The Law Society
OF WESTERN AUSTRALIA

8 April 2005

By Email: LegCon.Sen@aph.gov.au

Mr Owen Walsh
Secretary
Legal and Constitutional Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

Inquiry into the Migration Litigation Reform Bill 2005

I refer to your email letter of 17 March 2005 inviting the Society to comment on the Inquiry into the Migration Litigation Reform Bill 2005. The Society's comments on the Bill are attached.

Thank you for providing the opportunity to comment on the issue.

Yours faithfully

Celia Searle

Celia Searle
President

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Migration Litigation Reform Bill 2005

A Law Society of Western Australia submission in response to a request from the Senate Legal and Constitutional Legislation Committee for comment on the Migration Litigation Reform Bill 2005

1. The Law Society of Western Australia Inc (Society) welcomes the opportunity to provide submissions to the Constitutional Committee on the Migration *Litigation Reform Bill* (Bill).

2. The Law Society is the professional association for Western Australian barristers and solicitors. This submission therefore is based on the experience of members of the legal profession from working within the jurisdiction of the legislation.

3. The submission is not intended to represent the interests of clients or groups of clients. The Society expects individual firms to present submissions on behalf of specific clients if those clients wish to comment on this review.

4. It is claimed that the Bill "... aims to improve the overall efficiency of migration litigation." Efficiency can never be preferred to justice. While the Society accepts that some features of the Bill, such as the amendment of time limits for the commencement of migration matters are unexceptionable, and in that case long overdue, others are controversial, and potentially raise constitutional issues.

5. It is of further concern to the Society that the Bill purports to provide a remedy to problems, which its proponents refuse to identify by publication of the "Migration Litigation Review" conducted by Hilary Penfold QC, commissioned in October 2003. In the absence of disclosure of the contents of the Review, the Society can only infer, by analogy with the rule in *Jones v Dunkel*, that the results of the review do not support the more controversial measures proposed.

6. Before being in a position to comment on the merits, the Society would need to know, for example, the success rate in relation to represented as against unrepresented litigants, and the courts in which the matters were heard.

7. In Western Australia, the majority of migration cases are undertaken on a pro bono basis under Order 80 of the *Federal Court Rules*. There is no incentive to abuse the system or to prolong litigation. In these circumstances, it is difficult to understand the need for the costs orders.

8. The power to award costs against a legal practitioner is of particular concern. That power already exists under section 43 of the *Federal Court of Australia Act 1976 (Cth)* and has been exercised by the Court in a number of cases: *de Sousa v for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 (French J.); *Caboolture Park Shopping Centre Pty Ltd (In Liq.) v. White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 (Full Court); *Caritativo v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2002) FCA 735 (French J.). See also the provisions of Order 62, rule 9 of the *Federal Court Rules.*

9. The terms of section 486E and the reference to 'contravention' in section 486F(1) appear to indicate an intention on the part of the Bill to create an offence and that costs orders are to be a form of punishment. So far as legal practitioners are concerned this raises a number of issues. In the past, It has been accepted that costs orders are not made against a legal practitioner as a form of punishment but rather, in appropriate cases, to protect his or her client against cost orders made against the client: *Myers v Elman* [1940] AC 282 at 289 where Viscount Maugham said: "The primary object of the Court is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured."

10. This is distinct from the disciplinary powers of the Court to strike off a practitioner, which is exercised in Australia by the Supreme Courts of the States. Other disciplinary powers are exercised in the States by statutory bodies set up for that purpose.

11. The mere fact that litigation fails is no ground for the exercise of the power. There has to be something that amounts to a serious dereliction of duty: *Edwards v Edwards* [1958] P 235 at 248. However, what is contemplated by the provisions in the Bill falls well short of that. Firstly, the migration litigation has to "...have no reasonable prospect of success." The test proposed is objective rather than subjective, and the decision will be made with the benefit of hindsight. A person, including a practitioner, may be caught notwithstanding that at the time he or she believed that the litigation did have a reasonable prospect of success.

12. The second requirement is that the person did not "... give proper consideration to the prospects of success of the migration litigation." Again the test appears to be an objective one and raises the issue as to what is proper consideration in the very difficult area of migration law, where even questions of construction fail to be considered in the High Court?

13. It is possible to go further. However, the real concern of the Society is that the provision is, so far as practitioners are concerned, unnecessary. It is difficult to avoid the inference that this particular measure is proposed *in terrorem* of those who might otherwise be prepared to accept *pro bono* assignments under Order 80 of the *Federal Court Rules,* rather than as a genuine attempt to improve the efficiency of the system. The likely effect of this 'reform' is to deter practitioners from acting *pro bono* in migration cases. This will increase the number of unrepresented litigants, thus reducing not only the efficiency of the system but at the same time decreasing the likelihood of just outcomes.

14. The only other area of concern that the Society has been able to address in the time available is raised by the summary judgment provisions in the proposed sections 31A of the *Migration Act 1957* and *17A* of the *Federal Magistrates Act 1999.* Concerns are again raised by the concept of "reasonable prospects of success," again falling short of 'hopeless' or 'bound to fail'.

15. The concept broadens the capacity of the courts to dispose of matters summarily, and at an early stage. Should the Bill be passed in its present form, it is likely to increase the number of cases where the applicant or respondent is unrepresented – a situation which already is placing the courts under severe strain.

16. Courts are familiar with the situation where the case of an unrepresented applicant appeared hopeless, but is turned around by something said by the applicant in oral submissions which had not previously been made apparent. In the clear case, such as where a time limit has been exceeded and there is no power to extend time, the situation can be dealt with by a notice of objection to competency. In the absence of such a notice, the matter should be determined in the ordinary way, and should not be dealt with by way of summary judgment since this is likely to lead to a failure to achieve a just outcome.

17. The Society does not support either of the proposed measures.

Celia Searle

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President

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