

Washington International Law Journal

Volume 8 | Number 3

9-1-1999

The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act

Andrew N. Langham

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Andrew N. Langham, Comment, *The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act*, 8 Pac. Rim L & Pol'y J. 651 (1999).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol8/iss3/12>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

THE EROSION OF REFUGEE RIGHTS IN AUSTRALIA: TWO PROPOSED AMENDMENTS TO THE MIGRATION ACT

ANDREW N. LANGHAM

Abstract: The Australian government has proposed two amendments to the Migration Act. The first excludes judicial review of administrative determinations in the immigration context. The second severely limits how and when detained refugees can access information regarding their rights as asylum seekers. Refugees arrive in Australia vulnerable and wholly ignorant of the legal system, and must make their claims for asylum in a politically hostile atmosphere. Current immigration laws protect the integrity of the system by making judicial review of immigration determinations possible in some cases and by giving refugees access to information on the refugee determination process. The proposed amendments will undermine the accuracy and effectiveness of Australia's system for determining refugee status, which will inevitably lead to mistakes. Such mistakes will result in a violation of the refoulement principle, under which no refugee may be returned to any country where he or she is likely to face persecution or torture. The proposed amendments will weaken Australia's refugee determination system and should be rejected.

I. INTRODUCTION

The claim to refugee status is a transnational invocation of the ideals of freedom and self-determination.¹ These ideals define the modern liberal democracy. In searching for the protection that freedom provides, the refugee tests the boundaries of a state's commitment to these ideals.² The ideological commitment of many states to the protection of refugees is continually challenged by political opposition to rising immigration levels. Australia is no exception.

¹ The term refugee was initially defined in the Convention Relating to the Status of Refugees, which was amended by the Protocol Relating to the Status of Refugees. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. This definition is the criterion used under Australian immigration law to determine whether a non-citizen qualifies for a "protection visa." If a non-citizen is a refugee as defined under these conventions, then Section 36 of Australia's Migration Act of 1958 allows the refugee to obtain a protection visa. Migration Act, 1958, § 36 (Austl.). Although under Australian immigration law, those qualifying as refugees are granted a "protection visa," in other countries, including the United States, refugees are granted "asylum." These are simply different legal terms used to describe the same status. See Immigration and Nationality Act, 1958, §§ 101(a)(42), 208 (Austl.). Since the term "asylum" is the legal term used in the municipal law of most countries, this Comment will generally use that term.

² Howard Adelman, *Justice, Immigration and Refugees, in* IMMIGRATION AND REFUGEE POLICY: AUSTRALIA AND CANADA COMPARED 63, 79 (Howard Adelman et al. eds., 1994).

During the 1999 session of the Australian Parliament, two recently introduced immigration amendments will be considered: the Migration Legislation Amendment (Judicial Review) Bill ("Judicial Review Amendment")³ and the Migration Legislation Amendment Bill (No. 2) ("Amendment No. 2").⁴ Substantially similar versions of both amendments have been presented to Parliament in the past but have failed to gain sufficient support.⁵ If enacted, these amendments will significantly alter Australian refugee law by further narrowing the opportunity for a refugee to present a credible asylum claim.⁶ The Judicial Review Amendment will make decisions of the Refugee Review Tribunal final by eliminating the opportunity for judicial review of these decisions. Amendment No. 2 places the onus for requesting information about refugee status on a detained refugee and restricts when and under what conditions information can be provided to a detained refugee.

This Comment argues that the proposed amendments undermine the accuracy and effectiveness of Australia's refugee determination process and should be rejected. Part II examines the concept of refugee protection and the development of Australian refugee law. Part III describes the current system for processing refugee claims. This Part examines the procedure for claiming asylum and the opportunity for judicial review of administrative determinations on refugee status. Part IV examines the effects and implications of the proposed amendments and argues that the amendments should be rejected because they will undermine the fairness of the refugee determination process. Part V considers the amendments in relation to Australia's international obligations and questions whether Australia will remain in compliance with international law if the amendments are passed.

³ Migration Legislation Amendment (Judicial Review) Bill 1998, *available in* The Parliament of the Commonwealth of Australia Homepage (visited Feb. 4, 1999) <<http://www.aph.gov.au/parlinfo/billsnet>> [hereinafter Judicial Review Amendment].

⁴ Migration Legislation Amendment Bill (No. 2) 1998, *available in* The Parliament of the Commonwealth of Australia Homepage (visited Feb. 4, 1999) <<http://www.aph.gov.au/parlinfo/billsnet>> [hereinafter Amendment No. 2].

⁵ The predecessor to the Judicial Review Amendment was the Migration Legislation Amendment Bill No. 5, which failed in 1997. MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 265 (1998) (citing Migration Legislation Amendment Bill No. 5, 1997). The predecessor to Amendment No. 2 was called the Migration Legislation Amendment Bill No. 2, which failed in 1996. *Id.* at 213 (citing Migration Legislation Amendment Bill No. 2, 1996).

⁶ Similar limitations on judicial review of refugee determinations are also in effect in the United States and in Western Europe. See generally Erwin Cherminsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295 (1999); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997).

II. BACKGROUND

A. *Refugee Protection in International Law*

In the aftermath of World War II, a genuine resolve emerged among the international community to provide legal mechanisms to help refugees.⁷ The 1951 United Nations ("U.N.") Convention Relating to the Status of Refugees ("Refugee Convention") and the 1967 Protocol Relating to the Status of Refugees ("Refugee Protocol") were the first major agreements to offer refugees legal protection.⁸ Although both agreements impose weak requirements on signatory nations and provide only limited guarantees to refugees,⁹ they do offer guidelines and definitions that signatory nations are obliged to consider in their refugee determination processes.¹⁰ Currently, 136 countries are party to one or both of the agreements and, in the interest of safeguarding the rights and well-being of the world's twelve million refugees, have accepted a duty to compromise state sovereignty in the immigration context.¹¹

Under the Refugee Convention and the Refugee Protocol, a refugee is defined as any person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

⁷ David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1254 (1990).

⁸ HÉLÈNE LAMBERT, *SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 1-2* (1995); Refugee Convention, *supra* note 1; Refugee Protocol, *supra* note 1. Australia is a party to both of these treaties.

⁹ The purpose of the 1951 Refugee Convention has been identified by Guy S. Goodwin-Gill, a leading authority on refugee law.

The 1951 Convention was originally intended to establish, confirm or clarify the legal status of a known population of the displaced. This met the needs of the time, and most provisions focus on assimilation, or are premised on lawful residence or tolerated presence. There is nothing on asylum, on admission, or on resettlement.

Guy S. Goodwin-Gill, *The Future of International Refugee Law*, REFUGEES, Oct. 1998, at 28.

¹⁰ Patricia Hyndman, *International Refugee Law and Some Implications for Procedures*, 6 INT'L J. REFUGEE L. 245, 246 (1994).

¹¹ Statistical Unit, United Nations High Commission for Refugees, *Refugees and Others of Concern to UNHCR: 1998 Statistical Overview, Table I.1* (visited Sept. 11, 1999) <<http://www.unhcr.ch/statist/98oview.htm>> [hereinafter *UNHCR Statistical Overview*]. For the year 1998, the United Nations High Commission for Refugees ("UNHCR") reported that almost 12 million people worldwide qualified as refugees under the Refugee Convention definition. However, the combined figure for refugees, returnees, and persons displaced within their own country was almost 22 million.

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.¹²

This definition, when incorporated into municipal law, creates a narrow exception to immigration policies that generally permit immigration for reasons related to family and employment.¹³ In effect, the refugee provision offers an important tool to oppressed individuals who do not qualify for immigration based on their family or employment status.

Protective standards and procedures have been incorporated into municipal law as an increasing number of states have become parties to these agreements. The United States, for example, modeled portions of both the Immigration and Nationality Act and the Refugee Act of 1980 on the Refugee Convention's language and on other international standards.¹⁴

Although some states have enacted refugee laws that in theory incorporate their international commitments, many have enacted restrictive amendments or implemented their laws poorly and have thus failed to adequately protect refugees.¹⁵ This has occurred in the United States. Although the language of U.S. refugee law suggests compliance with international standards, an examination of how the laws are actually implemented suggests otherwise.¹⁶ As James Hathaway, an authority on international refugee law, has commented, "[s]tates pay lip service to the importance of honouring the right to seek asylum, but in practice devote

¹² Refugee Convention, *supra* note 1, art. 1(A)(2); *see also* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 2 (1992). In addition to the Refugee Convention definition, the Organisation of African Unity also provides:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1001 U.N.T.S. 14691, art. 1.2.

¹³ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 231 (1991).

¹⁴ Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 *BERKELEY J. INT'L L.* 1, 1 (1997). Although Professor Fitzpatrick discusses the textual similarities between U.S. refugee law and international refugee law, the article argues that U.S. decisionmakers have failed to fully conform domestic law to international standards. *Id.* at 3.

¹⁵ *See generally id.* *See also* discussion *infra* Part V, which examines Australia's international obligations.

¹⁶ Fitzpatrick, *supra* note 14, at 3.

significant resources to keep refugees away from their borders."¹⁷ In the absence of an international organ with the authority or power to enforce these commitments, Australia and other countries are able to consider legislation that undermines their international commitments.¹⁸

B. *The Development of Refugee Law in Australia*

1. *The Historical Backdrop and Public Opinion on Immigration*

Under Australia's historically strict immigration controls, only narrow grounds exist for processing asylum claims.¹⁹ In 1997, the United Nations High Commission for Refugees ("UNHCR") reported that there were 9,300 asylum seekers in Australia. For the ten-year period from 1988 to 1997, the UNHCR reported that 76,400 individuals applied for asylum in Australia.²⁰ The relatively small number of people applying for refugee status in Australia can be partially explained by Australia's consistent pattern of imposing strict immigration controls.

