# ANOTHER SALVO ACROSS THE BOW:

# MIGRATION LEGISLATION AMENDMENT BILL (NO 2) 2000 (CTH)

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> Senator Bartlett: You have given a number of examples of various changes that have been made, back to 1992 or so, ... aimed at reducing access to courts, which basically have not been successful. Most of these reforms have been aimed at curtailing rights of appeal ... Out of all the others that you are continually putting in place, why is this one going to succeed, also taking into account that the number of appeals continues to increase?
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> Mr Metcalfe: I think that is a good question. I suppose what you are asking is: have we identified the last loophole?
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> Senator Bartlett: I could be asking whether we are going in the right direction.[1]

## I. INTRODUCTION

To those involved in advocacy on behalf of refugees and asylum seekers in Australia, it seems that all aspects of the sector, whether substantive or procedural, are under siege from the current Government.[2]

Many Non-Government Organisations ("NGOs") have expressed their concern over the general trend of limiting refugees' access to legal aid, legal advice and judicial review in a series of submissions to Parliamentary

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1 Joint Committee on Migration hearing on Migration Legislation Amendment Bill (No 2) 2000 (Cth), Transcript, Canberra, 8 May 2000. Evidence of Mr Andrew Metcalfe, Deputy Secretary, Department of Immigration & Multicultural Affairs, pp 20–1 available at <http://www.aph.gov.au/house/committee/MIG/mlab/index.htm>.

2 Advocates are themselves under siege in the wake of the Woomera riots in late August. The Australian newspaper ran the headline "Refugee Advocates to Blame": B Haslem & M Spencer, "Refugee Advocates to Blame" *The Australian*, 30 August 2000, p 1.

Committees in 1999,[3] notably regarding the Immigration Advice and Application Assistance Scheme ("IAAAS"), the Migration Legislation Amendment Bill (No 2) 1998 (Cth), the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) and the Migration (Visa Application) Charge Amendment Bill 1998 (Cth). This raft of restrictions aimed at reducing asylum seekers' access to judicial review necessitates a return to first principles and an examination of the practical implications of the changes imposed upon the refugee sector.

The Joint Standing Committee on Migration ("JSCM") recently called for submissions on the Migration Legislation Amendment Bill (No 2) 2000 (Cth) with rather unseemly haste.[4] Due to the early reporting date given to the Committee by the Minister, most NGOs were given only a week to deal with and submit their concerns on the complex legal issues raised. The hearings took place soon afterwards. Despite this lack of notice, the number of submissions to the Committee, is evidence in itself of the depth of concern in the NGO sector over the Government's handling of the asylum seeker determination process. Given the passage of similar bills in the past year, there is a strong likelihood that this Bill will pass, although the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) containing the 'privative clause' amendments is still outstanding.[5]

The following features of the Bill are examined in detail: first, the prohibition of class actions in migration litigation; second, the introduction of a 28 day time-limit for applications to the High Court; and third, the quasi-technical amendments to the 'character provisions' in section 501A, which allow the Minister to set aside an earlier favourable decision by the Administrative Appeals Tribunal and substitute his or her own (adverse) decision.

Concerns as to the effect of such a Bill centre around four principal themes: first, the erosion of the doctrine of separation of powers; second, the contravention of international law and absence of administrative justice; and finally, the twin practical concerns of the continuing erosion of the status and rights of asylum seekers under Australian law with the resultant demoralisation of the asylum seeker, and the erosion of good faith between NGOs and the Government.

This Bill is another salvo in the running skirmish over refugee law between the Government and the NGO refugee sector. As Savitri Taylor has recently argued, the Australian Government's treatment of unauthorised arrivals has "set our feet upon a path that leads us all towards the perils of arbitrary

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3 NGOs that have made submissions on these bills include the National Council of Churches in Australia, the Refugee Council of Australia, Amnesty International, the Law Council of Australia, the International Commission of Jurists and the Australian Catholic Migration and Refugee Office, among others.

4 Most NGOs received invitations to submit to the committee on 23 April 2000. Submissions were due on 1 May; the Sydney hearings were held on 24 May 2000. The Terms of Reference can be found on the Joint Standing Committee on Migration website at <http://www.aph.gov.au/house/committee/MIG/mlab/index.htm>. Copies of the transcripts and submissions can also be found on this site. The report was tabled on October 9 2000 and is available at <http://www.aph.gov.au/house/committee/mig/report/Mlab2000/index.htm>.

