

**Submission to the Senate Legal and Constitutional Affairs Committee on  
Migration Legislation Amendment (Procedural Fairness) Bill 2002 &  
Migration Legislation Amendment Bill (No.1) 2002**

**1. Introduction**

- 1.1 The Refugee and Immigration Legal Centre (RILC) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants.
- 1.2. RILC specializes in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Scheme (IAAAS) and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 6 years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited Port Hedland and Curtin Immigration Reception and Processing centres on a number of occasions. We are also a regular contributor to the policy debate on detention.
- 1.3 In 2000 to 2001, RILC gave assistance to 1,838 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford private legal assistance and are often disadvantaged in other ways.

**2. Migration Legislation Amendment (Procedural Fairness) Bill 2002 ("the Procedural Fairness Bill")**

**2.1 Introductory comments**

- 2.1.1 By way of introductory comment, we note that RILC (and its predecessor organisations, RACS and VIARC) have previously expressed strong opposition to this Committee concerning the introduction of provisions in past legislation which have related to further restrictions on the ability of applicants to access judicial review by way of introduction of privative clauses. We have also opposed the limited and inadequate scope and operation of the "codes of procedure" introduced in a purported attempt to codify the requirements of the natural justice rule. In this context, together with the recent amendments which have further restricted the already very limited judicial review grounds, we are acutely concerned that any residual, basic safeguards which are afforded by the common law rules of natural justice be preserved for the purposes of judicial review. It is our submission that the common law rules of natural justice should be applied to decisions made under the *Migration Act* 1958 ("the Act") and that the application of such rules should be the subject of judicial scrutiny.

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In strongly opposing the introduction of the Procedural Fairness Bill, we intend to focus primarily on the impact of such provisions on individual applicants, and the jurisdiction more generally.

2.1.2 In this regard, we note that the general effect of the Procedural Fairness Bill is to render the “codes of procedure” in the Act with respect to a wide range specified matters an exhaustive statement of the rules of natural justice. Further, the Bill seeks to ensure that acts done or omitted to be done concerning the so-called exhaustive statements of the natural justice rule contained in the “codes of procedure” are protected from invalidity. Such acts or omissions are intended to be protected by the new privative clause contained in section 474 of the Act, which was introduced by *Migration Legislation Amendment (Judicial Review) Act 2001* (“Judicial Review Act 2001”). In short, the present Bill seeks to both “codify” current codes of procedure relating to natural justice requirements, and to immunise those specified requirements from invalidity by judicial review.

2.1.2 The Procedural Fairness Bill represents a further restriction of the grounds for which judicial review can be sought under the Act. The grounds of judicial review available under the Act were further substantially restricted by the introduction of the new section 474 privative clause in the Judicial Review Act 2001. Against a background of previous substantial legislative incursions on the available grounds of judicial review accessible to applicants, the general effect of the Judicial Review Act 2001 is to render almost all decisions under the Act subject to a privative clause. In other words, the Bill must be viewed against a background where all but those visa-related decisions which fall within the following categories set out in the decision of *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 cannot be invalidated by the Courts:

- the decision-maker was not acting in good faith in making the decision; or
- the decision is not reasonably capable of reference to the decision-making power given to the decision-maker; or
- the decision does not relate to the subject matter of the legislation; or
- the decision exceeded the limits in the Commonwealth Constitution.

2.1.3 The Bill seeks to ensure that the requirements of the rules of natural justice are brought within the scope and operation of the new section 474 privative clause. This is seen as necessary in light of the decision in *Re MIMA; Ex parte Miah* [2001] HCA 22 (“*Miah*”), in which a majority of the High Court held, inter alia, that the requirements of the common rules of natural justice were not excluded by the “codes of procedure” under the Act.<sup>1</sup> *Miah* was decided under the predecessor to the current section 474 privative clause. Arguably, however, the broader common law rules of natural of justice were not excluded by the introduction of the current privative clause. This was confirmed by the recent decision of *Walton v Philip Ruddock, The Minister for Immigration & Multicultural Affairs* [2001] FCA 1839 (20 December 2001), in which Merkel J commented thus in the context of the new section 474 privative clause:

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<sup>1</sup> See: Migration Legislation Amendment (Procedural Fairness) Bill 2002, Explanatory Memorandum, p.2.