Australia has limited immigration in several ways. Early immigration policies made race and ethnicity the principal qualifying factors for immigrants.²¹ Following World War II, Australia controlled immigration by

¹⁷ James C. Hathaway, *Preface: Can International Refugee Law Be Made Relevant Again?*, in *RECONCEIVING INTERNATIONAL REFUGEE LAW*, xvii, xvii (James C. Hathaway ed., 1997).

¹⁸ *Id.* This is not to suggest that Australia is somehow unique in its failure to fully consider its international obligations. Instead, Australia is following a predictable pattern of behavior common among industrialized countries.

¹⁹ Robert Birrell, *Immigration Control in Australia*, 534 *ANNALS AM. ACAD. POL. & SOC. SCI.* 106, 106 (1994). Birrell argues that Australian immigration policy is a result of the country's "heritage of control." Specifically, Birrell identifies a pattern of policies, culminating in the reform efforts of the past decade, which have resulted in "measures . . . much tougher than those enforced in North America." *Id.*

²⁰ *UNHCR Statistical Overview*, *supra* note 11, at Table 17. The respective figures for other countries include the United States, with 122,900 and 1,528,800; the United Kingdom, with 41,500 and 370,100; Canada, with 22,600 and 291,700; and France, with 21,400 and 339,500. *Id.*

²¹ CROCK, *supra* note 5, at 11. At the end of the nineteenth century, the desire to control immigration and to achieve uniformity in immigration laws was a motivating factor "favouring the federation of the colonies and the establishment of a Commonwealth." *Id.* at 13. Several of the colonies, including New South Wales, South Australia, and Tasmania, passed the Colored Races Restriction Bills in 1896, but the British imperial government refused to approve the bills. *Id.* The establishment of a Commonwealth in 1901 allowed Australia to enact immigration laws that were not subject to British approval and that also provided uniformity across the continent. The Immigration Restriction Act of 1901 (renamed the Immigration Act in 1912, and ultimately repealed by the Migration Act of 1958) defined six classes of prohibited immigrants. *Id.* The first class consisted of people who "when asked to do so by an officer, [fail] to write out at dictation and sign in the presence of the officer a passage of fifty words in length in a European language directed by the officer." *Id.* (quoting The Immigration Act § 3(a)). The high level of proficiency needed to meet this requirement is illustrated by the following dictation test, which was administered in 1908.

requiring immigrants to sign contracts that allowed the Australian government to specify their employment for the first two years of their residency in Australia.²² In 1949, the War-Time Refugees Removal Act was enacted for the specific purpose of removing "Asian and other non-white migrants" who had fled to Australia during World War II.²³ In *Koon Wing Lau v. Calwell*,²⁴ the High Court upheld the constitutionality of the War-Time Refugees Removal Act. The Court stated:

Their presence here is wholly the result of the operations of war, and is as visible and tangible, and in the opinion of Parliament, may be as undesirable, as the unrepaired damage done by enemy bombing to an Australian city, and may be as validly dealt with under the defence power.²⁵

The emphasis on race and ethnicity, which largely defined Australia's immigration policies following World War II, has lessened in subsequent decades, but the policy to strictly limit immigration has continued. The proposed amendments are the Australian government's most recent attempt to control immigration patterns. If passed, the proposed amendments will drastically limit judicial review of refugee determinations and will undermine the rights to which detained refugees are currently entitled.²⁶

Public opinion has generally opposed increasing immigration levels. Although almost twenty-five percent of all Australians are foreign-born,²⁷ the Australian public perceives immigration as a problem that requires government action.²⁸ Public perception, however, is often based on misinformation and overt media influence. As Professor Mary Crock, a leading Australian immigration law scholar, concludes, "concern about the

Very many considerations lead to the conclusion that life began on sea, first as single cells, then as groups of cells held together by a secretion of mucilage, then as filament and tissues. For a very long time low-grade marine organisms were simply hollow cylinders, through which salt water streams.

Id. at 14 (quoting M. WILLARD, HISTORY OF THE WHITE AUSTRALIA POLICY 126 (1923)).

²² Birrell, *supra* note 19, at 108.

²³ CROCK, *supra* note 5, at 19.

²⁴ *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533 (Austl.). The High Court of Australia is established by the Australian Constitution and is the country's highest court. Australia Attorney General, *Australia's Legal System*, available in Australia Attorney General Homepage (visited Sept. 27, 1999) <<http://www.law.gov.au>>.

²⁵ *Koon Wing Lau*, 80 C.L.R. at 594-95.

²⁶ This is the combined result of the Judicial Review Amendment and Amendment No. 2.

²⁷ Birrell, *supra* note 19, at 116.

²⁸ The current government was elected on a platform that included a commitment to be tough on immigrants and particularly on refugees. *Id.* at 117.

phenomenon of uninvited refugees and asylum seekers is quite out of proportion to the actual number of persons who seek refuge here. The level of misunderstanding in the community is high, prompted in many cases by poor reporting or blatant scare mongering tactics in the media."²⁹ The adverse public perception of refugees has fostered an environment in which the government is able to pursue increasingly strict immigration measures without worrying about public scrutiny.³⁰

2. *Legal Developments Related to Refugee Law*

Since 1980, when the Administrative Decisions (Judicial Review) Act ("ADJR")³¹ formalized judicial review of administrative decisions, Australian courts have become increasingly active in reviewing immigration decisions.³² Judicial review has imposed levels of accountability and scrutiny which, prior to 1980, were absent from both Australian immigration law and administrative law in general. The legislature and the executive, including the Department of Immigration, have not embraced this development. In fact, the judiciary's active role in reviewing immigration decisions has created an adversarial relationship between the courts and the immigration bureaucracy.³³

Over the past fifteen years, judicial decisions related to immigration issues have frequently triggered legislative responses that have effectively overruled, amended, or nullified the decisions.³⁴ For example, prior to 1989, the Migration Act granted permanent residence to any non-citizen who could demonstrate a need to immigrate based on "compassionate or humanitarian

²⁹ CROCK, *supra* note 5, at 163. A survey of 368 people concluded that "30% exaggerated the number of border refugee claimants by factors of between 11 and 26." *Id.* at 163 n.51.

³⁰ *Id.* at 163.

³¹ Administrative Decisions (Judicial Review) Act, 1977 (Austl.) [hereinafter ADJR Act].

³² Birrell, *supra* note 19, at 107.

³³ CROCK, *supra* note 5, at 296. Professor Crock comments that "[a] close study of the migration case law of recent years reveals a government that has become *obsessed* with controlling both immigration into Australia and the *role of the courts in the review of migration decisions*." *Id.* (emphasis added).

³⁴ *Id.* Professor Crock has referred to this relationship as "a continuum of such tit for tat legislative amendments . . . [that] can be linked to particular court cases or to trends in curial interpretation." *Id.* See also Mary Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* (1994) (unpublished Ph.D. Thesis, University of Melbourne (Austl.)) (on file with author). Similarly, Birrell characterizes the court's approach as being "liberal [and] permissive . . . cutting across the strict control agenda pursued by the immigration bureaucracy." Birrell, *supra* note 19, at 111. Birrell asserts that this approach can be attributed to the increasing influence of human rights ideals and the "body of international case law influenced by such ideals," which is ultimately considered by the judiciary not only in Australia but also in Canada, the United States, and in other countries. *Id.*

grounds."³⁵ The Migration Act did not provide a more specific definition of these grounds, and, during the 1980s, the Australian courts broadly interpreted the language.³⁶ Motivated by the perceived need to limit increasingly broad interpretations, the Minister of Immigration restricted judicial discretion by defining "compassionate or humanitarian grounds."³⁷ Compassionate grounds were defined as involving a close familial relationship with an Australian resident, and humanitarian grounds were defined as involving "a significant threat to personal security on return as a result of targeted action by persons in the country of return."³⁸ The Minister of Immigration's restrictive response has become typical and is reflected in the proposed amendments.

In 1989, the Australian High Court examined in detail the definition of a refugee in *Chan v. Minister for Immigration and Ethnic Affairs*.³⁹ Decided against the backdrop of the Tiananmen Square tragedy in China,⁴⁰ the High Court rejected the Department of Immigration's earlier refusal to grant Chan refugee status.⁴¹ The Court found that the Minister of Immigration had acted unreasonably by misapplying the "well-founded fear" element of the refugee definition.⁴² Instead of applying the Department of Immigration's "well-founded fear" standard, which required that the refugee face a greater than fifty percent chance of persecution in his or her home country, the Court applied a "real chance of persecution" standard. Under this standard, a refugee can face a less than fifty percent chance of persecution and still be eligible for asylum.⁴³ For the Department of Immigration and Parliament, this case represented the height of judicial

³⁵ Prior to the 1989 reforms, the Migration Act granted permanent residence to any non-citizen who could demonstrate "strong compassionate or humanitarian" grounds. Migration Act, *supra* note 1, § 6A(1)(e); *see also* CROCK, *supra* note 5, at 130-31.

³⁶ CROCK, *supra* note 5, at 133-34.

