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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Migration Litigation Reform Bill 2005

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Wednesday, 13 April 2005

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Ludwig and Payne

Terms of reference for the inquiry:

Migration Litigation Reform Bill 2005

WITNESSES

CROCK, Associate Professor Mary Elizabeth, Member, International Law Section, Law Council of Australia **12**

HUNYOR, Mr Jonathon, Senior Legal Officer, Human Rights and Equal Opportunity Commission **2**

IRELAND, Ms Cassandra May, Director, Legal Policy Section, Department of Immigration and Multicultural and Indigenous Affairs **51**

KAMAND, Ms Suhad, Director/Principal Solicitor, Immigration Advice and Rights Centre Inc. **33**

KIDSON, Ms Nitra, Project Coordinator, Refugee and Immigration Legal Support Project, Queensland Public Interest Law Clearing House **26**

LACHOWICZ, Mr Robert, Coordinator and Principal Solicitor, South Brisbane Immigration and Community Legal Service **26**

LENEHAN, Mr Craig, Deputy Director, Legal, Human Rights and Equal Opportunity Commission **2**

MARTIN, Mr Wayne Stewart, QC, President, Administrative Review Council **20**

MORTIMER, Ms Debra, Member (Senior Counsel), Victorian Bar; Representative, Public Interest Law Clearing House (Victoria) **46**

POWER, Ms Sandra, Assistant Secretary, Civil Jurisdiction and Federal Courts Branch, Civil Justice Division, Attorney-General's Department **51**

SAUL, Dr Ben, Private capacity **39**

TURNER, Ms Deborah, Principal Legal Officer, Attorney-General's Department **51**

WALKER, Mr Doug James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs **51**

WEBB, Mr Peter, Secretary-General, Law Council of Australia **12**

WILLIAMS, Professor George, Private capacity **39**

Committee met at 2.02 p.m.

CHAIR—Good afternoon, ladies and gentlemen. This is a hearing of the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Migration Litigation Reform Bill 2005. The inquiry was referred to the committee by the Senate on 16 March 2005 for report by 11 May 2005. The bill proposes to amend the Migration Act 1958, the Federal Court of Australia Act 1976, the Federal Magistrates Act 1999 and the Judiciary Act 1903 to improve the overall efficiency of migration litigation.

The committee has received 24 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[2.03 p.m.]

HUNYOR, Mr Jonathon, Senior Legal Officer, Human Rights and Equal Opportunity Commission

LENEHAN, Mr Craig, Deputy Director, Legal, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. The commission has lodged a submission with the committee which we have numbered submission No. 17. Do you need to make any amendments or alterations to that submission?

Mr Lenehan—We need to make one small amendment to paragraph 26. You will see that there is a filled-in dot point and then an empty dot point. In the paragraph with the empty dot point the word 'no' is missing after the word 'has', so it should read 'the applicant has no real prospect'. We apologise for that error. Mr Hunyor will read our opening statement.

CHAIR—We are all in favour of variety. Unfortunately, we cannot change the people up here, so you are stuck with us!

Mr Hunyor—The commission thanks the committee for its invitation to give evidence to this inquiry. The present bill seeks to 'improve the overall efficiency of migration litigation'. The commission has no difficulty in supporting such an objective; however, changes made in the name of efficiency should not come at the cost of the fundamental rights of the people involved. The commission is concerned that the bill potentially undermines the rights of litigants in migration and other proceedings. Such cost is not justified, particularly where the claimed benefits of the proposed changes are less than certain. To put it plainly, a number of the changes proposed are potentially unjust and seem unlikely to work. Underlying many of the commission's concerns is the issue of nonrefoulement. The prohibition on refoulement, returning a person to a country where they face persecution, is recognised as one of the most fundamental principles in international human rights law. In the commission's view it is imperative that cases in which a person has a fear of persecution are justly decided. A system which fails to ensure this creates an unacceptably high risk of refoulement, in breach of Australia's human rights obligations and with consequences of the highest significance for the individual concerned.

There are four points I would like to address in this statement, and Mr Lenehan has another matter which he will seek to raise. The first point is the issue of time limits. The bill proposes, in effect, an absolute time limit of 84 days. The commission submits that there is no sufficient reason to deny an extension of time beyond this period where the interests of justice require it. To do otherwise is, with respect, to make a clear and conscious decision to put efficiency before justice. The commission submits that parliament ought not to do so, especially where there is a potential for refoulement in which the stakes are potentially life and death. Cases commenced out of time are not necessarily lacking in merit, and courts have made it clear on a number of occasions that strict time limits may result in justice being denied—and those cases are referred to in our written submission and in other submissions before you.

The commission also urges the committee to be conscious of the significant disadvantages faced by many people making claims under the Migration Act, particularly those in immigration detention. Again, those disadvantages are reflected upon in some detail in many of the submissions before the committee. The commission has made a suggestion as to an amendment to the proposed provisions relating to time limits which would discourage applications being made out of time but would still ensure that potential injustice can be avoided in particular circumstances. The commission urges the committee to give this proposal consideration. The commission notes that its proposal would also prevent the potential procedural trap that it has identified in item 37 of the bill, which imposes further procedural requirements on applicants. They relate to having to state other matters in which judicial review has been sought. I will not go into that at this stage, but it is covered in detail in our written submission.

The second matter that I want to deal with relates to the powers of summary judgment. The commission opposes the extension of the power of summary judgment proposed by the bill. In the commission's view, a power of summary judgment should only be used sparingly given the significant impact such decisions may have upon a person's rights. This is the approach that has been taken under the common law and it should not be altered, in the commission's view. The changes proposed by the bill are similar to those proposed by the Australian Law Reform Commission, the ALRC, in its review of the federal civil justice system. The commission notes that the government did not support that recommendation and it was not implemented. The proposal was also opposed by the Federal Court, amongst others.

In fact, the proposal in the bill contains a significant, potentially retrograde difference to that proposed by the ALRC. The ALRC proposal required that there be 'no other reason why the case or issue should be disposed of at trial' before a matter was summarily decided. It is unclear why this additional requirement has been omitted from the present bill. In the event that this aspect of the bill is to be retained, the commission submits that it is appropriate that a court be required to consider other reasons why the case should not be disposed of at trial. Such reasons may include a public interest in the matter proceeding to trial or the potential that an applicant may face refoulement if their claim is summarily dismissed.

The commission also notes that these provisions, which are of general application, will apply to cases brought before the Federal Magistrates Court and the Federal Court under the HREOC Act alleging unlawful racial, sex, disability or age discrimination. The commission is concerned that an expanded power of summary judgment may have the effect of preventing people from pursuing remedies for breaches of their human rights as set out in those laws, for example, where they face difficulties in formulating their claim at an early stage in proceedings.

The third matter that I would like to address in this opening statement is item 38, the provisions designed to deter unmeritorious applications. The commission submits that the provisions in item 38, which relate to cost orders and requirements for certification by legal practitioners, are poorly defined, potentially very broad and likely to have the effect of cutting off access to advice, assistance and representation for people in migration matters.

The commission opposes the proposals in the bill for the following reasons. First, for people already disadvantaged in navigating the complexities of migration litigation, the

changes may prevent people from bringing valid claims and this may result in their refoulement. Second, the measures seem more likely to create more inefficiency by requiring litigants to go to court without representation or assistance. Third, the fact that a person may appear to have an unmeritorious case is not, in our view, sufficient reason to deny them representation and assistance. Fourth, courts already have the power to make cost awards against lawyers who commence or maintain proceedings for an ulterior purpose or in dereliction of duty, and it is not been demonstrated, in our view, that such a power is inadequate. The commission also notes, as do a number of other submissions to the committee, that it may be more effective to seek to address the potential causes of unmeritorious litigation rather than focus simply on its effect.

The final matter is the rights of children. The commission notes finally that the present provisions fail to take into account the vulnerabilities of children who may be involved in migration litigation. The imposition of strict procedural requirements, such as the time limits proposed, is particularly objectionable in this context. It is conceivable, for example, that the guardian of a child who is seeking protection as a refugee may miss a strict deadline, fail to meet a strict procedural requirement or wrongly name the respondent. The result of this may be to deny that child the ability to pursue their claim through no fault of their own.

CHAIR—Thank you very much, Mr Hunyor. I think Mr Lenehan has a matter he wishes to refer to as well.

Mr Lenehan—Yes, there is a matter that Mr Hunyor and I realised over lunch we had not addressed in the submission and I would like to briefly outline it. It seems to have been said in the second reading debate, and it was also said in relation to the similar bill that was considered by the last parliament, that the views of the UNHCR executive committee to the effect that one level of review is all that is necessary for decisions on asylum claims and that review can either be judicial or administrative mean that any restrictions on judicial review affected by this bill or the similar bill in the last parliament will not breach Australia's international obligations. You would have gathered from the response of the commission in the inquiry into the bill that was before the previous parliament that we take issue with that.

CHAIR—You take issue with that interpretation?

Mr Lenehan—Yes. In very brief terms we make three points. Firstly, the UNHCR, including in its submission to this committee, has indicated that it thinks judicial review is desirable. It has made specific reference to article 16 of the refugees convention which amongst other things, states:

A refugee shall have free access to the courts of law on the Territory of all Contracting States.

The second point is that, as we have discussed in our oral evidence to the committee this morning, the ICCPR requires states to develop an effective remedy for violations of human rights. In certain circumstances that remedy is going to need to be a judicial remedy depending on the nature of the violation in question. It is the commission's view that refoulement requires a judicial remedy because of the seriousness of the violations involved.

The third point that we make relates to the matters that Mr Hunyor has just mentioned about the obligations to avoid refoulement. Put very simply, the obligations to avoid refoulement under the ICCPR, the convention against torture, the Convention on the Rights of

the Child, as well as the refugees convention are not going to be met in having a bit of a go at making a decision on an asylum claim which is a sound decision. If a flawed process results in potential refoulement and if courts are restricted such that they can simply sit by and watch the effects of that, Australia is going to be breaching its international obligations, in the commission's view. We thought that we should make that plain up-front because we anticipate that perhaps the department might raise that again, as they did in the inquiry into the bill before the last parliament.

CHAIR—They did indeed. Is there anything else?

Mr Lenehan—No.

Senator LUDWIG—There are issues that you raise more broadly. You say that, effectively, the time limits could create unfairness. Is there a point where time limits may not create unfairness or might be reasonable? What if you had a time limit of six months?

Mr Lenehan—We do not take issue with the imposition of time limits per se. What we do take issue with is the absence of a discretion to extend time limits in cases where the interests of justice require it. That is a principle that has a long history with courts.

Senator LUDWIG—So even if a time limit were double or triple what they have here, it is the fact that the court does not have the discretion to extend it in particular cases which troubles you.

Mr Lenehan—Given that you are dealing with vulnerable people who have language difficulties, we anticipate that there are still going to be instances where even a longer time limit is not going to be satisfactory to avoid injustice in particular cases. This is not a theoretical concern. We have given examples from the cases that bear out that concern, and Mr Hunyor might like to elaborate on those if he thinks it will assist.