As s 474 and Pt 8 of the Act are altogether silent on compliance or non-compliance with the rules of natural justice there may be obstacles in the path of an argument that the section provides a clear legislative intention to abrogate or exclude the rules of natural justice cf s 501(5). See also *Miah* ... Thus absent a change in the substantive law in that regard, **plainly, there are grounds for contending that s 474 does not prevent the review of decisions in respect of visas on that ground.** (emphasis added)

2.1.4 Our submission will proceed on the assumption that the common law grounds of natural justice have not been ousted from judicial review. Clearly, if this is not the case and the new section 474 privative clause serves to preclude such grounds from judicial review, then the Procedural Fairness Bill is superfluous.

## 2.2 The limited and inadequate scope of the “codes of procedure”

2.2.1 As mentioned, we have previously raised serious concerns with this Committee concerning the scope of the “codes of procedure”. In our submission, these “codes of procedure”, which the Procedural Fairness Bill now seeks to ensure are an exhaustive enunciation of the rules of natural justice, only partially encompass the common law rules of natural justice. In turn, they are unjustifiably narrow in scope and provide an insufficient replacement insofar as they purport to be a codification of such rules.

2.2.2 In this regard, we note that the common laws of natural justice (otherwise commonly referred to as ‘procedural fairness’) encompass both the ‘hearing rule’ and the ‘bias rule’. It is generally accepted that the hearing rule requires that a decision-maker give to a person whose interests may be adversely affected by a decision (or relevant matters in making the decision) an opportunity to present his or her case (or an opportunity to deal with those relevant matters). In the administrative decision-making context, this generally requires decision-makers to put any adverse information which is credible, relevant or significant to the decision to be made to the applicant, and to provide the applicant with a reasonable opportunity to comment on that information. The rule is flexible, and “chameleon-like”;<sup>2</sup> the specific requirements will depend on the particular circumstances of the case. For example, not all information central to a decision will require disclosure for comment, such as non-adverse information. However, the more equivocal and less obvious to the applicant the information is, the stronger the need for disclosure.<sup>3</sup> The ‘bias rule’ requires that the decision-maker not be *actually* interested in the matter to be decided, nor that there be an *appearance* that the decision-maker brings to the matter a prejudiced mind.

2.2.3 The principles of natural justice have been developed at common law, and are not inflexible, adapting to the circumstances of the particular case. Whilst it is conceded that the common law rules may at times be chameleon-like and not readily subjected to precise parameters, as indicated in paragraph 2.2.4 below, the current codes of procedure are conspicuously inadequate in scope when regard is had to clear requirements under the common law rules, and the clear injustices which can flow from a strict adherence to the requirements of the codes under the Act.

<sup>2</sup>*Kioa v West* (1985) 159 CLR 550 at 612 per Brennan J.

<sup>3</sup>*Miah* [2001] HCA 22 at 30 per McHugh J.