³⁷ Permissive judicial interpretation had created a situation that, from the perspective of the director of the Department of Immigration's Asylum Policy Branch at the time, merely required applicants to demonstrate "a situation that would invoke strong feelings of pity or compassion in the ordinary member of the Australian public." *Id.* (quoting Dr. E. Arthur, *The Impact of Administrative Law on Humanitarian Decision-Making*, 66 CANBERRA BULL. PUB. ADMIN. 90 (1991)).

³⁸ Birrell, *supra* note 19, at 113 (citing Minister of Immigration, Local Government and Ethnic Affairs, Media Release, no. 15, 1991).

³⁹ *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R. 379 (Austl.); *see also* CROCK, *supra* note 5, at 134.

⁴⁰ The 1989 protests in Tiananmen Square and the accompanying Chinese government crackdown resulted in about 20,000 Chinese claims for refugee status in Australia. Birrell, *supra* note 19, at 110.

⁴¹ *Chan*, 169 C.L.R. 379. For a detailed discussion of *Chan* *see also* Mary Crock, *Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?*, 18 SYDNEY L. REV. 267, 281-83 (1996) [hereinafter *Reform or Overkill*]; *see generally* Mary Crock, *Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia*, 15 SYDNEY L. REV. 338 (1993).

⁴² *Chan*, 169 C.L.R. at McHugh, J. ¶¶ 42-44.

⁴³ *Id.* at Mason, J. ¶ 12.

activism.⁴⁴ Members of Parliament, including the Minister of Immigration and Multicultural Affairs, Philip Ruddock, mocked this interpretation as setting a standard under which the pity of the average middle-class Australian would be sufficient to establish refugee status.⁴⁵

Three years later, the High Court decided *Chu Kheng Lim v. Minister of Immigration*⁴⁶ and held Section 54R of the Migration Act invalid.⁴⁷ Section 54R of the Migration Act was part of a larger package of amendments designed to counter a challenge to the Department of Immigration's immigrant detention policy.⁴⁸ Specifically, Section 54R provided that "[a] court is not to order the release from custody of a designated person."⁴⁹ In response to Section 54R, the Court held:

A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the commonwealth and is invalid.⁵⁰

Following these and other similar cases,⁵¹ Parliament enacted Part 8 of the Migration Act⁵² in 1994 to counter what was perceived to be excessive judicial activism.⁵³

⁴⁴ *Id.*

⁴⁵ *Reform or Overkill*, *supra* note 41, at 282.

⁴⁶ *Chu Kheng Lim and Others v. The Minister for Immigration, Local Gov't and Ethnic Affairs and Another* (1992) 176 C.L.R. 1 (Austl.).

⁴⁷ *Id.* at Brennan, Deane and Dawson, JJ. ¶¶ 36-40. Section 54R of the Migration Act was enacted in 1992 and was formerly included in Part 2, Division 4B of the Migration Act. Section 54R is now codified at Section 183 of the Migration Act.

⁴⁸ *Reform or Overkill*, *supra* note 41, at 283.

⁴⁹ Migration Act, *supra* note 1, § 183 (formerly contained within Part 2, Division 4B, § 54R). Section 177 of the Migration Act defines a "designated person" as a non-citizen who arrives by boat and is without a visa. *Id.* § 177.

⁵⁰ *Chu*, 176 C.L.R. at Brennan, Deane and Dawson, JJ. ¶ 38; *see also* AUSTL. CONST. § 75.

⁵¹ Other significant decisions that have challenged the Department of Immigration's refugee policies include: *Ly Sok Pheng v. Minister for Immigration and Ethnic Affairs*, High Court Proceedings No. S199 (1992)(Austl.); *Georgiadis v. Australian and Overseas Telecomm. Corp.* (1994) 179 C.L.R. 297 (Austl.); *Minister for Immigration, Local Gov't and Ethnic Affairs v. A and B* (1994) 127 A.L.R. 383 (Austl.); *Somaghi v. Minister for Immigration, Local Gov't and Ethnic Affairs* (1991) 31 F.C.R. 100 (Austl.); *Heshmati v. Minister for Immigration, Local Gov't and Ethnic Affairs* (1991) 31 F.C.R. 123 (Austl.). *See generally Reform or Overkill*, *supra* note 41.

⁵² Migration Act, *supra* note 1, §§ 474-86.

⁵³ *See infra* Part III.B.

The proposed amendments represent the latest legislative response to a judiciary that has refused to passively comply with the Department of Immigration's refugee agenda. Minister Ruddock has been open about his lack of faith in the judiciary. In a recent speech, Minister Ruddock commented that some judges were making it their own business to "use issues of error of law to wrongly reconsider cases on their merits"⁵⁴ and that they were "searching for loopholes to deliberately undermine the government's refugee policies."⁵⁵ Minister Ruddock has also expressed concerns that judicial review carries high costs in terms of legal expenses and is being used as a tool to prolong the stays of refugee applicants.⁵⁶ These concerns, combined with the Australian government's general anti-immigration posture, have led to the two proposed amendments.

The Judicial Review Amendment is the product of a struggle between the executive, which wants to control immigration strictly, and the judiciary, which is more concerned with individual rights in the context of both Australian law and international human rights law. If enacted, the Judicial Review Amendment would repeal the existing judicial review provisions of the Migration Act and replace them with a privative clause.⁵⁷ The privative clause would make administrative immigration determinations final and would prevent the judiciary from reviewing such decisions. This is not the first time such legislation has appeared before Parliament. In 1996, a substantively similar bill was considered but failed to gain sufficient support for passage.⁵⁸

Amendment No. 2 is a legislative response to the 1996 case *Human Rights and Equal Opportunity Commission v. Secretary of the Department of Immigration and Multicultural Affairs*.⁵⁹ The Human Rights and Equal Opportunity Commission ("HREOC") is a government agency that was established primarily to oversee the proper functioning of other government agencies with regard to human rights.⁶⁰ As a part of this function, the

⁵⁴ Roderick Campbell, *Law Society Fights Ministerial Attack on Judges*, CANBERRA TIMES, Dec. 8, 1998, at A1.

⁵⁵ Lorna Knowles, *Ruddock Hits back at Sir Anthony Mason*, AAP NEWSFEED, Dec. 11, 1998, available in LEXIS, AAP Newsfeed File.

⁵⁶ Richard McGregor, *Judges Accused of Legal Frolic*, AUSTRALIAN, Dec. 7, 1998, at 1.

⁵⁷ Judicial Review Amendment, *supra* note 3, § 474.

⁵⁸ CROCK, *supra* note 5, at 265 (citing Migration Legislation Amendment Bill No. 5, 1997). See also *Tensions Rise Over Courts' Immigration Review Powers*, AAP NEWSFEED, Dec. 26, 1997, available in LEXIS, AAP Newsfeed File.

⁵⁹ Human Rights and Equal Opportunity Comm'n v. Secretary of the Dep't of Immigration and Multicultural Affairs (1996) 444 F.C.A. 1 (Austl.). See discussion *infra* Part IV.B on this case and Amendment No. 2.

⁶⁰ The Human Rights and Equal Opportunity Commission ("HREOC") was established to oversee the effective functioning of government agencies with regard to "the indivisibility and universality of

HREOC is authorized by law to provide legal information in sealed envelopes, including forms and information regarding legal rights, to citizen and non-citizen detainees.⁶¹ In *HREOC v. Department of Immigration*, the court determined that Section 20(6)(b) of the HREOC Act obligated the Department of Immigration to deliver sealed correspondence from the HREOC to a detainee, regardless of whether or not the detainee actually requested the information.⁶² The court expressly rejected the Department of Immigration's assertion that only information actually requested by the detainee must be delivered.⁶³ Instead, the court held that regardless of whether the HREOC was acting on its own initiative or on the basis of information provided by a third party, the Department of Immigration had an obligation to deliver the correspondence.⁶⁴ Amendment No. 2 would overrule *HREOC v. Department of Immigration* because it provides that the Department of Immigration is under no obligation to deliver communications to a detained immigrant unless the immigrant first makes a complaint to either the HREOC or the Commonwealth Ombudsman.⁶⁵

Amendment No. 2 is not Parliament's first attempt to overrule *HREOC v. Immigration*.⁶⁶ In 1996, Parliament considered Migration Legislation Amendment Bill (No. 2) 1996, which was identical in substance to the proposed Amendment No. 2.⁶⁷ Amendment Bill (No. 2) 1996 was

human rights; and the principle that every person is free and equal in dignity and rights." Human Rights and Equal Opportunity Commission Act, 1986, §§ 10A, 11.

⁶¹ Section 20(6)(b) of the HREOC Act states,

A person who is detained in custody . . . is entitled . . . to have delivered to the detainee, without undue delay, any sealed envelope, addressed to the detainee and sent by the Commission, that comes into the possession or under the control of the custodian or of a custodial officer.

Id. § 20(6)(b).

⁶² *HREOC v. Department of Immigration*, 444 F.C.A. at Lindgren, J.

⁶³ *Id.*

⁶⁴ *Id.* Justice Lindgren concluded that "[p]aragraph 20(6)(b) operates to give a detainee the right to have delivered to him or her a sealed envelope satisfying the description in that paragraph without the necessity of a prior request by the detainee." *Id.* at 24.

⁶⁵ Amendment No. 2, *supra* note 4, § 193. The Commonwealth Ombudsman processes citizen complaints against government agencies. Similar to Section 20(6)(b) of the HREOC Act, Section 7(3)(b) of the Ombudsman Act provides that

[A] person who is detained in custody is entitled . . . to have delivered to him or her, without undue delay, any sealed envelope, addressed to him or her and sent by the Ombudsman, that comes into the possession or under the control of the person in whose custody he or she is detained or of any other person performing duties in connection with his or her detention.

