GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

6 April 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the provisions of the Migration Litigation Reform Bill 2005

Thank you for the opportunity to make this submission, and for the extension of time until 6 April 2005. We support efforts by Parliament to improve the efficiency of migration litigation and in particular to reduce unmeritorious claims. Conferring jurisdiction on the Federal Magistrates Court that is identical to the jurisdiction of the High Court under section 75(v) of the Constitution may alleviate some of the pressure placed on the High Court by the large volume of migration review applications. We note, however, that under the Constitution the possibility of seeking judicial review in the High Court must remain open.

We address four issues in our submission: (1) the need for the legislation; (2) the concept of a 'purported privative clause decision'; (3) the provisions for discouraging unmeritorious litigation; and (4) time limits. In making this submission, we have drawn on our previous publications: Mary Crock and Ben Saul, *Refugees and the Law in Australia* (2002, 2nd edition forthcoming 2005), and Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219.

1. The Need for the Legislation

The core justification for the Bill is the assumption that judicial review is being inappropriately used in the majority of cases to prolong the stay in Australia of unmeritorious applicants (Minster Ruddock, Hansard, House of Representatives, 10 March 2005, p. 2). This argument is based on the claim that the Government has won over 90 per cent of cases decided at hearing.

There is no question that a proportion of applicants are using judicial review to extend their stay even though they do not have a meritorious case. . However, it is questionable that the high volume of cases won by the Government indicates that most applicants are abusing the system. **First**, judicial review applications chiefly involve questions of law rather than fact, so that cases decided wrongly on the merits may be still be unsuccessful in judicial review proceedings.

SYDNEY 2052 AUSTRALIA
Email:george.williams@unsw.edu.au
Telephone: +61 (2) 9385 2259
Mobile: 0414 241 593
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

Compared to other western countries, Australia has among the lowest recognition rates for onshore asylum applications (averaging 13% between 1991 and 1999), suggesting that primary decision-makers and members of the Refugee Review Tribunal are not at all generous in their interpretation of refugee law, yet these restrictive decisions cannot be challenged in the courts.

In contrast, in the same period, recognition rates in comparable countries were much higher: 74% in Denmark; 62% in Canada; 44% in the US; 43% in the UK; 51% in Finland; 50% in Sweden; 43% in Norway; 39% in the Netherlands; 39% in Switzerland; and 33% in South Africa (UNHCR Statistical Overview, 1999). There is little evidence to suggest that asylum applicants in Australia have less credible claims than asylum seekers in other countries.

Australia's low recognition rate is compounded by the legislation passed in September 2001 that narrowed the interpretation of the meaning of a 'refugee' under the 1951 Refugee Convention, particularly as regards the terms 'persecution', 'particular social group', and 'non-political crime'. The new Act also made it easier to reject the refugee claims of asylum seekers whom officers 'have reason to believe' are not telling the truth. These factors encourage applicants to seek review in the hope of enjoying the full scope of the *international* protection obligations that Australia has voluntarily adopted under the 1951 Refugee Convention.

The low recognition rate is encouraged by the lack of tenure enjoyed by RRT members, whose decisions may be influenced by the prospects of reappointment by the executive. Improving the quality of departmental and RRT decision-making would reduce the need for applicants to pursue judicial review as the last available avenue of redress, even where futile. A Senate Committee inquiry in 2000 identified a range of ways to improve the RRT (Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000), recommendations 5.1 to 5.8).

Further, as the Refugee Council of Australia has noted, the contraction of legal aid funding for asylum applicants, particularly at the judicial review stage, means that some applicants may suffer from a lack of proper preparation or adequate legal advice, thereby encouraging some unmeritorious review applications to be made.

Second, applicants in need of protection may not strictly satisfy the definition of a refugee in the 1951 Refugee Convention, yet there is no regular procedure available to them for claiming complementary protection (for example, based on a fear of torture, or serious human rights abuses in their country of origin). There is therefore an incentive for such applicants pursue judicial review proceedings as a means of avoiding return to serious harm.

