Submission

LAW COUNCIL
—— OF ——
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SUBMISSION TO THE

SENATE

LEGAL AND CONSTITUTIONAL

LEGISLATION COMMITTEE

MIGRATION LEGISLATION AMENDMENT (PROCEDURAL FAIRNESS) BILL 2002

April 2002

THE PROCEDURAL FAIRNESS BILL 2002

This Bill is all about the way administrative decisions have to be made under the Migration Act and the role the courts should play in the overseeing the procedures followed by the decision makers. Put another way, the Bill is about the Rule of Law in migration decision making.

The Law Institute of Victoria and the Law Council of Australia objects to the proposed legislation on two main bases. First the Bill is not necessary because the *Migration Legislation (Judicial Review) Act 2001* ("privative clause provisions") covers the field of possible error and that Act applies to all decisions sought to be covered by the present Bill.

Second, if the Bill is to perform a function, and that function is to restrict even further the scope for judicial oversight of migration decision making, then the Bill is offensive to the notion that each of the three arms of government in Australia should be in balance and subject to the Rule of Law.

1 Why the Bill is not needed – some preliminary comments

The Bill is predicated on an understanding of the law of procedural fairness as it has evolved over the centuries in English and Australian law. The phrases "procedural fairness" and "natural justice" are legal terms of art that have their provenance in legal pre-history. The basic concept is explained by Kirby J in the following terms:[1]

> In Australia, it is a basic principle of the common law rules of natural justice that a person whose interests are likely to be affected by an exercise of power will be afforded a fair opportunity to respond to information or relevant material adverse to that person's interests which the repository of the power proposes to take into account in deciding upon its exercise. In short, a person should ordinarily be afforded the opportunity to provide evidence or material to rebut information or material tendered against that person's interests. As well, the person should be afforded the opportunity of persuading the decision-maker, by oral or written submissions, as to the significance of the adverse evidence or material and the way in which it might be reconciled with the person's claim[21].

A question that has exercised courts (and Parliaments) for years is the relationship between the common law principles and legislation that sets out rules about the way decisions are meant to be made. Put simply, courts have always recognised that the applicability of the rules of procedural fairness can be affected by legislation. Statute will also affect the *content* of the rules. Where the courts have divided is on the question of the effect legislated procedures will have on the common law. In *Miah's* case, the High Court held that the existence of a code of procedures in the Migration Act

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[1] See Re Minister for Immigration and Multicultural Affairs; Ex parte "A"[2001] HCA 77 (21 December 2001), para 43.

governing the making of primary decisions did not indicate an intention in Parliament to exclude the common law rules of natural justice.

In that case, a refugee claimant was treated in a way that clearly breached the hearing rules set out above. In normal circumstances, the error of law would have been corrected if the man had exercised his right to appeal to the RRT. The problem was that throught no fault of the refugee claimant, he lost his right to appeal to the RRT. Judicial review in the High Court was the only way left for him to challenge the legality of the decision made. The Court acknowledged that Parliament had put time limits on access to administrative review (RRT). It found that the mere existence of this right to appeal, together with the code of procedures for primary decision makers, did not amount to Parliamentary exclusion of the common law rules of natural justice.

The Bill attempts to overturn a High court decision (*Miah*) without offering any compelling reason (in the explanatory memorandum or the second reading speech) as to why the High Court decision is wrong and should be, in effect, overturned by Parliament.

In *Miah*, the circumstances that lead the High Court to overturn the decision made were extreme. Judicial review was the only avenue available to the applicant. It is not clear why the government would want to prevent the correction of a legal error of such magnitude, and where the personal consequences of the flawed decision were so great. The decision hardly opened the floodgates on refugee appeals. If applicants have access to merits review, the decision is not going to encourage applicants to by-pass this avenue of redress.

2 Why the Bill is not needed: the effect of the privative clause provisions

The Bill is not needed because the power of the courts to review migration decisions has already been reduced by the privative clause provisions introduced in September 2001 (in the face of objections from the Law Council of Australia). At the very least, the Bill is premature because the scope and validity of those privative clause provisions are yet to determined the High Court.[2]

The Chief Justice, Murray Gleeson noted as much in his speech on 7 November, 2001 where he said:[3]

> "Legal theory does not require the conclusion that all forms of restriction upon the capacity of the judiciary to override executive action on legal grounds necessary involve a derogation from the rule of law. Subject to any limits on legislative power imposed by the Constitution, it is for Parliament to define the power and jurisdiction of administrators and tribunals. The essential supervisory role of the courts is to ensure that the recipients of the power or jurisdiction conform to the terms and legal conditions upon which it is conferred, and by which it is confined. But not

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2 See the transcripts in *Dang, Ex Parte MIMA*, 26 February 2002 before Hayne J; and *Gamaethige v MIMA*, 5 March 2002 before Gummow & Kirby JJ).

