Submissions regarding the *Migration Litigation Reform Bill 2005*

for further information contact IARC's Director/ Principal Solicitor, Suhad Kamand

6 April 2005

Set out below are submissions to the Senate Legal and Constitutional Legislation Committee (**'Committee'**) regarding the *Migration Litigation Reform Bill 2005* (**'Bill'**).

1. About the Immigration Advice and Rights Centre

1.1 Established in 1986, the Immigration Advice and Rights Centre (**IARC**) is a specialist community legal centre in New South Wales providing free advice, assistance, education, training, and advocacy in law and policy reform in the area of immigration and refugee law. Engaging the services of around 70 volunteer migration agents and administrative staff, IARC provides free and independent advice to almost 5,000 socio-economically disadvantaged people each year. A further 1,000 people or so attend our training seminars annually, while thousands more subscribe to or access IARC's plain English publications which seek to maximize awareness of Australia's immigration law and policy.

1.2 In keeping with its goal of maximizing access to immigration legal information, IARC produces several plain English publications including:

- *The Immigration Kit*, a practical guide for immigration advisers;
- the *Immigration News*, a quarterly publication setting out the latest Australian immigration law and policy developments;
- IARC Information Sheets which provide a step-by-step guide to the application and review process for various visas and other aspects of Australia's immigration processes;
- IARC's website, which provides access to the above Information Sheets, and to the latest information regarding IARC's services.

1.3 IARC also conducts training /information seminars for members of the public, the migration profession, those who intend to enter the migration profession, community service providers and community groups. These seminars range in content and

objective from raising awareness of IARC's services to informing communities of their immigration rights and obligations.

1.4 Users of IARC's services are generally low or nil income earners and frequently have other disadvantages including low level English language skills, past torture/ trauma, domestic violence etc.

1.2 Since its establishment in 1986 IARC has developed a high level of specialist expertise in the area of immigration law and procedure. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration law. IARC uses its expertise to promote the interests of the most vulnerable participants in Australia's immigration system, and advocates, through forums such as this enquiry, to maximize access and equity in Australia's migration processes.

2. Preliminary matters

2.1 While IARC welcomes the opportunity to comment on the *Migration Litigation Reform Bill 2005* ('**Bill'**), we are concerned that this Bill has been released for public comment without all relevant information being made publicly available. We refer here primarily to the Penfold Report[1] which continues to be concealed from the public. We question the rationale behind concealing the findings of an inquiry 'on which the proposals in the 2005 Bill are based'[2]. This concern was also raised in Bills Digest 118. The concern stated therein remains relevant today, that 'this prevents any assessment of the adequacy … of the Bill as a response to the Review'.

2.2 We are curious as to why the Penfold Report has not been publicly released, and question whether this enquiry can be properly informed without that report being made publicly available. Until that report is released there can be no publicly recognized policy basis to support the amendments set out in the Bill.

2.3 Notwithstanding this, set out below are our general comments and concerns regarding the Bill.

3 IARC's concerns regarding the Bill

3.1 While IARC supports measures which seek to increase efficiency in migration determination processes and minimize unmeritorious claims, we are of the view that the Bill does not achieve these objectives.

3.2 IARC opposes the Bill and urges the Committee to question the prudence of a Bill which is replete with far-reaching concepts and ill-defined offences which attract highly onerous penalties. Such a Bill is destined to defeat its own objectives by inviting, and indeed requiring, judicial scrutiny of its ill-defined parameters and application.

3.3 IARC is also concerned that the Bill, if passed in its current form, will service only to:

---

[1] The report stemming from the October 2003 Migration Litigation Review conducted by Hillary Penfold QC

[2] Bills Digest 132, Migration Litigation Reform Bill 2005, p 4. Mr Phillip Ruddock also states in his second reading speech (10 march 2005) that ' the measures in the bill have been drawn from recommendations by the migration litigation review – also called the Penfold inquiry'.

