REFUGEE COUNCIL OF AUSTRALIA

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Submission on Migration Bill (Judicial Review)

Introduction:

The Refugee Council of Australia (RCOA) is Australia's peak refugee agency, representing some 120 organisations and individuals working with and for refugees in Australia and around the world.

The aim of the Council is to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and displaced persons by the Australian and other Governments. In furtherance of this aim we monitor Government policy as it pertains to refugees and, where relevant, seek to represent the views of our members to relevant legislative and policy bodies.

On this occasion we seek to comment on the Migration Legislation Amendment (Judicial Review) Bill 1998 in relation to their impact on refugees and others of concern, and in so doing argue that the proposed measures are contrary to both international and domestic law, undermine the principle of separation of powers and will not necessarily achieve their stated aim.

Views on the Proposed Bill:

The Refugee Council notes the stated intention of the Minister in introducing this Bill, namely "the growing cost and incidence of immigration litigation and the associated delays in removal of non-citizens with no right to remain in Australia" and his argument that the introduction of the current Bill is the best way to remedy this situation.

As inferred above, RCOA has strong reservations about the Bill. We are aware that these concerns are shared by a number of other community, human rights and legal organisations and that many are making representations about various aspects of the Bill. The Refugee Council will thus confine its remarks to the perceived impact of the Bill on a subset of those whom it is intended to cover: refugees, asylum seekers and stateless people. Our reservations fall into the following areas:

(i) International Law:

The international legal instruments to which Australia is a signatory, spell out a State's obligations with respect to access to the courts.
In the first instance, Article 14 of the International Covenant on Civil and Political Rights dictates that:

- All persons shall be equal before the courts and tribunals...

To deny access to any one group of people to judicial review that is afforded to all others, is contrary to the spirit of equality before the law.

When one considers refugees, international law is much clearer in its prescriptions. Article 16 of the 1951 Convention Relating to the Status of Refugees states:

- A refugee shall have free access to the courts of law on the territory of all Contracting states.
- 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 judictum solvi.
- A refugee shall be accorded in the matters referred to in paragraph 2 in the countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

That the majority of those initiating actions in the courts have not been granted refugee status at that point does not necessarily mean that they are not refugees. The act of initiating action is premised on concern about the lawfulness and procedural fairness of the decision making process used to determine refugee status in that case. There have been many instances where the court has remitted a case to the Refugee Review Tribunal and the applicant has subsequently been found to be a refugee.

Also among those who apply to the courts from the Refugee Review Tribunal are people who are or may be stateless. Here too international law provides clear guidance. Article 16 of the 1954 Convention Relating to the Status of Stateless Persons states:

A stateless person shall have free access to the Courts of Law on the territory of all contracting states.

- A stateless person 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 judictum solvi.
- A stateless person shall be accorded in the matters referred to in paragraph 2 in the countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.
- As with refugee status, the fact that a person has not been determined to be stateless does not mean that he/she is not.

It can thus be concluded that the denial to one group of people (ie people aggrieved with immigration related decisions) access to the courts afforded to others (ie people aggrieved with all other administrative decisions) is contrary to Australia's international legal obligations and is of particular consequence when the denial applies to people who are or may be refugees or stateless people.

(ii) Compliance with Domestic Law:

Reference is made in the Second Reading Speech to compliance with section 75 of the Constitution and it is conceded that "the precise limits of the privative clauses may need examination by the High Court".

RCOA is aware that this issue is being taken up in several other submissions. We do not therefore intend to pursue this in any depth save to say that to pass legislation that the Government knows will be challenged in the High Court on Constitutional grounds is neither good governance nor the mark of a government interested in saving taxpayers funds. The

rebuttal argument to the latter, namely that the legislation will save more than it costs, will be dealt with later.

(iii) Separation of Powers:

Good government in a democratic state is predicated on the three organs of government - the Legislature, the Executive and the Judiciary - being in balance. The introduction of this Bill is an attack on the principle of separation of powers and has the potential to dangerously skew the balance that underpins the governance of this country.

