Migration Litigation Reform Bill 2005
Joint submission of the Public Interest Law Clearing House (Vic) Inc and the Victorian Bar
6 April 2005

INTRODUCTION

1. This submission to the Senate Legal and Constitutional Legislation Committee is made jointly by the Public Interest Law Clearing House (Vic) Inc (**'PILCH'**) and the Victorian Bar, and is based on the collective experience of PILCH and the Victorian Bar. This experience is drawn from membership of the Refugee Review Tribunal (**'RRT'**), appearances before the RRT and the Migration Review Tribunal (**'MRT'**), reading and listening to large numbers of transcripts and tapes of hearings before these Tribunals, and scrutiny of a large number of the Tribunal decisions and the material on which they are based. It also derives from providing representation for, and acting, in migration cases at the judicial review stage in the Federal Magistrates Court, Federal Court of Australia and High Court of Australia.

What is PILCH?

2. PILCH is a not-for-profit, independent legal service based in Melbourne. PILCH coordinates the provision of pro bono legal assistance through four pro bono legal assistance schemes:

   (a) Public Interest Law Clearing House Scheme (**'PILCH Scheme'**);

   (b) Victorian Bar Legal Assistance Scheme (**'VB LAS'**);

   (c) Law Institute of Victoria Legal Assistance Scheme (**'LIV LAS'**); and

   (d) Homeless Persons' Legal Clinic (**'HPLC'**).

   HPLC does not assist in migration matters and therefore will not be discussed further in this submission.

3. The PILCH Scheme, VB LAS and LIV LAS (**'the Schemes'**) receive, assess and refer requests for pro bono legal assistance to law firms and barristers. The Schemes only refer matters for assistance where clients meet a means test, where

their matter has legal merit and where community assistance is not available from another source (*e.g.* legal aid or a community legal centre).

4. The PILCH Scheme has an additional criterion. It only refers *public interest* matters for assistance. Public interest matters are:

   (a) legal matters for not-for-profit organisations with public interest objectives; or

   (b) individuals' matters which raise an issue which requires addressing for the public good and which:

      (i) affects a significant number of people, not just the individual;

      (ii) is of broad public concern; or

      (iii) impacts on disadvantaged or marginalised groups.

PILCH and the Victorian Bar

5. The Victorian Bar is a member of PILCH. It has also sub-contracted the administration of VB LAS to PILCH. The administration of VB LAS by PILCH is also subject to the supervision of the Victorian Bar Council. Barristers who are members of the Victorian Bar volunteer and provide pro bono legal assistance through the PILCH Scheme and VB LAS.

PILCH and migration

6. At PILCH, the majority of migration matters are dealt with by VB LAS. In the year to 30 June 2004, migration matters constituted the largest body of pro bono referrals made by VB LAS. In that year, 25.8% of referrals made by VB LAS were migration matters. Notably this was a significant *decrease* from the previous year, where in 2002-2003, migration matters accounted for 42% of referrals made by the VBLAS. Our experience does therefore not reflect an ongoing large increase in the number of migration applications to the courts as asserted by the Government.

7. The majority of inquiries to the Schemes for legal assistance in migration matters are from asylum seekers before the courts in existing judicial review proceedings

that have been commenced prior to making a request for legal assistance. In these cases, arrangements are made for a barrister to assess the merits of the client's application for judicial review and, if it is determined that the application has legal merit (*i.e.* an arguable case with reasonable prospects of success), to represent the client in the proceeding, by preparing for and appearing at the hearing.

8. The Schemes receive inquiries in asylum seeker matters from a number of sources, including from:

- asylum seekers directly;
- community legal centres, including specialist migration centres;
- welfare agencies that assist asylum seekers;
- Victoria Legal Aid; and
- members of the community who are friends or supporters of asylum seekers.

9. Generally, the PILCH Scheme and VB LAS do not assist with referrals to lawyers for clients at the merits review stage before the RRT or MRT or with applications under ss 48B, 351 or 417 of the *Migration Act 1958* (Cth) (**'the *Migration Act*'**).

