COMMONWEALTH OF AUSTRALIA

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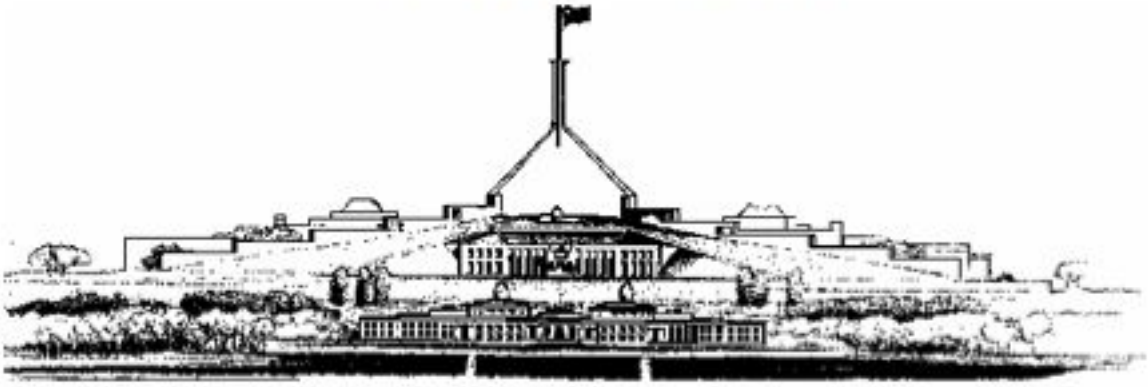

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (NO. 2) 2000

Second Reading

SPEECH

Tuesday, 6 February 2001

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

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Questioner		**Responder**	
Speaker	Albanese, Anthony, MP	**Question No.**	

Mr ALBANESE (Grayndler) (6.20 pm)—I am very pleased to have the opportunity to support the shadow minister for immigration in opposing Migration Legislation Amendment Bill (No. 2) 2000. This bill is the latest in a series of changes that the Minister for Immigration and Multicultural Affairs has made to the migration regulations since coming to office four years ago. In essence, this bill seeks to deny justice to visa applicants who believe they have a legitimate case to put before the courts. The bill is so controversial that I am sure it raised the hackles of more than a few government MPs with legal training—so much so that I believe they were probably quite relieved to see it whisked off to a committee last year. Many of them probably wish it would stay there permanently.

This bill needs to be viewed in the wider context of the human rights meltdown that is taking place on the government front bench. The Australian government's actions and inaction in the field of human rights over the last 12 months in particular give we Australians cause to hang our heads in shame. This is a government that refuses to put a stop to the mandatory sentencing of young, mainly indigenous people in the Northern Territory over trivial offences. How can any fair-minded person accept that theft of a crayon or a bottle of cordial is anything more than a misdemeanour; yet the Northern Territory deems all property offences to be criminal acts.

When this issue came before the House last year, the crocodile tears coming from the moderates on the other side of the House were laughable. We saw members of the government speaking in favour of a bill that they subsequently voted against. Then, hard on the heels of the disgraceful inaction over this, the immigration minister and the foreign minister took on the UN.

Mrs Gallus—Mr Deputy Speaker, I raise a point of order. The legislation is about migration and not about mandatory sentencing and a whole lot of other issues.

Mr DEPUTY SPEAKER (Hon. D. G. H. Adams)—I thank the parliamentary secretary.

Mr ALBANESE—I can understand why a moderate such as the parliamentary secretary is ashamed of the government's position on this and indeed on any issue related to human rights. As Australians, we are proud of our role in setting up treaty committees. The government, however, seems to think that these treaties were not designed to criticise us—just all the other countries that violate human rights. But close scrutiny of the government's treatment of indigenous Australians and onshore asylum seekers is not something it welcomes.

The government is also in the business of legitimising the rule of indicted war criminals, much to the chagrin of western European countries and the US. For example, when the rest of the world was condemning Slobodan Milosevic as a war criminal, the government sent Charles Stuart, our new ambassador to Yugoslavia, to meet him within days of him taking up his new post. In September last year the people of Yugoslavia spoke loud and clear when they handed the presidency to Vojislav Kostunica. But wait; there's more. As a final insult to indigenous Australians, the government has tried to deny the stolen generations.

The fact is that this bill is yet another example of the government's attempts to restrict the rights of its citizens and of people who believe they have a case for permanent residence. You only have to look at the appalling conditions in immigration detention centres all over Australia to see that this government is doing all it can to act tough over the issue of asylum seekers. In places like Woomera and Port Hedland we had cases of young children being put in conditions about which they said they would rather go back to their country of origin and face potential death than put up with.