5 The text of the Bill can be found on <http://www.aph.gov.au/parlinfo/billsnet/main.htm>. The Senate Committee report is available on <http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm>.

government".[6] The quotation from Senator Andrew Bartlett above, also questions the overall effectiveness of the current strategies in meeting the stated policy aims.

## II. SPECIFIC PROVISIONS OF THE BILL

### A. Section 486B - Restrictions of Class Actions

Section 486B provides as follows:

> 486B **No multiple parties in migration litigation**
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> (1) In any proceeding in the High Court or the Federal Court that raises an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens, the following are not permitted:
>
> (a) joinder of plaintiffs or applicants;
>
> (b) consolidation of the proceeding with any other proceedings;
>
> (c) representative or class actions;
>
> (d) a person in any other way being a party to the proceeding jointly with, on behalf of, for the benefit of, representing, one or more other persons, however this is described.
>
> *Relationship with other laws*
>
> (2) Subsection (1) has effect despite any other law, including in particular:
>
> (a) Part IVA of the *Federal Court of Australia Act 1976*; and
>
> (b) any Rules of Court.
>
> (3) However, subsection (2) does not apply to a provision of an Act if the provision:
>
> (a) commences after this section commences; and
>
> (b) specifically states that it applies despite this section.
>
> *Exceptions to general rule*
>
> (4) Subsection (1) does not prevent the following persons from being involved in a proceeding in any of the ways mentioned in that subsection:
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> (a) the applicants in the proceeding and any persons they represent, if:
>
> (i) the regulations set out a definition of family for the purposes of this paragraph; and
>
> (ii) all of those applicants and other persons are members of the same family as so defined;
>
> (b) a person who becomes a party to the proceeding in performing the person's statutory functions;
>
> (c) the Attorney-General of the Commonwealth or of a State or Territory;

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6 S Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" (2000) 6 *AJHR* 35.

(d) any other person prescribed in the regulations.

The Minister made the following comments about this aspect of the Bill in a recent press release:

> The Government believes class actions are being used to encourage large numbers of people to litigate, with the aim of delaying their departure. ... Other than through litigation, most of those people would have no way of remaining lawfully in Australia and would have to be removed.[7]

Most people would have to acknowledge that some unmeritorious asylum seeker class action claims have proceeded in the Federal Court in the last decade. However, cutting off that avenue for review completely, instead of assessing the causes of such cases, is a gross overreaction. There is no probative evidence (despite assertion) in the *Explanatory Memorandum* of the Bill[8] or the Department of Immigration And Multicultural Affairs' ("DIMA") submission that the only motivation behind class actions is to delay the asylum seeker's departure date. The only data available is that applications for judicial review have drastically increased since 1994, that 50 per cent of all applicants in migration matters withdraw their application prior to the hearing, and that the Minister is successful in 86 per cent of cases that proceed to Court.[9] Clearly, the figures support the Minister's basic proposition, but there are other possible explanations for these statistics, such as the high rejection rates of the Refugee Review Tribunal ("RRT") and dissatisfaction with its processes; bad legal advice; a fundamental misapprehension of the powers and role of the Federal Court; a lack of representation leading to withdrawal due to 'stage fright'; or even the disincentive of the $1 000 penalty for unsuccessful actions.

No surveys have been conducted assessing the reasons for asylum seekers' applications to the Federal Court, but there is no doubt a range of motivations, including a genuine belief in the strength of the case. Regardless, without judicial review of the increasingly broad powers of the Minister, asylum seekers may be unjustly deported. As a result of the Bill there is certain to be less transparency and accountability in the decision-making process and less incentive for the Minister or DIMA to abide by due process

Moreover, there is no reason that other options could not be more successfully implemented. For instance, an examination of the practices of some agents and practitioners, and greater provision of quality legal advice and assistance to asylum seekers would improve the quality of cases appearing in the Federal Court without such drastic consequences. These measures would complement the discretionary powers the Court already possesses under Part IVA of the *Federal Court of Australia Act* 1976 (Cth) to manage aspects of class actions, as well as its normal powers regarding actions which are oppressive, vexatious, frivolous or an abuse of process.

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7 Minister for Immigration, P Ruddock, "Government to stop use of class actions in migration matter", Media release, 14 March 2000.

8 *Explanatory Memorandum*, Migration Legislation Amendment Bill (No 2) (2000).