Previous Relevant Submissions on Migration Litigation Reforms

10. PILCH and the Victorian Bar have previously provided relevant written submissions dated 29 April 2004 to the Committee on the *Migration Amendment (Judicial Review) Bill 2004* which contained similar provisions in relation to time limits on judicial review Applications. Mr Christopher Horan of the Victorian Bar also gave oral submissions on behalf of the PILCH and the Victorian Bar to the Committee on 12 March 2004. In its report of June 2004 the Committee referred to these submissions (see par 3.71 of Report). The Report did not however express a view on the Submission that the courts must retain a discretion to extend time limits in the interests of justice. As the issue of time limits is again proposed

by the *Migration Litigation Reform Bill 2005* (**'the Bill'**), we again set out our concerns below. We submit that the Committee must direct its attention to this fundamental jurisdictional concern or the new legislation may find itself open to Constitutional challenge.

The Penfold Review Report

11. PILCH and the Victorian Bar also jointly contributed a detailed written submission to the Migration Litigation Review conducted by Hilary Penfold QC on 25 November 2003. This submission challenged the underlying assumptions of the Government's views on litigation in the migration jurisdiction and in particular raised concerns with the definition of 'unmeritorious' cases. These concerns are also highly relevant to the provisions of the Bill (Part 8B) and are summarized below. We would like to submit that it is crucial that the Committee obtain and consider the Penfold Report prior determining its views on the provisions of the Bill that are concerned with 'unmeritorious' applications.

12. The Committee, in its June 2004 Report on the *Migration Amendment (Judicial Review) Bill* 2004, urged the Government to release the Report of the Penfold Review before it seeks further to amend the Migration Act (par 3.25). That statement was in response to strong submissions that any amendments, such as were contained in that Bill were premature. The independent Parliamentary Library Bills Digest No 118 2003-04 on that Bill had, in its Concluding Comments at page 9 and following, seriously questioned the need for and appropriateness of the amendments in that Bill: "According to the Government's second reading speech, 'the statistics speak for themselves'. Yet it is not plain that they do" (at p. 9). The Bills Digest No. 132 2004-05 on the present Bill repeats the same concerns even more forcefully: "After the distorting effect of the *Muin* case on migration matters passed, numbers of migration applications have declined dramatically. The extent to which the reforms proposed in the Bill are now necessary is unclear." (at p 3).

13. PILCH and the Victorian Bar urge the Committee to take a forceful stand against this Bill proceeding at all until the Penfold Review Report has been released and time allowed for public comment. The amendments in this Bill are far more extensive than those in the 2004 Bill (some 20 pages compared with about 2 pages) and more far reaching (extending to summary judgment in all cases, not just migration cases). We call upon the Committee to stand by its own stance against further amendment until after that Report is released, with time for comment, and to recommend unequivocally against the Bill proceeding.

Endorsement of Submissions by other Organisations

14. PILCH and the Victorian Bar have had the benefit of reading the Submission made to the Committee by the National Pro Bono Resource Centre ('NPBRC') and endorse in general terms the comments made in this submission. Further, as referred to above, we commend to the Committee the previous relevant submissions to the Migration Litigation Review made by the Refugee and Immigration Legal Centre ('RILC'), Melbourne, in particular their analysis of the issue of the framework to ensure that migration agents and lawyers do not bring 'unmeritorious' migration cases .

SUBMISSIONS

We set out below some comments on the Bill, using the subject headings employed in the Explanatory Memorandum.

Ensuring identical grounds of review in migration cases.

15. PILCH and the Victorian Bar agree with the general principle that it is sensible to ensure consistency between the respective jurisdictions of the Federal Magistrates Court, the Federal Court and the High Court in relation to the judicial review of migration decisions.

16. PILCH and the Victorian Bar are concerned however, that the Bill will alter the existing position where by at present, the Federal Court's jurisdiction derives from s.39B of the Judiciary Act 1903. This includes jurisdiction conferred by s.39B(1A), which extends to matters "arising under the Constitution, or involving its interpretation" and matters "arising under any laws made by the Parliament". The jurisdiction of the Federal Magistrates Court is defined by reference to that of the Federal Court in relation to matters arising under the Migration Act (s.483A of the Migration Act). Under the Bill, the jurisdiction of the Federal Magistrates Court will now be defined by reference to the High Court's jurisdiction under s.75(v) of the Constitution. The Federal Court will only have original jurisdiction in limited circumstances. The effect of these changes may remove the jurisdiction currently derived from s.39B(1A) of the Judiciary Act in so far as that jurisdiction is "in relation to a migration decision". Jurisdiction in relation to migration decisions will be limited to the jurisdiction derived from s.75(v) of the Constitution. PILCH and the Victorian Bar does not support the narrowing or removal of jurisdiction currently derived from s.39B(1A) of the Judiciary Act.