- 2.2.4 In our submission, Miah's case provides a compelling case in point. In this case, the Minister's delegate refused the applicant's claim for refugee status approximately one year after the application had been made. In the intervening period, there had been an election and change in government in the applicant's home country of Bangladesh. This change in government formed a substantial part of the delegate's reasons for refusal, in that the delegate considered this change had effectively negated the well-foundedness of the applicant's fears. Relevantly, prior to the decision, the applicant was not provided with the adverse information used in the decision; nor was he otherwise given an opportunity to respond to the information. Under sections 56 and 57 of the Act, being the relevant code of procedure sections governing the exercise of the delegate's power concerning the disclosure of information and opportunity to comment, there is no *requirement* that adverse country information material to the decision be provided to applicant for comment. However, the High Court held by a majority that the application of the common law rules of natural justice were not precluded by the Act, and in turn, that in the circumstances, procedural fairness required that the adverse information relied upon by the delegate be put to applicant for comment prior to a decision being made.
- 2.2.5 We note that under section 424A in Part 7 of the Act, there is a similar provision concerning information which the Tribunal must give to the applicant. Notably, section 424A(2) places restrictions on the nature of the adverse information which must be provided to the applicant for comment. In short, it is only information which is specifically about or directly pertains to the applicant which must be put for comment; not country information. Such restrictions are particularly concerning when it is appreciated that in most Tribunal hearings, an assessment of credibility and the interrelated attribution of relative weight to country information, are central the decision-making process. In our experience, the operation of the mirror provision at the Departmental level (section 57 of the Act) has resulted in the common practice of the Department not providing the applicant with adverse country information. Often, however, it is the adverse country information which is determinative in the final decision. It is our experience that the Tribunal has generally demonstrated more of a readiness to disclose adverse information for comment either by presentation to the applicant of relevant documentation and/or by explanation of core issues contained in the adverse information. However, the practice has been applied inconsistently, and the code of procedure provides no requirement to do so.
- 2.2.6 We submit that it is of fundamental importance for refugee applicants to properly comprehend the reasons the Department and/or Tribunal has concerns about whether the fear of persecution is objectively well-founded. Most of our clients hold a very strong subjective fear and a direct, personal experience of the country situation in question. The failure to provide adverse country information to applicants who are then refused on the basis of that information has resulted in many applicants being left at the end of the process with little or no understanding whatsoever of why their application was rejected. As previously submitted to this Committee, such a failure not only limits the ability of the applicant to understand and come to terms with the basis of the decision, but may well, as a consequence, increase the possibility of the applicant pursuing futile litigation.

2.2.7 Another example of where shortcomings are apparent is that in the codes of procedure, under section 58 of the Act, the Minister may invite an applicant to provide further information in support of an application, but such information can be required to be given in a particular fashion and within a prescribed time limit. We note that a similar provision is contained under Part 7 of the Act (section 424B). In our experience, general migration and refugee applications are often made by applicants who possess very limited skills in English, and who are compelled to confront the ever-growing complexity of a legal morass in migration and refugee law. Many applicants also come from backgrounds where the legal system which they confront in Australia is alien to them. In our experience, even where adverse information is provided to an applicant for comment, the precise nature of this process and the task confronting the applicant is not readily apparent and requires detailed explanation. Further, it is common for applicants to require the request to be translated or interpreted prior to being in a position to respond to an invitation. This may involve a lengthy and costly process in itself. In these circumstances, the time limit specified for comment may have expired. A decision can therefore be made on the application regardless of the failure of the applicant to meet the deadline (see section 62 of the Act). In such a case, the decision would be made in conformity with the code of procedure but nevertheless in denial of the rules of natural justice whereby the only adequate relief available would be by way of judicial review. In the absence of the availability of judicial review, we submit that a substantial and unjustifiable injustice would follow.

2.2.8 Even if it were accepted that the codes of procedure were an adequate codification of the rules of natural justice, in practice these codes of procedure are not always complied with by Departmental and Tribunal decision-makers. The recent Full Federal Court decision of *W375/01A v Minister for Immigration & Multicultural Affairs* [2002] FCA 379 (3 April 2002) provides a clear illustration of this point. In that case, the Tribunal found that the applicant, an Iranian asylum seeker, had recently invented a claim relevant to his fear of persecution. In doing so, the Tribunal refused to listen to a tape recording of a previous interview with the Department concerning his claims, despite a request to do so by the applicant. The refusal by the Tribunal constituted a failure to perform the duty imposed by section 425(1) of the Act.

### **2.3 The undesirability of the rules of natural justice being subject to the section 474 privative clause**

2.3.1 As mentioned, we have previously indicated to this Committee our strong opposition to the introduction of privative clauses of the kind enacted by the new section 474. On the assumption that the common law rules of natural justice have survived the section 474 privative clause, we submit that the Procedural Fairness Bill should be opposed as an unwarranted attempt to eliminate from judicial scrutiny denials of procedural fairness, which are a fundamental and deep-rooted principle in our law.