9 DIMA, *Submission of the Department of Immigration and Multicultural Affairs to the Joint Standing Committee on Migration*, (2000), p 4; see also the evidence of Mr Metcalfe, DIMA, in Australia, Joint Committee on Migration Hansard, 8 May 2000, p 5.

There are also numerous advantages to class actions that would be lost. Actions of these types allow a group of people with a similar complaint to pool their resources and bring a single case against the government instead of numerous small, and individually expensive, cases. The *Access to Justice* report in 1994 stated their merits:

> Representative actions provide a more efficient and effective court procedure for dealing with numerous related claims, with benefits to the group involved, to its opponent and to the court system. They allow for consistent and equitable resolution of disputes arising from common circumstances...fair and efficient representative action procedures should be available in all Australian jurisdictions.[10]

Note that the report states there are benefits to the *opponent*. Properly funded class actions could be a way for DIMA and the Minister to spend less money and time on litigation than the projected figure of $15 million this year.[11] The NGO community would much prefer to see this money spent on improving services and detention conditions rather than litigation and border control. Justices Wilcox and Madgwick have both suggested in recent cases that the lack of public funding beyond merits review stage "has simply resulted in the expenditure of even greater amounts of public money in paying the Minister's solicitor and counsel to respond to hopeless applications and paying the judge to decide them".[12] It is almost as if the Government does not want to be seen spending taxpayers' money on proactive measures to benefit asylum seekers, even if such measures cost less in the long-term.[13]

The Minister appears to regard all class actions without exception as the "misuse of judicial processes by non-citizens refusing to leave Australia".[14] Such comments are reminiscent of a statement made recently by Alasdair Mackenzie, coordinator of Asylum Aid, about the British Home Office's 'Fortress Britain' attitude towards asylum seekers: "They are very suspicious of anyone who makes an application for asylum. Basically, they don't believe anyone."[15]

In fact, the Minster is incorrect in stating "all class actions are a misuse of judicial process" and that "all 10 of class actions decided - involving about 4 000 participants - have been dismissed by the courts".[16] The case of *Fazal Din v*

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10 Access to Justice Advisory Committee, *Access to Justice – An Action Plan,* (1994), paras 2.104-5 (emphasis added).

11 Joint Committee on Migration hearing on Migration Legislation Amendment Bill (No 2) 2000 (Cth), Transcript, Canberra, 8 May 2000. Evidence of Mr Andrew Metcalfe, Deputy Secretary, Department of Immigration & Multicultural Affairs, p 14. Available at <http://www.aph.gov.au/house/committee/MIG/mlab/index.htm>.

12 Note 6 *supra* at 49.

13 *Ibid* at 55. In its evidence to the JSCM, DIMA did canvas the possibility of using the 'test case' as an alternative: note 9 *supra*, p 8. This is an idea with some merit, but does not depend on the abandonment of the class action.

14 Minister for Immigration, P Ruddock, "Government to stop use of class actions in migration matter", Media release, 14 March 2000.

15 S Lyall,, "Fortress Britain to Asylum seekers" *The New York Times*, 27 April 2000.

16 Minister for Immigration, P Ruddock, "Government to stop use of class actions in migration matter", Media release, 14 March 2000.

*Minister for Immigration and Multicultural Affairs*[17] was decided in favour of the twenty claimants, as was the case of *Chu Keng Lim v Minister for Immigration Local Government and Ethnic Affairs*[18] for its 36 plaintiffs. The Law Council submission on the Bill noted that in the case of *Macabenta v Minister for Immigration and Multicultural Affairs*,[19] the Federal Court acknowledged the significance of the issue raised, even though the legal challenge failed.[20] If the Minister's argument is to be taken seriously, by analogy, though there have been few successful cases on insider trading in Australia those provisions in the *Corporations Law* should be repealed. The merits of legislation are surely not to be judged by the success rate of applicants, especially in areas requiring a high standard of proof, and where many of the claimants are unrepresented but rather by the significant policy grounds that weigh in favour of protection against departmental and administrative error.