Imposing uniform time limits in all Migration cases

17. PILCH and the Victorian Bar acknowledge that, under the Bill, the time limits now run from actual rather than deemed notification. The Bill seeks to place a 28-day time limit upon applications for judicial review by the Federal Magistrates Court, the Federal Court or the High Court with a discretion by the court to extend this time limit by a further 56 days. We therefore repeat the points made in previous submissions about the undesirability of absolute time limits.

18. PILCH and the Victorian Bar oppose the amendments contained in the Bill, in so far as they impose absolute time limits on applications for judicial review by all courts of migration decisions on grounds of jurisdictional error. We submit that the time limits on judicial review applications should include a further discretion to extend time in 'special circumstances.'

19. Placing a definitive time limit of up to a maximum of 84 days may deny some applicants the ability to challenge decisions that are beyond jurisdiction. Conferral of an absolute time limit, without a residual discretion to extend time, will operate to prevent both meritorious and unmeritorious applications, as the ability to meet a time deadline may bear no relevant relationship to a cases' inherent merit.

20. The fact remains that there are many cases where an applicant might have been given actual notice and yet the application is lodged out of time through no fault on the part of the applicant, or for reasons beyond the control of the applicant. For example, there may be a failure on the part of the applicant's agent or representative, or by some third party (such as an officer at a detention centre). In cases such as this, a the existence of a private remedy against that third party for negligence or breach of contract will not remedy the injustice. The court should have discretion to extend time in such cases, or more generally to take account of the possible obstacles and disadvantages that might be faced by applicants in filing applications with the Court within the outer limits of the prescribed time limit (84 days).

21. Asylum seekers in immigration detention centres often face obstacles in filing applications for judicial review of adverse RRT decisions in a proper and timely manner. These obstacles are caused by, among other things, a lack of access to information, including information about their rights and about the requirements for applications for review such as time limits; language barriers; administrative inefficiencies as a result of immigration detention; and the frequent inability of asylum seekers in detention to access legal and migration advice. The failure of an applicant to submit an application in a timely manner is not an indication that the application is unmeritorious. Often it is purely symptomatic of the difficulties faced by asylum seekers in accessing the legal system as a result of their situation and especially their detention.

22. In so far as it allows restriction judicial review of protection visa decisions, the Bill may in fact result in an increased risk of refoulement (expulsion from Australia and return to the state from which the claimant seeks asylum) of

genuine asylum seekers, and consequently the violation of Australia's international obligations under the Refugee Convention. Errors by the RRT can lead to the rejection of genuine refugees who may face serious persecution and even death upon removal to their country of origin. High standards of decision-making and access to judicial review reduce the risk of wrongful refoulement. Conversely, blunt legislative measures such as the imposition of an absolute time limit on judicial review applications are likely to increase the risk of wrongful refoulement.

23. Many cases can be cited to exemplify the injustices resulting from legislative absolute time limits.[1] Three of these cases are:

(a) *Al Achrafi v Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 550, in which the application for review was sent by the applicant's family to the Tribunal, rather than to the Court;

(b) *Guendouz v Minister for Immigration and Multicultural Affairs* [2000] FCA 766, in which the applicant did not speak English and was not informed that he had the right to judicial review of the Tribunal's decision; and

(c) *Kucuk v Minister for Immigration and Multicultural Affairs* [2001] FCA 535, in which the officer at the detention centre, after being given the application by the applicant well within the time limit, (twice) faxed the application to the wrong telephone number.

In each of these cases, the court rejected the applications for an extension of time, finding that the Parliament had "left no room for any conclusion other than that it intends that the provision which it…enacted should override any common law

[1] For example, see *Al Adwan v Minister for Immigration and Multicultural Affairs* [2001] FCA 706; *Gamage v Minister for Immigration and Multicultural Affairs* [2000] FCA 1223; *Takli v Minister for Immigration and Multicultural Affairs* [2000] FCA 1186; *Radhi v Minister for Immigration and Multicultural Affairs* [2000] FCA 777; *Duwai v Minister for Immigration and Multicultural Affairs* [1999] FCA 1309; *Kumar v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 680 and *Susiatin v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 574.

considerations and be given effect to precisely in terms of the words chosen."[2] In *Kucuk*, Hely J found that "[t]he terms of the statute and a line of authority establish that [there is] no power to grant an extension of time irrespective of the justice of doing so in the circumstances of the particular case."[3] The asylum seekers were therefore barred from accessing the courts to seek judicial review of the Tribunal's decision that they were not entitled to protection. Given the grave consequences to asylum seekers, it is entirely inappropriate that such errors should result in their inability to access judicial review.