2.3.2 Firstly, the Procedural Fairness Bill seeks to bring the rules of natural justice within the scope and consequent protection of the section 474 privative clause. In short, it is an attempt to make lawful actions which would otherwise be considered unlawful. This seriously undermines the doctrine of the separation of powers between the Executive, Judiciary and Legislature. The importance of judicial review of administrative decision-making is deeply rooted in the doctrine of the separation of

powers, and in particular, the fundamental necessity of ensuring that the executive is made accountable for decisions affecting the rights and entitlements of individuals. We again endorse the comments of the Senate Standing Committee for the Scrutiny of Bills on the perilous nature of ousting judicial review:

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 the 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.<sup>4</sup>

- 2.3.3 In our submission, the importance of protecting a basic safeguard such as the right to judicial scrutiny of a denial of procedural fairness is particularly acute when the decision is one affecting refugees. In such cases, where the consequences of an unlawful decision are extremely grave, namely, being sent back to a situation of persecution, it is vital that sufficient safeguards are preserved. In our submission, failure to preserve the safeguard of judicial review of natural justice grounds runs the very real risk and alarming consequence that a person may be sent back to a place of persecution, in contravention of Australia's international obligations. The importance of preserving this residual safeguard is underscored by the recent further restriction on available grounds of judicial review.
- 2.3.4 In relation to the risk of refoulement, it is clear that mistakes are made at the administrative review level. It would be a nonsense to suggest otherwise. Further, as the cases referred to in this submission demonstrate, the nature of these mistakes are sometimes potentially critical to the outcome of the application.
- 2.3.5 In addition, regardless of the outcome of remittal of a decision on judicial review, it is critical that there remain in place a mechanism to ensure that administrative decision-makers, who already have increased powers by virtue of the privative clause, are accountable in relation to the lawfulness of their decisions as they relate to procedural fairness.
- 2.3.6 Further, we remain concerned that the Procedural Fairness Bill would have the effect of ensuring that codes of procedure will not be subject to jurisprudential developments in relation to common law rules of natural justice, and thus will not continue (to the extent that they already do) to so develop. Clearly, the Procedural Fairness Bill would also deny the administrative decision-makers, and the jurisdiction more generally, critical guidance in respect of natural justice requirements and their development.

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<sup>4</sup> Scrutiny of Bills Committee report quoted in Submission No 8, National Council of Churches in Australia, page 3.

2.3.7 In our submission, in a society governed by the rule of law and doctrine of the separation of powers, it is unjustifiable to seek to oust from judicial scrutiny principles and safeguards as fundamental as those of procedural fairness. In our submission, justifications for ouster of the Court's role, such as the costs and delays involved, are totally insufficient reasons for such a radical departure from ensuring adequate safeguards for the individual from otherwise unlawful decisions, particularly where the matters at stake and the implications of a mistake may be the difference between life or death for the applicant.

### **3. Migration Legislation Amendment Bill (No. 1) 2002**

#### **3.1 Schedule 6, items 1-2: proposed section 48(3)**

3.1.1 RILC has serious concerns about the unintended effects of the proposed new section 48(3), which it fears will cause unnecessary and substantial injustice and hardship for both visa applicants, and citizens and permanent residents of Australia.

3.1.2 In the explanatory memorandum it is stated that the intention of the proposed section 48(3) is to prevent non-citizens from lodging second visa applications in circumstances where they hold a bridging visa which has allowed them to leave and re-enter the migration zone, thus removing the operation of the section 48 bar on further valid visa applications.

3.1.3 However, such visa applications have a limited chance of success due to the effect of the Schedule 3 criteria which, for most onshore visa subclasses, apply to persons who make visa applications while they are the holder of a bridging visa or are unlawful. The proposed section, if confined to its intended operation, would therefore only impact on a small number of applicants not already restricted from being granted visas by operation of the additional criteria in Schedule 3.

3.1.4 We note however that the proposed section will also bar persons who hold a bridging visa from being able to leave Australia to lodge a visa application outside Australia and then return to Australia on the bridging visa while waiting for a preceding onshore application to be finally determined. This is an undesirable consequence of the proposed section that is not referred to in the explanatory memorandum.

3.1.5 Persons who lodge offshore visa applications and return to Australia are not attempting to exploit an anomaly in the migration law, but have merely returned to Australia on a valid bridging visa while their offshore application is processed. For many, this course of action is adopted due to the excessive and inconsistent processing times for the processing of many classes of offshore visa applications in various countries. For example, in Nairobi, the offshore visa processing time for a spousal visa is 134 weeks.