It could also be argued that the legislation sets a very dangerous precedent. If this is passed, what is there to stop other areas of the Executive or Legislature taking similar action to quiet a Judiciary perceived to be circumventing their policy objectives?

(iv) Ministerial Powers:

The Refugee Council wishes to query the proposed alterations to Subsections 32(2) and 36(2) of the Migration Act, in particular the latter, and notes that no clear explanation is given to the purpose for these changes.

If, as may be the case, the additional wording is intended to rectify a textual anomaly or ambiguity, the Council has no concerns.

If, on the other hand, the change to Subsection 36(2) is intended to allow the Minister to overturn a decision of the Refugee Review Tribunal in favour of the applicant, the Council would be deeply concerned, especially as under the terms of this Bill, the applicant would have no right of appeal. Such a measure would call into question the independence of the Refugee Review Tribunal and pose a dangerous precent for other areas of administrative law. It also allows for political expedience to potentially intrude on an area of decision making where Government policy should have no place. Refugee Status is determined according to criteria set out in international law and can, under no circumstances, be influenced by a country's (possibly fragile) diplomatic relations with another.

(v) Is Merits Review Enough?:

In justifying this Bill, much is made of the existence of merits review in this jurisdiction. In response we proffer the following points for consideration:

- merits review exists in all other administrative jurisdictions, yet no attempt is being made to limit access judicial review in any, even those where there are or it is proposed that there be more than one tier of review (eg veterans affairs). What, other than the level of litigation, sets immigration aside from other jurisdictions to justify the selective treatment?;
- it is common practice in other western asylum countries (including the United Kingdom, Germany, France, USA and Canada) to allow judicial review following (the various tiers of) merits review. Further, in Europe aggrieved applicants can also appeal to the European Court of Human Rights;
- reliance only on administrative determination processes removes the checks and balances that monitor administrative process and ensure compliance with the law;
- there have, over time, been many matters that have required court decisions to assist administrative decision makers in the refugee jurisdiction (such as Chan in relation to the interpretation of the "real chance" of a person experiencing persecution).
- It is not only the applicants but also the Minister who have sought guidance from the courts and decisions of both the Federal and High Court have guided decision makers and have assisted in the determination process. To block such access would atrophy the

development of administrative law in this jurisdiction and disadvantage all parties, including the Government.

(vi) Application Rate:

One of the justifications given for the introduction of the Bill is the increase in the number of applications to the courts in the last five years. No attempt, however, is made to examine why the numbers may be rising.

RCOA would like to suggest that in the refugee area the following may be relevant:

- many asylum seekers (and more often than not those with meritorious claims) have limited financial resources. Since access to welfare benefits were substantially reduced and work rights limited, more and more are without any form of income. They are thus unable to pay for application advice;
- the amount of free application advice available to applicants has been substantially reduced over the years, first with the introduction of registration, then funding cutbacks to community advisers and most significantly, with the removal of Legal Aid access from July 1998. Many asylum seekers with strong claims and few skills to represent themselves unaided (eg someone with no English and who is unfamiliar with bureaucratic processes eg a Somali woman) are not able to get access to competent advice. This has meant that cases are not necessarily examined as carefully as they should be at the administrative determination stages because the applicant is unprepared for the complexities of the determination process;
- access to competent advice about whether or not an applicant has grounds to seek judicial review is even more scarce. The DIMA funded IAAAS providers are unable to give this advice. In the past the Legal Aid Commissions could provide assistance but this too was cut substantially in July 1998;
- despite reforms to both the primary and review stages of refugee determination, concern remains about the quality of decision making, in particular in cases where applicants are unrepresented.

As a result of the above, some refugees and asylum seekers:

- present ill prepared applications that do not allow a proper examination of the claims - thus flow on to appeal;
- fall victim to unscrupulous lawyers and migration agents who promise the world, abuse the determination system and fail to represent the interests of their clients;
- receive decisions that they strongly believe do not give appropriate weight to the issues they raised and to their fears of returning and thus are desirous of challenging;
- submit applications to the courts without having had the benefit of competent and impartial legal advice as to whether the application has merit and without any legal support.