Even if the motivation behind the Bill was better intentioned, the amendments will not achieve the stated policy aim in practical terms. As the Law Council submission points out, *Migration Regulation* No 050.212(4), amended in July 1998, provides an entitlement to a bridging visa to those who are party to a class action, until 28 days after the action has been finally determined by the courts. The visas have no work rights attached. As the applicant can still bring an individual proceeding, that person will still obtain a bridging visa. If it their aim, applicants can still delay their departure and they will merely be encouraged to bring a legal action without legal representation.[21]

## B. Provision of Legal Assistance

The main argument for the introduction of the Bill is the alleged increase in applicants seeking judicial review via class actions merely to prolong their stay in Australia. It can be argued that the increase in the application rate for judicial review is partly due to reduced access to competent legal advice. Changes to the provision of legal aid in July 1998 have made it very difficult for asylum seekers in the community with limited resources and merits to access the Legal Aid they desperately need.[22] Whilst the IAAAS does provide some community application assistance, in 1997-8 this amounted to only 68 cases.[23] None of this application assistance is provided for judicial review. In addition, legal aid for asylum seekers applying to the Federal Court was also severely restricted.[24] Combined

17 [1998] 961 FCA (14 August 1998); (Unreported, Federal Court, Wilcox J, 14/08/98)

18 (1992) 176 CLR 1.

19 (1998) 154 ALR 591, per Tamberlin J.

20 Law Council of Australia, *Submission of the Law Council of Australia to the Joint Standing Committee on Migration*, (2000), p 3, available at <http://www.aph.gov.au/house/committee/MIG/mlab/index.htm>.

21 *Ibid.*

22 Note 6 *supra* at 38-9.

23 Department of Immigration and Multicultural Affairs, *Annual General Report*, (1997-8) p 76.

24 Since July 1998, legal aid has only been available where there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court, or the proceedings seek to challenge the lawfulness of detention. Prior to July 1998, legal assistance was available where there was a complex or important issue of law involved.

with the fact that many applicants do not speak English and do not possess an understanding of the Australian legal system, it is then possible to see how difficult it is for asylum seekers to gain access to the legal system.

With limited legal advice, applicants at the Federal Court submit applications generally with little understanding of the merits of their application, or on what basis they can appeal or why they are appealing. Thus, it is not a surprise that they often fall victim to unscrupulous legal practitioners or migration advisers who do not properly advise their clients and present ill-prepared applications that flow on to appeal. Justice Madgwick made this point in *Kumula v Minister for Immigration and Multicultural Affairs*, where his Honour said,[25] "Had Mr Kumula been properly legally advised, it is doubtful that he would have persisted with his application". In fact, it could be argued that the only realistic and affordable way for genuine asylum seekers to apply to the Federal Court for judicial review with adequate representation from competent solicitors and barristers is via a class action.

Much was made in the hearings before the JSCM of an advertisement submitted by DIMA. It read:

> Permanent Residence- Australia
>
> Refugee Class Actions!
>
> If you have been rejected by the Refugee Review Tribunal (RRT) you may still be able to join our class actions at a very low cost. Our latest action is very easy to join (over 1 200 people have already joined)!
>
> It doesn't matter if you are illegal or that your Ministerial Review has been rejected.
>
> Please supply your refugee & RRT decisions.
>
> You may still qualify for a bridging visa and become legal.
>
> Free consultation – you have nothing to lose.[26]

In his evidence, the response of the Human Rights Commissioner, Chris Sidoti, was swift:

> if this legislation is designed to stop objectionable advertisements then it is directed at the wrong parties. Why, again, are we punishing those seeking to regularise their status in this country?[27]

An investigation into the self-regulation of the Migration Agent Registration Authority ("MARA") was never proposed by DIMA, it was merely asserted that the legislation "removes the capacity for class actions to occur. As a result of that, the promotion of such schemes will not be possible".[28]

## C. Court Administration Issues

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25 [1998] 613 FCA; (Unreported, Federal Court, Madgwick J, 18/05/98)

26 Evidence of Chris Sidoti, HREOC, in Australia, Joint Committee on Migration Hansard, 24 May 2000, pp 36-7.

27 *Ibid*, p 37.

28 Evidence of Mr Metcalfe, note 9 *supra*, p 5.

Under s 75(v) of the Constitution, access to the High Court cannot be entirely restricted. If the Bill passes, it is likely that aggrieved applicants will still turn to the High Court in individual cases. This would have undesirable effects for the Court as it deals with less than 100 cases per year and is responsible for determining the most significant legal issues in Australia.