While applicants may be granted humanitarian protection in such circumstances, this arises as a result of the Minister's discretion under section 417 of the *Migration Act 1958*, and not through the regulation operation of law. Further, Ministerial discretion is only available at the end of the process, once all appeals have failed. Establishing a regular procedure for claiming complementary protection, as part of the original asylum application process, would prevent persons in need of protection being forced to resort to judicial review proceedings.

Australia should follow the lead of the 25 democracies of the European Union in establishing complementary protection as an essential migration status additional to refugee status (see, eg, (1) *EU Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need*

International Protection and the Content of the Protection Granted (27 April 2004); (2) Jane McAdam, 'The EU Qualification Directive: The Creation of a Subsidiary Protection Regime' (forthcoming 2005) *International Journal of Refugee Law*; (3) Australian Senate Legal and Constitutional References Committee, *A Sanctuary under Review* (2000), recommendation 2.2).

Third, Australia's insistence on maintaining a policy of mandatory detention of asylum seekers who arrive without permission encourages detainees to pursue every available opportunity to regularise their status in Australia and thus to be released from the distress of prolonged detention. Australia should abolish mandatory detention in order to remove the present incentive for asylum seekers to pursue judicial review as a means of escaping detention.

In cases where a fear of persecution or serious harm is genuine, it is disingenuous to assert that detainees are free to leave Australia at any time, and thus are themselves responsible for prolonging their detention through review proceedings. As the European Court of Human Rights observed in *Amuur v France* [1996], where a person fears return to serious harm, there is no genuine choice to leave the country of asylum.

Finally, the statistical claim that 90% of review applications decided at hearing is somewhat misleading, and overstates the problem. In 2003-04, the Minister actually won around 69% of all first instance Federal Court cases (2451 of 3579 cases) (DIMIA Fact Sheet 9). Applicants won in almost 3% of cases (102 of 3579 cases), and the Minister withdrew in almost 4% of cases (136 of 3579 cases) – effectively taking the overall success rate of applicants to 7%.

Importantly, the applicant withdrew from proceedings in almost 25% of cases (890 of 3579 cases) (ie before hearing). Far from suggesting that lawyers are pursuing spurious claims, this statistic indicates that lawyers are often advising their clients not to proceed with unmeritorious applications. This undermines the rationale for tightening further the regulation of lawyers and migration agents advising asylum applicants.

In sum, the need for the legislation would be substantially reduced if other alternatives were first pursued: improving primary decision-making; enhancing the RRT's independence; increasing legal aid funding to improve the quality of migration advice about judicial review; removing restrictive interpretations of the refugee definition, and establishing complementary protection as a new migration status; and abolishing mandatory detention.

2. 'Purported Privative Clause Decision'

The attempt to extend elements of Parts 8 and 8A of the *Migration Act 1958* to a 'purported privative clause decision', including a decision involving jurisdictional error, raises constitutional questions. While this was not at issue in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 77 ALJR 454, the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ found obiter dicta (at 470) that if s 474 had extended to a "purported decision" (which the Bill does not seek to do in this case), and thus to decisions involving jurisdictional error, it:

> would be in direct conflict with s 75(v) of the *Constitution* and, thus, invalid. Further, they would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the *Constitution* that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.

The reference to a 'purported privative clause decision' in the Bill is contradictory in seeking to regulate something that is not a decision at all. The amendment may be invalid because it might not be seen as a 'law' that could be enacted by Parliament under section 51 of the Constitution.

More generally, the application of privative clauses to migration decisions involving non-citizens undermines the principle of equal treatment that is fundamental to the rule of law and the common law, and may infringe the human right to freedom from non-discrimination. The idea of equality before the law demands that Australia's justice system, including the basic right of judicial review of administrative action, must extend to all persons within Australia's jurisdiction, regardless of their status.

While non-citizens may be justifiably excluded from certain constitutional protections enjoyed by citizens as members of the social compact, procedural fairness and natural justice are elementary protections designed to prevent the arbitrary exercise of political power, whether against citizens or non-citizens. Privative clauses can thus run contrary to the rule of law.

