HANSON, Mr Greg, Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

MANNE, Mr David Thomas, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

[10:34]

CHAIR: I now call the Refugee and Immigration Legal Centre, whose submission we have numbered as 165. Thanks very much for being with us, gentlemen. I think you have both been to Senate hearings before, so you will know that these are proceedings of parliament and that parliamentary protection applies. If there is anything you particularly want to say in private, let us know and we can talk about that.

You are conscious that, for reasons beyond our control, we have to be out of here a couple of minutes after 11, by the very latest. I am just trying to find out when we have to be there.

If you want to amend your submission, now is the time to do that. Otherwise, you may wish to make an opening statement and then there will be questions from the committee.

Mr Manne: Would it be worthwhile providing an opening statement as usual or would it be better, given time constraints, to go straight to questions, given that we have lodged a submission?

CHAIR: Could you give us an opening statement highlighting—which you have done very well in your submission, as always— the main issues that concern you.

Mr Manne: Perhaps in relation to our experience and the capacity in which we appear, I will begin by stating that we appear on behalf of the Refugee and Immigration Legal Centre. RILC is a specialist community legal centre which provides free legal assistance to asylum seekers, to refugees and to disadvantaged migrants in Australia and has done so for 25 years. Essentially, we help around 5,000 individuals a year and have very substantial experience in both the principles and the practice that is directly relevant to this inquiry.

In summary, we recommend that the proposed amendments not be passed for four principal reasons. Firstly, the proposed measures represent, in our view, a wholly unwarranted and radical deviation from the fundamental principles of the rule of law under the Australian legal system. Principal among them is the right to a fair hearing. The provisions would abandon this vital safeguard, in our submission, which is a safeguard which has long been considered in this country and internationally under our international obligations as a basic and essential prerequisite for fairness, justice and the protection of individual rights.

Fundamentally, the amendments proposed would collectively substantially increase the risks of Australia being responsible for exposing people to serious human rights abuses, people whom we have a duty to protect. Our key concerns along those lines, as I say, are the denial of a fair merits review; secondly, the proposed removal of references to the referee convention and, in their place, a proposed codification of the definition of a refugee and related amendments, which would in our submission to create a legal framework for processing of protection claims which is unnecessarily narrow and would bring us into a situation being inconsistent with both international law and those tests applied by comparable industrialised countries.

Another of our principal concerns relates to the introduction of a statutory cap on protection visas and the removal of the 90-day time limit and parliamentary reporting requirements for protection visa decisions, which would not only in our view prolong detention for many individuals and families but would remove fundamental transparency from that process and the ability of the public to know what the government is doing in relation to the fate of people, including processing and detention deprivation of liberty. The fourth

Lastly, our principal concerns relate also to the proposed introduction of temporary protection visas which, in our view, would deprive thousands of individuals and families of any basic certainty in a way that violates their rights and their families' rights, inflicts untold harm on them and retraumatises them and which would reintroduce a policy to this country which, in our view, has been one of the most monumental failures of public policy in recent times.

In summary, the amendments would collectively substantially increase the risk of Australia being responsible for exposing people to serious human rights abuses, people whom we have duty to protect, and we are profoundly concerned that the amendments proposed by the bill represent a legislative package which would involve the most radical repudiation of Australia's international obligations to refugees and other people in need of international protection since the Second World War.

If enacted, the measures proposed would risk gravely undermining Australia's authority and reputation in relation to respect and promotion of human rights and refugee protection is in the international arena. It is for those reasons that we submit none of the amendments pass.

CHAIR: With the codification of the refugee things, has the draftsperson tried to accurately codify the existing situation, or have they re-written it to suit the aims? If the former, is there a better way that it could have been drafted? Is it an attempt to accurately codify what is there or is it an attempt to change the status?

Mr Manne: I perhaps might start and then refer to my colleague for further comments. The attempt to codify in and of itself involves a fundamental misconception of the refugee convention, of our signing up to it, and of the obligations we have signed up to, first and foremost. So the whole notion of the codification in a sense involves a fundamental misunderstanding of the obligation that we have signed up to. Secondly, in our view, broadly speaking, to the extent that it does seek to codify it is not a proper codification in the sense that it does not cover the field of matters that might be relevant. So it is a sort of a partial attempt to codify, which in and of itself is highly problematic. Thirdly, it is quite clear that the broad thrust of this purported codification is in order to unnecessarily and unjustifiably narrow the scope of who might be considered to be a person in need of protection, in a way that is not only in many respects fundamentally contrary to international law and comparable approaches taken in industrialised countries, but also in many respects significantly contrary to what the UNHCR itself says ought to be the proper approach.