The comments of McHugh J of the High Court in *Re Minister for Immigration and Multicultural Affairs: Ex Parte Durairajasingham*[29] early this year are enlightening on this point. His Honour took the unusual step of criticising amendments to the *Migration Act* 1958 (Cth) (the *Migration Act*) which limit the role of the Federal Court in considering decisions of the Minister for Immigration, and thus forcing applicants to take their cases straight to the High Court. The result is that more than two-thirds of applications for prerogative relief pending in the High Court are now individual immigration cases:

> Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the *Migration Act* 1958 (Cth) ("the Act") which now prevent this Court from remitting to the Federal Court all issues arising under that Act which fall within this Court's original jurisdiction. No other constitutional or ultimate appellate court of any nation of which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.
>
> There is no ground whatever for thinking that the judges of the Federal Court are not capable of dealing with all issues arising under the Act which fall within this Court's jurisdiction. Although the refugee matters that cannot be remitted to the Federal Court do arise under this Court's constitutionally entrenched jurisdiction, most of them are not constitutional matters as that term is ordinarily understood. The great majority of the matters which cannot be remitted simply involve questions of administrative law with which the Federal Court has long been familiar and in respect of which it has great experience and expertise.
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> The reforms brought about by the amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as 'the keystone of the federal arch'[10] and the ultimate appellate Court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved.[30]

Justice Gummow has also commented that the results of the changes to the *Migration Act* are to "encourage the twin evils of cost and delay, and, it would appear, to impede the efficient administration of the migration laws".[31]

## D. Part 8A – Time Limits to the High Court

Section 486A, entitled "Time limit on applications to the High Court for judicial review" states:

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29 (2000) 168 ALR 407.

30 *Ibid*, paras 13-15.

31 *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1998) 152 ALR 177 at 180. See also comments made by Gleeson CJ and McHugh J in *Abebe v The Commonwealth* (1999) 162 ALR 1 at 17.

> (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a decision covered by subsection 475(1), (2) or (3) must be made to the High Court within 28 days of the notification of the decision.
>
> (2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period.

This aspect of the Bill is objectionable on three grounds: first, that the time limits may be constitutionally invalid; second, that inflexible time limits run counter to ordinary administrative law practice; and third, that inflexible time limits place undue hardship on an asylum seeker.

Section 486A, if enacted, would prevent any applicant from bringing a case in the High Court to challenge an immigration decision any later than 28 days after receiving notice of the decision. The right of any person to seek orders from the High Court against an officer of the Commonwealth is enshrined in s 75(v) of the Constitution. Though the Parliament has not interfered directly with this Constitutional right, the constitutional validity of the indirect time limitations on the High Court's original jurisdiction in the new Part 8A is questionable. Indeed, the High Court has previously commented in obiter that time limits imposed without the discretion to review in particular circumstances might be seen as "an attempt to control the Court, and an interference with the judicial process itself".[32]

Even if the provision is constitutionally valid, the current impact of the RRT and Federal Court's lack of discretion to consider an out-of-time application under *Migration Act* provisions should be considered.[33] Ordinary Australian administrative law does not impose time limits that cannot be revisited by the court at its discretion if exceptional circumstances exist.[34] This is an acknowledgement that sometimes genuine and worthy claims do not proceed within the set time limit because of extenuating circumstances, such as the incompetence of legal advisers.

Asylum seekers should be reasonably expected to have more problems than other administrative law claimants in meeting strict deadlines. They may have to have the written notification of the decision in their case and their right to review translated and explained.[35] They are also often in detention where their freedom of movement and thus access to communication and to quality legal advice is severely curtailed.

## E. Section 501A - Minister's Power to Substitute an Adverse Decision

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32 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96. See also *Liyanage v R* [1967] AC 259.

33 See ss 412(1)(b), 478(1)(2).

34 Note the *Administrative Appeals Tribunal Act* 1975 (Cth), s 29 and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 11.

35 The applicant is considered to have been 'notified' by a written letter, even if they cannot understand English; see *Nguyen v RRT* (1997) 74 FCR 311.

The character provisions of the Bill are equivocal in their effect. Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees ("Refugees Convention"), character can be relevant to whether Australia owes a non-refoulement obligation to a particular refugee. Article 33(2) states that:

> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 1F of the Convention exhaustively defines the grounds on which a person can be excluded from the protection of the Convention and may be expelled to a country where they may face persecution. The grounds include a person who has committed a war crime or crime against humanity, a serious non-political crime outside the country of refuge, or a person who has been guilty of acts contrary to the purposes and principles of the United Nations.

The *Explanatory Memorandum* to the Bill explains that s 501A contains technical amendments concerning the character test in s 501 of the *Migration Act*. Under that section, the Minister or his or her delegate may refuse to grant a visa if a person does not pass the character test. Section 500 provides a right of review to the AAT from a decision of a delegate to refuse to grant a visa on character grounds. Section 501A provides the Minister with a personal, non-reviewable power to set aside the decision of the AAT in favour of the applicant, on grounds of dubious character.