Mr Hunyor—The cases are set out in our submission at paragraph 13. One of the cases mentioned there is Kucuk v Minister for Immigration and Multicultural Affairs. In that case a facsimile was sent by detention centre staff to the wrong number, resulting in the application being lodged out of time and being found to be incompetent. In that case I am not sure how long the delay was, but it could be imagined that someone, particularly if they are in detention, may not know for some time that their application has not been properly lodged. There are others there. I am not sure that the particular details are set out, but I could certainly provide those to you if that would assist.

Senator LUDWIG—It would be helpful. Though I do not think it is particularly germane to the matters that are before us, there are areas where you say that Australia is already in breach of its international obligations, though not necessarily in respect of this bill, if I understand that right. Where we are currently in breach of our international obligations?

Mr Lenehan—Under the existing system?

Senator LUDWIG—Yes.

Mr Lenehan—I am not sure that we have a view that I can express in a paragraph on the problems with the existing system. As you would probably know, the Human Rights Commissioner has prepared a lengthy report regarding the effects of that system upon

children in particular and has, on behalf of the commission, identified a number of breaches of areas—

Senator LUDWIG—So that is what you refer to in paragraph 5 when you say that the commission has previously expressed its concern. We have seen you so many times in the last short while. I was trying to—

Mr Lenehan—I am sorry. I misunderstood. That specific point relates to a concern that we have expressed before about the fact that the current system for the protection of asylum seekers is confined to the grounds in the refugees convention. As we have said to you before, Australia's obligations to avoid refouling people go beyond that. They are also in the ICCPR, the CRC and the convention against torture.

You would be very familiar with the fact that the refugee convention has been both interpreted by the courts and narrowed down by the legislature such that people can be excluded from the definitions of that convention on a number of technical bases. It is our view that if Australia were to more fully meet its obligations under those other instruments you would have fewer people seeking to come within the definitions in the refugee convention and therefore bringing claims which are essentially without merit hoping that afterwards they will get a favourable exercise of the 417 discretion.

Senator LUDWIG—So you end up with the 417 scenario again.

Mr Lenehan—As a measure of last resort—but it being a requirement that you first have to go through the process.

Senator LUDWIG—You have to go to the RRT.

Mr Lenehan—To us that seems to be quite unsatisfactory, and also wasteful of court resources.

Senator LUDWIG—I think I have said that I agree with that. As you would be familiar with, there have been a number of committee reports dealing with 417.

Mr Lenehan—Yes.

Senator LUDWIG—I was thinking of the original one in 2000, which was Senator McKiernan's.

CHAIR—I was thinking of yours.

Senator LUDWIG—I did not want to go there. Have you looked at the figures for the number of unrepresented litigants, the number of matters that are now going to the High Court, the cases the High Court has on hand, how many of those could be unmeritorious and the workload that is now revolving around these issues?

Mr Lenehan—We have seen the department's views on unmeritorious cases, which have been referred to in a number of submissions to the inquiry.

Senator LUDWIG—As I understand it, they regard all those who are potentially unsuccessful as unmeritorious.

Mr Lenehan—Yes.

Senator LUDWIG—They do not seem to be able to differentiate between those that may be pushing the boundaries or who have cases that may be on the outskirts but still require—

Mr Lenehan—Yes. As I understand it, that figure also includes matters where the minister consents to the matter being remitted to the tribunal. There may be some other inclusions in there that are questionable. I do not have all the information on those figures. We have not addressed it in the submission.

Senator LUDWIG—Do you accept that there is a problem at the moment? Do you accept that it is a workload issue that the High Court should itself resolve through the registrar?

Mr Lenehan—We are certainly aware of the views that have been expressed by the High Court and by other courts. The question that arises for us is: where does the problem really lie? That is an issue that is raised not just in our submission but in other submissions. Do you answer that problem by cutting off people's rights to bring cases that may very well result in them being awarded protection visas or do you look at more fundamental aspects of the problem, which include the matter that you have referred to which is that you have a bunch of unrepresented litigants in the highest court in the land dealing with legal issues that are not only beyond their comprehension but also in a language that they may not understand. That is one issue.

There is the issue regarding the definitions of 'refugee', which I have referred to before. Again, that is going to increase the numbers of people who are bringing claims that appear to be without merit. There are other issues that other people have raised both here and before the migration litigation review. The sound approach to us seems to be, particularly when you are dealing with fundamental rights, not to rush in a solution which does not first look to what are the real problems here and what are their causes. We endorse that view.

Senator LUDWIG—Do you have a view as to whether this will work? We know the nature of the issues, we know the potential problems and we know that it has been said that a number of cases are 'clogging up the system'—those are my words. Will this provision fix that, in your view?

Mr Lenehan—I will raise one matter and then I will see if Mr Hunyor wants to raise some others. The provisions that in broad terms might be seen to deter people providing legal representation to people making asylum claims or other claims under the Migration Act are going to lead to an increase in the phenomenon that you have described—that is, unrepresented people in the courts.

Senator LUDWIG—That is in relation to the provision where it would seem that the likely result of a legal representative would be not to pursue the case because the potential outcome might be perceived as being quite negative.

Mr Lenehan—There is a requirement that they file a certificate and a further provision that relates to the potential cost orders that might be made against them. As other people have pointed out, that seems to have a potentially chilling effect on people's willingness to provide, often, pro bono legal advice.

Senator LUDWIG—So it could affect those who otherwise would do it pro bono and those who would do it on a cost basis or on full charges, as the case may be, but it still might

act as a potential discouragement. What about the cab rank rule? Wouldn't that protect them, in the sense that if a barrister were engaged they would be required to take the case? This is excluding pro bono work.

Mr Lenehan—I guess the first thing about that is that the cab rank rule does not apply to solicitors, who are people's primary source of advice.

Senator LUDWIG—But the rules are a bit more relaxed. You can access a barrister without necessarily going through a solicitor now.

Mr Lenehan—That is correct. I will turn to the provisions of the bill. Clause 486E says:

(1) A person must not encourage another person ... to commence or continue ... litigation in a court if—

and the clause continues. That seems to be a legislative direction not to continue to provide legal services in those circumstances.

Senator LUDWIG—Yes, but someone could also say, 'Here's the necessary wherewithal you might need,' and off you go as an unrepresented litigant.

Mr Lenehan—Yes. 'Here's the hard news and I can no longer offer my legal services to you.' At that point—and this is one of the key things that we are concerned about—not only is that person deprived of legal advice but the court is deprived of somebody who can make sense of what is potentially a morass of facts that really require a lawyer to refine and present them in their proper order and in their proper form so that a court can apply the act to them and make sense of the application. So, in our view, the provision of legal advice potentially makes the proceedings more efficient. Insofar as the provisions of the bill lead in the opposite direction, that seems to have an undesirable result to us.

Mr Hunyor—One of the concerns we raise in paragraph 33 is that the term 'encourage' is not defined, but it may be potentially very broad and include notions of suggestion or providing assistance. In fact, where someone may have an unmeritorious claim, it may assist the efficient disposition of their case if at least they can get the assistance of someone to help them properly draft their claim. That will make it much easier for a court to figure out what the real issues are and whether in fact someone has a valid claim, whereas if they are even denied that assistance, it is simply going to be counterproductive and not achieve the aims that this bill sets out to achieve.

In terms of whether the other provisions will work, the other matter that we have raised is time limits. I am not sure that it is possible to say that they will necessarily assist in reducing unmeritorious litigation. I do not think there is anything to demonstrate that matters commenced in or out of time are more or less likely to be meritorious.

Senator LUDWIG—Do we have any reasonable statistics about how many of those applications have been made out of time?

Mr Hunyor—I am not aware of any.

Mr Lenehan—Nor am I.

Senator LUDWIG—I am sure it was one of those matters we raised at estimates. In fact, I have a recollection of it.

CHAIR—I think we also raised it in a hearing on the last bill in the last parliament.

Senator LUDWIG—Yes. I was just trying to establish how large the problem was.

CHAIR—Yes, we asked but I am sure whether we established an answer.

Senator LUDWIG—We will re-ask it anyway. Thank you.

CHAIR—I want to come back to the observations you make in your submission and in your comments today about the rights of children particularly and what effect the provisions may have on children who might be involved in migration litigation. What are the most difficult aspects of the bill with regard to that?

Mr Hunyor—One of the obviously difficult areas is the strict time limit that applies and possibly also the way in which that combines with what we have described as the 'procedural trap' in item 37 that relates to a requirement that a person must not commence a proceeding unless the person discloses previous judicial review, and the way in which they may effectively prevent a person from bringing a case if those procedural requirements are not met. Effectively, because children are not in a position to run their own proceedings, they are very much at the mercy of their guardian, who may inadvertently or through incompetence fail to meet those procedural steps. Therefore the child through no fault of their own—

CHAIR—Is disadvantaged.

Mr Hunyor—It may be through no fault of their guardian either. But a child is in that particular position of vulnerability and there is no discretion. Once you remove that aspect of discretion then you are unable to give proper consideration to the best interests of the child in that particular decision. So that is one particular area that raises concern.

CHAIR—I think in our last iteration of this process the commission referred particularly to unaccompanied children and the perhaps more significant impact that it may have on them.

Mr Hunyor—Yes.

Mr Lenehan—In some respects it applies not just to children but to people in the category of case that Mr Hunyor referred to before. Where you have an unaccompanied child, you should have an immigration guardian acting for them. If that person, for whatever reason, misses the time limit, why should the child be adversely affected by that failure, be it through mistake or for whatever reason? Similarly, for a lot of the cases we have referred to in our submissions regarding time limits, the time limit is missed not through any fault of the party themselves but through the actions of a third party. Again, that seems to reveal the potential injustices wrought by the bill.

CHAIR—I think that has covered most of the issues.

Senator LUDWIG—Did you get the Penfold report?

Mr Lenehan—If only, Senator.

Senator LUDWIG—Not even in a redacted form?

Mr Lenehan—Not even in a redacted form, Senator.

Senator LUDWIG—Were you consulted on this bill specifically?

Mr Lenehan—Not that I am aware of.

Senator LUDWIG—Perhaps you would just like to check your record on that too.

Mr Lenehan—We will take that on notice and do so.

Senator LUDWIG—Do you have a view about a purported decision? Can it in fact be a decision or can you write it into a decision by calling it a decision in a piece of legislation? It is an interesting point.

Mr Lenehan—It is an interesting point. We do not have the commission's views on that issue.

Senator LUDWIG—That would mean that the legislators could say that a purported decision, which is not a decision, is a decision. I know that we have those devices and have used those devices in the past, but it is a novel one. If you have a view on that, I would not mind hearing it.

Mr Lenehan—We will seek the commission's views. One thing that I will raise there though is that our primary concern in appearing before you today has been to raise human rights issues and we have deliberately—

Senator LUDWIG—I will withdraw that question and not ask you for your views, because it is one I can ask elsewhere. I appreciate your main role.

Mr Lenehan—It is one that interests Mr Hunyor and me but I am not sure that we should be expressing our views in the absence of a view of the commission.