- increase litigation and consequent delays;
- diminish access to sound legal advice and representation (through the intimidating and far-reaching threat of personal cost orders)
- increase insurance premiums with the flow on cost being transferred to consumers, except in the non-profit sector in which those costs cannot be transferred at all (we anticipate that insurance premiums would be likely to increase due to the increased and immeasurable professional risks introduced by the Bill);
- undermine the fundamental principles of access and equity which underpin the nondiscriminatory and fair administration of law and justice.

3.4 'Unmeritorious' actions

3.4.1 IARC is concerned also that the Bill is premised on the view of the Commonwealth Attorney General that the majority of cases brought before the Courts by applicants are 'unmeritorious'. What is meant by this is unclear. The basis of Mr Ruddock's view appears to be the much-used statistic that the Department of Immigration (**'Department'**) has won over 90% of cases decided at hearing. Before the Bill can be endorsed or rejected for its ability to achieve its stated objectives, further information is required regarding the Attorney General's asserted 90% success rate ie:

- Does this include cases settled out of court?
- Does the figure include matters which are withdrawn? Does the Bill consider the many reasons why applications may be withdrawn?
- Does the figure include matters won at first instance by the applicant and consequently appealed by the Department (which may test the view that such action is being taken by applicants to prolong their stay in Australia)?
- How many Court actions have flowed from the judicial uncertainty stemming the introduction of 'privative clause decisions' under section 474 of the *Migration Act 1958*?
- How many cases involved unrepresented litigants? Does the Bill have the potential to increase the number of unrepresented litigants by putting in place highly onerous requirements on lawyers and migration agents (ie personal costs orders, increased professional negligence risks based on time limits which are based on 'deemed notification', requirement for certification as to the merits of the case etc)?
- Has any assessment been done as to whether unrepresented litigants would have pursued their cases if they had access to sound legal advice (eg access to legal aid)?
- What studies have been done to support the conclusion that cases which are lost are 'unmeritorious', and what does this mean?

3.4.2 Without a thorough assessment of the above it is impossible to assess whether the measures proposed in the Bill address the *causes* of the high migration litigation caseload.

3.5 The Possibility of Costs Orders Against Lawyers and Voluntary Organizations

3.5.1 IARC strongly objects to the provisions of the Bill dealing with costs orders.

3.5.2 While the invitation to comment on the Bill refers to the 'possibility of costs orders against lawyers and voluntary organisations', the Bill is more far-reaching than this,

introducing a possibility that costs orders can be made against any 'person' who breaches the proposed section 486E of the *Migration Act 1958* (**Act**). That section reads:

486E Obligation where there is no reasonable prospect of success

(1) A person must not encourage another person (the litigant) to commence or continue migration litigation in a court if:
  (a) the migration litigation has no reasonable prospect of success; and
  (b) either:
    (i) the person does not give proper consideration to the prospects of success of the migration litigation; or
    (ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

(2) For the purposes of this section, migration litigation need not be:
  (a) hopeless; or
  (b) bound to fail;
  for it to have no reasonable prospect of success.

(3) This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.

3.5.3 The proposed section 486E creates a positive obligation on a 'person', to 'not encourage' litigation where there is 'no reasonable prospect of success'. The obligation is assessed by reference to whether the person did not give 'proper consideration to the prospects of success of the migration litigation', or their purpose in commencing or continuing the migration litigation is 'unrelated to the objectives which the court process is designed to achieve'.

Addressing each component part of this section in turn, it is clear that the obligation is extremely far-reaching and has the potential to lead to increased litigation. For example:

- **S486E (1) - 'person' –** the obligation to ' not **encourage** migration litigation applies to a 'person'. 'Person' is not defined, and could be any person, including not only legal advisors and migration agents, but also family members who, like most family members, prioritise the unity of their family over all other things. The meaning of 'encourage' is also unclear and potentially very broad, and is likely to invite judicial scrutiny as a result.

- **S486E(1)(a) - 'migration litigation has no reasonable prospect of success'**. We refer to and endorse the submissions made by SBICLS, QPILCH and RAILS on this point, and add that this clause has the potential to create a large volume of new litigation to establish what, in migration cases, amounts to 'no reasonable prospect of success'.