Although it is correct that UNHCR recommends that asylum applicants receive a primary decision and one level of review (either administrative or judicial) (Mr Turnbull, Hansard, House of Representatives, 17 March 2005, p. 44), this is only a *minimum* international standard. It applies to developing and developed countries alike, and to authoritarian and democratic regimes. As a long-established liberal democracy, in Australia the standard of justice expected by Australians is far higher than the international minimum, and includes full judicial review.

3. 'No Reasonable Prospect of Success'

It is recognised that some lawyers and migration agents have encouraged unmeritorious migration litigation. However, the proposed provisions for preventing litigation where there is 'no reasonable prospect for success' suffer from a number of defects.

Permitting the courts to give summary judgment where there is 'no reasonable prospect of success' departs from the carefully constructed common law test, which requires that a case be manifestly groundless (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62).

This higher threshold ensures that cases are not disposed of prematurely, before all the evidence has become available during the proceedings on the merits. As Chief Justice Barwick stated (at para. 10): 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case'. Requiring a reasonable prospect of success risks depriving applicants of a fair opportunity to mount a case.

Particularly where public interest test cases are being run to challenge accepted interpretations of the law, there may be 'no reasonable prospect of success' in the immediate case, but the litigation may contribute in important ways to the future evolution of common law principles. Discouraging litigation where there is no reasonable prospect of success risks chilling the progressive development of the law, and stymieing the correction of bad precedents.

The imposition of cost orders on those who encourage cases with no reasonable prospect of success may prove particularly burdensome on pro bono and non-profit community organisations which assist asylum applicants, such as the Refugee Advice and Casework

Service (RACS) (Ben Saul discloses that he is a member of the RACS Management Committee).

It is preferable to strengthen the training and accreditation of migration agents, and emphasize the professional responsibilities and regulation of lawyers, than to legislate directly on this issue.

4. Time Limits

The Bill proposes that applications for judicial review must be made within 28 days, extendable by up to a further period of 56 days. While time limits are not objectionable in themselves, any time limit must keep open the possibility for an extension of time in appropriate circumstances – even beyond the maximum period in the Bill of 84 days.

For example, extensions may be necessary where applicants were not aware of their rights, due to poor legal advice or language barriers; or where the grounds of review do not become known due to unlawful action by government (such as corruption until after the time limit has expired). The rule of law should not be curtailed by a non-extendable time limit, however lengthy.

The may also be constitutionally invalid in placing this time limit on review by the High Court.. It is not clear that Parliament can place an absolute limit on the time available to seek this review (such as where, for example, the time limits proves unreasonable due to circumstances beyond an applicant's control). The High Court in *Plaintiff S157/*2002 did not determine this issue, although Callinan J did state at [176] of the current provision in the Act:

> I do not doubt that there is a power to prescribe time limits binding on the High Court in relation to the remedies available under s 75 of the Constitution as part of the incidental power with respect to the federal judicature. But those time limits must be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as s 486A in my opinion does. A substantially longer period might perhaps lawfully be prescribed, or perhaps even 35 days accompanied by a power to extend time. Finality of litigation is in all circumstances desirable. The Commonwealth has just as much interest in knowing that rights and remedies against it may no longer be pursued as do other litigants. As I earlier observed, the Commonwealth and its Executive have many departments to administer and many priorities to assess and allocations to make. These need to be able to be done upon a reasonably settled basis of the numbers involved and other demands upon the treasury of the nation. It is consonant with the exercise of both Executive and Judicial power that a finite reasonable time be fixed for the supervision by the latter over relevant decisions made by the former. It should also be kept in mind that in any event, delay may provide a discretionary bar to the grant of relief under s 75(v).

Yours sincerely

Professor George Williams
Anthony Mason Professor
Director, Gilbert + Tobin Centre of Public Law

Dr Ben Saul
Lecturer, Faculty of Law
University of NSW