Ombudsman Act, 1976, § 7(3)(b) (Austl.).

⁶⁶ See discussion *infra* Part IV for the amendment's effect.

⁶⁷ CROCK, *supra* note 5, at 213.

criticized as placing Australia in breach of its international obligations relating to refugees and failed to gain sufficient support for passage.⁶⁸

III. PROCESSING REFUGEE CLAIMS

A. *Hearing and Reviewing a Refugee Claim Through the Administrative Process*

The claim for refugee status begins with a primary determination. In the primary determination, a case officer, who is an employee of the Department of Immigration, either finalizes a decision or makes a recommendation to grant or deny asylum.⁶⁹ This occurs under the direction of the Determination of Refugee Status ("DORS"), a section of the Department of Immigration. The case officer's decision may be appealed to the Refugee Review Tribunal, which is an administrative organ.

Assessment at the primary determination stage frequently occurs without legal representation or advice for the applicant.⁷⁰ Moreover, most case officers do not have formal legal training.⁷¹ These factors inevitably increase the risk of incorrect decisionmaking.⁷² The refugee applicant initiates a claim for protective status by completing a questionnaire.⁷³ An interview, which is transcribed and becomes a part of the applicant's record, is generally conducted at this stage.⁷⁴ Based upon the application, interview, supporting documentation, and the Department of Immigration's own information on the applicant's country, the case officer makes a recommendation to a delegate of the Minister of Immigration.⁷⁵ Trained legal personnel are almost never involved in this process, as the case officers

⁶⁸ *Id.*

⁶⁹ Jean-Pierre Fonteyne, *Overview of Refugee Determination Procedures in Australia*, 6 INT'L J. REFUGEE L. 253, 253-54 (1994).

⁷⁰ *Id.* at 253-55.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Two different questionnaires are currently used. For refugees applying as onshore applicants, the questionnaire is long and detailed. *Id.* at 253 & n.3. For "boat people," a shorter, less-detailed application is used. *Id.* The rationale is that "boat people," who are always held in detention, will be interviewed shortly after submitting the application. *Id.*

⁷⁴ An interview is not required and is administered at the discretion of the case officer. Public Affairs Section, Department of Immigration and Multicultural Affairs, *Migration Fact Sheet 41, Seeking Asylum Within Australia* (visited Apr. 20, 1999) <<http://www.immi.gov.au/facts/41asylum.htm>>. However, the Department of Immigration maintains that as a matter of practice, an adverse decision will not be made without first interviewing the applicant. Fonteyne, *supra* note 69, at 254.

⁷⁵ Fonteyne, *supra* note 69, at 254.

are not required to have legal qualifications⁷⁶ and the applicant has no right to legal representation.⁷⁷ Furthermore, although DORS has a legal division that case officers and other officials can consult, the division has so few attorneys in relation to the number of refugee applications that it can only provide legal advice in a small percentage of the cases.⁷⁸

The Refugee Review Tribunal ("RRT") can review a DORS decision that denies an applicant's claim to refugee status.⁷⁹ The RRT has broad powers to conduct reviews of denied refugee claims and "is not bound by technicalities, legal forms or rules of evidence."⁸⁰ The RRT replaced an earlier "paper" system. Under this system, DORS decisions were reviewed solely on the written record and without a hearing of any kind.⁸¹ This system proved to be inefficient and susceptible to judicial review.⁸² The RRT was developed not only to increase efficiency⁸³ (especially in light of the substantial case backlog in the early 1990s)⁸⁴ but also to reduce the need for judicial review.⁸⁵

The RRT is a quasi-inquisitorial body with the power to investigate an applicant's refugee claim and the discretion to set the parameters of an appeal.⁸⁶ The only significant restraint on the RRT is that it cannot rule *against* an applicant without first providing an oral hearing.⁸⁷ At the

⁷⁶ *Id.* at 254 & n.8. Although Fonteyne notes that his information is not precise, in 1994 he determined that less than five percent of case officers were legally qualified. Further, the minimal amount of legal training provided to case officers on "the substantive aspects" of the refugee definition has generated wide criticism. *Id.*

⁷⁷ Although legal representation is theoretically allowed, the Department of Immigration's practice "appears . . . at least in the case of boat people, not to allow any outside contact (including contact with legal advisors) until after the initial interview by departmental officers." *Id.* at 253 & n.4. See *Human Rights and Equal Opportunity Comm'n v. Secretary of the Dep't of Immigration and Multicultural Affairs* (1996) 444 F.C.A. 1 (Austl.), for an example of how the Department of Immigration has denied detained refugee applicants access to legal representation.

⁷⁸ Fonteyne, *supra* note 69, at 255 & n.9. Information from 1992 revealed that the DORS Refugee Law Section employed five lawyers and that from July 1992 to July 1993, 11,758 applications passed through the primary or review stage. *Id.*

⁷⁹ Migration Act, *supra* note 1, §§ 410-56.

⁸⁰ *Id.* § 420. See generally Fonteyne, *supra* note 69, at 255-58.

⁸¹ CROCK, *supra* note 5, at 257.

⁸² *Id.* at 258.

⁸³ Migration Act, *supra* note 1, § 420(1). Section 420(1) provides that the function of the Refugee Review Tribunal ("RRT") is to provide "a mechanism of review that is fair, just, economical, informal and quick." *Id.*

⁸⁴ Largely as a result of China's Tiananmen Square tragedy, there was a backlog of 21,000 asylum claims in 1993. Birrell, *supra* note 19, at 110.

⁸⁵ Mary Crock & Mark Gibian, *Before the High Court: Minister for Immigration and Ethnic Affairs v. Eshetu*, 20 SYDNEY L. REV. 457, 460-61 (1998) [hereinafter *Before the High Court*].

⁸⁶ CROCK, *supra* note 5, at 258; Migration Act, *supra* note 1, §§ 423-29.

⁸⁷ Migration Act, *supra* note 1, §§ 424-25. Section 424(1) provides that if the RRT is prepared to make a decision "favourable to the applicant," then the applicant does not have a right to appear before the

hearing, an applicant has no right to call witnesses,⁸⁸ to cross-examine witnesses,⁸⁹ or to have an attorney present.⁹⁰ A non-English speaking applicant only has a right to translations of those parts of the hearing during which the applicant is spoken to directly and not to a translation of the entire hearing.⁹¹ Additionally, if the applicant's appeal to the RRT is unsuccessful, the applicant is required to pay a "post-decision" fee of 1000 Australian dollars.⁹² This fee is designed to deter unmeritorious claims. In making its determination, the RRT is not confined to the evidence presented at the hearing and can consider previously submitted evidence.⁹³ The RRT has the power to affirm a decision, to vary a decision, to remit the matter for reconsideration, or to make an entirely new decision.⁹⁴ The decision must be provided in a written statement. This statement must set out the reasons for the decision and the findings of material questions of fact and must reference the evidence on which the findings of fact are based.⁹⁵

Although one of the objectives for establishing the RRT was to reduce the need for judicial review, judicial oversight of the administrative decisionmaking process continues to be necessary.⁹⁶ From July 1993 through December 1998, the RRT decided 22,083 cases.⁹⁷ Refugee status was granted in thirteen percent of these cases.⁹⁸ Of the 1,788 RRT decisions

RRT. On the other hand, when the RRT is not prepared to rule in favor of the applicant, the applicant must be given an opportunity to appear and to present evidence. *Id.* § 425(1)(a).

⁸⁸ *Id.* Section 426(2) provides that the applicant may notify the RRT of her desire to "obtain oral evidence from a person or persons named in the notice," but that the RRT is not required to honor this request. *Id.* § 426(3).

⁸⁹ *Id.* § 427(6)(b).

⁹⁰ *Id.* § 427(6)(a).

⁹¹ *Id.* § 427(7).

⁹² *Review of Migration Regulation 4.31B*, available in Parliament of Australia Homepage (visited Feb. 19, 1999) <<http://www.aph.gov.au/house/committee/MIG/regulation/index.htm>>. The fee provision is scheduled to expire in June 1999. At the time of writing, the Joint Standing Committee on Migration was accepting submissions on whether or not to continue imposing the fee. *Scrap \$1,000 "Penalty" on Failed Asylum-Seeker Plea*, AAP NEWSFEED, Feb. 26, 1999, available in LEXIS, AAP Newsfeed File.

⁹³ Dr. Peter Nygh, *Refugee Review Tribunal, Refugee Review Tribunal Practice Directions § 2.1* (Sept. 23, 1998) <<http://www.austlii.edu.au/au/other/rrt/practice.html>>.

⁹⁴ Migration Act, *supra* note 1, § 415.

⁹⁵ *Id.* § 430(1).

⁹⁶ From 1982 to 1992, 1,067 applications for judicial review of migration determinations were filed with the Federal Court and the High Court. This statistic includes all immigration decisions and not solely refugee determinations. *Reform or Overkill*, *supra* note 41, at 287-90. In comparison, from 1993 to 1996, 1,360 applications were filed. At the current rate of increase, 4,533 applications will be filed from 1993 to 2003. *Id.*; see also Public Affairs Section, Department of Immigration and Multicultural Affairs, *Migration Fact Sheet 86, Litigation Involving Migration Decisions* (visited Apr. 21, 1999) <<http://www.immi.gov.au/facts/41asylum.htm>>.