- **S486E(1)(b) (i) – 'the person does not give proper consideration to the prospects of success of the migration litigation'.** Given the potential for the obligation in clause 486E to extend to family members of applicants, many of whom have poor English skills and little, if any awareness of immigration jurisprudence, we question how such people can be expected to 'give proper consideration to the prospects of success of the migration litigation'. Indeed, what does 'proper' consideration mean? What is the test for whether the amount, extent or nature of consideration given by a 'person' was proper? Against what standards is 'proper' to be assessed. Does this clause require all

'persons' to be familiar with migration law in order to properly consider the prospects of success? These are questions which will, no doubt, form the basis for further litigation, increasing the burden on the courts.

- **S486E(1)(b)(ii) – 'a purpose in commencing or continuing the migration litigation …'** Presumably this section is intended to capture those who advise clients to commence litigation for the purpose of prolonging their stay in Australia, in circumstances where the litigation has no reasonable prospect of success. Unfortunately, given the application of this section to all 'persons', including lay persons and family members, the purpose of wanting to maintain the family unit in Australia may be a purpose which amounts to a breach of this section. Again, this will undoubtedly be a question to be tested through further litigation. Another question which will undoubtedly be brought before the courts is the meaning of 'a purpose'. Reminiscent of the jurisprudence surrounding legal professional privilege, clarification regarding the application of the clause to situations involving multiple purposes will be required. One likely outcome of this Bill is to invite judicial scrutiny of cases where migration litigation is motivated by many purposes, and establishing which purposes are relevant to s486E.

- **S486E(1)(b)(ii) – '… is unrelated to the objectives which the court process is designed to achieve'.** Another question which may have to be resolved through further litigation, is what are the 'objectives which the court process is designed to achieve', and to what extent does the purpose of the litigation have to be 'related'. How direct a relationship is required?

  Surely the court process is designed to achieve many things, including:

  - resolution of questions of law;
  - interpretation of legislation;
  - preserving accountability/ transparency of the administrative limb of the migration determination process;
  - ensuring consistency and legal correctness of the decisions and processes of the Department and the administrative tribunals.

  Ironically, the Bill itself undermines the 'objectives which the court process is designed to achieve' by further limiting the role of the courts (especially in removing its power to review primary decisions). Resolving test cases and shaping migration jurisprudence is a fundamental part of the courts' role. Intimidating measures which expose all persons to costs orders for encouraging cases which are of merit but do not have a reasonable prospect of success (broadly and ambiguously defined) can only be seen as 'related' to the objectives which the court process is designed to achieve. Again, this is a question which invites further litigation.

  To introduce measures which frustrate the capacity of the Courts to consider cases which clarify or develop existing legal principles, and to intimidate and punish those who encourage such cases, does little to further the objectives of the courts. Indeed, the wording of the act is so broad and intimidating that the likelihood of test cases being brought before the courts is practically

extinguished. This surely flies in the face of the 'objectives which the court process is designed to achieve'.

3.5.4 Costs Orders

Section 486F of the Bill provides that the courts 'must consider' whether a costs order should be made. The costs order may be imposed on any 'person' who contravenes section 486E. The potential impact of this is:

- the proposed section can be applied to any person who is seen in any way to have 'encouraged' the migration litigation, including family members, or any person who may have provided one-off advice to a potential litigant. Again, this is a far-reaching provision which will deter even the most sound and experienced practitioners from becoming involved in any way in migration litigation. The flow on effect of this will be a diminution in the availability of migration legal advice/ representation, and an increase in unrepresented litigants. We refer to and support the submissions made by:

  - the Migration Institute of Australia[3]; and
  - the Law Society of NSW[4]

  on this point.

- the increase in liability which inevitably results from the Bill for migration practitioner may result in **increased professional indemnity insurance premiums** to cover the increased professional risks. The extent of such increases may be unaffordable, particularly for the non-profit sector which has no way of passing those costs on. For the commercial sector, any increased premiums which practitioners must pay will be reflected in higher fees which are passed on to consumers, making immigration advice and assistance more unaffordable, thereby undermining further the principles of access and equity. **We strongly suggest that the Committee requests comments from Law Cover and prominent insurers to assess the extent of this most important aspect which may cripple the entire migration profession.** We have also reviewed the submission provided by the Migration Institute of Australia, and have suggested that they provide a supplementary submission addressing this point.