24. In *Salehi v Minister for Immigration & Multicultural* Affairs [2001] FCA 995, Mansfield J considered s478(1)(b) of the *Migration Act*, which specified that a 28-day time limit applied to applications for judicial review, and s479(2) which precluded the Federal Court from making an order allowing for an extension of time. His Honour found that he was bound by the legislature to dismiss the applications of seventeen applicants for an extension of time despite their difficult circumstances, "and sit idly by while injustice is done."[4] His Honour stated:

> *One may struggle to perceive any rationale underlying that legislative intent. Section 478(1)(b) may generally operate fairly once notification of the Tribunal decision is given to a person who is not in immigration detention. In the case of persons in immigration detention under s 189… such persons are frequently unable to read or speak English, and sometimes are illiterate in their own language. At least with the seventeen persons to whom I have referred, they were dependent upon those maintaining the particular detention centre for the provision of forms to enable them to seek review to the Federal Court, as their requests for legal assistance were not met. They did not all receive those forms when requested, or experienced delays in being able to convey their requests for the necessary forms or then in receiving the forms. None of those delays were their fault. They could have done no more to get the forms. As I have found, some residents of Woomera Detention Centre went on a hunger strike to draw attention to their requests for the forms. They were then, in all instances, physically unable by themselves to complete those forms in English, and in some instances in their own language. They sought help from the interpreters available, on a very limited basis, at the Woomera Detention Centre. They did not*

[2] *Guendouz v Minister for Immigration and Multicultural Affairs* [2000] FCA 766, per RD Nicholson J at [9].
[3] *Kucuk v Minister for Immigration and Multicultural Affairs* [2001] FCA 535, per Hely J at [17].
[4] *Salehi v Minister for Immigration & Multicultural* Affairs [2001] FCA 995 (1 August 2001), per Mansfield J at [55].

> *receive that help in a timely manner, through no fault of their own but due to the limited time the interpreters had available. The other duties of interpreters were very substantial. They had to prioritise their time allocations, and had little time available to assist the applicants as requested. The unfortunate result is that these applications are all outside the twenty-eight day time limit prescribed by s 478(1)(b).*[5]

25. Mansfield J noted in his decision that the applicants "might apply in the High Court's original jurisdiction under s 75(v) of the Constitution for constitutional writs…"[6] The Act did not at that time attempt to place time limits upon applications to the original jurisdiction of the High Court.

26. We are aware of at least one applicant who was denied an extension of time by Mansfield J, as a result of the inflexible legislative limits, and who subsequently successfully sought judicial review by the High Court in its original jurisdiction. On remittal to the Tribunal, it was determined that the applicant fell within the definition of a refugee and as such was entitled to protection by Australia. Under the proposed amendments to the Act, this applicant would have been denied judicial review once the time limits had passed, despite the difficulties faced by the applicant in lodging the application within time. A genuine refugee would have been refouled in these circumstances, that is, sent back to his or her country of origin to face persecution or even death.

27. The limited discretion to extend the 28-day time limit for applications for judicial review for a further 56 days does not satisfactorily counteract the potential injustices. The result of the proposed amendment is to create an absolute maximum time limit of 84 days within which an application for judicial review must be lodged. A further discretion to extend time is required.

28. Based on the experiences of representing applicants in these circumstances, it is submitted that, rather than introducing absolute time limits on applications, a better response would be to allow the courts to retain a discretion to grant an extension of time in 'special circumstances.' This alternative will serve the purpose of filtering out unmeritorious applicants and discouraging those who are

[5] *Id* at [51]
[6] *Id* at [55].

merely attempting to delay their departure from Australia. However, it will do so in a just and reasonable manner, allowing for each case to be decided on its particular circumstances, and allowing for an extension of time where otherwise injustice would be done.