⁹⁷ *Id.*

⁹⁸ Refugee Review Tribunal, *RRT Statistical Information at 31 December 1998* (visited Apr. 21, 1999) <<http://www.austlii.edu.au/au/other/rrt/statist.html>> [hereinafter *RRT Statistical Information*].

that have been reviewed by the courts since July 1993, 240 have been set aside in favor of the applicant.⁹⁹ As these statistics indicate, judicial review is an integral component of the refugee determination process. Without judicial review, 240 credible refugees would have been returned to the countries from which they fled.¹⁰⁰

B. *Judicial Review*

In 1994, the Migration Act was amended by Part 8,¹⁰¹ which substantially restricted judicial review of all immigration determinations.¹⁰² Prior to this amendment, judicial review was generally available through the ADJR Act and the Judiciary Act, under which the procedure for review of immigration determinations was the same as for any other administrative determination.¹⁰³ Part 8 removed the possibility of seeking review under either of these acts and specified how and when review of immigration determinations could occur.¹⁰⁴

Part 8 specifies the immigration decisions that are reviewable by the Federal Court,¹⁰⁵ the grounds for judicial review,¹⁰⁶ which parties have standing,¹⁰⁷ and the powers of the Federal Court.¹⁰⁸ Section 475 of the Migration Act limits reviewable decisions to final determinations of an administrative body such as the RRT.¹⁰⁹ Section 475(2) prohibits judicial review of decisions still reviewable by an administrative body or decisions made by the Minister of Immigration either not to exercise, or not to consider the exercise of, his discretionary power.¹¹⁰ Applications for judicial review must be filed no later than twenty-eight days after an applicant is notified of a decision.¹¹¹ Additionally, under Section 479, only the person actually subject to a decision has standing to seek review of the decision.¹¹²

⁹⁹ The RRT reports that it has made 22,083 decisions. Of these decisions, 8.1% were appealed to the courts. Of the decisions that were reviewed by the judiciary, 19% were set aside. *Id.*

¹⁰⁰ To return (refouler) a credible refugee to the circumstances from which they fled is a violation of the Refugee Convention. Refugee Convention, *supra* note 1, art. 33. See *infra* Part V.C.

¹⁰¹ Migration Act, *supra* note 1, §§ 474-86.

¹⁰² See *Reform or Overkill*, *supra* note 41, at 269-80.

¹⁰³ See *supra* Part II.B.2.

¹⁰⁴ *Reform or Overkill*, *supra* note 41, at 270.

¹⁰⁵ Migration Act, *supra* note 1, § 475.

¹⁰⁶ *Id.* § 476.

¹⁰⁷ *Id.* § 479.

¹⁰⁸ *Id.* § 481.

¹⁰⁹ *Id.* § 475.

¹¹⁰ *Id.* § 475(2). The Minister's discretionary powers are provided for in the Migration Act. *Id.* §§ 48B, 72(1)(c), 91F, 945, 951, 417, and 454.

¹¹¹ *Id.* § 478(1)(b).

¹¹² *Id.* § 479.

Under the ADJR Act, standing was given to a "person aggrieved," a provision which was interpreted to confer standing on "all persons whose interests are adversely affected" by the decision, including dependents.¹¹³

In an attempt to restrict judicial access and to curb judicial activism, Part 8 narrowed and eliminated previously recognized grounds for review.¹¹⁴ The grounds available for judicial review in Part 8 are (1) failure to observe required procedures, (2) lack of jurisdiction in the decisionmaker, (3) making a decision that is not authorized by the act or regulations, (4) making a decision that is an improper exercise of power, (5) an error of law involving an incorrect interpretation or an incorrect application of the law to the facts, (6) fraud or actual bias, and (7) a lack of evidence to justify the decision.¹¹⁵ The failure to make a decision provides additional grounds for review.¹¹⁶ Grounds for review that Part 8 eliminated are (1) denial of natural justice, (2) unreasonableness, (3) taking an irrelevant consideration into account, (4) failure to take into account a relevant consideration, (5) bad faith, and (6) any other abuse of power.¹¹⁷

Part 8 has not reduced the number of decisions actually reviewed by the courts. Instead, since the passage of Part 8, the number of cases reviewed has risen sharply.¹¹⁸ In 1994-95, the courts received 400 applications for judicial review.¹¹⁹ For 1998-99, this number is expected to exceed 1000.¹²⁰ In 1997-98, when 800 applications were filed, the government incurred litigation costs of over nine million Australian dollars.¹²¹ These costs are predicted to rise to twenty million Australian dollars by the year 2002.¹²² The government justifies the proposed Judicial Review Amendment in part by citing these high costs of litigation.¹²³

¹¹³ *Reform or Overkill*, *supra* note 41, at 273 & n.13 (citing *Tooheys Ltd. v. Minister for Bus. and Consumer Affairs* (1981) 36 A.L.R. 64 (Austl.)); *Bedro v. Minister for Immigration and Ethnic Affairs* (1987) 14 A.L.D. 131 (Austl.).

¹¹⁴ *Reform or Overkill*, *supra* note 41, at 272.

¹¹⁵ Migration Act, *supra* note 1, § 476(1).

¹¹⁶ *Id.* § 477.

¹¹⁷ *Reform or Overkill*, *supra* note 41, at 272. Migration Act, *supra* note 1, §§ 476(2)-(3).

¹¹⁸ THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE MIGRATION LEGISLATION AMENDMENT (JUDICIAL REVIEW) BILL 1998 ¶ 1.4 (quoting Minister Ruddock, Second Reading Speech 2) (1999) [hereinafter JUDICIAL REVIEW COMMITTEE REPORT].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* See also Liz Rudall & Max Blenkin, *Aust. Immigration Levels May Rise: Ruddock*, AAP NEWSFEED, Mar. 7, 1999, available in LEXIS, AAP Newsfeed File.

¹²³ JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118. The Department of Immigration has predicted savings of up to 50% in legal costs if the proposed judicial review amendment is enacted. *Id.* ¶ 1.7 (citing Submission No. 23, Department of Immigration and Ethnic Affairs, Attachment B, 5).

Although Part 8 has not reduced the number of decisions actually reviewed by the courts, it has been successful in curtailing judicial activism and maintaining very low set-aside rates.¹²⁴ Since July 1993, the courts have upheld eighty-one percent of the RRT decisions submitted for review.¹²⁵ The courts have largely accepted the restrictions imposed by Part 8. Even in cases where the lower courts have broadly interpreted Part 8, the High Court (and the Federal Court) have frequently called for judicial deference.¹²⁶ Although the High Court has acknowledged that the power of the Federal Court to review immigration decisions has been "severely truncated" under Part 8,¹²⁷ it has confirmed Parliament's constitutional power to "limit the grounds upon which that court can examine the correctness or, at all events, the lawfulness of the decision."¹²⁸

Despite the general trend of judicial acquiescence to Part 8, several decisions have fueled the government's desire to further limit judicial review. In 1997, the Federal Court broadly interpreted a reference in Section 420 to "substantial justice" and determined that this provision requires the RRT to review a primary determination in accordance with substantial justice and the merits.¹²⁹ The failure to take "relevant considerations" into account may constitute a neglect of "substantial justice."¹³⁰ The court found for the applicant because the RRT made a number of errors in interpreting the definition of a refugee. Effectively, the court chose not to read the Section 476 review limitations literally and

¹²⁴ CROCK, *supra* note 5, at 292. "The more recent cases coming from the Federal Court reveal an interesting trend. In its review of refugee decisions, that court is proving very reluctant to overturn decisions by the RRT." *Id.*

¹²⁵ *RRT Statistical Information*, *supra* note 98. Of these, 53% of the applications for review were withdrawn by the applicant. The remaining 19% resulted in a favorable decision for the applicant and were decided either by a court or by the RRT upon consent for reconsideration. *Id.*

¹²⁶ See *Minister for Immigration and Ethnic Affairs v. Guo Wei Rong and Others* (1997) 144 A.L.R. 567 (Austl.) (in which the High Court rejected a full Federal Court decision which held that the RRT had misapplied the test for determining refugee status); *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 C.L.R. 259 (Austl.).

¹²⁷ *Abebe v. Commonwealth of Australia; Re Minister for Immigration and Multicultural Affairs* (1999) H.C.A. 14, ¶ 21 (Austl.).

¹²⁸ *Id.* ¶ 1.

¹²⁹ *Moges Eshetu v. Minister for Immigration and Multicultural Affairs* (1997) 142 A.L.R. 474, *rev'd en banc* (Full Federal Court) (1997) 145 A.L.R. 621, 624, 636 (Austl.). The High Court of Australia has granted the Minister for Immigration leave to appeal the full Federal Court's decision, but at the time of writing a decision had not been entered. For a case note on Eshetu, see *Before the High Court*, *supra* note 85. See also *Sun Zhan Qui v. Minister for Immigration and Ethnic Affairs* (1998) 151 A.L.R. 505, 548 (Austl.) ("[I]f the tribunal's treatment of the issues is so unreasonable that it must be said the decision could not have been made by a reasonable person, there has not been 'substantial justice'").

¹³⁰ *Before the High Court*, *supra* note 85, at 464.

indicated a willingness to review both the tribunal procedures and the substantive bases of the tribunal's decisions.¹³¹

IV. THE PROPOSED AMENDMENTS

A. *The Judicial Review Amendment*

If adopted, the Judicial Review Amendment would severely limit refugee access to the courts. This would impact the accuracy and effectiveness of decisionmaking at the administrative level. To invest finality at the administrative level without leaving any opportunity to seek judicial review would grant administrative decisionmakers unchecked power that would undermine the accuracy and effectiveness of the refugee determination process. There are also serious questions regarding the constitutionality of the Judicial Review Amendment and its implications for separation of powers in Australia's government.¹³² Based on these concerns, the Judicial Review Amendment should be rejected.