Mr Hanson: In regard to treaties and international instruments that Australia is a signatory to, it has an obligation under international law to apply them in good faith and in the ordinary meaning of the terms of the treaties. Clearly, the definition that is proposed is much narrower in scope than the definition in the refugee convention. So in that sense it does not comply with the ordinary meaning of the definition—the ordinary terms of that treaty. Also, the policy rationale that has been described in the explanatory statement and in the second reading speech would indicate that it is a deliberate attempt to narrow the scope of what is being applied, which we would submit is not a good space—

CHAIR: What you are saying is that under the convention there is a broad definition, which is then interpreted, in our case, by the High Court as meaning a certain thing, but this attempt is to do what the High Court does and put the parameters around what is a refugee?

Mr Hanson: We certainly would not propose that it is currently a broad definition. It is quite a succinct, well-contained definition that has evolved over years and years of jurisprudence and case law—decades of case law—in Australia to a point of certainty that is consistent with the international regime. Here is a proposal to narrow that definition to such parameters that it would result in quite a number of people being expelled from Australia who would be refugees under international law to countries where they fear persecution. But under domestic law, due to the narrowing of the scope, they would not be considered to be refugees in Australia.

Mr Manne: In that sense it is a form of legal fortressing, which fundamentally misunderstands the nature of treaties in the international system. Australia has signed the refugee convention as part of a global compact, not as an Australasian compact and not as its own parochial, isolationist compact. It is a treaty that was framed, and Australia took a great part in that, proudly so, in the aftermath of the Second World War. It is a treaty and a definition that is meant to be dynamic and to be responsive to the needs of people fleeing from persecution. It is meant to be applied within an international context where there is responsibility sharing amongst states, not as a matter of an isolationist approach, which is what is proposed here essentially, where Australia fortresses itself both practically, and under this proposal legally, in a way that is inconsistent with the way in which we in the international system define who is in need of protection. This is one of the fundamental problems with the whole concept that is being proposed before parliament. It is an isolationist and parochial approach in an international system.

CHAIR: I understand the point you are making.

Senator JACINTA COLLINS: Mr Manne, we heard from earlier witnesses the concern that the fast-tracking proposals in this bill are more likely than anything to generate a greater bogging down in the courts. Would you like to reflect on that point.

Mr Manne: I think there is little doubt that the so-called fast-track may well slow down very quickly due to the likelihood of a far greater increase in judicial review. The fundamental reason is this—it has a number of components, but the core of it is this: the long-standing principles and practices in Australia in administrative law decision making are that there be a primary decision, then a proper merits review of that on the merits, and then, if after a proper merits review someone has been refused there is the availability of judicial review. What we are looking at here is so severely limiting the merits review part of the process that in many respects it is unlikely that someone will get what we would ordinarily under our legal system consider to be a fair hearing. That means almost certainly that if what we are fundamentally relying on is a primary decision, which is proposed be made quicker, which from all of the experience is often an inferior form of decision making, which is often subject to overturn on review. We have seen the figures on the very high rates of refusal at the RRT. What we are looking at is that if we cut out the merits review safeguard, the fundamental safeguard in the end may well end up being

judicial review—and judicial review of decisions that have often been overturned at the merits review level. In a way, what we might be looking at here is a false economy. In fact our view is that we will be looking at a false economy here, where a lot of the consideration of people's claims is on judicial review.

That is a wholly undesirable outcome in our view, and one that, whatever one makes of this package of proposals, is clearly not desirable or intended.

Senator JACINTA COLLINS: Do you think it is likely to change the character of judicial review, as well? The suggestion was that at the judicial review stage to date the earlier processes are essentially used as guidance, whereas the courts are unlikely to regard them as adequate for that purpose, and we will almost have to revisit some components of what currently occurs in the existing system.