3 See The Honourable Murray Gleeson CJ, "Courts And The Rule Of Law", onThe Rule of Law Series, Melbourne University, 7 November, 2001

all courts have that role, and most courts have a jurisdiction which is created, and may be limited, by Parliament. To the extent to which a privative clause, properly construed, lawfully amplifies power or limits jurisdiction, then respect for the rule of law requires courts to give effect to that expression of legislative will. Subject to the Constitution, the Parliament, in the exercise of its legislative power, is not obliged to maximise the area of potential justiciability of disputes between citizen and government. In this context, an appeal to the rule of law may be to its aspirational rather than its formal content. It may be an appropriate use of political rhetoric to contend that a privative clause is a derogation from the rule of law, but that is not a substitute for legal analysis. And the primary focus of legal analysis will be the legislative competence of the Parliament. If such competence exists, the rule of law requires that its exercise be respected by the judiciary. The two most obvious potential constraints upon the capacity of the Parliament to enact privative clauses are s 75(v) of the Constitution, which confers upon the High Court a jurisdiction that cannot be diminished by Parliament, and the limitations upon the subject matters with respect to which the Parliament has power to enact laws. The ultimate bounds are set by the limits upon the power of Parliament itself. This is a point at which the Constitution's assumption of the rule of law may be significant. **The extent to which it is within the competence of Parliament to exclude all forms of judicial review of administrative action remains to be defined.**

The complexities of the interplay between legislative will, executive action, and judicial power will continue to evolve. The ultimate principle underlying the role of judicial supervision, however, is simple. It was expressed by Lord Denning, in words that related to the jurisdiction of tribunals:

> **"If tribunals were at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end"** (R v Medical Appeal Tribunal; Ex parte Gilmore [1957] 1 QB 574 at 586)." (emphasis added)

3 Why the Bill is inappropriate: the Muin and Lie class actions before the High Court

The Bill is also premature as the issue of the requirements of natural justice in the Migration Act is now before the High Court and is to be decided in representative proceedings (a class action) by the Court shortly. The case was argued in Canberra in October 2001. Whether the Bill is passed or not by the Parliament, the introduction of the Bill is plainly designed to unfairly influence the High Court in its deliberations in relation to that case.

Reference to pending cases was made in *Re Minister for Immigration and Multicultural Affairs; Ex parte "A"* [2001] HCA 77 (21 December 2001) (KirbyJ) at [47], footnote 24, where he said:

> 47.No decision of this Court determines whether the scope of s 424A(3)(a) is such as to oust the basic rule of procedural fairness that, in the case of the delegate, was held to apply by the Court's decision in Miah. There is presently before the Full Court a reference of certain questions under s 18 of the Judiciary Act, which relates to the obligations of the Tribunal to disclose country information used adversely to a claimant for refugee status. However, the provisions of s 424A, upon which the Minister relies, were inserted in the Act in 1998[23]. They were not available in the cases referred for the decision of the Full Court[24]. The decisions of the Tribunal in those cases were made prior to the commencement of s 424A.

48.One possible argument available to the applicant is that s 424A is not a code, as the Minister claimed, excluding the fundamental principle of procedural fairness but a provision enacted to make clear a procedure for affording relevant information to a person affected by information supplied to the Tribunal. On this footing, the exemptions in s 424A(3) would apply only in respect of the explicit statutory duty. They would not qualify the residual common law requirements that remain in the background to the Act and are assumed to supplement its provisions. Another argument might be that the restriction in s 424A(3)(a) of the Act would be strictly construed and confined to information about a "class of persons" and not extended to information which, as such, referred to the social and political conditions of the country concerned, including any alleged change in the conditions in that country said to disentitle an applicant for refugee status.

... "[24] *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* High Court Applications S36 and S89 of 1999. Judgment was reserved in those matters on 10 October 2001. The decisions of the Tribunal in *Muin* and *Lie* were made prior to the coming into force of s 424A of the Act. That section was enacted by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth). It commenced on 1 June 1999. By the transitional provisions of that Act, s 424A was applied to pending applications before the Tribunal and thus applied to the present applicant's case. In *Muin* and *Lie*, where the applications had already been determined, the applicants also relied on a Practice Direction of the Tribunal. The relevant Practice Directions applicable to the present case were directions under s 420A of the Act published by the Acting Principal Member of the Tribunal, dated 1 June 1999, and the Practice Directions of the Tribunal, dated May 1999. This change provides a further ground for distinguishing *Muin* and *Lie*."

4 Why the Bill is inappropriate: The Apparent purpose of the Bill

The Explanatory Memorandum for the Bill suggests that the purpose of the legislation is to do more than stipulate that the Codes of Procedure in the Migration Act are to be an exhaustive statement of the rules of procedural fairness. Item 8 is said to indicate that the privative clause provisions are to be extended by the Bill so as to prevent any legal challenge based on any failure to follow the Code of Procedures set out in the Migration Act.

The vision of the administrative process that this evokes is truly frightening. In effect, Parliament is being asked to enact a law that allows administrators to ignore the procedures that Parliament has set for them to follow, while at the same time, the courts are prevented from reviewing the fairness of the procedures that are actually followed by the administrators. The message to the administration is this: you are free to depart from Parliament's Code of Procedures, and you need not be troubled about the courts calling you to task.[4] The constitutionality of such a provision must be open to question. More importantly, as legislators, you must ask yourselves whether you are happy with this vision of the administrative Rule of Law in Australia?

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[4] In this respect the Bill evokes the new s 7A of the Migration Act which tells us that the "executive" power of the government is not to be limited by any Act of Parliament when we are dealing with the exclusion or removal of any *person* to protect Australia's borders.