1. *The Privative Clause*

The privative clause, which is the central feature of the Judicial Review Amendment, effectively eliminates judicial review of administrative decisions made under the Migration Act.¹³³ Section 474(2) of the Judicial Review Amendment defines a privative clause decision as any decision of an "administrative character made . . . under this [Migration] Act."¹³⁴ Section 474(1) provides that a privative clause decision is "(a) final and conclusive; (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."¹³⁵ The Judicial Review Amendment also explicitly removes the jurisdiction of the

¹³¹ *Id.*

¹³² *Law Council Opposes Migration Legislation Amendments*, AUSTRALIAN LAW (Law Council of Australia), available in Law Council of Australia Homepage (visited Feb. 4, 1999) <<http://www.lawcouncil.asn.au/aulw1297.htm>>.

¹³³ Judicial Review Amendment, *supra* note 3, § 474.

¹³⁴ *Id.* § 474(2). This definition would include decisions made by the RRT.

¹³⁵ *Id.* § 474(1). Section 474(4) of the amendment lists decisions that are not privative clause decisions. These mostly include decisions relating to property rights such as liability for costs, seized valuables, the detention of vessels, and the taking of securities. Also included are decisions relating to the members of the review tribunals. *Id.* § 474(4).

Federal Court to hear immigration appeals under either the Judiciary Act or the Administrative Appeals Act.¹³⁶

2. *Parliament's Power to Exclude Judicial Review*

Although Parliament has the power to define and, if it chooses, to withdraw Federal Court jurisdiction over a matter, it lacks similar authority over the High Court.¹³⁷ The Federal Court is merely a creature of legislation and is ultimately subject to Parliament's control. In contrast, the High Court is constitutionally mandated and its power of original jurisdiction is guaranteed by the Australian Constitution.¹³⁸ The constitutionality of the Judicial Review Amendment is thus questionable because it withdraws both Federal Court and High Court jurisdiction over immigration decisions.

The Minister for Immigration argues that this is not the first occasion a privative clause has been used to limit the High Court's jurisdiction, and that case law affirms the constitutionality of enacting a privative clause in the immigration context.¹³⁹ The government asserts that the Hickman principle, which emerged from *The King v. Hickman*,¹⁴⁰ validates the constitutionality of the privative clause.¹⁴¹ This case upheld the constitutionality of the privative clause, but it also identified certain exceptions to the use of such a clause. Justice Dixon of the High Court explained that a privative clause can validly restrict judicial review, provided that the decision of a lower body "is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."¹⁴² *The*

¹³⁶ *Id.* §§ 476, 483-84.

¹³⁷ CROCK, *supra* note 5, at 294.

¹³⁸ The Australian Constitution grants the High Court original jurisdiction in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." AUSTL. CONST., *supra* note 50, § 75(v).

¹³⁹ JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.27 (citing The Hon. Phillip Ruddock, MP, *Narrowing of judicial review in the migration context*, 19).

¹⁴⁰ *The King v. Hickman* (1945) 70 C.L.R. 598 (Austl.); *Ex parte Fox and Clinton* (1945) 70 C.L.R. 598 (Austl.).

¹⁴¹ THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, SENATE, MIGRATION LEGISLATION AMENDMENT (JUDICIAL REVIEW) BILL 1998, EXPLANATORY MEMORANDUM ¶ 15 (1998), circulated by authority of the Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock MP [hereinafter JUDICIAL REVIEW EXPLANATORY MEMORANDUM].

¹⁴² *The King v. Hickman*, 70 C.L.R. at 615. Since 1945, the Hickman principle has been affirmed in subsequent cases. CROCK, *supra* note 5, at 295 & n.11 (citing *R v. Commonwealth Rent Controller*; *Ex parte Nat'l Mut. Life Assoc. of Australasia Ltd.* (1947) 75 C.L.R. 361 (Austl.); *R v. Central Reference Bd.*; *Ex parte Thiess (Repairs) Pty. Ltd.* (1948) 77 C.L.R. 123 (Austl.); *Bank of New S. Wales v. Commonwealth* (1948) 76 C.L.R. 1, 175 (Austl.); *R v. Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant* (1950) 81 C.L.R. 27 (Austl.); *R v. Commonwealth Conciliation and Arbitration*

King v. Hickman and subsequent cases interpret the available grounds for challenging a privative clause decision as constitutional invalidity, narrow jurisdictional error, or *mala fides*.¹⁴³ Although the Hickman principle provides exceptions under which a privative clause may be circumvented, the standard required to review the privative clause determination is high. Under this standard, an RRT decision would be difficult to challenge. As Professor Crock has noted, “[t]he privative clause becomes a mechanism for *expanding* the jurisdiction of the tribunal so as to deem lawful all decisions made in a bona fide attempt to exercise a power.”¹⁴⁴

Although a privative clause is considered constitutionally valid in theory, courts have questioned its use in certain contexts. In *Darling Casino Ltd. v. New South Wales Casino Control Authority*,¹⁴⁵ the Court noted that its constitutionally protected jurisdiction would be gradually eroded if a privative clause prevented it from reviewing jurisdictional errors generally.¹⁴⁶ The Court also indicated its reluctance to relinquish its power to intervene where legal determinations are made by individuals who do not have any legal training.¹⁴⁷ The proposed use of a privative clause to protect the decisions of bodies such as the RRT, which engages in findings of fact and law, is distinguishable from earlier cases in which the clause was used to protect decisions of lower courts and bodies constituted for the sole purpose of making findings of fact.¹⁴⁸ When a privative clause is confined to the latter contexts, it does not undermine the principle that the bodies making final determinations on questions of law should be the courts.¹⁴⁹

It is difficult to predict whether the High Court would uphold the constitutionality of a privative clause in the context of immigration. This, however, provides further reason to question the government’s motivations in proposing this amendment. As the Refugee Council of Australia commented, “to pass legislation that the Government knows will be challenged in the High Court on constitutional grounds is neither good

Comm’n; *Ex parte Amalgamated Eng’r Union* (1967) 118 C.L.R. 219 (Austl.); *R v. Coldham*; *Ex parte Australian Workers’ Union* (1983) 153 C.L.R. 415 (Austl.); *Deputy Comm’r of Taxation v. Richard Walter Pty. Ltd.* (1995) 183 C.L.R. 168 (Austl.); *O’Toole v. Charles David Pty. Ltd.* (1991) 171 C.L.R. 232 (Austl.).

¹⁴³ JUDICIAL REVIEW EXPLANATORY MEMORANDUM, *supra* note 141, ¶ 15 (citing *The King v. Hickman*, 70 C.L.R. 598). *Mala fides* refers to a decision in bad faith.

¹⁴⁴ CROCK, *supra* note 5, at 295 (citing *O’Toole v. Charles David Pty. Ltd.*, 171 C.L.R. at 275).

¹⁴⁵ *Darling Casino Ltd. v. New S. Wales Casino Control Auth.* (1997) 143 A.L.R. 55 (Austl.).

¹⁴⁶ CROCK, *supra* note 5, at 295-96. See AUSTRALIAN CONST., *supra* note 50, § 75(v).

¹⁴⁷ CROCK, *supra* note 5, at 295-96.

¹⁴⁸ JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.30 (quoting Submission No. 5, Law Council of Australia, 4).

¹⁴⁹ *Id.*

governance nor the mark of a government interested in saving taxpayers [sic] funds."¹⁵⁰ This amendment, which proposes potentially unconstitutional legislation, reflects the determination of the Department of Immigration and some members of Parliament to further limit immigration.

3. *Separation of Powers*

The Judicial Review Amendment arises out of the power struggle over immigration decisionmaking that has defined the Australian executive's experience with the judiciary over the past fifteen years.¹⁵¹ Central to this struggle has been the executive's perception that because immigration implicates foreign affairs, it should be handled exclusively by the executive, and that judicial intervention in the immigration process is actually a form of interference in the exercise of executive power.¹⁵² This amendment uses legislative power to further reduce the judiciary's role in immigration.

Australia's commitment to the principle of separation of powers would be weakened by the Judicial Review Amendment. Of fundamental importance to a government premised on principles of separation of powers is a commitment to these principles. In the present matter, one branch of government (the executive) is using another branch of government (the Parliament) to exclude a third branch of government (the judiciary) from its role of providing a check on the other two branches. In such circumstances, caution should be exercised.¹⁵³ In Australia, a fundamental role of the courts is to review the decisions of governmental actors. This is particularly true when rights, privileges, duties, obligations, or other legitimate expectations are affected.¹⁵⁴ An abridgement of this role jeopardizes the delicate arrangement of checks and balances on which tripartite democracy is based.¹⁵⁵

The absence of a judicial check on executive decisions in the immigration process is cause for significant concern. For the RRT to function fairly and effectively, its determinations must be subject to judicial review. Judicial oversight enhances the quality of initial decisions by

¹⁵⁰ *Id.* ¶ 2.40 (quoting Submission No. 7, Refugee Council of Australia, 3).

¹⁵¹ *See Reform or Overkill*, *supra* note 41.

¹⁵² JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.23 (quoting THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE, CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE, MIGRATION LEGISLATION AMENDMENT BILL (No. 5) 1997 (Oct. 30, 1997), Submission No. 11E, Mr. Michael Chaaya, 314).

¹⁵³ *Id.* ¶ 2.20.