As the *Explanatory Memorandum* indicates, the current wording of s 501A(1)(c) wrongly implies that the AAT has the power to grant a visa. In actual fact, the AAT only has the power to decide that a visa should not be refused on character grounds. Item 1 amends s 501A(1)(c) to remove the false implication. Item 4 makes a similar amendment to the transitional provisions which are contained in the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth).

Item 2 clarifies that the Minister has the power under s 501A to substitute an adverse decision for a favourable decision of the delegate even when a person passes the character test in s 501.

Item 3 inserts the proposed s 501A(4A), which clarifies that the power to substitute an adverse decision may be exercised by the Minister at any stage after the approval on character grounds has been given, including after the visa has been granted.[36]

It is uncertain whether the amendments in the Bill are technical in nature or substantive; in other words, whether the Minister already has the power to substitute an adverse decision. On a first reading, the clauses appear to have a substantive effect. However, it is not entirely clear whether the Ministerial discretion in s 501A(3) and the applicable character test in the *Migration Act* go beyond the permissible boundaries of the Refugees Convention. Paragraph 1.9 of Ministerial Direction Number 17 requires that the AAT consider "activities indicating contempt or disregard for the law" particularly breaches of

36 A Grimm, "Migration Legislation Amendment Bill (No 2) 2000" (1999-2000) 140 *Bills Digest Service.*

immigration law, or "whether the non-citizen has in connection with any application for the grant of a visa or any kind of government benefit, provided a bogus document or made a false or misleading statement". It was a subject of debate with the Committee over whether the Minister would ever consider that even consorting with known people smugglers would be considered such a form of 'disregard'.[37]

There is an obvious danger in allowing DIMA and the Minister to decide what constitutes a criterion as subjective as a "contempt or disregard for immigration laws" without full review. It is likely to lead to circular definitions where bona fide attempts to use the determination processes, or more probably, people who fall victim to unscrupulous advisers who instruct them to embellish their story, are considered abusive.[38] It has been suggested that there is already a strong "rejection mentality on the part of administrative decision-makers".[39] There is a greater danger in allowing the Minister to circumvent the Convention, the Tribunal and court processes when he or she does not agree with the outcome. A test case on these features of the Bill will be necessary to clarify the full impact of these amendments, but the substantive problems with the character provisions are clear.

## III. WIDER IMPLICATIONS OF THE BILL

### A. Separation of Powers

Proponents of the Bill argue that, as applicants receive a full merits review at the RRT, there is no need for judicial review. However, as the RRT is not a court of law and its members rely on the Minister for reappointment, decisions made by the Tribunal may be perceived to be open to Government pressure.[40] There is a crucial role to be played by both merits review and judicial review, but they are qualitatively different roles. Judicial review is essential as a check on the unlawful exercise of power by the Executive. This was emphasised by the Standing Committee for the Scrutiny of Bills:

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37 Evidence of Steve Wolfson, UNHCR, in Australia, Joint Committee on Migration Hansard, 24 May 2000, p 89.

38 Manlangit and Department of Immigration and Multicultural Affairs [2000] AATA 400 (22 May 2000).

39 Note 6 *supra* at 39.

40 See the Senate Legal and Constitutional References Committee recommendations on the RRT in Australia, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, (2000), available at <http://www.aph.gov.au/senate/committee/legcon_ctte/refugees/index.htm>

> Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.[41]

The same arguments apply to the general processes of the Administrative Appeals Tribunal ("AAT"), even though it is not a court.[42]

The ability of the Minister under this Bill to substitute an adverse decision for that of the AAT on the grounds of character is of particular concern. Australians have recently witnessed the distasteful aftermath of the Safe Haven visa scheme that left a large number of unreviewable decisions, in respect of those Kosovars who refused to return voluntarily, in the hands of the Minister. Such a process does not allow for certainty or transparency – the foundations of the rule of law – not to mention the personal pressure it must place on the particular decision-maker. As one submission to the JSCM stated, with regard to the 1996 changes to Part 8 of the *Migration Act*, which removed the application of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) to refugee and migration matters:

> The move to excise a category of decisions from the application of the *ADJR Act* not only undermined the integrity of the long-standing and internationally standard-setting framework for review of administrative decisions – it made the statement that some categories of decisions (specifically, those involving non-citizens) were less worthy of careful judicial oversight than others.[43]

In brief, government policy should not be promulgated without regard to the rule of law, the basic principles of administrative law or basic human rights. Yet, with each successive amendment to the migration laws in Australia, the boundaries of administrative discretion have slowly shifted in this direction.