Senator LUDWIG—It is interesting, but I understand that it is not within your general area of interest and concern.

Mr Lenehan—I have just realised that I may have misled the committee before when I referred to 486E as a legislative direction not to continue and its possible interaction with the cab rank rule. Under 486E(1)(b) you would also have to meet the conditions that there has been no proper consideration of the prospects of success or that it is essentially an abuse-of-process type case. Those are the additional matters that would have to be met there. That does not get over the possibility that a busy barrister, say, is unable to give proper consideration to the prospects of success of migration litigation, which may be for a number of reasons, particularly with the onerous time limits in the act. People up to the level of Justice McHugh have suggested that it is perfectly appropriate for people to file applications to preserve their rights in those circumstances. I do not know what the answer is for a barrister who is having regard to their duties, to their client and to their duties under this act, but it seems to put them in an invidious position.

Senator LUDWIG—We would even use words such as 'protective appeals', which are for the purpose of holding while we consider what we should do next.

Mr Lenehan—Yes.

Senator LUDWIG—That would put in jeopardy that term in this area or it would certainly put a new spin on it.

Mr Lenehan—It does. That seems to us to be a legitimate approach when you are talking about potential violations of the rights that we have referred to in our submission.

Senator LUDWIG—Have you looked at a way to overcome some of those issues?

Mr Hunyor—There is a way. In terms of the issue of time limits, we have suggested a provision in the terms set out in paragraph 15 of our submission, which suggests that there be discretion in the courts to extend time—

Senator LUDWIG—I am familiar with that. I am referring to the case where you might want to lodge a protective appeal, more than anything else—when there is a time limit which might expire and you need to preserve the position. You say the answer is the discretion of the court, but that still means that it is after the time. This is a case which may have come to the attention of someone prior to that but there is insufficient time for them to turn their mind fully to all the issues, read through all the transcripts in the matter or examine all material, and the time limit is ticking and it might be running out tomorrow. Therefore, the usual course would be to lodge a protective appeal rather than go past the appeal date and then try to persuade the court that you were busy.

Mr Lenehan—Yes. It is a peculiar difficulty which is a cumulative effect of the time limit and the provisions that we have just been discussing. We do have some fundamental concerns about the time limit.

Senator LUDWIG—Thank you.

CHAIR—Thank you, again, very much, Mr Hunyor and Mr Lenehan for assisting the committee. We have found your evidence today very helpful.

[2.39 p.m.]

CROCK, Associate Professor Mary Elizabeth, Member, International Law Section, Law Council of Australia

WEBB, Mr Peter, Secretary-General, Law Council of Australia

CHAIR—Welcome. The council has lodged a submission with the committee which we have numbered submission No. 21. Do you need to make any amendments or alterations to that submission?

Mr Webb—There is a minor typographical error that should be corrected. It is about the sixth line from the bottom of page 10. 'Mitigation' law should be 'migration' law.

CHAIR—I now invite you to make an opening statement, after which we will go to questions.

Prof. Crock—It is our view that this legislation is contemptuous of the notion of the separation of powers in this country. Like the migration legislation reform enactments that have preceded it, it is ill-conceived, of questionable constitutionality and is likely to have effects that are unintended and are detrimental to both the legal process and the rule of law in Australia. This bill is yet another attempt to oust the judicial review of migration decisions, but it goes further than that. It touches the judicial process generally in the federal area. Whereas on the last occasion the attack was on the courts themselves, this time the approach is two-pronged and involves an attack on the courts and an attempt to discourage and penalise those in the community responsible for bringing judicial review applications.

I would like to turn briefly to these two foci of the bill: provisions relating to the jurisdiction of the federal courts and the functions and powers of the courts in the judicial review of unmeritorious applications. The legislation is offensive because it attempts to extend the operation of the privative clause of the Migration Act by including in one part purported decisions and by defining and confining the respective jurisdictions of the federal courts by introducing time limits and by limiting the types of decisions that can be considered by those courts. There are some aspects of this bill that look like constitutional kite flying; indeed, one might even think that they are close to a legislative contempt of court.

I refer in this context to the extension of the operation of the current privative clause to include the notion of purported decision. The High Court of Australia has made it patently clear that the Australian Constitution contains guarantees that cannot be ousted by parliamentary enactment. These guarantees are contained in sections 73 and 75 of the Constitution. They provide that the judicial power in Australia is to be exercised by a federal court, to be known as the High Court of Australia, and that as an irreducible minimum the High Court is to have the power or jurisdiction to review actions taken by an officer of the Commonwealth. These provisions embody the notion that the rule of law in this country involves the power of parliament and of the executive being balanced by the oversight of the court. This means that if a court says that either legislation or administrative action stands outside the law it should be subject to judicial correction. In its reference to purported decisions—I know very few decisions are caught by this—the legislation attempts to preclude

the review of decisions affected by the jurisdictional error, and it says that in the legislation. I find it hugely distressing that parliament would purport to put words like that in an enactment given the terms of the Constitution.

While it is likely that the courts will treat these new provisions as they do the current privative clause, there are other aspects of the bill that are very concerning, because it is our view that they are likely to recreate some of the worst disasters of the first part 8 of the Migration Act. These relate to the imposition of time limits and the ban proposed on the Federal Magistrates Court's review of primary decisions. The bill attempts to return the Migration Act to the situation that pertained before September 2001 when decisions by primary decision makers could not be reviewed by the Federal Court. It also purports to articulate which of the courts can review which types of decisions.

In principle, we have no trouble with the lower courts dealing with the bulk of migration matters. I think that is entirely appropriate. The problem is, if you put legislation in force that because of the Constitution is likely to leave people with only one place to go—namely, the High Court of Australia—then you set in place the preconditions for a return to the disastrous consequences of the first part 8. What happened there, of course, was that, because the Federal Court of Australia was unable to deal with all aspects of a judicial review application—they were only able to look at some legal errors and not other legal errors—everybody went to the High Court of Australia. It is the same here: primary decisions cannot be reviewed by these courts. These are good examples of cases where time limits can work catastrophically against vulnerable people, particularly unrepresented refugee claimants, separated children or unaccompanied minors. The problem is that you have again set up the matrix that would require some people to go to the High Court. That, in itself, is going to be problematic. Combine that with the other parts of this bill, which are designed to discourage unmeritorious applications, and I put it to you that the results could be absolutely catastrophic.

There are two aspects of the discouragement of unmeritorious applications which the Law Council has great concerns about. One relates to the lowering of the bar for the summary dismissal of applications without merit; the other relates to the penalties to be imposed on persons assisting litigants in such cases. Our submission briefly addresses—we did not have enough time to go into greater detail in our submission, unfortunately, but I think you have been assisted by people all around Australia making the same point—the fact that the courts already have power to dismiss unmeritorious applications. By introducing this legislation across all of the courts, I think the danger is that it looks as though the legislation is attempting to direct the courts to knock out cases at the risk, I think, of restricting a vital part of the judicial function.

In particular, the way that this legislation would stifle the operation of the common law is very problematic because what it does, in effect, is say to a lower court, 'If you have a precedent that binds you then you really must consider dismissing this summarily.' Again, that is going to have the effect of pushing cases up to the higher courts. It will have exactly the opposite effect to the one intended. The common law depends for its development on courts being allowed to consider cases that, on their face, may not look promising. Lower courts have to be able to consider matters and explore the avenues that are there.

As for the penalties that this bill envisages, we note that the bill refers to 'any person' who encourages a litigant. So this covers not just the lawyers and people on the record; it covers everybody from your good selves, Senators, and your advisers through to people in the community who might encourage people. As many submissions have put to you, the basic problem with this legislation is that the term 'encourage' is so broad that it could cover—indeed, I think it places at risk—anybody who stands up in court and argues a case that might be unmeritorious. Equally, it could also cover anybody who could be traced back to an individual who ends up in court.

Again, going back to the issue of the likely impact on the operation of the courts, the only outcome that I can see from this bill is that it will impact on pro bono services such as the schemes that have been set up to great effect by the Federal Court of Australia and by the law societies all around the country. It will discourage solicitors from giving their time to be involved in such schemes and/or it will just encourage an underground army of litigators. There is already a tremendously strong network of refugee advocates around the country, and I do not think they will be dissuaded from continuing to assist. In fact, they may see it as a badge of honour to push people. But the end result is that you are going to get many more unrepresented litigants. I put it to the committee that this is really in some ways a case of prohibition. We have seen that you cannot prohibit the sale of alcohol without catastrophic effects. You cannot prohibit prostitution. Do you take the point?

CHAIR—It is usually sex and drugs. Yes, we are with you.

Senator LUDWIG—I was hoping not to go there.

CHAIR—This is going to be a long day.

Prof. Crock—There is a prohibition issue here. With the greatest respect, I cannot see that the bill has any redeeming features.

CHAIR—Mr Webb, do you have anything further to add?

Mr Webb—No.

Senator LUDWIG—There are a couple of issues. This is a vexed question in my mind. The bill seeks to make a decision, effectively. There is always an argument about whether the stream should rise above its source—that is, whether it is in the legislative competency of parliament to make a law such as that. It is a unique mechanism, I think. I cannot recall that type of mechanism although I do recall that legislators in the past have made something for convenience which is not something for the purposes of the law. I guess that is where the concept comes from. The mischief, though, is where you have a jurisdictional error. Is there a way of expressing it so that it is kept within constitutional competency, in your view? In other words, how do you address the issue of where you have jurisdictional difficulties and decisions are made which exclude a particular course? Do you say that the High Court then should have the discretion, which they currently have, to rule on those in any event, and you do not need the legislation or any remedy such as that proposed for cases like S157?

Prof. Crock—Short of amending the Constitution after referendum—

Senator LUDWIG—Let us rule that out, because I think that is probably beyond our scope.

Prof. Crock—Would you want to do that, though? That is the question. Either the courts are to have a role in supervising the law in Australia or they are not. That is really the issue here. I realise that it is confined to a very narrow class of cases, but it is the principle that is important. You can put this in legislation if you want to, but I think the High Court will just simply say, 'This is unconstitutional and we will treat it as a nonprovision.'

Senator LUDWIG—As to the matters that go to time limits, do you have similar concerns to the Human Rights and Equal Opportunity Commission in the sense that it is not so much the time limits that are proposed but the non-discretion element or does the length of time trouble you as well?

Prof. Crock—This is also a matter that comes back to the Constitution ultimately and it attempts to oust the courts from reviewing decisions that are plainly affected by jurisdictional error. That is what is at the base of all of the argument about time limits. It is because of that constitutional foundation that the discretion is necessary. There is nothing wrong with having indicative time limits, because courts have to manage their business. The High Court of Australia has imposed its own time limits. If you appear before the court it imposes very strict time limits, as in, 'You have 30 seconds to go.' It is not the issue of time limits but the ability of the court to consider whether a particular decision has been affected to the point where it is operating outside of our law. Again, it comes back to the rule of law. It is not the length of time but the absence of discretion that is of concern.

Senator LUDWIG—In some areas they seem to impose or would impose a cost order or potential cost order. Is there any other legislation that has that penalty that you can recollect?