29. In the case of *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, Gleeson CJ discussed the ability of Parliament to oust the jurisdiction conferred upon the High Court by s 75(v), in that case, in the context of a privative clause. Gleeson CJ found that the Parliament has no power to do so.[7] In finding that "[t]he Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution,"[8] His Honour stated:

> *Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament... Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted*.[9]

30. It is submitted that by imposing absolute time limits, Parliament is attempting to curtail the original jurisdiction of the High Court. To the extent that the proposed amendments do so, they are likely to face constitutional challengeThe time limit would operate in cases where the applicant could otherwise successfully argue that the decision is infected with jurisdictional error and that, at law, no decision under the Act has been made. . Accordingly, the Bill should give courts a residual discretion to extend time in special circumstances or where it is in the interests of justice.

<u>Facilitating quicker handling of cases by improving court processes</u>

[7] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 441, per Gleeson C J at [3].
[8] Ibid at [6].
[9] Ibid at [5].

31. The proposed s.486D (inserted by item 37) requires an applicant to disclose previous judicial review proceedings in relation to the same migration decision. The consequences of failing to comply with s.486D(1) are not clear from the terms of the provision. PILCH and the Victorian Bar would like to identify one possible concern that the provision could be interpreted as a condition on the jurisdiction of the relevant court, in that any failure to disclose would mean that the proceeding would not have been effectively commenced. This could have quite drastic consequences, in conjunction with the absolute time limits.

32. The Explanatory Memorandum does not provide much assistance on the intended meaning or effect of s.486D, simply stating that it "will assist the courts to identify early in the process applicants seeking to re-litigate matters". It is not apparent why there is currently any difficulty relying on the respondent (*i.e.* the Minister) or the courts to identify any previous judicial review applications, and to seek any appropriate orders.

33. PILCH and the Victorian Bar recommends that proposed s.486D is unnecessary and should be removed and alternatively, the effect of proposed s.486D should be clarified. We recommend that the proposed s.486D should not potentially operate to "invalidate" an application otherwise commenced within time.

<u>Deterring unmeritorious applications – general comments</u>

34. The explanatory memorandum and second reading speech of the Bill refers to the underlying concern of the government to deter 'unmeritorious' litigation. In response to this concern, PILCH and the Victorian Bar submit that mere fact that an application for judicial review is unsuccessful, does not necessarily mean that the application is 'unmeritorious' or can be characterised as an abuse of the review process. Further, even though the success rate for applicants in the Federal Court and Federal Magistrates Court proceedings is low, that does not mean that the cases that were unsuccessful were 'unmeritorious'. It is not uncommon that, despite an applicant being unsuccessful, the Court nonetheless is critical of the

tribunal's factual conclusions, reasoning or procedures; and/or makes reference to the Minister's power to intervene under section 417 of the *Migration Act* to substitute a more favourable decision to that made by the tribunal as a possible appropriate option. See, for example, the recent decisions of the Full Court of the Federal Court in *VGAO of 2002 v Minister for Immigration and Multicultural and Indigenous* Affairs [2003] FCAFC 68[10], *WAFV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 280[11], *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 235[12] and *Minister for Immigration and Multicultural and Indigenous Affairs* v W306/01A [2003] FCAFC 203.[13]

35. Judicial comment that is critical of RRT and MRT decisions is significant because it somewhat justifies the dissatisfaction that some applicants have with their experiences in the RRT and MRT and helps to explain why they institute Court proceedings.

36. Further, it is important to remember that cases that are unsuccessful at first instance can succeed in an intermediate appellate court or ultimately in the High

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[10] Justice Allsop was strongly critical of the Refugee Review Tribunal's reasoning, logic and conclusions. At [50] Allsop J stated: "The reasoning of the Tribunal appears neither cogent nor persuasive". At [51] his Honour further said: "Further, it is difficult to understand the logic behind the conclusions reached by the Tribunal [concerning a particular matter]". See also at [57] where Allsop J said: "I am less than persuaded by the factual conclusions drawn by the Tribunal". Justices Wilcox and Cooper each separately and specifically endorsed Justice Allsop's concerns. Wilcox J expressly referred to the Minister's power under s 417 to intervene at [4].

[11] Justices Lee and RD Nicholson JJ held at [7]:

"However, we share with Carr J the concern regarding the effect of the finding reached by the Tribunal in breach of procedural fairness in its potential impact on the appellant's detention and future administrative treatment. Although this appeal will be dismissed, it should be well understood by those responsible for such administration that the finding adverse to the appellant's claims to be from Afghanistan is not a finding properly made in law."

Carr J dissented and would have allowed the appeal.