There are two sections of this bill that I wish to speak on. Schedule 1, part 1, of the bill seeks to introduce a new part to the Migration Act. Under part 8A, section 486A will set a 28-day absolute time limit on applications to the High Court for judicial review. Setting such a time limit is a contentious act. Section 75(v) of the Constitution states that, in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction. The 28-day time limit constricts a person's

ability to seek leave of the High Court, and as such this bill is contentious and it can be argued that it interferes with the exercise of judicial power. There is something that we Australians hold sacred in our Constitution and that is the separation of powers. The basic premise is that the legislature should not interfere with the judiciary. It is hardly surprising, however, that the government seeks to interfere in this case, given that its inaction has given tacit support to the Northern Territory legislature's interference in its judiciary with the imposition of mandatory sentencing. So, while there is no question that this bill is just another example of a mean-spirited government, there is a big question over the legality of these proposed changes. While the government may have received advice that this provision is valid, the comments of Chief Justice Gleeson and Justice McHugh in the case of Abebe would suggest otherwise. The justices said:

> But once a question arises as to whether a Commonwealth officer has acted lawfully or within or outside the jurisdiction conferred upon him or her, no law of the Parliament can curtail the jurisdiction of this Court to decide the issue, ...

This is why I am pleased to support the shadow minister's amendment. The rationale behind this bill is to discourage a person from taking his or her case to the High Court, thus reducing the workload of the High Court. However, the bill is just as likely to produce the opposite effect. Solicitors may decide to start their cases in the High Court in order to get in before the 28-day cut-off. Matters can always be remitted back down the system, and this may well become the most pragmatic option. So the bill may actually be responsible for clogging up the courts even more.

I accept that in the majority of cases the department and the tribunals make accurate and fair decisions. However, it is a fact that officers of the Commonwealth occasionally get things wrong, and this was a point that was not lost on the people who drafted our Constitution. I might add that it is not a point lost on this minister, who has intervened more than any of his predecessors to grant ministerial discretion, and in many of those cases I welcome the minister's decision to do that. But you cannot have it both ways. You cannot say, `I have a right as a minister to intervene because the system gets it wrong,' and then at the same time try to restrict people's legal options. The court system allows people with a genuine case to seek justice. Therefore setting a 28-day limit on accessing the High Court interferes with the pursuit of natural justice.

I believe there is another agenda at play here in this bill. This bill is part of the minister's mission to limit the access that non-citizens have to judicial review. It is the minister's belief that all court action is taken purely to stretch out a non-citizen's illegitimate attempt to remain in Australia. Whilst in some cases that might be true, it is certainly not true in all cases, and these are the people who deserve their day in court.

Schedule 1, part 2, of the bill is also of great concern to me. Here the minister seeks to prevent representative, grouped or class actions relating to visas and decisions to deport and remove unlawful non-citizens from being heard in the Federal Court and High Court. The rationale behind class actions is to prevent drawn-out legal processes by allowing people in the same circumstances to present one case instead of multiple cases. The minister is very dismissive of such actions. In keeping with his belief that all applications are vexatious, the minister wants to close this right of appeal as well. I concede that some class actions have been frivolous, but many others have not. When introducing this bill to the House last year, the minister stated that of the 14 class actions that have been commenced since October 1997, the 10 that have been decided were dismissed. What the minister conveniently failed to mention was the success of Fazal Din v. Minister for Immigration and Multicultural Affairs in the Federal Court. Clearly not all class actions are vexatious. Even when class actions are unsuccessful, it does not mean they are without merit. In the case of Macabenta v. Minister for Immigration and Multicultural Affairs, the justices of the High Court were not unanimous in their ruling, ruling in favour of the minister by two to one. In other words, one justice of the High Court was prepared to grant leave to appeal. David Bennett QC, who represented the applicants, had this to say:

> The issues raised are novel and important issues arising in the law of racial discrimination and in my view the applicants were well justified in bringing the proceedings.

David Bennett is now the Commonwealth Solicitor-General, so I would have thought that even the minister must have some respect for his opinions. There were approximately 3,500 people involved in this particular class action. Clearly there was merit in their case and, as a result, these people would have been justified in pursuing their individual cases—3,500 people clogging up the courts to litigate a common question when only one decision needed to be made. This bill does nothing to rationalise the cost of court action. In reality it may well have the opposite effect. Even the explanatory memorandum concedes this point. The minister is dismissive of the use of the courts by appellants seeking to have their migration cases heard. However, he is not averse to using the judicial process when it suits him. To quote from the department's annual report of 1998-99, the minister

sought judicial review of 34 portfolio tribunal decisions, appealed to the full Federal Court in 26 matters, and sought special leave to appeal to the High Court in eight matters. This bill would seem to be a case of `Do as I say, not as I do.' I have no doubt there are many members of the government backbench who are privately very uncomfortable with the changes contained in this bill, just like they are uncomfortable with a government that says it is legitimate to inject people in detention centres, like something out of some bad rerun of World War II.

Sitting suspended from 6.31 p.m. to 8.00 p.m.