Prof. Crock—There is already the power for courts to make costs orders.

Senator LUDWIG—I understand that.

Prof. Crock—I have brought a couple of examples with me. I think I have an example here of a case where—

Senator LUDWIG—Is your example of where the court has done that?

Prof. Crock—Yes.

Senator LUDWIG—My question was whether you are familiar with any other legislation that has a similar type of provision.

Mr Webb—As distinct from the inherent powers of the court.

Senator LUDWIG—Yes.

Prof. Crock—That directs a court to consider—

Senator LUDWIG—I wondered whether you were familiar with any. I cannot think of any. I will ask Attorney-General's about one that I have in the back of my mind; they may have heard of it from somewhere themselves. I cannot recall any legislation which has a provision similar to this one, which imposes a penalty. I know that the court does have that inherent power and has exercised that in the past, but I do not know whether that has ever been put in legislation or been considered in a decision. I imagine that if it were imposed upon you and if it were significant, you would probably appeal it.

Mr Webb—I have a feeling there are provisions like that in legal profession acts of the states and territories. I might have a reference to one of those here, but I just cannot be sure. I will keep looking for it.

Senator LUDWIG—Perhaps they are confined to that area. I cannot recall whether or not they have been subject to any judicial consideration. I would imagine that if a significant one were imposed, it would not necessarily always be accepted.

Mr Webb—It has been accepted, provided it was reasonable, proportionate and necessary, which are usually, as I mentioned this morning, the guiding principles we use to assess the appropriateness of legislation. Section 198M of the Legal Profession Act 1987 deals with costs orders against solicitors or barristers who act without reasonable prospects of success. That is the sort of precedent I think you are looking for. I think you would find an equivalent provision in many legal profession acts around the country.

Prof. Crock—There is power under section 43 of the Federal Court of Australia Act to make an order that a solicitor for an unsuccessful party pay the costs personally of a successful party. This has been done in a number of cases, amongst them De Sousa v MILGEA (1993) 41 FCR 544 and Caritativo v MIMA (no 2) [2002] FCA 735 in 2002.

Senator LUDWIG—Your primary issue with the provision is not so much the provision itself but the operation of the provision in this context as a deterrent?

Prof. Crock—I am not aware of any precedent. These are against the solicitor on the record. The difference here is that this bill refers to any person who has encouraged the litigation. So the very uncertainty of this legislation would—

Senator LUDWIG—I am just trying to narrow down a particular issue. Your concern is not the provision more generally or how the scheme might operate, although in some respects it might be because some submitters object to how the scheme operates—in other words, as a penalty provision—but that it operates so widely as to encompass not only the solicitor on the record but other persons. What might have been in the minds of the drafters is that there would be people who may assist significantly some unrepresented litigants to be able to present their case. I can assume, probably correctly, that they have also tried to broaden it out to include not only the unrepresented litigant who may not have any resources at their disposal in any event but also those people who might encourage. Do you agree with that so far? That seems to be the case.

Prof. Crock—Yes. There are in fact two problems with this piece of legislation.

Senator LUDWIG—It might be reasonable as a piece of legislation that appears in solicitors acts, but not in this context and in this breadth.

Prof. Crock—I think the point is that in other contexts the focus is on the cost order against somebody who is plainly responsible for the carriage of proceedings, namely, a solicitor on the record. There are two problems with this section of the bill. The first is that the cost order is tied to the definition of unmeritorious application; it is not disconnected from the provisions relating to what constitutes an unmeritorious application. The second aspect of it is its breadth and the fact that it does not just capture, if you like, the person who might have the carriage of litigation before a court. It covers any person.

Senator LUDWIG—The result, of course, is that lawyers may go underground or be driven out of this area where they might otherwise have provided reasoned assistance which would speed up cases, you would imagine.

Prof. Crock—Yes. At the end of the day, the biggest problem with this whole package of legislation is that it does not address the problem that we see in Australia at the moment. In fact, it is only likely to make it worse. We are getting so few refugee applications each month now. We are down to about 190 new applications every month coming in through the airports. We have one of the smallest bodies of refugee claims in the world and one of the most astonishingly disproportionately large load of cases in the courts. You have to ask why this is happening. For years, we have been saying, 'Let's blame the lawyers and attack the courts.' That has not worked. Perhaps we need to stand back and look more holistically at the system and what is going wrong.

Senator LUDWIG—There seems to be—if not anecdotally—reports by the registrars that these cases have been clogging the courts up for some time. Do you say the solution to that is not this legislation? I will ask the Attorney-General's and DIMIA to provide updated figures, but I was at a conference on the weekend which seemed to suggest that the number of cases were starting to diminish and that a lot of these matters are, so to speak, flushing through the system because there might have been a small band of people with a large number of cases and that is now being confined. Do you have any figures on that? Have you looked at that particular issue about whether or not it is just one of those spikes in the system which is now passing?

Prof. Crock—It should be a spike that is passing. In terms of the number of cases coming through, that should be the case. My concern is with the backlog. As you are well aware, there are ongoing problems that are due to the fact that people get recognised as refugees in Australia but that is not the end of the story. They have to reapply, so we recycle our refugees ad nauseam. There is still quite a large cohort there to go through the system.

Senator LUDWIG—Are these the TPV holders?

Prof. Crock—Yes.

Senator LUDWIG—Is that about 2,000 or 4,000?

Prof. Crock—I think it is closer to 10,000.

Senator LUDWIG—That is in total—that have currently been added this year?

CHAIR—When you talk about recycling, Professor, you mean that they are re-presenting in different categories?

Prof. Crock—Yes. Their status is not clear. It comes back to what you were talking about before about complementary protection. All around the world, countries now recognise that the definition of refugee is very narrow and that you need to deal with a cohort of people beyond that who need permanent assistance of some kind. Unfortunately, our system as it operates at the moment does not.

Senator LUDWIG—What I meant was that, of those 10,000-odd TPVs, they do not all come up at the same time; they come up in groups because they usually have three years. So

they do not all come up together but they are then re-presenting and going through the system again.

Prof. Crock—They are the source. That is your bank, if you like, of potential litigants of the future.

CHAIR—I want to come back to the question of unaccompanied minors which you only adverted to quite briefly in your opening remarks. What are the Law Council's concerns in relation to that issue?

Prof. Crock—I have a particular interest in that, as I am doing a major project at the moment looking at the treatment of unaccompanied minors in Australia. In that context I have personally come across a number of young people. I have come across some spectacular successes. The arrangements in Brisbane, for example, have been outstanding in terms of looking after the needs and the processing of unaccompanied minors. But when you get into the big cities, particularly Melbourne and Sydney, there are people popping up all the time who have fallen through the cracks in the system. The decisions that are coming out at the other end are hugely problematic.

CHAIR—You might need to be a little bit more specific for me. What are the particular issues in Melbourne and Sydney? Is it poor representation or is it errors in representation which would be exacerbated by the provisions in this bill?

Prof. Crock—Yes, all that. They do not know that there is free advice available, so they go and pay for advice and the advice is really bad. They are relying on each other. From my personal experience they have absolutely no comprehension of the way the system works, but they all think that after the tribunal you go federal—that is, to the Federal Court. This is the problem. If you have people who are not being looked after and they are not being captured, if you like, by people who are going to look after their cases properly, these people will end up making unmeritorious—or apparently unmeritorious—applications. But in fact they are people who are in dire need of assistance and who have good claims that have never been properly articulated. It is a systemic failure that this is really not addressing. That is the point I would like to make.

CHAIR—The only other issue I wanted to go to, which is an additional matter from the previous legislation, relates to some of your observations about the potential impact on pro bono work. The stimulus for that does differ from the provisions of the previous bill. Does the council have any information or any responses from members which would indicate that that is expected to be the case—that, when faced with this particular provision and the costs penalty, some of the formal pro bono schemes in particular that operate in this area would no longer continue to operate?

Mr Webb—Perhaps we could refer you to the submission by one of our constituent members, the South Australian Law Society. It does particularise their concerns about pro bono. The passage says:

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.

They seem to be putting their finger even on a particular organisation that will be adversely impacted by this.

CHAIR—Thank you for drawing my attention to that particular detail.

Senator LUDWIG—You said in your submission that you were in the process of examining the issue of summary decisions. Is that still in the process of being examined?

Mr Webb—Yes.

Senator LUDWIG—It has not concluded as yet?

Mr Webb—No, it has not concluded.

Senator LUDWIG—That is whether or not Dey and General Steel still remains the case. This would of course change all that.

Mr Webb—Indeed.

Prof. Crock—I think the point to make about that is that these matters have been under active consideration in the past. This bill comes out of left field and makes you wonder how it relates to the other ongoing inquiries.

Senator LUDWIG—Have you had the opportunity of discussing that particular issue with the Attorney-General?

Mr Webb—Not directly, no.

CHAIR—I think that covers most of the issues that we wanted to pursue with you both. Thank you very much for your assistance this afternoon and for appearing before the committee. If there are matters which arise out of our further deliberations today—we do have a number of witnesses to hear from—then we may pursue those with you.

[3.12 p.m.]

MARTIN, Mr Wayne Stewart, QC, President, Administrative Review Council

Evidence was taken via teleconference—

CHAIR—Welcome. We will go through the formal processes and then start your evidence. The ARC has lodged a submission with the committee, which we have numbered as submission No. 6. Do you need to make any amendments or alternations to that submission?

Mr Martin—No.

CHAIR—Thank you for appearing by teleconference. I know it is not the most convenient process for either participant, but we are grateful for your assistance today. I invite you to make an opening statement and at the conclusion of that we will begin with questions.

Mr Martin—Again, on behalf of the council, I express our gratitude for the opportunity to put some submissions to the Senate in its consideration of this bill. By way of introductory remarks, I suggest that there are probably three aspects of migration litigation that distinguish it from the ordinary run-of-the-mill litigation. The first aspect is the fact that the litigation can be an end in itself, irrespective of the ultimate outcome. That of course is because the litigant is generally permitted to remain in Australia for as long as the litigation is on foot. That fact has, I think, undoubtedly had the consequence that a disproportionately high number of unmeritorious cases have been brought in that jurisdiction.

The second aspect is that migration litigation has, I think, unfortunately been characterised by significant elements of abuse and exploitation of vulnerable and inexperienced noncitizens by unscrupulous agents and, unfortunately, in some cases—it must be admitted—by lawyers who have exploited their weakness and vulnerability to reap substantial profits by abusing the system. The third aspect is at the other end of the spectrum. Migration litigation is also characterised by the significant amount of pro bono assistance which is provided by the legal profession—often unsung and unrecognised publicly, it is nevertheless very significant in enabling the system to work smoothly and achieving just outcomes in cases where that is appropriate.

What the bill is endeavouring to do is to strike the right balance in that rather unusual context. The view of the council is that, generally speaking, the bill does strike that right balance and it is for that reason that we generally support its terms.