Mr Manne: In our view there is a high likelihood of exactly what you have described occurring. At the end of the day, under the Australian legal system, where serious rights and interests are at stake, as they are here on the question of whether someone needs refugee protection, a fundamental component of that is a fair hearing. As a package, what is being proposed here essentially removes the fundamental components of a fair hearing, which means that if the matter ends up in a court without a fair hearing having been held and given, it will be a matter for the courts to pay close scrutiny to to ensure that someone is afforded procedural fairness, which is a fundamental tenet of our legal system, and that the rule of law applies. One of the fundamental tenets of the rule of law, which is fundamentally undermined in this proposed legislation, is proper independent scrutiny of administrative decision making.

Senator REYNOLDS: Could I get a few points of clarification on your testimony. I think you made reference to the fact that we are now in breach—or we are changing the definition of 'refugee' under the convention. Can you point me to the exact section you think we are now breaching or changing?

Mr Hanson: Article 42 of the refugees convention provides that states are prohibited from modifying the scope of the definition of the provisions in article 1, where the definition of 'refugee' is contained.

Senator REYNOLDS: Can you point me to the exact wording in the proposed changes that would breach that?

Mr Hanson: The act of codification of the definition of 'refugee'—that is distinct and narrow and inconsistent with the definition at article 1A of the convention. That is a modification of article 1A. That is how Australia has chosen—in its domestic legislation. That is the different than the definition at article 1A.

Senator REYNOLDS: My understanding is that that is not correct, but could you perhaps take that on notice and provide some further information, just to show us exactly, legally, why you think that is the case?

Mr Hanson: Yes. We would be happy to do that.

Mr Manne: Absolutely.

Senator REYNOLDS: That would be good. Thank you.

Mr Hanson: Also it is articles 27 and 31 of the Vienna Convention on Law of Treaties in regard to how states are obligated to apply treaties in good faith and in the ordinary meaning of the terms of those treaties.

Senator JACINTA COLLINS: I think Senator Reynolds is asking you to take us to the actual provisions in the bill where that occurs.

Senator REYNOLDS: Yes, the actual words. You have made quite a substantive assertion, but what we would like is the specifics of it—so exactly what words are inconsistent and how are they inconsistent under law.

Mr Hanson: We would be happy to do that.

Mr Manne: Can we just clarify what you want to know it is inconsistent with?

Senator JACINTA COLLINS: Article 42.

Senator REYNOLDS: I understood, from your opening statement and what you said, that that is what you were referring to, saying that what the government is doing is inconsistent.

Mr Hanson: Yes.

Senator REYNOLDS: If you can provide exactly where that is, that would be much appreciated.

Mr Manne: We will. We will go on and provide something further, but one of the central matters, which we have already referred to, is the removal of references to the refugees convention.

Senator REYNOLDS: For the sake of time—I know Senator Hanson-Young wants to ask some questions—I am happy for you to take that one on notice, just to provide a bit more specificity.

Mr Manne: That is fine. I appreciate that.

Senator HANSON-YOUNG: The whole of schedule 5—that is what it is designed to do.

Senator REYNOLDS: Sorry, Senator Hanson-Young; I would be grateful for the response to come back from those giving evidence.

CHAIR: It will be much more accurate.

Senator REYNOLDS: I just wonder if you can clarify this for me. In relation to access to legal requirements, we have had some testimony before—and some of it has been quite impassioned, as some of the language you used was very, very impassioned and quite strident—in relation to the stripping away of legal rights. Correct me if I am wrong, but there is nothing in these bills that would stop your organisation from providing the advice and the assistance you currently provide. Is that correct? In terms of the legal advice that you provide, there is nothing here that would stop you doing what you are currently doing.

Mr Manne: That is not correct. Nor is it correct, with respect, to suggest that what we are saying is strident, but we are profoundly concerned that fundamental, longstanding principles and practices—

Senator REYNOLDS: I am sorry, but words like 'retraumatised', 'violates rights', 'radical repudiation', to me, are quite strong language.

Mr Manne: Well, we—

Senator REYNOLDS: I am sorry; just let me finish the question. It is just a matter of interpretation, but I interpret those as very strong words. Others may not, but I do. However, the question is really what legal rights have been removed under this, because I understand that all the 30,000, whether they are in detention or out in the community, absolutely still have recourse to legal advice. The question is who pays for it. In terms of your organisation, is there anything in this bill specifically that stops you providing the services that you currently provide?