It is thus argued that, before resorting to such extreme measures as this Bill, examination needs to be given as to why people are motivated to go to the courts and whether there are measures that can be taken to remove the motivation rather than blocking access.

(vii) Overturn Percentage:

Another argument used in favour of the Bill is the overturn rate for cases that go to judicial review. Here we would argue that there is merit is isolating and examining the statistics that relate to specifically to refugee claimants, as opposed to the general immigration area.

In the Annual Report of the Refugee Review Tribunal for 1997-98 it is stated (p15) that, of the cases resolved (other than through dismissal or withdrawal) by the Federal Court during that year:

- 166 Tribunal decisions were upheld by judgement
- 20 Tribunal decisions were set aside by judgement
- 54 Tribunal decisions were remitted by consent.

In other words, in 30.8% of cases resolved there were matters determined or agreed to require re-examination by the Refugee Review Tribunal. This is not a trivial percentage.

It is noted too that in the same year, 224 applications were dismissed or withdrawn. In relation to these the arguments presented in section vi above are valid: to what extent is the number of manifestly unfounded applications linked to the lack of affordable, impartial and competent advice available to applicants in this jurisdiction?

(viii) Cost of Litigation:

It is appropriate that there be concern about the cost to the taxpayer of litigation that has no merit but not about litigation per se. As previously stated, access to the courts is both a fundamental human rights enshrined in international law and fundamental to living in a democratic state.

It has also been argued that the question that should be being asked is why people are resorting to litigation in this jurisdiction? This submission has already pointed to some of the reasons: lack of access to competent advice, lack of confidence in administrative decisions etc. There are doubtless others.

If the concern rests with the cost of dealing with spurious and abusive applications to the courts, the focus should be on addressing the reasons these are being made, not blocking access to all applicants, in particular those who have valid grounds on which to appeal.

(ix) Benefits to Applicants:

In the Second Reading Speech reference is made to the fact that this "is probably the only area of administrative law where delaying the final determination is seen as beneficial by those pursuing the court action".

This is a very sweeping statement and may have been true in some cases in the past. There are now, however, restrictions on the work rights of those seeking judicial review so it can no longer be said that the objective of entering into litigation is to prolong a working holiday. Further, it is the Council's experience that there are many applicants who receive no perceivable benefits from prolonging their stay - in fact they do so in a state of penury in the community or in detention. In such cases their objective is not their immediate comfort. They are clearly motivated by their fear of returning to their country of origin and the possibility/probability that they may be harmed/imprisoned if they were to return.

In this regard the Refugee Council would like to stress that when assessing the benefits to those seeking court action, consideration must also be given to the benefits of having an accurate decision. Unlike any other area of administrative law, an incorrect decision in refugee determination can, quite literally, cost a refugee his/her life. Surely the checks and safeguards in this jurisdiction should be far more rigorous that in an area where the stakes are far lower.

Conclusion:

The Refugee Council notes that the Minister for Immigration and Multicultural affairs has legitimate concerns about the number of manifestly unfounded applications being made to the

courts in this jurisdiction and about the cost of dealing with these. It does not, however, agree that the proposed Bill is the proper or most efficient way to address the problem.
The Refugee Council urges the Committee to recommend that this Bill is not passed for the reasons outlined above. It further argues that the Committee recommend that other avenues be explored to address the Minister's concerns, such as:

- the introduction of (expeditiously processed) leave to appeal provisions in the Federal Court; and
- increasing access to free, competent and impartial legal advice on a means and merits tested basis to asylum seekers at both the administrative and judicial review stages.

In closing, we submit a quote from the Chief Justice James Spigelman's 1998 Ethnic Affairs Oration:

The right to participate in legal decisions, on the basis of equality before the law, must be real right, not merely a theoretical one. That requires that all people have access to legal advice and to the courts and tribunals that make decisions.