There are two particular issues that I would like to address, and they have been the focus of comment in a number of submissions that the committee has received. The first concerns the expanded scope for summary judgment. The council supports the bill's proposal in this regard. That is not surprising, because it was us who suggested it to Ms Penfold in the course of her review. The line taken in the bill is generally consistent with the recommendation made by the Australian Law Reform Commission some years ago and is in fact identical to the recommendation proposed by the Western Australian Law Reform Commission in 1999. It proposed the adoption of the precise test that the bill uses—namely, no reasonable prospect of success—as the criterion for summary judgment. But I should disclose that I was the

chairman of the WA Law Reform Commission at the time it made that recommendation, so it is hardly surprising that I support the terms of the bill.

The reason we support that expansion of the scope of summary judgment is that the principles concerning the traditional enunciation of the reluctance of the courts to dismiss a case without it being fully heard, as found in High Court cases like Dey and the Victorian Railways Commissioners and General Steel, evolved in quite a different era and quite a different litigious context, an era in which there was a lot less litigation and a lot less pressure on limited judicial resources. The world has changed significantly since those statements were made, in that there has been, relatively speaking, a torrent of litigation in all jurisdictions which has placed significant pressure on limited judicial resources. My own view is that that requires a reassessment of the principle to ensure that we are allocating those limited judicial resources as efficiently as possible. In that context, if a case has no reasonable prospect of success, it seems to us to be in everybody's interests—the interests of the parties, the court and the public in the efficient allocation of the resources of the court—that the fact be recognised sooner rather than later.

The expansion of the scope of summary judgment, which is essentially early determination on the papers, seems to us to be preferable to other suggestions that have been made from time to time, like the introduction of a requirement for leave to proceed. That is because summary judgment is effectively a final determination on the merits, whereas the refusal of leave to proceed is simply an interlocutory step and experience shows that the introduction of leave requirements generally protracts rather than shortens the process. In the migration area, a leave requirement would be ineffective anyway because of the enshrined constitutional jurisdiction of the High Court under section 75 of the Constitution.

So we do not share the view that the expansion of the availability of summary judgment is likely to lead to the dismissal of worthy cases. In fact, if there is any risk, my own view is that the risk is more likely to be in trying to shift the courts away from their traditional reluctance to dismiss cases without there having been a full hearing. So I do not think it is likely that the courts will react to this legislation in a cavalier or fanciful way, dismissing worthy causes.

The second area I would like to address, and to which my final remarks are directed, is the question of third party costs orders, which has obviously attracted a great deal of attention. We think the terms of the bill have to be read against a context in which the courts already have an inherent power to make costs orders against third parties in all areas of jurisdiction. What the bill seems to do in the migration area is to expand that power in two significant ways. The first is by casting the net of potential exposure to catch anybody who was involved in encouraging the proceedings. That may well be casting the net wider than the present inherent power of the court. The second way is by identifying the availability of the power to award costs if a purpose of the relevant person has been some purpose other than the legitimate court process. That is probably broader than the inherent power, which would focus rather more upon predominant purpose.

In the context to which I referred earlier, namely, the significant work done by pro bono advisers, we as a council were concerned about and gave quite anxious consideration to the question of whether those provisions might discourage pro bono assistance. Pro bono assistance seems to us to be very important in the smooth running of the system because

where people are represented their cases run quicker, are better presented and more efficiently advanced. On balance, we came to the conclusion that one could have some confidence that the court in implementing these provisions would act sensibly and in a reserved way and would not exercise the power to award costs against a third party other than in an appropriate case, which would essentially be a case involving some significant element of abuse and culpability on the part of the person against whom the costs order is made. On balance, we came to the conclusion that we supported the terms of the bill as proposed. That is all I wish to say by way of opening remarks.

CHAIR—Thank you. We have just been discussing the issue of the costs order in particular and its potential impact on pro bono services with the Law Council. The Secretary-General of the Law Council, Mr Webb, referred us to a submission to this inquiry from the South Australian Law Society. They are very specific in their concerns about the impact they think this may have on pro bono services in the immigration area. I quote very briefly from that submission. It says that the Attorney-General has recognised the significant contribution of legal practitioners:

... who are prepared to act on a pro bono basis for indigent clients ... 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 ... this will result in a huge upsurge in numbers of unrepresented litigants ... with consequent delays.

That is an inevitable cost to the system. It continues:

It will achieve the opposite to the outcome allegedly desired ...At the very least voluntary organizations and lawyers acting pro bono should be exempted.

I am sorry to read that to you without you having the benefit of it in front of you, but it is quite a specific concern from a specific organisation and they certainly do not seem to read the process and the approach of the courts as generously as you do.

Mr Martin—The key point of difference between the South Australians and me—and that is certainly a legitimate view that they have advanced—is the apprehension that the risk of an adverse costs order will choke off pro bono assistance. If I thought that was the case then I would be vehemently opposed to the bill because I agree with the proposition that pro bono assistance is very important in this area. We have a network in Western Australia that is not at all dissimilar to that described in South Australia. My colleagues at the bar and I are extensively involved in the provision of pro bono assistance in this area.

The reason I disagree with the proposition that the mere passage of the bill will choke off that important resource is that I find it very difficult to conceive of a circumstance in which, under this bill, a pro bono lawyer who has acted in good faith would be at any appreciable risk of having a costs order made against him or her. I cannot see that a lawyer acting properly in accordance with our normal professional obligation and particularly in a pro bono context would be at any risk of a judicial order. It would only be the most extraordinary case and a case that would probably lead to the conclusion that the lawyer had acted unprofessionally. That is the only circumstance in which a costs order would be made.

If the bodies that have engaged in giving this service looked carefully at the legislation and applied it to the services they provide I think they would come to the conclusion that they

would be at no appreciable risk of an order—especially in the pro bono context. I can imagine a judge taking a harsher view of a lawyer who was motivated by profit in pursuing a case that had no reasonable prospect of success. A pro bono adviser cannot have that motive.

CHAIR—Mr Martin, are you making the assumption that the new clause 486E concerns a lawyer?

Mr Martin—No, I am not. Plainly, it extends beyond lawyers to third parties. But the people who will ordinarily be at the business end of these orders, I suspect, are the lawyers. A significant amount of the pro bono work is done by lawyers, although they are assisted by community groups of the kind that are described in the South Australian submission. I can give you an example: a person who is not a lawyer and who might be exposed to a costs order under this regime, and who is acting as part of a community group, would, I think, have to do something that was really quite out of the ordinary in terms of the things done by such bodies—such as actively mislead their legal adviser or actively mislead the court as to the true facts—before, I would have thought, the judicial discretion would be exercised against that person. The facts I have just illustrated are an example from which one could infer that the person's purpose was some purpose other than the objectives for which the court process was designed.

CHAIR—Of course, the problem that we have as a committee in this instance and in so many others is that that is not what the bill says. If the bill said that—if the bill provided those protections and reassurances—then perhaps a significant number of our submitters would feel equally reassured. But it simply does not. It does not include a definition of the word 'encourage'. It does not say what a 'person' is. The Law Council, for example, just raised with us the position of ourselves and our electorate staff who, as you might imagine, are involved in issues of migration questions and assistance to our constituents on literally a daily basis—if not minute by minute in some cases. We could probably be described as, on occasion, encouraging people in a manner which could be deemed to have offended the legislation. Because there are no definitions in this aspect of the legislation one would not know.

Mr Martin—I think that is certainly right. I meant by my remarks earlier to point to—and our submission does point to—the breadth of this provision. There is a reasonable basis for criticism of its breadth. The only constraints upon it are, firstly, the requirement that the litigation has no reasonable prospect of success and, secondly, that the person against whom a costs order is made must have a purpose which is unrelated to the objectives which the court process is designed to achieve. Viewing that with my lawyer's glasses on, I would read that as: pursuit of litigation for an improper purpose. That is why I give it a more constrained reading than a number of the submitters.

Senator LUDWIG—On that same point, it seems that the new position will provide for 'no reasonable prospects of success'. The Law Council have told us they are currently part way through an examination of the existing provision, as provided for in Dey and General Steel, and that, in their view, it seems to be a tougher test than that which is now proposed under this legislation. So you have the combination of a lesser test than what currently exists and an undefined 'encouragement' coupled with an undefined 'actor.' The scope of the 'actor' or 'actors' could be quite broad. It is not clear whether or not a party of 'actors' could be included in that term—whether you could include those people, excluding the solicitor, who

have otherwise encouraged a person, who then becomes a self-represented litigant, to take action. That is the nub of the problem as I see it: when you put those three together you end up with the position where the law—if this bill is passed—has moved in three distinct ways, all reliant on one another to bring you to a result. Potentially, that could mean my electorate staff who encourage an unrepresented litigant to pursue a claim which then turns out to fail that test. They are not lawyers—at least I think they are not. Even if the encouragement was, on the face of it, well intentioned, they might find themselves a party in a costs order.

Mr Martin—I do not disagree with that process of analysis at all, and in particular it is very safe to assume that the legislation will lower the hurdle for summary judgment. That is its obvious purpose and intent. The scope of application of section 486E will be broader than the current scope of summary judgment. Certainly, all that you say about the breadth of the persons potentially liable and the breadth of the notion of encouragement seems to me, with respect, to be entirely correct. I suppose the only way one could perhaps view the ultimate conclusion note, cast in terms of the hypothetical electorate officer, is to look at the two alternative requirements in 486E(1)(b). In (i), it says:

… the person does not give proper consideration to the prospects of success of the migration litigation …

I would read 'proper' in that context to mean having regard to the role that the person has played in encouraging the litigation so that the extent of proper consideration expected of a lawyer, who is advising the person to initiate proceedings, would be one thing. The extent of proper consideration given by an electorate officer who is pointing out to the person their options would be very different, and may well be negligible, so that it might be that virtually no consideration would be necessary to satisfy the requirement that proper consideration had been given in that context. What I am saying is: there seems to me to be a relationship between the role played by the encourager and what would be proper consideration. Turning to the second alternative limb, which is (b)(ii), it says:

… a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

That word 'unrelated' seems to me to connote the requirement that the relevant purpose has to be entirely outside the scope of purposes that the litigation is intended to achieve. Those purposes would include the achievement of a just outcome in relation to a visa application et cetera. In order to come within the second limb, it would have to be established that the encourager who is liable for a costs order had a purpose that was completely divorced from the purpose of the litigation. If the clauses are construed in the way in which I would suggest then there are constraints there. But if they are not then your analysis is entirely correct, and the fear that follows from that analysis is justified.

Senator LUDWIG—The other area is the time limit. A number of submitters have indicated that it is not so much the length of time, but the non-discretion of the judiciary in that area. I notice your submission makes some comment, but not on that particular issue.

Mr Martin—As I understand the bill, there is a discretion of up to, I think, a total period of 84 days commencing from the date of notice; in other words, actual notice—not deemed notice, but actual receipt of the notice by the person. I suppose all that one can say is that

limitation periods always involve the drawing of a line. The line is usually drawn in ordinary litigation much further out than that, cast in terms of years. But in migration litigation, there is a reasonable basis for the view that a period of just under three months is an appropriate time for a person to make a decision about whether or not they are going to challenge a decision concerning their capacity to stay in the country.