[12] Justices Tamberlin, Emmett and Weinberg held (at [21]) that there was "an important error in the logic adopted by the RRT in framing its reasons" but that (at [29]) the Court was bound by a line of authority "to the effect that illogical reasoning does not of itself constitute an error of law or jurisdictional error."

[13] Justices French and Hill allowed the Minister's appeal despite matters that (see [51]):

"… call into question the reliability of its [ie, the RRT's] findings of fact on an issue of critical importance. That criticism, while of very real concern does not support or imply a finding that the Tribunal has failed to carry out its statutory function of reviewing the respondent's application for a protection visa."

See also Marshall J at [78].

Court. (A recent example of this is the successful asylum seeker litigant in person in the High Court in *Dranichnikov v the Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 107 ALR 389)

37. Self represented litigants are often criticised for pursuing "hopeless" applications and appeals. It is notable that Dranichnikov represented himself in the Federal Court and High Court. The High Court commented at paragraph [21] (per Gummow and Callinan JJ) that the meritorious argument accepted by the High Court was "lost in the morass of argumentative and illogical propositions that he advanced generally". See similar comments by Kirby J at paragraphs [52] and [54]. This highlights the difficulty in identifying "hopeless" cases and the need for legal aid to fund representation.

38. Members of the Victorian Bar currently perform a significant role in 'vetting' unmeritorious cases. A referral from the pro bono schemes[14] of both the Federal Court and the Federal Magistrates Court requests barristers to assist unrepresented applicants to the Court in the manner specified by the instructions as ordered at the Judge and authorised by the Judge's associate. The nature of the referral made by the Judge varies from case to case. For example, the referral may merely request that counsel advise the applicant on their prospects of success in the proceeding, or may include instructions to act further. The general practice of PILCH's referral to barristers in migration matters is that, given the direct access provisions of the Bar Rules, a case is referred only for an assessment of legal merit at first instance. If counsel is of the opinion that a matter has a meritorious ground of review, PILCH requests that they continue to act. There are many cases where PILCH, on the advice of Counsel, decides not to grant assistance for representation on the basis that the matter does not have any or sufficient prospects of success. This advice is communicated to the applicant and may itself convince the applicant to discontinue the proceedings.

<u>Deterring unmeritorious applications – Summary Judgment provisions</u>

[14] Order 80 of the Federal Court Rules and Part 12 of the Federal Magistrates Court Rules

39. PILCH and the Victorian Bar submit that the courts (and the parties to proceedings) already have sufficient mechanisms for dealing with proceedings which are an abuse of process or have no legal merit and therefore the provisions for summary judgment (Section 7,8 & 9 of the Bill) are unnecessary and unclear. In appropriate cases, the respondent Minister can already apply for judicial review proceedings to be struck out or summarily dismissed: see, for example, Order 20 rule 2 of the Federal Court Rules and Rule 21.07 of the Federal Magistrates Court Rules.

40. The provisions do not provide any further clarification as to what constitutes a proceeding that is 'hopeless', 'bound to fail' or 'no reasonable prospects of success. There is therefore a great risk that such a change to the provisions relating to summary dismissal will be productive of additional costs and delays by introducing further stages to the review process, and that an applicant would often successfully defend an application for summary dismissal upon demonstrating that the application was not hopeless. Accordingly, implementing the new provisions on summary dismissal may cause further migration litigation rather than reducing it.

41. The provisions conferring new powers of summary dismissal on the Federal Magistrates Court, the Federal Court and the High Court potentially operate to "lower the bar" for obtaining summary judgments. These powers are not confined in application to migration cases and may have a broad effect on the law in the Federal jurisdiction.

<u>Deterring unmeritorious applications – Costs Order Provisions (new Part 8B)</u>

42. PILCH and the Victorian Bar are opposed to the new Part 8B of the Migration Act proposed by the Bill as a measure that may limit access to legal representation. We consider the provisions will dissuade practitioners from acting on a pro bono basis in migration litigation for fear of attracting a fine. Our experience is that the pool of legal practitioners who are experienced in migration matters is small and the pool of practitioners who are willing to act in such

matters on a pro bono basis is even smaller. In our experience, there is no problem of pro bono lawyers encouraging unmeritorious claims. It is simply not in these practitioners' interests to pursue unmeritorious applications ethically or financially.

43. Obviously, court cases are heard most expeditiously, efficiently and with the minimum cost where parties are legally represented. If lawyers were to perform less pro bono judicial review work for asylum seekers there would be adverse effects for all parties, including the Government, the courts and the administration of justice.