## B. Contravention of International Law

The principle of non–refoulement set out in Article 33 of the Refugees Convention[44] provides that:

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41 Standing Committee for Scrutiny of Bills, "Re: Migration Legislation Amendment Bill (No 2) 1998" (January 1999 ) *Alert Digest.*

42 It remains to be seen how the new 'super-tribunal', the Administrative Review Tribunal, set to begin on 1 February 2001, will differ from the current model.

43 M Bliss, *Submission to the Joint Standing Committee on Migration*, (2000), p 5, available at <http://www.aph.gov.au/house/committee/MIG/mlab/index.htm>.

44 Australia acceded to the Refugees Convention on 22 Jan 1954 and the Protocol on 13 Dec 1973. DIMA's interpretation of Australia's international protection obligations can be found in DIMA, Fact Sheet No 46*: Australia's International Protection Obligations*, 3 May 2000, available at <http://www.immi.gov.au/facts/46protect.htm>.

> No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Bill will deny refugee claimants the opportunity to have an administrative decision reviewed as part of a class action, and will therefore block the only remaining cost-effective way of accessing the Federal Court. The time limitation for appeal to the High Court could effectively prevent a claimant from being able to seek the legal advice and funding they would need to launch a viable High Court proceeding.

Of the cases resolved (other than through dismissal or withdrawal) by the Federal Court during 1997-8, 166 tribunal decisions were upheld by judgment, 20 were set aside by judgment and 54 were remitted by consent. Therefore, if not for judicial review, 74 cases could have been determined in error and the applicants could have been returned to their country of origin. Particular instances are cited below.[45] The RRT website states that 482 cases in total would have been decided in error since 1993 if not for judicial review mechanisms.[46] Even though this is a tiny percentage of total RRT decisions, it is significant enough to demonstrate that safeguards must remain.

In addition, Article 14 of the International Covenant on Civil and Political Rights, to which Australia is a signatory,[47] provides that "all persons shall be equal before the courts and tribunals". Presently, within the jurisdiction of the Commonwealth all persons can seek to have administrative decisions reviewed on the basis of an error of law. The Bill seeks to treat asylum seekers in a manner different to all other persons, in contravention of Article 14. The Human Rights Commissioner Chris Sidoti was prepared to state in his evidence on this Bill that it could lead to a 'cumulative breach' of Article 14.[48]

Article 16 of the 1951 Convention Relating to the Status of Refugees provides that:

> 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 *cautio judicatem solvi*.

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45 *Khadra Mohamed Abdalla v Minister for Immigration and Multicultural Affairs* [1998] FCA 1017, where the Federal Court held that the RRT had wrongly concluded that a recurring pattern of violence within the context of the civil war in Somalia could not amount to persecution for a Convention reason. In addition such decisions as *Lay Kon Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681, which reviewed whether East Timorese asylum seekers had Portuguese nationality, could not have been brought before the Court.

46 <http://www.rrt.gov.au/judreview.html> as of 31 August 2000.

47 The ICCPR came into force generally (except Article 41) on 23 March 1976, and in Australia (except Article 41) on 13 November 1980. Article 41 came into force generally on 28 March 1979, and in Australia on 28 January 1993. The text can be found at Australian Treaty Series 1980, No 23 - <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>.

48 Note 26 *supra*, p 38.

> A refugee shall be accorded, in the matters referred to in paragraph 2 in countries other than that which he has his habitual residence, the treatment granted to a national of the country of his habitual residence.

Whilst the Bill applies to those in the process of seeking refugee status, many of them are in fact refugees for the purpose of the Refugees Convention referred to above. In a joint judgement in *Minister for Immigration and Ethnic Affairs v Mayer*,[49] Mason, Deane and Dawson JJ stated that:

> [T]he obligations of a State Party in respect of a person depend upon the particular circumstances in which the person is placed and upon whether or not he or she is a 'refugee' within the meaning of the Convention or the Protocol. There is nothing in the Convention or Protocol which expressly or impliedly calls for a general determination by a State Party that a person enjoys the abstract status of refugee within the meaning of the Convention or Protocol.