Senator LUDWIG—The complaint is that the judiciary is left with no discretion. Even with time limits in other pieces of legislation, there is still a discretion that the judiciary can expand upon. What they say seems to suggest, in this instance, that it is taking away the discretion of the judiciary and, to perhaps take it further, they are overriding the judiciary in that they remove their discretion.

Mr Martin—There is not always a discretion to extend time limits. It varies from state to state. In my own state of Western Australia there is no general discretion to extend limitation periods. A number of states have that, but this state does not. So there are occasions when limitation periods are hard and fast, and I suppose all one can say is to repeat what I said: it is the nature of the litigation. Because we are talking about a person's presence in Australia, there has to be a finite point in time by which a process that is to be invoked challenging that presence must be invoked.

Senator LUDWIG—They say that the privative clause provisions, which is the purported decision that makes it a decision in this bill, are unconstitutional, or at least can be challenged on the basis that they could be unconstitutional. Have you turned your mind to that issue?

Mr Martin—I have looked at that but not in the detail that some of the submitters have and, of course, when the submission comes from somebody as eminent as Professor Williams, it is entitled to be received with respect. My own view, though, is that I thought this ground was covered pretty much by the bill that lapsed with the parliament last year. My impression of it was that the effect of the introduction of the definition was largely mechanical and procedural to overcome what might have been an unintended consequence of the High Court's decision in S157. As I read the provisions of the bill—and I may have misread them—both that bill and, to the extent the provisions have been carried forward in this bill, this one, it was not intended by that definition to attempt to, as it were, resurrect the scope of the privative clause that was emasculated in S157 but, rather, to apply that decision to some of the mechanical provisions of the bill relating to time limits and so forth.

Senator LUDWIG—Thank you; that is helpful.

CHAIR—Thank you very much for your time and for the Administrative Review Council's submission. If any further issues are raised during the proceedings this afternoon, we may come back to you to seek some advice on those.

[3.44 p.m.]

KIDSON, Ms Nitra, Project Coordinator, Refugee and Immigration Legal Support Project, Queensland Public Interest Law Clearing House

LACHOWICZ, Mr Robert, Coordinator and Principal Solicitor, South Brisbane Immigration and Community Legal Service

Evidence was taken via teleconference—

CHAIR—Welcome. I appreciate your appearing by teleconference. I know it is not the most convenient or perhaps effective way of doing this but it enables us to take your evidence, so we are very grateful for that. The submission you have lodged with the committee has been numbered 11. Do you need to make any amendments or alterations to that submission?

Mr Lachowicz—No, I do not think so—not at this stage.

CHAIR—I invite you to make an opening statement and at the conclusion of that members of the committee will ask questions.

Ms Kidson—I will make the opening statement and I will be brief. Our objection to the bill is that it will effect a significant erosion of legal rights for one particular group of applicants—applicants in migration cases—without any evidence to demonstrate that it is needed or justified. Our position is that dramatic reductions in people's ability to access legal advice and representation and to have their cases heard by the courts should not be implemented on the basis of untested assumptions or on an idea that something might be going on without any actual qualitative analysis to determine whether it is going on or not.

I would like to give an example for each of the three main measures proposed by the bill. The first is the imposition of the non-discretionary time limits. In the explanatory memorandum to the bill the government quotes statistics which show that in the 2003-04 financial year a significant number of applications for judicial review in migration cases were lodged outside of time—up to one year, I believe. But there has been no analysis or study done of the reasons for those applications being lodged out of time. For example, that financial year covers the period after the High Court handed down its decision in the case of Plaintiff S157/2002, which significantly changed people's perceptions about whether they could proceed with judicial review. In that case the High Court, as you know, changed the notion of the privative clause and what it would bar, and also changed the notion of the operation of time limits. So it is quite possible that many of those applications were brought by people who had cases but who did not bring them prior to that decision because they felt they could not.

Neither does it demonstrate how many applicants who lodged outside of time had good reason and were able to show that. Courts should retain a discretion to extend time. Giving courts that discretion does not mean that there would be open slather on bringing applications. Courts, in many jurisdictions, have the capacity to look at whether it is appropriate to grant extensions of time, and they do that by looking at the merits of the case, the reasons for the delay and whether or not continuing the proceedings is futile. We ask: why would the government want to ban judicial review of potentially meritorious cases in situations where an

applicant can demonstrate compelling reasons for not bringing an application within time? Yet the bill would achieve that if it is successful.

In relation to summary dismissal, the analysis that we have undertaken for our submission demonstrates that existing summary dismissal powers have been used to dismiss cases where applications were not supported by any evidence or by sufficient evidence, and where applications as pleaded did not disclose any errors of law or any causes of actions that were recognisable. They have been used to dismiss applications where the matters have previously been unsuccessfully litigated in the courts and they have been used to dismiss actions where the applicant was raising a point of law that they clearly could not succeed on.

Those are the very types of cases of which the government complains, and the courts have demonstrated that under existing powers they are more than prepared to summarily dismiss them. Our view is that that has not happened more frequently because the government simply does not bring applications for summary dismissal. Before it goes about seeking to increase those powers it is incumbent upon the government to at least test the limits of the existing powers and to demonstrate where they are deficient. What cases does the government say are not being dismissed summarily that should be dismissed summarily? Tell us the details and nature of those cases and explain how the interests of justice are served by having those cases dismissed without a full hearing.

In relation to the imposition of liability for legal costs, again we do not believe the government can point to any evidence that lawyers and other persons are encouraging applicants to abuse the legal system. The explanatory memorandum talks about advisers operating behind the scenes, but I have to ask: how does the government know what goes on behind the scenes? We have undertaken an extensive review of judicial review cases for another project. On our review the overwhelming bulk of those that could be considered to be unmeritorious in terms of the types of cases that could have been summarily dismissed are overwhelmingly if not completely brought by self-represented applicants, although we will caution that many of those cases may well have had a different outcome if legal representation had been available. Where there is abuse by practitioners, if it can be identified as a matter of reality not as conjecture, the courts already have a general discretion to award costs personally against lawyers and they have done so in the past where they have been satisfied it is appropriate. There are professional bodies whose job is to deal with any systemic conduct which is unprofessional or unbecoming. Migration lawyers, particularly, are probably the most regulated lawyers in the country because they are subject to both their own state law societies as well as the national migration agents authority.

We have no doubt that the provisions that are contained in the bill will be successful if they are implemented in scaring away lawyers from being involved in migration cases. Our concern is that it will do that by dissuading good, ethical and competent lawyers from assisting applicants in complex and borderline cases. It is difficult for us not to draw the conclusion that that is in fact the ultimate intention of the bill and that the interplay of the different provisions is intended to keep lawyers away from anything but the strongest of cases, resulting in applicants with complex, difficult or borderline cases being unrepresented and therefore less able to defend summary judgment applications, particularly where those summary judgment powers are broadened. Our position is that at every turn the government's

response to migration litigation is to reduce applicants' access to justice and to give a particular group of applicants lesser justice. In that regard, we have had the opportunity to review Katherine Biber's submission to the inquiry and we strongly endorse it. We advocate an alternative response which is to give greater justice to that group of applicants at the primary and the merits review stages. Thank you.

CHAIR—Thank you very much. Mr Lachowicz, did you want to add anything at this stage?

Mr Lachowicz—No. I think that has been a good overview by Ms Kidson.

CHAIR—One of the observations that you make in your submission is about the adequacy of existing summary dismissal powers, which I think you suggest are quite adequate in your view to deal with unmeritorious litigation and are currently underutilised. Why do you think it is the case that they are, as you say, underutilised?

Ms Kidson—I am not really sure about that, and it is interesting that there are many more instances of them being utilised in the Federal Magistrates Court. I do not know whether it is because the government has a view that the Federal Court would not intervene in cases and therefore it sees no point in trying. I do not know why that would be the case when the rules in the Federal Magistrates Court are identical to those in the Federal Court. I do not know the answer to that. All I can do is have a look at the cases that have been decided and try to find examples of where they have been utilised. As I say, in the Federal Court they were startling for their absence in terms of cases being there.

I could say that I was surprised by the underutilisation. For a different project I recently reviewed all decisions undertaken in the full Federal Court over the last 18 months and, out of about 450 decisions made by the full court, I identified—I have to check my numbers—around 55 or 60 that I would call cases that would probably have been amenable to summary judgment. They were cases where the applicant never at any stage really articulated a case, did not submit any further material, was unrepresented and often did not appear at a hearing, yet those were cases that were allowed to proceed to a final hearing. I cannot say why that happened. Again, it seems to be in contrast to the practice in the Federal Magistrates Court. Otherwise, that is a question that only the government could answer. I am saying that I would like them to answer that before they propose—

CHAIR—The government or the court?

Ms Kidson—Summary judgment applications are predominantly brought by one of the parties. It would be a rare instance for a court to bring a summary judgment application on its own motion, so mostly it is an application brought by the parties.

CHAIR—Sometimes we speak to the courts. We often speak to the Family Court but not often to the Federal Court; it might be interesting to explore that. We can pursue that with the departments who appear later this afternoon. I had another question for you, but while I find that I will go to Senator Ludwig.

Senator LUDWIG—You provide some encouragement in relation to the bill by indicating that there are sensible and pragmatic measures in the legislation. I wonder, after reading your comprehensive submission, which they are.

Ms Kidson—They include some of the changes in relation to the structure of the jurisdiction of the courts—for example, giving the High Court power to remit on the papers. We have said that we have no objection to that, provided that safeguards are in place—provided, for example, that the High Court retains the power to hear oral submissions if it believes it is necessary and if one of the parties makes a case for that. We have stated that we have no in-principle objection to the Federal Magistrates Court becoming the primary judicial jurisdiction for hearing cases—again, provided it retains the discretion, which under the bill it currently does, to refer complex cases to the Federal Court.

The same thing goes in relation to the change in the nature of the Federal Court's appellate jurisdiction. We have no objection to the bill changing the appellate jurisdiction to be primarily an exercise by single judges. The statistics cited in the explanatory memorandum show that 87 per cent of cases that are on appeal from the Federal Magistrates Court are in fact determined by a single judge in the Federal Court in any event. We have no objection to that being institutionalised—as I said, provided that the discretion always remains for a case to be referred to a full court on appeal if it is an appropriate case. Again, the bill appears to preserve those discretions, so we do not object to that.

Senator LUDWIG—In respect of the time limits, is it the time limit itself or the inability of the court to have a discretion in relation to the time limit that troubles you?

Ms Kidson—Twenty-eight days is a tight time limit but I certainly acknowledge that it is a common time limit: 28 days is a time limit which is used in many jurisdictions, not just in the area of migration law. It is the capacity to not have the discretion to extend it that is the issue. I believe one of the other submissions—I think from RILC, the Refugee and Immigration Legal Centre—points out that they have not been able to find any other jurisdiction with a non-discretionary time limit. It is the inability to extend the time to which we object.

Senator LUDWIG—I have been informed by the previous submitter for the ALR that Western Australia does have fixed time limits, if I can use that phrase, which lack discretion, so perhaps you can point them in that direction.

