAIRNESS) BILL 2002**


**Summary**

- Codes of Procedure may in theory amount to a codification of the rules of procedural fairness.
- The Codes of Procedure laid down in the Migration Act fall far short of the common law rules of procedural fairness.
- In any case, even though the term Code of Procedure implies that decision-makers are bound to observe it, in practice decision-makers both at departmental and administrative review level frequently pay scant regard to the Codes of Procedure.
- Furthermore, even if the Codes of Procedure did equate with the rules of procedural fairness, it is questionable as to whether they would provide any protection to applicants from capricious and arbitrary exercises of power, given the recent legislative attempts to all but remove the right to judicial review of migration decisions (*Migration Legislation Amendment (Judicial Review) Act* 2001). If that legislation is effective in its aims, then apart from anything else, the current Bill is completely unnecessary.
- The Bill also straddles an issue that is before the High Court at the moment in a major class action. As such it comes close to being a contempt of the High Court.
- It is anathema, and inimical to an Australian society supposedly governed by the rule of law, for both citizens and non-citizens alike to be denied procedural fairness, particularly if there is no right to judicial review of such behaviour.
- It is therefore essential that decisions and conduct made pursuant to the *Migration Act* 1958 continue to be made in accordance with the full range of the rules of procedural fairness, and that, to the extent that the scope for judicial review remains, the Courts continue to apply those rules to administrative decision making.


**Detail of Argument**

1. The common law rules of procedural fairness (or natural justice) include the hearing rule and the bias rule. The rule against bias is (or should be) self-evident: that a person is entitled to have administrative decisions made by someone who is not actually or apparently biased against them. The hearing rule is explained by the Latin maxim, *audi alterem partem*, meaning to hear both sides. In essence, administrative decision makers subject to the rules of procedural fairness are required to hear both sides of the story, including giving the subject of that decision details of any adverse information and the reasonable opportunity to respond to that information. The rules of procedural fairness have evolved, being both developed and interpreted by the courts over time. There is no reason in principle why those rules could not be codified legislatively, although experience suggests that no matter how detailed and comprehensive a codification, disputes arise as to meaning and judicial expertise is called upon to aid in the interpretation and application of legislation.

2. The Codes of Procedure laid down in the *Migration Act* fall far short of a codification of the rules of procedural fairness, and for this Bill to suggest that they are an adequate substitute is nonsense. To take an example from Part 7 of the Migration Act, s 424A prescribes that in relation to Refugee Review Tribunal hearings the applicant must be given certain information:

   424A.

   (1) Subject to subsection (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.

Protection visa applicants are often rejected because their account does not accord with certain country information. However, there is no obligation under S424A to provide them with any information other than that which refers to them specifically, and even then, the circumstances in which that must be provided are heavily qualified. And yet when the country material relied on in RRT decisions is examined, not infrequently it is found that it does not rebut the applicant's claims at all.

An example of this involved an applicant being disbelieved in relation to his knowledge of the leaders and factions of a political party he claimed to have belonged to, where the country information the Tribunal relied upon related to a completely different political party. The applicant was right all along, but this was only confirmed when the information relied upon by the Tribunal was obtained through an FOI application made after the applicant had been rejected. The Tribunal probably complied with the Code of Procedure, but clearly denied the applicant procedural fairness and a life-threatening injustice resulted.

Similarly, section 424B provides for the Tribunal to invite the applicant to give additional information or comments:

424B. (1) If a person is:

(a) invited under section 424 to give additional information; or

(b) invited under section 424A to comment on information;

**the invitation is to specify the way in which the additional information or the comments may be given, being the way the Tribunal considers is appropriate in the circumstances.**

In practice, some Tribunal members, if they deign to invite an applicant to comment at all, might *consider it appropriate in the circumstances* to offer a sheaf of reports across the bench to applicants and ask them to comment, with little regard to the applicant's English language skills, their education level in their own language, or whether they are represented.

The Bill sends an unhealthy message of encouragement to such administrative decision-makers.

3. Unfortunately, not even the inadequate Codes of Procedure are always complied with. However, the *Migration Legislation Amendment (Judicial Review) Act* 2001, replaced Part 8 of the Migration Act (dealing with judicial review) and introduced privative clause provisions. These provisions seek to

limit the availability of judicial review to a very limited class of errors of law. A failure to comply with the Code of Procedure is not among them.

4. Although it is barely if at all defensible to discriminate against non-citizens as this Bill chiefly does, it should be borne in mind that it is not just non-citizens who are affected. Many review applicants are in fact Australian citizens who are sponsoring their spouses or close relatives to come here.