44. Generally, we believe that the current framework for regulating legal practitioners is adequate to dissuade legal practitioners from 'encouraging' unmeritorious migration cases. Legal practitioners are currently entitled to act on behalf of an applicant unless a case is patently unarguable, or without foundation. We submit that there is no basis for making this obligation any more stringent.

45. In the event that a legal practitioner does act on behalf of an applicant where the case is patently unarguable or without foundation, that practitioner may already be exposed to possible sanctions, including costs orders. Order 62 Rule 9 of the Federal Court Rules and Rule 21.07 of the Federal Magistrates Court Rules allow for costs orders to be made against legal practitioners. PILCH and the Victorian Bar submit that these rules provide the Court with sufficient power to dissuade practitioners from encouraging baseless applications to be commenced or pursued.

46. PILCH and the Victorian Bar submit that the new Part 8B of the Migration Act will represent a major policy initiative that calls for significant consideration and debate. The new powers have far-reaching implications, including for the legal profession. The amendments should not be "rushed" through the Parliament under the guise of a measure to address perceived problems in the migration caseload in the courts. Even assuming that the provision is primarily directed at those involved in the more blatant abuses within the migration jurisdiction, the potential scope and impact of the new powers must be fully explored. There is no

indication that the existing powers of courts to make costs orders against non-parties are inadequate to address the mischief at which proposed Part 8B is ostensibly directed.

47. The questions raised by proposed Part 8B include the possible impact of the provisions on the fundamental human right to legal representation in civil litigation and the established cab-rank principle of Counsel. As set out above, as an impediment to adequate representation, there is a real chance that these provisions will discourage meritorious cases.

48. There are many particular respects in which the actual drafting of the provisions of the Bill can be criticised. For example it is not clear what will constitute "encouraging" a litigant to commence or continue migration litigation for the purposes of s.486E. PILCH and the Victorian Bar question whether, for the purposes of the Bill, it be sufficient simply to agree to act/appear for a litigant, or is something more required. In this respect, it appears that proposed s.486E(3) attempts to remove any argument that the lawyer was merely acting in accordance with instructions.

49. Proposed paragraph 486E(1)(b) provides for a disjunctive test. Sub-paragraph (ii) does not make it clear <u>who</u> must have the 'improper purpose'. PILCH and the Victorian Bar question whether it might be sufficient if a lawyer "encourages" the litigation, but the "improper" purpose is held by the litigant or further, whether it is sufficient to attract sub-paragraph (ii) if ***a*** purpose in commencing or continuing the litigation is unrelated to the objectives which the court process is designed to achieve (as opposed to the purpose, or the dominant purpose). If so, this represents a major expansion on ordinary principles relating to abuse of process.

50. It appears that the new Part 8B will be attracted whenever a court finds <u>in hindsight</u> that the litigation had no reasonable prospect of success: see proposed s.486F(2) and (4). This may place legal representatives and advisers in a very difficult position when deciding whether to commence or continue proceedings. The law in this area is relatively complex and the limitations on judicial review

not easily comprehended or understood by lay persons. In many cases applicants will have a legitimate sense of grievance at the decision or process and the limitations in judicial review may not be appreciated.

RECOMMENDATIONS

PILCH and the Victorian Bar make the following recommendations to the Committee:-

a) The Committee should forcefully recommend against the Bill proceeding until the Government has released the Penfold Review Report to the public and allowed time for detailed review and comment. We note that the Committee already took this position in its Report on the 2004 Bill. It should not now back down from that position

b) Any legislative time limits on applications for judicial review in the Bill should ensure the Court retains a discretion to grant an extension of time in 'special circumstances.'

c) The proposed s.486D of the Bill is unnecessary and should be removed; alternatively, the effect of proposed s.486D should be clarified;

d) The proposed s.486D of the Bill should not potentially operate to "invalidate" an application otherwise commenced within time.

e) There is no need for the Bill to alter the existing principles and tests for the summary determination of migration applications.

f) The new Part 8B of the Migration Act as set out in the Bill will represent a major policy initiative that calls for significant consideration and debate. The new powers have far-reaching implications, including for the legal profession. The potential scope and impact of the new powers should be fully explored. In addition, the drafting of the provision should be clarified.

Public Interest Law Clearing House and the Victorian Bar

6 April 2005