Peter Hillerstrom

The Secretariat
Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Thursday 29th April 2004

Dear Secretary

Inquiry into the provisions of the *Migration Amendment (Judicial Review) Bill* 2004

The proposed amendment to the *Migration Act* 1958 demonstrates that there has been a recognition that this is an area of the law that has become increasingly unworkable. The successive amendments of previous years have failed to achieve the complete renovation that migration law in Australia so severely requires. Yet sadly the proposed amendment, as it currently stands, has scant chance of succeeding where past alterations have failed. Rather than learning from previous mistakes, the 2004 bill purports to build on them. The currently disastrous situation, that has brought the entire federal judicial machine to a standstill, requires a re-examination that is unfortunately beyond the scope of the *Migration Amendment (Judicial Review) Bill* 2004.

The bill aims to effect two principal changes to the *Migration Act* 1958. Firstly the bill seeks to negate the common law effect of the case of *S157/2002 v Commonwealth of Australia*.[1] That is, under the proposed amendment the crucial distinction between jurisdictional error and other grounds for review is removed as subsection 5(1) extends the definition of a privative clause decision to include 'purported' decisions. Secondly, the time limits established under previous amendments are redefined to allow for 28 day limits with the possibility of an extension to 56 days for both the High Court and the Federal Court (as well as the Federal Magistrates Court). The result that the combined effect of these two changes is intended to have is to reduce government litigation costs as the amount of judicial review applications made is significantly reduced. As stated in the bill's second reading the changes are part of the 'government's continual, yet urgent, commitment to implement effective reforms to the migration litigation system'.[2] Both these changes, however, are certain to fail in the tasks they set out to achieve due to the constitutional and common law principles that are being sadly ignored.

Revising the definition of 'privative clause decisions':

The fundamental issue that the bill seeks to address is that by limiting review of migration decisions in this way, the result will be a further burdening on the High Court as the number of applicants who avail themselves of the court's original

[1] (2003) 195 ALR 24
[2] http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_judicial_04/ (1st May 2004)

jurisdiction will surely increase. In purely statistical terms, the immediate result of the previous reforms have been a 217 per cent increase in the number of matters filed and under the Court's original jurisdiction there has been an increase in the number of constitutional writs filed from 300 to 2 131 compared with the previous year. Of these 99 per cent involved migration issues, which in total made up 82 per cent of all matters filed in the High Court in 2003.[3] While the extension of the privative clause definition may well restrict the hearing of such cases in the Federal Court and the Federal Magistrates Court, cases will continue to be brought in the High Court under section 75(v) of the Constitution, a jurisdiction that no statute can displace. Thus it is fallacious to suggest that the proposed amendments will reduce the government's litigation costs. In spite of the fact that there will be a reduction in matters filed in the Federal Court and the Federal Magistrates Court there will be a complimentary increase in matters filed in the High Court. Simply extending the definition of a 'privative clause decision' will do little to alleviate the burdens currently experienced by judiciary and legislature alike.

Time Limits in the Migration Act:

The second reading speech of the proposed bill drives home the point that the motivation behind the introduction of time limits for making an application for review in the High Court is to reduce the number of applications made by ensuring that those applications that would have been made after the final 84 days are rendered invalid.[4] As the legislation currently stands, applicants have an extra seven days to make an application in the High Court after the time period has expired for applications to the Federal Court and the Federal Magistrates Court. Effectively, the amendment aims to bring the High Court limits in line with those of the Federal Court and the Federal Magistrates Court, while allowing for the possibility of extension at the discretion of the court.

There is no doubt that time limits are a contentious issue. In his persuasive minority opinion in *S157* Callinan J advises that such limits would be invalid if they aimed to prohibit proceedings but would be valid if the limit in question was substantially longer or if the legislation allowed for the possibility of extension.[5] The proposed amendment does indeed offer the capacity for extension at the discretion of the court and so may indeed have the result that the government seeks to implement. Yet it must be noted that in a case such as *S157* it was held by the Chief Justice that such time clauses, then in an earlier incarnation, will not apply to 'purported decisions'.[6] Part 2 (14) of the proposed amendment would displace this authority as it states that such time limits apply to decisions made as well as 'purportedly made'.

The question that must be asked is whether for defendants deprived of their liberty, suffering the additional burden of language barriers as well as a crucial dearth of access to legal advice, funding and representation, such time limits, should they be held to be constitutional are an unnecessary burden on asylum seekers in Australia. The motives of an administration that purports to deprive what would amount to a majority of the asylum seeking community in Australia of the right to justice and procedural satisfaction are disturbing indeed. Surely a solution can be reached that

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[3] *High Court of Australia Annual Report 2002-2003* at 8

[4] http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_judicial_04/ (1st May 2004)

[5] Robertson H, 'Truth, Justice and the Australian Way- Plantiff S157 of 2002 v Commonwealth' (2003) 31 (2) *Federal Law Review* 373-393 at 387

[6] *S157/2002 v Comonwealth of Australia* (2003) 195 ALR 24 per Gleeson CJ

does not so blatantly dispense with the rule of law for the purposes of the expedient implementation of government policy.

Clearly the proposed change to the time limits and the privative clause definition placed on applications for review to each of the three forums specified will do little to ameliorate the current situation. What is required is a complete review of the policy of limiting judicial review of migration decisions if any real progress is to be made in this important area of the law sorely in need of prompt rectification.

Sincerely yours

Pater Hillerstrom