Mr Jamie Snaddon

4 May, 2004

The Secretariat
Legal and Constitutional (Legislation) Committee
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Re: Inquiry into the provisions of the *Migration Amendment (Judicial Review) Bill* 2004

Dear Secretary,

Constitutional validity of subsection 5(1).

The unanimous judgment given in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 (S157) clearly state that privative clauses must be [1] interpreted consistently with the Constitution, and [2] that it is presumed that Parliament does not intend to cut down the jurisdiction of the courts unless its is expressly stated or necessarily implied[1]. Accordingly, the joint judgment[2] went on to state that if purported decisions qualified as decisions made "under this Act", as per section 474(2) of the *Migration Act* 1958, then subsection 474(1)(c) would be unconstitutional and thus invalid[3]. Further, they added that a non-judicial decision maker of the Commonwealth could not conclusively determine the limits of their own jurisdiction, as this would infringe the mandate of Ch III of the Constitution[4], and equally be invalid.

The proposed Bill, as outlined in the second reading speech and the explanatory memorandum[5], is intended to uphold this distinction. The provision has been very careful in avoiding 'purported' decision from the definition made within the narrow section 474(2), and therefore they have not removed jurisdictional error from review. The aim of the amendment is to reduce the pursuit of litigation as an end in itself and to tackle the overwhelming cost this creates, at the same time allowing the courts to maintain judicial review by keeping the provisions within the confines of the Constitution. Parliament has made its intentions clear that they do not intend to allow the definition of 'purported' decision to extend beyond its application to the procedural requirements of the proposed time limits, and the High Court in S157 stated that they are to give the words of a statutory provision the meaning that the legislature has intended[6].

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[1] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 (S157) at 72, 73
[2] Gaudron, Kirby, McHugh, Gummow, Hayne JJ
[3] Above, note 1 at 76
[4] Above, note 1 at 76
[5] http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_judicial_04/
[6] above, note 1at 91 quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384

The High Court is guaranteed jurisdiction in all matters where a writ of Mandamus, Prohibition or Injunction is sought against an Officer of the Commonwealth, as prescribed by section 75(v) of the Constitution. As the right to recourse in the Federal Court and the Federal Magistrates Court has been greatly reduced by the provisions within the *Migration Act* 1958, applicants are forced to seek review at the High Court. This has had the result of a 217 percent increase in the number of matters filed, and with this 99 percent of this increase involves migration cases. Because of this, it can be argued that time limits are a necessary instrument to tackle this burgeoning trend.

Notwithstanding this, the High Court may still find the provision unconstitutional should the particular situation arise. Callinan J[7] stated that proceedings may be regulated as to procedure, but highlighted that they must not be in substance a prohibition, which would make any constitutional right of recourse illusory. 28 days has been argued recently as 'draconian', and capable of giving rise to injustice[8]. What if a jurisdiction error on behalf of the decision maker was to be the cause of a delay and therefore resulted in the applicant failing to meet the strict time requirements? The complexities within the migration arena are ever increasing, and with the possibility of poor advice and mistakes made to the detriment of applicants, would this not make constitutional recourse illusory in certain circumstances? A hypothetical example could be that there was a delay on the part of the Migration Review Tribunal to provide a copy of their decision to an applicant in detention that went far beyond the 14 days stipulated within section 368D of the *Migration Act.* Suppose this scenario inflicts a small window of time to appeal, and subsequently a similar situation arises to that in *Abidin v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 54, where the application for review had been then placed within time in the departmental box at the Port Hedland Detention Centre, but the application was not received by the Court Registry until after the time restriction had lapsed, so at no fault of the applicant no appeal could will be granted. This could be construed as 'prohibitive' as outlined by Callinan J, and be deemed unconstitutional on the grounds that it excludes original jurisdiction of the High Court by the imposition of time limits immune from decisions infected with jurisdictional error.

The High Court held that a non-judicial decision maker cannot define the limits of jurisdiction because to do this is to exercise the judicial power conferred exclusively on courts of law. If such a situation arose similar to the hypothetical scenario given above, it could be argued that the result of such a provision such as section 5(1)(b) is to define the limits of jurisdiction and therefore invalid . Furthermore, the High court has been specific in illustrating that any decision which involves jurisdictional error is no decision at all[9], and if this includes an inviolable limitation that results in the applicant failing to meet the timeline for appeal, there is every reason to believe from the dialogue of the High Court that the provision will be read down or struck out so that it falls within the constitutional boundaries.

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[7] above, note 1 at 174, 177
[8] WAIM v Minister for Immigration and Multicultural Affairs [2004] FMCA 33 at 40
[9] Above, note 1 at 77

Dialogue from the High Court in S157 has illustrated that if any rights or obligations are to be removed, parliament must make its intention clear through unambiguous language. If this is achieved, inviolable limitations can be removed, and thus not subject to jurisdictional error. An example of this could be the enacting of *Migration Legislation Amendment (Procedural Fairness) Act* 2002. However, in the present Bill there seems no clear indication of unambiguous language as to the removal of inviolable limitations, rather recognition that they exist but with no recourse if an extremely short time period has lapsed. This is in stark contradiction to the interpretation the Court suggested Parliament should adopt when utilizing privative clauses, in that the clause should not be seen as qualifying the power of the decision maker, but rather qualifying the protection which it purports[10]. Engaging in the previous, and erroneous, construction of privative clauses could encourage the Court to read down the effect of section 5(1)(b).

The proposed Bill is definitely well-intentioned, and is trying to interpret the decisions made by the High Court in S157. However, it is clear that it requires more work. Even with the possible opportunity for extension, 28 days is an extremely short time period to process an application, especially with respect to refugees and the problems they face gaining access to legal advice, and their potential struggles with the English language. Even if such a narrow reading could be given to section 5(1)(b), if the result would be to arbitrarily remove the right to have a decision reviewed it not only challenges the idea of justice, but risks being argued as Constitutionally invalid.

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[10] Above, note 1 at 91