Ms Kidson—In what jurisdiction?

Senator LUDWIG—It would be state jurisdiction, I suspect, not federal.

Ms Kidson—It would have to be limited to a very specific area. It certainly would not be broadly across the civil spectrum, but I can certainly—

Senator LUDWIG—I was going to have a look at it myself as well.

Ms Kidson—We would object to it. Anywhere where there is a non-discretionary time limit, we would object to it and say that the capacity for injustice is manifest.

Senator LUDWIG—With regard to the purported decision, one of the submitters indicates that it is a mechanical provision in the sense that it is procedural, designed to at least address the problem identified in S157. You say that it is more than that, as I understand your submission, and that potentially it could cut across the jurisdiction of the court and may in fact be unconstitutional. So you do not see it as a procedural or mechanical device in light of the decision in S157—that is, that it is not designed to challenge the ability of the court to review a decision.

Ms Kidson—I do not see how you can make the distinction when the bill seeks to impose a procedural regime which would effectively extinguish substantive rights. I think it is disingenuous for the government to say, 'We're not changing the capacity to judicially review decisions, because we're not seeking to alter the definition of privative clause decisions in that way; we're only seeking to alter the definition in relation to these procedural aspects.' Those procedural aspects have the capacity to extinguish the right to bring judicial review.

So if you have a non-discretionary time limit which, upon its expiration, destroys any capacity to bring a substantive application and if the High Court has said, as it has, that it will not uphold any law which seeks to abolish the capacity to bring judicial review application for jurisdictional error, then I find it very difficult to believe that the bill in its current form would be upheld. Going about it a different way—coming at it down a different road, when the end result is the same—is not something I think would be upheld.

Senator LUDWIG—You raise the cab rank rule on page 21. Do you say that there is a conflict in the sense of a barrister having to take the cases they are presented—

Ms Kidson—I am not an expert—I am not a barrister, so bear with me. I will have to give you what I understand to be the cab rank rule and what I have been told is the substance of the cab rank rule, but I hope I do not misquote it. The cab rank rule currently says that if a barrister is approached by a solicitor with a brief within their area of expertise and the client is able to pay the barrister's fee and the barrister is not otherwise engaged, they are obliged to take the brief. The effect of this bill would be that a barrister would have to in fact refuse to abide by the cab rank rule if the barrister were to form a view that it was a case which may potentially make that barrister personally liable for legal costs.

Senator LUDWIG—But your real concern, with the way the provision operates, is that it has the potential to create a liability against those people who, undefined in courage, present cases to the court.

Ms Kidson—We are very concerned about the potential of the provisions of the bill, yes, to discourage a solicitor or a barrister or a lawyer, in any shape or form, from being involved in anything other than the clearest of cases. It is only a handful of cases that are the clearest of cases. Most cases are a matter of argument and a matter of judgment as to which argument will prevail on the day.

Senator LUDWIG—Thank you.

CHAIR—Ms Kidson and Mr Lachowicz, are there any additional matters you would like to raise with the committee?

Mr Lachowicz—No, I think Ms Kidson has covered the area very well. She has done a lot of research in the area. I do not have anything to add at this stage.

CHAIR—We are very grateful for your submission, because it is very comprehensive and touches on a number of the most important areas for the committee. Senator Ludwig reminds me that we will be getting back to you to make further submissions on other hearings in the future.

Ms Kidson—Could I really stress one point. Following on from what I have said, the overwhelming majority of cases, particularly migration cases, are very difficult to call. They

are a matter of argument. One of the objections we have to the bill is that it requires a level of prescience and judgment on the part of lawyers assisting applicants that is not required by the courts or by the government. It is requiring lawyers, at very early stages, to be able to make very concrete assessments of the ultimate prospects of the case and to proceed at their own peril. Yet with the bill at the moment, for example, the liability for legal costs is not limited to cases that are summarily dismissed. In fact, you can go all the way to the end, to a full hearing, the minister can get a judgment and, at that point, under the current provisions, a court is obliged to consider whether that case was unmeritorious. Both the minister and the courts get the benefit of hindsight, the benefit of full argument, the benefit of all the evidence to make that judgment and to penalise the applicant's lawyer for failing to arrive at the same conclusion as themselves.

Particularly if you bear in mind summary dismissal provisions that the bill seeks to bring in, by having a structural scheme like that, you are actually allowing a situation where the minister gets proceedings and looks at a case—and remember in a migration case the minister has all the material that the applicant has, because it is whatever material was before a tribunal, so there is no new evidence that can come out at the hearing; everybody knows what the case is from the material before the tribunal—and the minister can decide there are not sufficient grounds or say: 'I don't feel I have a good case for summary dismissal; I actually can't call this on the merits. Let's go to a full hearing.' And yet at the full hearing, where the minister prevails, the minister can turn around and say: 'That was unmeritorious. You shouldn't have brought it. I seek an order for costs against the lawyer.' It is requiring lawyers for applicants to make judgment calls that courts and the minister are not required to make. It is forcing lawyers to proceed further at their own risk.

Senator LUDWIG—But doesn't it do more than that? You can imagine they would win some that they thought they should in fact lose and lose some that they knew they should in fact win.

Ms Kidson—Absolutely.

Senator LUDWIG—It is very difficult to make a judgment without having the benefit of the evidence brought in, the affidavits finally filed and the sense of the case in total being examined. Even then, during the hearing process, it can take a left turn or a right turn as the case may be.

Ms Kidson—Absolutely. I would have to find the case, but I believe that Chief Justice Gleeson in a recent High Court case made that very point and said that by the time cases come before the High Court they bear no relationship to the case that was filed, whether in the Federal Magistrates Court or the Federal Court, because the nature of cases changes. The way in which they are viewed changes according to the legal argument and the views of the courts below. These are very close calls that have to be made. The bill changes the bar without defining it. I guess that is the other objection we have to the bill: with the summary dismissal provisions and with the same bar for summary dismissals applied to the potential liability for costs, it tells us that the bar we all know does not apply, but it does not tell us what the new bar is. So it tells us that all the court cases where there is talk about them being doomed to failure, having no real prospect of success et cetera, do not apply. It gives us absolutely no guidance as to what the new test is, and yet from the moment of commencement of the act

lawyers—and who knows who else the bill is meant to apply to, because it is not limited to lawyers—are having to structure the advice they give and make decisions about who they help and who they do not help without any idea what this new bar is. It is ironic that a bill whose object is to reduce litigation contains so many ambiguous provisions that scream for judicial scrutiny. It is absolutely ironic.

CHAIR—The committee notes your observations. I do not have any questions, because mine were in fact going to be in relation to proposed section 486E. As Senator Ludwig has no further questions, I thank you both for assisting the committee and, as I said previously, for your comprehensive submission.

Ms Kidson—Thank you very much.

[4.09 p.m.]

KAMAND, Ms Suhad, Director/Principal Solicitor, Immigration Advice and Rights Centre Inc.

CHAIR—Welcome. Ms Kamand, you have lodged a submission with the committee, which we have numbered 10. Do you need to make any amendments or alterations to that submission?

Ms Kamand—I want to check that you have the correct version of the submission.

CHAIR—We hope so.

Ms Kamand—I sent an amended version through which ends at section 3.7 rather than at 3.8.

CHAIR—Yes, we have that. I invite you to make an opening statement in relation to your submission and the issues pertaining to the bill, and at the conclusion of that we will ask you questions.

Ms Kamand—I want to start by clarifying the services and role of the Immigration Advice and Rights Centre and why we have made a submission in relation to the bill. IARC does not provide advice or representation in judicial reviews. Those cases are referred by our centre to legal aid and pro bono solicitors for advice. However, our centre does inform clients of their time limits for lodging judicial reviews and suggests that clients obtain advice on the merits of their case within that time. The bulk of IARC's work in advising and representing clients is at the primary level and at the review stage—that is, the MRT, RRT and AAT.

Notwithstanding our limited role in the judicial review process, we felt compelled to comment on this bill for the following reasons. We share the concerns expressed by those promoting the bill regarding the high and increasing volume of migration litigation and the delays in, and burdens on, the migration determination process which result. We share the objective of increasing efficiency and expedition in the migration determination process, but only to the extent that the quality, fairness, integrity and constitutionality of that determination are preserved. We strongly object to the much used ill-defined and empirically unsupported assumption by those promoting the bill that the high volume of migration litigation is due primarily to unmeritorious migration litigation. In our view that sort of analysis is unhelpful and simplifies the causes of the high volume of migration litigation unfairly by reference to one cause.

We have strong concerns regarding the potentially far-reaching effect of the bill on access to migration legal services and the likelihood that it will result in an increase in highly vulnerable socioeconomic groups, often with poor English language skills and little if any understanding of the Australian migration law and processes, representing themselves in complex migration litigation. We are concerned that, while having the potential to significantly decrease access and equity in relation to migration litigation or migration legal services, the bill does little to ensure that its stated objectives of increasing efficiency and minimising unmeritorious claims will be achieved. Indeed it is our view that the measures the bill seeks to put in place will defeat these objectives by decreasing access to sound legal

advice and representation, prompting a rise in unrepresented litigants and inviting judicial scrutiny at the application and intent of the ill-defined, onerous and far-reaching obligations and penalties proposed.

We are most concerned, however, that the bill has been introduced without any public empirical assessment of why so many applications for judicial review in migration matters are being made. The bill appears to rely on anecdotal evidence and unsupported assumptions regarding unmeritorious litigation pursued by those who seek to abuse Australia's immigration process. Without research being produced publicly, these assumptions are unhelpful and do little do address the cause of the problem. Spending public money on the basis of unfounded assumptions cannot be supported. If, however, the expensive and potentially damaging measures proposed in the bill can be supported through research, perhaps contained in the Penfold report, we urge the Attorney-General, as others have—including this committee—to produce that report for public review.

IARC's overall position in relation to the bill is that it must be rejected in its entirety for the following reasons. It is asserted to be based on recommendations and findings in the Penfold report. No other basis for the bill has been cited, except for an unfounded assumption that because the department wins approximately 93 per cent of judicial review applications then 93 per cent of cases are therefore unmeritorious. The changes it seeks are far-reaching, onerous and ill-defined. There is considerable expense involved in the changes sought, without any guarantee that the measures proposed will alleviate the case load of the courts. It would be irresponsible, in our view, to approve a bill which seeks to make such far-reaching changes as this bill seeks to do and to spend public money in doing so without a sound basis.

Until the suggested alternatives presented by various stakeholders in relation to the Migration Amendment (Judicial Review) Bill 2004 are explored in more detail, a bill which seeks to remedy a recognised problem by addressing its assumed cause cannot be supported. Our centre would suggest that, before any bill of this nature can be supported, closer investigation of the causes of the high volume of migration litigation is necessary. Possible contributing causes and alternatives need to be explored, for example. We need to look at existing inaccuracies and inefficiencies in the decision-making process at the primary and merits review stage. Support for this suggestion can be found by looking simply at the MRT annual report for 2003-04. In that report you will find statistics of set asides of primary decisions made by the department. The overall set-aside rate was 46 per cent, which is reasonably high.