3.1.6 The proposed section would mean that an applicant who had made an unsuccessful visa application in Australia would be unable to lodge a valid offshore spouse visa if they wished to return to Australia to pursue their review options in respect of the preceding onshore application.

- 3.1.7 The persons who will be most adversely affected by the unintended consequences of the proposed section are those who have strong connections to Australia. These form the basis for the offshore visa applications for which they wish to apply. Persons who currently lodge offshore visa applications mainly travel offshore to apply for family or spouse visas, or have been nominated by an Australian employer, or business or State and Territory sponsor for migration to Australia.
- 3.1.8 Such persons necessarily have a strong connection to Australia, by virtue of spousal, familial or professional relationships. The proposed section would have the unintended and undesirable consequence of forcing such persons to wait outside the migration zone while their visa application is processed offshore. It would also have the effect that they would lose the right to remain onshore during the processing of their onshore visa application.
- 3.1.9 This will also cause unnecessary hardship for Australian citizens and permanent residents as a result of members of their family unit, relatives, fiancées or spouses being forced to wait offshore while the bureaucratic processes take their course. RILC can see no public policy reasons for preventing visa applicants from returning to Australia while their offshore application is processed, in circumstances where the applicant holds a valid bridging visa, which allows re-entry into Australia, in respect of a preceding onshore application.
- 3.1.10 We further note that the proposed section is undesirable as it penalizes persons who have complied with the requirements of the migration law, as opposed to persons whose status is unlawful. In order to have obtained a bridging visa which allows for entry to Australia, an applicant must have made their application for a visa while holding a substantive visa.<sup>5</sup> Therefore, the effect of the proposed section is to bar persons who have complied fully with the requirements of the law from making a valid offshore application for a visa. Persons who are unlawful at the time of their visa application are not eligible for a bridging visa with permission to leave and re-enter Australia, and are therefore not effected by the proposed section.<sup>6</sup>
- 3.1.11 The proposed section fails to accommodate situations where a visa applicant's circumstances have changed while they have been in Australia. It is common for this to occur and in most circumstances does not reflect a lack of integrity or genuineness on the part of the applicant. For example, a person who has applied for and been refused a protection visa enters into a spousal relationship during the processing of review for the protection application.
- 3.1.12 Furthermore, the proposed section will also perpetuate injustice in circumstances where a person has received poor advice from a migration agent or the Department of Immigration and Multicultural and Indigenous Affairs concerning the appropriate visa to apply for.
- 3.1.13 Work undertaken by RILC often involves providing advice to persons who have received poor immigration advice which has resulted in the lodging of an inappropriate visa application in circumstances where the persons were eligible for a

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<sup>5</sup> In such circumstances, a person is granted a bridging visa A, and subsequently a bridging visa B with permission to travel outside Australia.

<sup>6</sup> Such persons are granted a bridging visa C or E without permission to leave and re-enter Australia.

different class of visa. One remedial option available to persons in such situations who hold a bridging visa permitting re-entry to Australia is to travel offshore to lodge a further visa application for which they are eligible. If the proposed section were adopted, this important avenue for remedying the result of poor migration advice would be removed. A person would be prevented from applying for an appropriate visa offshore in circumstances where, through no fault of their own, the person applied for an inappropriate visa which was subsequently refused.

- 3.1.14 In RILC's experience, the problems created by poor migration advice are often exacerbated by the fact that many persons receiving migration advice are non-English speakers who have no familiarity with the Australian legal system or migration law. Such persons therefore have a heightened vulnerability with respect to poor advice. It would be unconscionable to deny such persons one of the few options available to them to remedy a situation for which they are not to blame.
- 3.1.15 One possible solution to avoid the undesirable and unintended consequences of the proposed amendment in barring persons from lodging offshore visa applications and returning to Australia (while still achieving the intended purpose of the proposed section as stated in the explanatory memorandum) would be to prescribe all offshore visa classes for the purposes of section 48(1) of the Act. RILC urges the Committee to consider this, or another alternative, to vitiate the undesirable effects of the proposed section. If such a course of action is not taken, the unintended consequences of the proposed section would create unnecessary hardship for a class of persons who are likely to have strong and genuine connections to Australia. It would also have adverse ramifications for many Australian permanent residents and citizens with connections to the affected visa applicants.