Mr Manne: Really this bill is about the rights, of course, of asylum seekers and refugees, and—

Senator REYNOLDS: But my question was: is there anything in this that would stop you doing what you are currently doing?

Mr Manne: the focus must start with that. In answer to your question: the question is not about RILC; the question is about the rights of asylum seekers and refugees, and—

Senator REYNOLDS: With respect, Mr Manne, my question was very clear: is there anything in this that would stop you providing the services? I cannot see anything in here, in my reading and my understanding, that would stop you and organisations like yourselves from providing advice and assistance.

Mr Manne: If it is possible, could I just finish the sentence that I have started twice please. The focus must be on asylum seekers and refugees who we assist, and the bill itself denies those people certain rights that have long existed in Australia in order to ensure that basic fairness is provided, so that we get it right on what are often life or death matters. Our experience is that most of the people we have assisted over the years have enormous difficulty, great difficulty, in confronting and navigating their way through the system and presenting their claims and understanding the system without proper legal assistance.

Our other experience is that most people in this predicament also, in order to be able to present their claim so that they can be properly assessed, not only require legal assistance but also struggle to get legal assistance unless there is publicly funded assistance, which is why there has been bipartisan support until recently, it appears, over the past two decades to ensure—

Senator REYNOLDS: I know Senator Hanson-Young wants you to answer her question, but would it be safe for me to say that the answer is: no, there is nothing in the bill that is stopping you from doing what you are doing? To be expedient, the next question is: is there anything in this bill that stops—as you have talked about at some length—the judicial process, that they still have recourse to judicial action and to the High Court?

Mr Manne: It is all about the question, isn't it? If you ask the right question, we go down a path to get the right answer. The real question is not whether we can do this work, it is whether people are able to—

Senator REYNOLDS: With respect, Mr Manne, that is your question; it is not my question. My question was a very simple question, which you have studiously avoided answering, and I commend you on your ability to do that. I will finish there because I know Senator Hanson-Young—

Senator HANSON-YOUNG: No, I am happy for Mr Manne to answer your question.

Senator REYNOLDS: If you would like to ask him the question he is actually answering, which is not my question—

Mr Manne: No, I have a very simple answer—

Senator HANSON-YOUNG: I am happy to hear from the witness.

Mr Manne: I have a very simple answer to your question, it is just that I think the focus has to be on the ability of people to access legal assistance. It is very important, the question you have asked about legal assistance, and one would hope that it is asked because you have a view that legal assistance would be necessary to actually be able to engage in this process, which is a complicated and difficult process. The answer is that in our experience most people would find it very difficult to access legal assistance on their own, and yet it is fundamental to their ability to present their claims properly and to have them assessed. So that is the answer.

CHAIR: Okay, and I can answer—

Senator REYNOLDS: I have got to commend Mr Manne on not answering my question but answering the question he wanted to.

CHAIR: Senator Reynolds, I can answer the question for you. I am not going to because I am not here as a witness.

Senator REYNOLDS: I will take it as a no.

Senator HANSON-YOUNG: Mr Manne, how many staff do you have working in your office?

Mr Manne: We have around 25 to 30, including contractors and others.

Senator HANSON-YOUNG: And are they trained? What kinds of qualifications do they have?

Mr Manne: Many of the staff have qualifications as legal practitioners and registered migration agents, and there are also some staff who are administrative staff.

Senator HANSON-YOUNG: So the people who would be offering assistance to asylum seekers now are trained and qualified in being able to understand the complexities of putting forward a refugee application?

Mr Manne: Correct.

Senator HANSON-YOUNG: Someone earlier today said a protection application is around 30 pages long—is that right in your experience?

Mr Manne: Yes.

Senator HANSON-YOUNG: How easy would it be for somebody sitting in a flat in Dandenong on their own, who perhaps speaks very little English, to understand how to go about filling out that application and knowing upfront everything that they have to include?

Mr Manne: Extremely difficult, if not impossible for many.

Senator HANSON-YOUNG: What about for somebody who has been traumatised through the detention process? Obviously that would add complexity.