¹⁵⁴ *Id.* ¶ 2.19 (quoting Submission No. 4, Administrative Review Council, 5).

¹⁵⁵ *Id.* ¶ 2.20

placing pressure on decisionmakers to make decisions carefully and to provide intelligible reasons for their position.¹⁵⁶ This process forces decisionmakers to identify and to resolve analytical problems before judicial scrutiny is even applied.¹⁵⁷

Additionally, judicial review helps foster independence at the decisionmaking level and insulates decisionmakers from political pressure.¹⁵⁸ The members of the RRT ("RRT Members") hold their positions for limited terms that are renewable at the Minister of Immigration's discretion.¹⁵⁹ Even with judicial review, this structure imposes considerable pressure on the RRT Members to decide cases in a way that will promote their prospects for reappointment.¹⁶⁰ If judicial review is eliminated and RRT Members can no longer rely on the judiciary to affirm politically unpopular decisions, RRT Members will be even more vulnerable to political pressure.

Political pressure on RRT Members has been the subject of recent controversy in Australia. In December 1996, the RRT ruled against the Department of Immigration and awarded refugee status to two women whose claims were based on spousal abuse.¹⁶¹ Following the decision, Minister Ruddock publicly criticized the members of the RRT and was quoted as saying, "[t]he view I take would be if there are tribunal members who have fixed term appointments who clearly make decisions outside the international law . . . their appointments would be ones I would be highly unlikely to renew."¹⁶² Reappointment statistics suggest that Minister Ruddock's threats are not idle. In June of 1997, thirty-five RRT Members applied for reappointment. Of these, sixteen were not reappointed.¹⁶³ Despite existing judicial oversight, the RRT has become increasingly vulnerable to political pressure. The elimination of a judicial check on the RRT means that there will be no judicial mechanism to ensure that immigration determinations are made in accordance with the law.

¹⁵⁶ Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*, 76 WASH. U. L.Q. 243, 245 (1998) [hereinafter Legomsky].

¹⁵⁷ Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1210-11 (1989) [hereinafter Legomsky 1989].

¹⁵⁸ Legomsky, *supra* note 156, at 246.

¹⁵⁹ *Id.* at 250.

¹⁶⁰ *Id.*

¹⁶¹ Mike Steketee, *Ruddock Flags Tougher Line on Refugee Bids*, AUSTRALIAN, Dec. 26, 1996, at 1.

¹⁶² *Id.*

¹⁶³ Legomsky, *supra* note 156, at 250. According to unconfirmed information, the two RRT members that Minister Ruddock had criticized were not reappointed. *Id.*

4. *The Right to Appeal*

A decision to grant or deny refugee status is of grave importance to the asylum seeker and is literally on the magnitude of life or death.¹⁶⁴ When an administrative determination has such significant implications, the opportunity for judicial review is a necessary and fundamental right.¹⁶⁵ The Judicial Review Amendment, by eliminating the possibility of judicial review, does not recognize this fundamental right. This failure ultimately undermines the credibility of Australia's refugee decisionmaking process.

The proposed amendment jeopardizes the integrity and accuracy of the refugee determination system because administrative decisionmaking is susceptible to inaccuracies and judicial review is needed to correct such mistakes. First, the proposed system would make the RRT the final body for review. The RRT is only equipped to undertake a merits review, and the review of legal error is beyond its jurisdiction.¹⁶⁶ The absence of a mechanism to review legal error at the administrative level makes it necessary to retain judicial review. Second, the RRT's merits review is itself often inadequate because the decisionmakers are not legally trained, which makes it difficult for them to apply the complex and frequently amended immigration laws in an appropriate manner.¹⁶⁷ In short, to eliminate judicial review of immigration determinations is an affront to the legal process, which relies on access to the courts for the vindication of legal rights.¹⁶⁸

B. *Amendment No. 2*

Amendment No. 2 limits the assistance that the Department of Immigration is required to provide to refugees. Amendment No. 2 overrules

¹⁶⁴ JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.49 (quoting Submission No. 7, Refugee Council of Australia, 7).

¹⁶⁵ See generally Legomsky 1989, *supra* note 157.

¹⁶⁶ The Senate Legal and Constitutional Legislation Committee commented that "[b]y allowing for merits review but not judicial review, the [Department of Migration] seems to be implying that although factual errors are made by the Department, legal errors never are." JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.55. On this matter, the Refugee and Immigration Legal Centre commented:

The rationale for this presumably is either that it is the belief of the Government that the Department of Immigration does not make errors as to procedure or jurisdictional errors or, alternatively, it does make such errors but persons applying under the Migration Act are not deserving of protection from these errors.

Id. (quoting Submission No. 1, Refugee and Immigration Legal Centre, 2).

¹⁶⁷ *Id.* ¶ 2.60.

¹⁶⁸ Law Council of Australia, *Unprecedented Call for Parliamentary Inquiry into Government Refugee Determination Practices* (visited Feb. 19, 1999) <<http://www.lawcouncil.asn.au/lcamed73.htm>>.

HREOC v. Department of Immigration and provides that the Department of Immigration is obligated to deliver information from the HREOC or the Commonwealth Ombudsman only if the detainee has made a "complaint" to one of these agencies. Specifically, Amendment No. 2 prohibits the operation of HREOC Act Section 20(6)(b) and Ombudsman Act Section 7(3)(b) in the immigration context. Both of these sections provide that a detained person is entitled to receive legal and other information delivered by the respective agency, regardless of whether the information has been requested.¹⁶⁹

The amendment also provides that the Department of Immigration has no obligation to provide any information to detained immigrants unless such information is actually requested. Specifically, the Department of Immigration would be under no obligation to provide an application form for a visa, provide advice as to whether a person may apply for a visa, allow any opportunity to apply for a visa, or allow access to advice (legal or otherwise).¹⁷⁰

Amendment No. 2 makes applying for refugee status substantially more difficult because it limits the access of immigrant detainees to information about their rights.¹⁷¹ In theory, the amendment does not eliminate the right to legal representation, but in practice it denies refugees access to information about the existence of this right.¹⁷² One justification for this amendment presented by the Minister of Immigration is that immigrants who arrive in Australia without a visa should explain why they arrived and must articulate their desire for legal assistance.¹⁷³

Unfortunately, the Minister's position ignores the practical difficulties faced by arriving refugees. Considering the cultural differences between

¹⁶⁹ Amendment No. 2, *supra* note 4, § 193. For the language of Section 20(6)(b) of the HREOC Act and Section 7(3)(b) of the Ombudsman Act, *see supra* note 61 and *supra* note 65, respectively.

¹⁷⁰ Migration Act, *supra* note 1, § 193; Amendment No. 2, *supra* note 4, §§ 193(2), 256. Section 193 of the Migration Act currently provides that no obligation exists to offer advice as to whether a person may apply for a visa, to allow any opportunity to apply for a visa, or to allow access to advice (legal or otherwise). Migration Act, *supra* note 1, § 193. The amendment will add that the Department of Immigration is under no obligation to provide an application form for a visa. Amendment No. 2, *supra* note 4, § 193(2). Although the amendment and Section 193 clearly absolve the Department of Immigration of any affirmative obligations, Section 256 of the Migration Act qualifies Section 193 and directs the Department of Immigration to provide access to certain advice, forms, and facilities upon the detainee's request. Migration Act, *supra* note 1, §§ 193, 256; Amendment No. 2, *supra* note 4, §§ 193 and 256.

¹⁷¹ *Law Council Says Migration Bills Illegal*, AAP NEWSFEED, Jan. 21, 1999, available in LEXIS, AAP Newsfeed File [hereinafter *Migration Bills Illegal*].

¹⁷² THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE, MIGRATION LEGISLATION AMENDMENT BILL (NO. 2) 1998, Dissenting Report by the Australian Democrats & Greens (WA) 4 (April 1999) [hereinafter AMENDMENT NO. 2 REPORT].

¹⁷³ *Id.* (citing Minister Ruddock, Second Reading Speech to the Bill, 1).

Australia and the home countries of many refugees, the lack of awareness of legal rights or support agencies such as the HREOC, the emotional stress of arriving in a new country, and the limited language skills of recent arrivals, the burden of having to file a "complaint in writing" before receiving HREOC support is unreasonable.¹⁷⁴ In reality, it is unlikely that many refugees will make such a request.

The proposed amendments will undermine the effectiveness and accuracy of Australia's refugee determination process. By removing judicial review, which serves as a check on the administrative process, the Judicial Review Amendment will increase the likelihood of inaccurate refugee decisions. In addition, there are also concerns regarding the constitutionality of the amendment and its implications for separation of powers in Australia's government. Finally, Amendment No. 2, by restricting how and when refugees can access information and assistance from government agencies, will undermine the effectiveness of the refugee determination system. Without knowledge of their rights or of the legal system generally, refugees will be unable to process claims as effectively as they could with the assistance of third parties such as the HREOC.

V. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The Judicial Review Amendment and Amendment No. 2 raise critical questions regarding Australia's compliance with its international obligations. Australia is a party to the Refugee Convention,¹⁷⁵ the Refugee Protocol,¹⁷⁶ the Convention Relating to the Status of Stateless Persons,¹⁷⁷ the Convention on the Rights of the Child,¹⁷⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture

¹⁷⁴ *Id.* ¶ 1.35. Regarding the conditions under which an undocumented arrival is held, the Refugee Advice and Casework Service commented,

[W]hile [the bill] does not remove the right of an immigration detainee to make a formal complaint . . . in practice it is impossible. The people are held in isolation, incommunicado. There is no telephone . . . There are no postal facilities . . . They have no contact with other detainees who are in the general body of the camp. They cannot pass a letter to other detainees . . . Therefore, on a purely practical level . . . the detainees themselves cannot physically initiate [an] investigation.