3.5.5 Lawyer's Certification

Pursuant to the proposed section 486I:

A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.

This section is problematic and invites increased litigation to resolve the following:

- What is the test for whether a lawyer has 'reasonable grounds'?

---

[3] *Submission To The Legal and Constitutional Committee Migration Litigation Reform Bill 2005*, April 2005, pages 5 and 6.
[4] Law Society of NSW submission, dated 1 April 2005

- Defining ‘reasonable grounds’ by reference to whether the litigation has a ‘reasonable prospect of success’ is of little assistance given the ambiguity of the what constitutes a reasonable prospect of success;
- Naturally the certification can only be provided by a lawyer based on their knowledge of the circumstances of the case at the time of lodging the application for review (and therefore prior to obtaining documents through the discovery process, which can only occur after proceedings are commenced). What would happen if those circumstances change, or if further information is brought to the lawyers attention after making the certification, which alters the practitioners views of the reasonable prospects of success? What would happen if the law changed after the time of providing the certification such that the prospects of success became altered?

3.5.6 Limited Waiver of Legal Professional Privilege

The Bill provides that, in determining whether or not to make a costs order under section 486F, a ‘person’ may produce a document ordinarily protected by legal professional privilege in defence of their position. This section is problematic in instances where litigants have been ‘encouraged’ by numerous ‘persons’ to commence or continue migration litigation. In such circumstances:

- Are all such persons joined to the proceedings?
- What would happen if one person is considered to have contravened section 486E, but in their defence, they wish to argue that another ‘person’ also breached section 486E. Would they then be able to access privileged documents held by another practitioner in order to prove this? Such a scenario reveals fundamental shortcomings in the proposed legislation, as well as its potential to lead to protracted litigation which will create additional burdens on the courts.

3.6 Provisions for Summary Dismissal

3.6.1 We have had the benefit of reviewing the submissions made by QPILCH, SBICLS and RAILS on this matter. IARC strongly supports those submissions.

3.7 Time limits imposed by the Bill

3.7.1 IARC objects to the strict time limits the Bill seeks to impose for commencing judicial review, and the imposition of those time limits in relation to ‘privative clause’ decisions and ‘non-privative clause decisions’. In relation to the questionable constitutionality of the proposed section 486A(1) of the Act we refer to and agree with the concerns raised by Peter Prince in Bills Digest 118 (p13-14), in which he quotes the concerns raised by Justice Callinan of the High Court in *Plaintiff 157* regarding the unconstitutional nature of regulations which seek, in substance, to prohibit access to the remedies available under s75 of the Constitution. We concur with the view of Peter Prince that

> Placing a maximum time on use of the High Court's discretion in migration matters…amounts to an absolute prohibition on appeals under section 75 outside this time, with no allowance for the circumstances of any particular case[5]

We are also concerned at the potential for increased professional indemnity risks incurred by practitioners who are left to juggle the strict time limits with making a full enough investigation of a case in order to determine (and provide a certification) that the case has a reasonable likelihood of success.

Again, we suggest that the Committee obtains an opinion from Lawcover and other professional indemnity insurance providers regarding how the professional risks associated with these proposals are likely to be measured and reflected in professional indemnity insurance premiums.

We also reiterate the impact that this proposal is likely to have in dissuading practitioners from getting involved in migration litigation, and the resultant increase in unrepresented litigants which will inevitably ensue.

We thank you again for the opportunity to comments in relation to this Bill.

IMMIGRATION ADVICE AND RIGHTS CENTRE INC.

Suhad Kamand
Director/Principal Solicitor
Email: Suhad_Kamand@fcl.fl.asn.au

[5] Bill's Digest 118 goes on to cite the vie of Callinan J that, setting a time limit on appeals to the High Court is contrary to the provisions in the High Court Rules (O 60 r 6) to extend the time for appeals as the justice of the case requires.