1 April 2005 H16
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Mr Owen Walsh
Secretary
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

Inquiry into the Migration Litigation Reform Bill 2005

I refer to your email of 17 March 2005 in which you invited the Society to provide a submission to the parliamentary inquiry into the Migration Litigation Reform Bill 2005.

The Bill has been considered by the Society's Human Rights Committee, which has provided the following comments in relation to particular aspects of the Bill.

Overview

While we recognise the need to process migration cases expeditiously and efficiently, we urge that measures proposed for that purpose not jeopardise fundamental safeguards or risk placing Australia in breach of its international obligations. We are opposed to provisions in proposed (and passed) legislation that have the effect of further restricting the ability of migration matter applicants to access judicial review, particularly by way of introduction of privative clauses. Any basic safeguards which remain should be preserved.

Although the government has refused to make available to the public the findings of its Migration Litigation Review, a few comments can be presumed from the proposals the government has introduced. In seeking to reduce the number of matters before the courts, the government response has focussed on implementing barriers and restrictions on the judicial process. It has failed to consider the structural reasons behind the problem. In particular, it has failed to introduce measures designed to improve the quality and transparency of primary decision making. It has also failed to address the consistency, quality and transparency of both the Migration Review Tribunal and the Refugee Review Tribunal. Further, the government has made no proposals designed to strengthen the availability of legal advice and assistance, whether pro bono or otherwise, to applicants before the tribunals leaving some of the most vulnerable members of society to attempt to represent themselves in these matters.

Time Limits imposed by the Bill

The Committee is in favour of uniformity but consider that the normal 28 day time limit may be too tight if there are delays in applicants accessing legal advice particularly if they are in detention and/or have language difficulties.

Provisions for summary decisions

The test of “no reasonable prospect of success” is insufficiently defined and therefore uncertain. It is something less than hopeless or bound to fail but how much less is unclear.

Deterring unmeritorious applications/ costs orders - possibility of costs orders against lawyers and voluntary organizations

The Law Society strongly objects to this proposal.

The government, in introducing these amendments, seeks to prohibit lawyers and migration agents from "encouraging the initiation or continuation of unmeritorious migration litigation." It seeks to introduce a personal costs order against such persons where there was "no reasonable prospect of success" and the person has either "(i) given no proper consideration to the prospects of success or (ii) initiated or continued migration litigation for a purpose unrelated to the objectives of the court process." Lawyers will be required to certify an application has merit.

In setting forth the basis for such legislative need, the Commonwealth Attorney-General has relied upon a statistic that 93% of all migration applications for review were found to be "unmeritorious". Upon further questioning, a DIMIA representative acknowledged that no distinction was able to be drawn between an "unsuccessful application" and an "unmeritorious application". There are, of course, many reasons why an application would be withdrawn that have no bearing on the meritorious nature of the claim. Absent any clearer statistics or a release of the oft-cited, but never released, findings of the government's inquiry in migration litigation reform, there would appear to be no valid policy basis for these amendments.

In addition, the proposed amendments, if enacted, would likely create a strong disincentive for pro bono, and other representation of migration clients. Access to justice for migration clients is already extremely limited because of the availability and restrictions place on legal aid to potential litigants. The current guidelines imposed upon legal aid service providers is that grants of aid can only be provided in test case matters in the Federal or High Court. Funding is limited by a requirement that there be "differences of judicial opinion". This limitation is very narrow and results in disadvantaged clients with meritorious cases being denied assistance.

Further, the funding is minimal. DIMIA's statistics indicate that, Australia-wide, in the financial year 2001-02, funded representation was provided in 398 non-detention cases. There are over 8000 Temporary Protection Visa holders applying for further visas, many of whom are unable to pay for representation. These persons are often

unrepresented, thereby adding to their experience of marginalisation and discrimination. It also contributes to the downgrade of Australia's commitment to the elimination of discrimination and the promotion of human rights.

There is no funding for primary stage applications. Adequate representation, and funding for that representation, would likely result in a reduction of costs incurred by the justice system as a result of poorly prepared applicants or self-represented litigants.

For a number of years the Federal Court and indeed the Attorney General have requested and encouraged Bar Associations and Law Societies to nominate practitioners who are prepared to act on a pro bono basis for indigent clients otherwise unrepresented in matters before the Federal Court including migration matters. Voluntary organizations have been formed to assist with this need eg. The Refugee Advocacy Service of South Australia (Inc). The threat of costs orders is likely to result in pro bono efforts coming to a halt. The Commonwealth might think that this will give them an advantage in litigation but we submit that it will result in a huge upsurge in numbers of unrepresented litigants and increased burden on the judicial system with consequent delays. It will achieve the opposite to the outcome allegedly desired.

At the very least voluntary organizations and lawyers acting pro bono should be exempted.

The twofold test in clause 486E is vague and uncertain. Under the proposed amendments, lawyers are required to make a determination of the merits, or otherwise, of a given application. Lawyers must show that they have given "proper consideration to the prospects of success". It is unclear how lawyers are supposed to give this proper consideration without having access to documents often available only through discovery proceedings. What amounts to proper consideration to the prospects of success? What is the standard? Prospects can change dramatically between the time when proceedings are issued and when judgement is given. The volume of case law requires constant and lengthy reading to stay in touch with new developments. It is also a very complex area of the law. New decisions can result in significant changes to arguments and even concessions.

Migration litigation may have a number of legitimate secondary purposes e.g. keeping a family together. If that is one of a number of purposes in commencing the litigation, is that caught by the provisions of 486E(1)(b)(ii)? The clause is drafted too broadly.

In my personal view, this threat of a cost penalty is an affront to the principles of access to justice. To frighten off legal advisers from taking up cases of clients is offensive. This is Australia; we should be setting standards of fairness.

Furthermore, the amendments are intended to reach to advise-only services of the legal aid and other community centres. The Explanatory Memorandum to the Bill makes clear this intention when it speaks of costs orders against those who "promote

litigation behind the scenes". While it is unclear how the Minister would be able to determine this, it has the direct result of further limiting applicants' access to justice.

Constitutionality of privative clauses

We note that the proposed amendments to the Administrative Decisions (Judicial Review) Act 1977 and Migration Act 1958 include a definition of "purported privative clause decisions". The background to the extended definition of privative clause matters is well known to the Committee and is adequately canvassed in its report into the (now lapsed) Migration Amendment (Judicial Review) Bill 2004.
We oppose the extension to the definition of the privative clause decisions and we question its constitutionality. Section 75(v) of the Constitution seeks to protect persons against unlawful incursions by government. The proposed extension would undermine the very protections s75 (v) of the Constitution seeks to ensure. Additionally, the proposed extension could well result in undermining Chapter III of the Constitution which provides that the judicial power of the Commonwealth be exercised only by s71 courts.

I trust that these comments are of interest to you and wish the Committee well with its Inquiry.

Jurisdiction of the FMC and the removal of the High Court's discretion to remit cases to the Federal Court

The removal of the High Court's discretion conferred by the proposed amendments is, according to the Explanatory Memorandum, designed to prevent double-handling of cases that are remitted from the High Court to the Federal Court to the Federal Magistrates Court. Not all migration cases fit into the FMC's jurisdiction as a forum for less-complex cases. By removing the High Court's discretion in determining the appropriate court to hear cases remitted to it, the amendments create a new kind of double-handling requiring the High Court to remit a matter to the FMC, who then may transfer the matter, due to its complexity, to the Federal Court. It is unclear that the amendments would result in the streamlining they seek to address.

Yours sincerely

Alexander Ward
PRESIDENT