Under Article 33(2) of the Refugees Convention, character can be relevant to whether Australia owes a non-refoulement obligation to a particular refugee, as examined above. The Minister, no matter how diligent, may make an error in substituting an adverse decision on character for a decision of the AAT, which is subject to only limited judicial review. This could easily result in Australia returning a refugee to a territory where his or her life or freedom would be threatened, in breach of the principle of non-refoulement.

## C. Government-NGO Relations

Governments and NGOs have a long history of working together on refugee issues, such as the Community Resettlement Scheme ("CRSS") program. This has helped facilitate the implementation of many programs over the years. However, a good working relationship is impeded by bills like that presently under examination, which are introduced hurriedly, and run counter to explicit NGO and community concerns. To provide inexpensive access to the courts and full judicial review to refugee applicants is not an unreasonable objective. Lack of political support for refugees sends the community the wrong messages about helping refugees resettle, and makes the work of NGOs more and more difficult. The need to react to constant changes in government policy impedes the proper delivery of services to asylum seekers.

There has also been erosion of the good faith built up between government and the NGO community. This good faith has been replaced with frustration and anger, most evident at the twice annual NGO meetings with DIMA, the Department of Foreign Affairs and Trade and the Attorney-General's Department (which observe Chatham House rules). For example, the Minister for Immigration has recently been reported in the press as considering introducing a 'HECS-like' scheme to recoup from refugees the cost of their detention.[50] The Refugee Council of Australia responded with a press release stating that it "is totally opposed to this scheme and sees it is the latest in a long list of measures contrived by the Government that cause great suffering to people

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49 (1985) 59 ALJR 824 at 827.

50 Quoted in Refugee Council of Australia, *Statement On Refugees Paying Detention Costs*, 1st May 2000 <http://www.refugeecouncil.org.au/position01052000.htm>

who have come to this country to escape persecution".[51] Expressions of hostility towards NGOs on the part of the Government have increased with the announcement of the review of UN human rights treaty bodies and the Refugees Convention itself.[52]

However, along with anger there is also a new and genuine fear. With the advent of the new Administrative Review Tribunal, less powerful Australians, such as those on welfare or indigenous Australians, should be very wary of the trends in refugee law, lest they be reflected in new administrative processes for citizens unable to defend their right to administrative justice within Australia. Although these issues go far deeper than the effect of this particular Bill, it is the incremental effect of legislative change, without consultation or agreement with the NGO sector, which provides much of the emotional charge to the current debates.

## IV. CONCLUSION

This Bill is cast in the same vein as previous Bills, which aim to prevent the courts reviewing Ministerial and departmental decisions, concentrate more discretionary power in the office of the Minister, and block almost all avenues to protection visas for both genuine refugees and those with unmeritorious claims. The charge of 'arbitrary government' is looming.

This paper has presented arguments that the Bill should be opposed on the three-fold basis of the erosion of the doctrine of separation of powers; the contravention of international law and lack of administrative justice; and the continuing erosion of the status and rights of asylum seekers under Australian law with the resultant demoralisation of the asylum seeker, and the erosion of good faith between NGOs and government.

As Savitri Taylor has concluded:

> The *Migration Act* 1958 (Cth) contains substantive provisions which purport to give effect to Australia's protection obligations under the Refugees Convention. "Look at us," we say, "universal human rights are important to us".
>
> The devil is in the procedural detail. It is in the boring technical stuff that is not part of the big picture, and is easy to gloss over. It lies in ... having inflexible time limits for review, and in dozens of other procedural pitfalls – some legislated and some just a matter of administrative practice.[53]

This paper has argued that whilst there is no probative evidence that these measures will achieve the intended effect of decreasing appeals and the appearance of unmeritorious cases before the courts, there is a real risk of the

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51 Refugee Council of Australia, Statement On Refugees Paying Detention Costs, 1st May 2000.

52 "We need to arrest the trend which has led to some pressure groups and organisations seeking to extend the scope of the Convention in ways which countries did not envisage, when they signed,": Minister Philip Ruddock, "Australian Government Measures to Reform UN Refugee Bodies", Media Release, 29 August 2000. See also Ministers A Downer, P Ruddock and D Williams, "Improving the Effectiveness of United Nations Committees", Media Release, 29 August 2000.

53 Note 6 *supra* at 53.

converse – that genuine asylum seekers will have less access to meaningful judicial review. The measures introduced in the last five years have only resulted in greatly increased appeals. The response to Senator Bartlett's initial query must be that Australia's refugee status determination system is heading rapidly in the wrong direction.