Mr Manne: That would add an additional obstacle for most people because it could severely impede their ability to understand the key questions and requirements of the process.

Our experience overall, in relation to those questions, is that most asylum seekers who come to Australia face a number of serious obstacles to being able to present their claims without legal assistance—that is: to understand the key questions and the key legal definitions; to understand the processes and procedures required; and to actually present their case as required, with very detailed and complicated forms—to fill those in, and to also provide a detailed statutory declaration of claims, setting out why they fear returning to their home country.

Senator HANSON-YOUNG: You spend a lot of time talking to decision makers about the policies in this area. Do you think MPs and senators have an understanding as to how to go about filling out one of those applications?

Mr Manne: I could not answer that, but what I can say is that, in a broader sense, in relation to the proposal here, one of our profound concerns is that it is deeply impractical. If you put together the complexity of the process, the requirements of making a valid legal application—which are fundamental to making a proper assessment of whether someone needs protection—and the fact that most people would not be able to afford legal assistance, which is why we have had a publicly funded scheme, one of the profound concerns of this package is that it may well be that many or most people are actually unable to present claims as required under the system in order for the government to be able to make a proper assessment—to get it right on whether or not someone needs protection, which is the fundamental point. Due process is not a mere abstraction; due process is actually fundamentally practical, and it requires that someone be able to present their claims coherently, to be able to understand the key questions, and to have them assessed properly to engage in that process. That is a fundamental tool that this country and others use to get it right in what are often life or death matters—and that includes both finding people to be in need of protection and also finding them not to be in need of protection, but having a system which is not arbitrary but is coherent, principled and fair.

Senator HANSON-YOUNG: It has been argued already this morning that—and in fact you used the term 'false economy', and someone else has already touched on that—this 'fast tracking' actually bounces a whole lot of cases into the courts and clogs the court system. What is that going to mean for the individuals involved? If this whole process is going to take years and years because people do not get it right at the beginning—years and years before they are even given a temporary visa—will that mean more people back in detention?

Mr Manne: One of the consequences may well be that. On your question: one of the things which history shows in Australia is that, if errors are not fixed at merits review level—errors which are very common in the primary process—experience shows that if government cuts corners, as we have seen recently in offshore processing regimes in Australia, then they end in fundamental failure and very high overturn rates. The best example I can give you is: under the previous government's offshore processing regime, the High Court case of M61, which found that those decisions were constrained by law, resulted in an overturn rate, in the end, at merits review, of decisions at the primary stage, of around 80 per cent. So what we see is that cutting corners does not work. Cutting corners at merits review level does not work. It ends up in the courts, and it ends up with wholesale reversals of refusals once fair processes are brought to bear. What it also can result in, in the meantime, is prolonged detention of thousands of people through processes that are unfair until they are resolved—

Senator HANSON-YOUNG: Which would also be quite costly to the taxpayer.

CHAIR: I am sorry; we might have to leave it there. I am sorry about that, Mr Manne, but we are constrained by other things. Just a quick question from me at the end for someone else: do you refer people or their representatives or their families to politicians to try and help them make submissions to the minister, where it is not possible to go into a full legal thing?

Mr Manne: I—

Mr Hanson: Sorry—I would just like to make it clear as well: with people assisting other people with immigration processes, you have to be very careful because it is a criminal offence for someone in certain circumstances—

CHAIR: And that is why I am suggesting that at times you might say, 'We're too busy to help you,' or, 'We're overloaded, but why don't you go down the road and see Mr X or Ms Y; she is your local senator or member; she might be able to help your family that you are appearing on behalf of.' I am just wondering if it is an option you have thought of.

Mr Manne: Having worked in this area for well over a decade, our common experience is that referrals are made to us, rather than us being able to refer.

CHAIR: But where you cannot do them because of—

Mr Manne: I understand.

CHAIR: I do a few of those, not terribly well, but I write to the minister to put the point. I have not had much success, I might say.

Mr Manne: Our experience is that the resources are so limited that it happens sometimes but usually it is inadequate in terms of what people need.

CHAIR: It was just a thought. Sorry, the bells are ringing. We have to go. Thank you very much for your appearance.

Proceedings suspended from 11:05 to 12:39