Id. ¶ 2.32 (quoting Transcript of Evidence, 1996 Inquiry, Refugee Advice and Casework Service, 175).

¹⁷⁵ Refugee Convention, *supra* note 1.

¹⁷⁶ Refugee Protocol, *supra* note 1.

¹⁷⁷ Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117.

¹⁷⁸ Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989).

Convention"),¹⁷⁹ and the International Covenant on Civil and Political Rights ("ICCPR").¹⁸⁰ Each of these agreements imposes certain obligations on signatory parties that are relevant to the treatment of asylum seekers. The U.N. Human Rights Committee has already found that Australia's refugee detention procedures violate the ICCPR.¹⁸¹ The enactment of the proposed amendments may place Australia in further violation of its international obligations.¹⁸²

A. *The Judicial Review Amendment Jeopardizes the Right to a Fair and Impartial Hearing*

Australia may be in violation of the ICCPR if it passes the Judicial Review Amendment. The ICCPR requires that "all persons shall be equal before the courts and tribunals . . . [and] shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal."¹⁸³ The RRT probably does not meet this standard, as it lacks members with sufficient legal training, functions under political pressure, and is frequently not open to the public.¹⁸⁴ The current refugee determination system only satisfies this provision because refugee applicants have recourse to the judiciary, which provides competency, political independence, and impartiality. If refugees are denied recourse to the judiciary, the fairness and impartiality of refugee determinations in Australia would be significantly weakened.

¹⁷⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Torture Convention*].

¹⁸⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976) [hereinafter *ICCPR*].

¹⁸¹ *A v. Australia* 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, Apr. 30, 1997. In response to a complaint filed by a detained refugee that challenged Australia's immigration detention policies, the U.N. Human Rights Committee found Australia in violation of its obligations under the ICCPR. See also CROCK, *supra* note 5, at 213.

¹⁸² See generally Debra Way, *Immigration Bill Discriminatory*, AAP NEWSFEED, Feb. 25, 1999, available in LEXIS, AAP Newsfeed File.

¹⁸³ ICCPR, *supra* note 180, art. 14.1. Article 14.1 provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Id.

¹⁸⁴ JUDICIAL REVIEW COMMITTEE REPORT, *supra* note 118, ¶ 2.66 (citing Submission No. 2, Human Rights and Equal Opportunity Commission, 4-5).

B. Amendment No. 2 and the Right to Information

Amendment No. 2 fails to consider Australia's international obligation to provide detained persons with certain basic rights, including the right to legal information and legal services.¹⁸⁵ If enacted, this amendment will limit how detained immigrants can obtain information and when information can be provided.¹⁸⁶

Amendment No. 2 violates Principle 13 of the U.N. Principles for Persons in Detention, which requires the authority responsible for a person's detention to provide the person with an explanation of his rights.¹⁸⁷ The amendment ignores this principle by limiting both HREOC and Commonwealth Ombudsman support for immigration detainees and by clarifying that the Department of Immigration has no duty to provide refugees with any information.

Amendment No. 2 also violates Articles 9.4 and 10 of the ICCPR. Article 9.4 provides that a detainee has a right to challenge the lawfulness of her detention.¹⁸⁸ Article 10 provides that everyone in detention must be "treated with humanity and with respect for the inherent dignity of the human person."¹⁸⁹ Article 10 has been interpreted to mean that detainees have a right to legal information, a right to equal treatment, and a right to challenge the validity of their detention.¹⁹⁰ These rights are undermined by

¹⁸⁵ U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 13, G.A. Res. 43/173, annex, U.N. GAOR 43rd Sess., Supp. No.49, at 298, U.N. Doc. A/43/49 (1988) [hereinafter Principles for Persons in Detention]. Principle 13 provides:

Any person shall . . . at the commencement of detention . . . or promptly thereafter, be provided by the authority responsible for his . . . detention . . . with information on and an explanation of his rights and how to avail himself of such rights.

Id. Although U.N. General Assembly resolutions are not considered binding sources of international law, they do have the status of recommendations and may be cited in support of asserted norms of customary law. See generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). AMENDMENT NO. 2 REPORT, *supra* note 172, ¶ 3.1.

¹⁸⁶ *Migration Bills Illegal*, *supra* note 171.

¹⁸⁷ Principles for Persons in Detention, *supra* note 185, principle 13.

¹⁸⁸ ICCPR, *supra* note 180, art. 9.4. Article 9.4 provides that "[a]nyone who is deprived of his liberty . . . shall be entitled to take proceedings before a court . . . [to] decide without delay on the lawfulness of his detention." *Id.* See also *A v. Australia* for a discussion of Australia's detention procedures, which the U.N. Human Rights Committee determined were in violation of Articles 9.1 and 9.4 of the ICCPR. *A v. Australia*, *supra* note 181.

¹⁸⁹ ICCPR, *supra* note 180, art. 10.1. Article 10.1 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." *Id.*

¹⁹⁰ AMENDMENT NO. 2 REPORT, *supra* note 172, ¶¶ 3.1-3.5. See also Hyndman, *supra* note 10, at 246-47. Here, Hyndman identifies three minimum procedures arising from the Refugee Convention and the Refugee Protocol. Under the Protocol,

Amendment No. 2, which effectively precludes any meaningful opportunity to challenge the detention and creates a distinction between detained immigrants and everyone else in the application of the HREOC Act.

C. *The Proposed Amendments and the Principle of Non-Refoulement*

The amendments substantially alter Australia's refugee determination system and jeopardize compliance with the principle of non-refoulement. Under the principle of non-refoulement, a country has a duty to prevent the return of a refugee to a country where the refugee faces a genuine risk of serious harm.¹⁹¹ The principle of non-refoulement is the most fundamental obligation imposed by international refugee law. The Refugee Convention provides that "[n]o contracting State shall expel or return ('refouler') a refugee . . . to the frontiers of territories where his life or freedom would be threatened. . . ."¹⁹² This principle is referenced not only in the Refugee Convention but also in the Refugee Protocol,¹⁹³ the Torture Convention,¹⁹⁴ and other international agreements.¹⁹⁵

By increasing the risk that refugees will not have an adequate opportunity to raise and process credible asylum claims, the two amendments will cause Australia to violate the non-refoulement principle. Amendment No. 2 will restrict access to important legal information. This will make it difficult for refugees to even assert a claim to refugee status. The Judicial Review Amendment will make determinations on claims that may have been inadequately processed at the administrative level final and unreviewable. The passage of the amendments will result in mistakes in refugee determinations and the return of credible refugees.

The proposed amendments will undermine Australia's ability to meet its international obligations. By removing judicial review (which will jeopardize the right to a fair and impartial hearing), restricting access to legal information

Refugee status determination procedures at a minimum must (1) be accessible to those who need access to them; (2) be so constructed that they afford applicants a fair opportunity to show that they come within the criteria for granting refugee status; and (3) not subject the criteria of the Refugee Convention definition to misinterpretation.

Id. Where Amendment No. 2 significantly limits access to refugees, the first two procedures are undermined.

¹⁹¹ Broadly, the principle of non-refoulement states that "no refugee should be returned to any country where he or she is likely to face persecution or torture." GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (1996).

¹⁹² Refugee Convention, *supra* note 1, art. 33.

¹⁹³ Refugee Protocol, *supra* note 1, arts. 1, 7.1.

¹⁹⁴ Torture Convention, *supra* note 179, art. 3.

¹⁹⁵ See generally GOODWIN-GILL, *supra* note 191, at 124-25.

and assistance, and establishing a refugee determination process that will increase the likelihood of refoulement, the amendments will cause Australia to violate its international obligations.

VI. CONCLUSION

If Australia desires to provide an accurate, fair, and effective system for processing refugee claims, the proposed amendments must be rejected. Just five years after enacting the current restrictions on judicial review, the Australian government is attempting to further exclude the judiciary from decisions made under the Migration Act by proposing the Judicial Review Amendment. The judiciary's importance in the immigration process mirrors its importance in society as a whole. Judicial review not only provides a direct check on executive decisions but also imposes a presence that fosters accurate decisionmaking at the administrative level in general. Especially in the context of rising immigration levels, which are politically unpopular, the refugee needs the safeguards of the judiciary. The Judicial Review Amendment is also of questionable constitutionality. The amendment's use of a privative clause to prevent judicial review of immigration decisions by the Federal Court and the High Court is unprecedented in the immigration context and may violate the Australian Constitution. For these reasons, the Judicial Review Amendment should be rejected.

Amendment No. 2 limits how and when a detained immigrant can access information and assistance that is often critical in applying for asylum. Newly arrived refugees are wholly ignorant of Australia's laws and legal system and must rely on the advice and information of third parties such as the HREOC and the Commonwealth Ombudsman. Amendment No. 2 would prevent these agencies from contacting a detained refugee and would thus impede the refugee's access to this critical information. Furthermore, the restrictions imposed by both the Judicial Review Amendment and Amendment No. 2 may violate Australia's commitments under international law.

Unless the proposed amendments are rejected, the accuracy and effectiveness of Australia's refugee determination system will be jeopardized. The failure to process refugee claims accurately will result in the return of refugees to countries where their lives are endangered. Australia's commitment to fair and accurate decisionmaking on the domestic front and to human rights law on the international front will be critically undermined if the proposed amendments are enacted.