Another alternative is to increase access to sound and affordable immigration legal assistance at the primary merits and judicial review stage. At the primary stage, increased access to sound practitioners will not only increase efficiency by ensuring that complete applications for the most appropriate visa categories are lodged and processed by the department but also ensure that any potential jurisdictional errors evident in DIMIA's processes at that stage are picked up by legal advisers.

It is IARC's experience in acting for clients at the primary level that DIMIA case officers do at times misunderstand the often complex legal framework with which their decisions and procedures must comply. In cases where IARC is acting, and where it is evident that the case officer is acting other than in accordance with prescribed law, policy and procedure, IARC

takes the issue up with senior staff at DIMIA, who then make an assessment of the concerns and act accordingly. In the absence of legal advice at the primary stage, such cases would pass without potential jurisdictional errors being picked up until applications for judicial review are contemplated. The same is true of access to legal advice and assistance at the merits review stage.

We also need to assess whether the current migration regulation regime ensures that only those competent to advise on migration law and processes are permitted to become migration practitioners. The extent to which this is a contributing factor to the high volume of migration litigation needs to be assessed, as does the adequacy of the migration agents regulatory scheme. For example, would the quality of advice to potential litigants be increased and the volume of unmeritorious claims, however defined or prevalent, be reduced if intending migration agents undertook more rigorous training and examination prior to becoming migration practitioners?

The above suggestions are by no means exhaustive, but serve to illustrate that alternatives exist which should be explored. If the bill is passed, which we do not support, the following amendments are essential: there should be an exemption for non-profit organisations from costs orders; a cap on the liability or extent of costs orders that can be imposed on commercial practitioners; a discretionary power for courts to extend time limits for seeking judicial review in light of all relevant circumstances of the case; and removing qualifications that proceedings 'need not be hopeless or bound to fail for it to have no reasonable prospects of success', bringing the test for reasonable causes of action in line with existing jurisprudence. That concludes my opening statement.

CHAIR—The issues that you raise, as I think you adverted to, have been raised in a number of other submissions. They are obviously of widespread concern amongst practitioners in particular. One of the points that you make is about increased professional indemnity insurance premiums. What sort of impact do you see the bill having in that regard?

Ms Kamand—I am not an expert on professional indemnity, but I had read through a few of the other submissions and I was concerned that it had not been raised in many others. My first impression on reading the proposed section 486E was of the ill-defined nature and the breadth of those obligations, together with the severity of the penalties imposed and the strict time limits. Most lawyers know, and I am sure most law insurers will confirm, that time limits are probably the biggest risk management area for lawyers. I would not want to provide any expert opinion on that area—it is not my area of expertise—but I would suggest that an opinion is obtained from an insurance provider, perhaps LawCover, on what they view the impacts to be.

CHAIR—That is an interesting suggestion. Thank you very much for that. How do you see this impacting on the operations of the organisation that you represent, the Immigration Advice and Rights Centre?

Ms Kamand—A lot of that depends on how the term 'encourage' is to be construed. I am sure that has been raised several times in the submissions. It is difficult to know what the impact would be and to take steps to control any risk because the terms are so ill-defined and broad. The problem with 'encourage' is that it does not seem to necessitate any causal nexus

between the actions of an adviser or a person. A person does not even have to be an adviser; it is anyone who is seen to somehow contribute to the commencement or continuation of the litigation. So volunteer organisations who may provide housing could fall foul of that obligation because they are facilitating a person's ability to remain in the community and pursue litigation. On its broadest interpretation, organisations like that could be caught.

For our centre, the only aspect of our work that would fall within this is advising people of their time limits. It would require a very broad interpretation of that clause for us to fall foul of that obligation—that is, for us to be seen to encourage people to commence litigation by simply advising them of their time limits. Our concern mainly is: who do we refer people to? Who is going to be willing to take on these cases?

CHAIR—Do you think it is an adequate response to say that the courts will be circumspect in how they exercise this power and that, for example, they would not be expected to exercise it unless there had been a very serious breach of professional standards in relation to the commencement or continuation—let alone encouragement—of a proceeding?

Ms Kamand—The trouble is that there is very little guidance as to how the courts should interpret it. What the explanatory memorandum has said, and as I heard Nitra Kidson from SBLCS saying earlier, is that there is an obligation to assess whether something has a reasonable prospect of success. The legislation tells us that it need not be hopeless or bound to fail for it to have no reasonable prospects of success, but the explanatory memorandum indicates that a greater degree of flexibility is given to the courts than has been in the case law to date. There is no guidance as to how flexible the courts should be or what should guide that flexibility. The intimidating nature of the legislation would have the effect of decreasing the willingness of practitioners to advise in this area until some case law is established that would set some parameters to these obligations.

CHAIR—But the process of establishing that case law has some quite serious potential pitfalls for the litigants, let alone the practitioners and anyone else defined as 'a person'.

Ms Kamand—Absolutely. One of the intentions of this bill is, ironically, to minimise litigation. But it seems to be full of terms and phrases that can only be defined in their application through litigation.

Senator LUDWIG—You work in this area, I take it, so you have reasonably close contact with unrepresented litigants who pursue these matters in the courts and the like. Is that right?

Ms Kamand—Our work is more in relation to people who seek assistance at the primary and merits review stages. When we get clients at our drop-in advice services or on our telephone advice service that need assistance in judicial review, we refer them to Legal Aid or pro bono lawyers.

Senator LUDWIG—Do you tell those that you refer on what prospects they might have?

Ms Kamand—No.

Senator LUDWIG—You simply say that, once the matters have been finalised with you, they should look at Legal Aid or somewhere else.

Ms Kamand—We tell them what their time limits are for lodging Federal Court applications and that Legal Aid will do a merits assessment for them.

Senator LUDWIG—So Legal Aid could be caught by this legislation?

Ms Kamand—Absolutely.

Senator LUDWIG—If the merits assessment is positive then they could effectively be seen to be encouraging.

CHAIR—There is certainly nothing to say that they could not be caught is there?

Senator LUDWIG—No. It would be a surprise to the Legal Aid commissioners, I suspect.

Ms Kamand—One of the policy grounds for this proposed section seems to be to stop unscrupulous migration agents and practitioners from encouraging potential litigants.

Senator LUDWIG—That is what seems to have been complained about most—the unrepresented litigants and, in your words, the unscrupulous migration agents or others who claim to be migration agents pursuing these issues on the client's behalf. That seems to be the target audience, but whether or not it is a directed or a shotgun approach is another question.

Ms Kamand—That seems to be a regulatory issue. But this seems to punish the users of migration litigation processes.

Senator LUDWIG—You provide immigration kits as well. Do any of those help people in terms of being self-represented litigants? Do those kits provide advice as to how they can file these matters?

Ms Kamand—Are you referring to the publications that I have listed?

Senator LUDWIG—Yes.

Ms Kamand—The immigration kit is an immigration textbook. In that textbook there is a section on judicial review. I had not thought of this before but, yes, that could be seen to encourage litigation.

Senator LUDWIG—This is one of those areas where, unless you turn your mind directly to it, if the legislation passed and became law, you would have to rethink a lot of the things that you currently do. I think that is the point I am making—that right through from your immigration kits to your news and all of those matters, you would have to be very careful that you did not offend, even accidentally, the legislation.

Ms Kamand—Absolutely.

Senator LUDWIG—In which case, it may limit the amount of useful advice that you can give people who may otherwise have reasonable cases.

Ms Kamand—That is right. It is something that I had not thought of previously, even as to the provision of information rather than advice.

Senator LUDWIG—Because information can be construed as being advice, I guess, in that instance. Chair, I do not have any other particular questions.

CHAIR—I think we have probably canvassed most of the areas that we needed to pursue.

Senator LUDWIG—Ms Kamand, we are in a position where many of the issues that you have raised have also been raised by a number of other submitters and we have now covered some of the additional matters that you have raised.

CHAIR—Ms Kamand, I think we have not asked you about the certification provision, the certification by the lawyer of the matter, and what professional issues you think that raises.

Ms Kamand—As set out in our written submission, references are made in the explanatory memorandum to the New South Wales legal practitioners act, which is drafted in different terms and refers to the knowledge of practitioners at the time that they lodged the application. There is no such qualification in the certification required under this proposed section. The risk is when circumstances change after provision of the certification. When looked at together with the strict time limits, practitioners will have in effect less than 28 days to fully assess a case and provide a certification. A freedom of information request takes around three to four months to process. So the limitation periods, when looked at together with the certification and the obligations on practitioners at the early stages of contemplating litigation, are just unrealistic.

CHAIR—So you are referring to a very practical aspect of your work?

Ms Kamand—Yes.

CHAIR—It is very useful for the committee to hear from organisations such IARC, so we do appreciate your coming today. I do not have any further questions, nor does Senator Ludwig. If anything does come out of the rest of our consideration this afternoon which we need to follow up with you, the secretariat will be in touch with you. We thank you for your submission and your appearance.

[4.36 p.m.]

SAUL, Dr Ben, Private capacity

WILLIAMS, Professor George, Private capacity

Evidence was taken via teleconference—

CHAIR—I welcome by teleconference Professor George Williams and Dr Ben Saul. You have lodged a submission with the committee, which we have numbered 14. Do you need to make any amendments or alterations to that submission?

Prof. Williams—No.

CHAIR—George, you know the drill. I invite you to make an opening statement, and then we will go to questions.

Prof. Williams—Ben will start and then I will finish, which will take another couple of minutes.

CHAIR—Thank you very much.

Dr Saul—We accept that there are concerns in the government and in the community as a whole about the abuse of judicial review on asylum applications. We understand that there is a need to take some sort of action in order to eliminate these kinds of manifest cases of abuse. On the other hand, we take a very different approach to how you should respond to this problem of judicial review being manipulated. Rather than taking a punitive approach by closing down avenues of appeal and imposing cost orders, we think it is preferable instead to address the root causes of why so many applicants seem to be using judicial review as a means of seeking asylum but yet being quite unsuccessful.

In our submission we deal with a number of reasons why some causes could be better addressed. Firstly, we think primary decision making and RRT decision making should be improved, and we give a whole range of statistics about why there seems to be quite a culture of rejection and a low rate of recognition of refugees in Australia, which simply is not seen in comparable liberal democracies around the world. Secondly, we think there are good arguments for enhancing the RRT's independence and even looking at some of the ideas floated in previous Senate inquiries like, for example, shifting primary decision making away from the Department of Immigration and Multicultural and Indigenous Affairs and instead giving it to the Attorney-General's Department, because clearly immigration control can conflict with Australia's international protection obligations. The immigration department is trying to restrict entry into Australia, and asylum is all about giving entry to Australia in circumstances where it is necessary to protect someone's human rights.

The other suggestions we make are to increase legal aid and stem the reduction in legal aid over the last few years and to remove restrictive interpretations on the refugee definition. And we note in this regard what we have not mentioned in our submission—that is, in the European Union the qualification directive of 2004 did the opposite to what Australia did: instead of restrictively interpreting the refugee definition, it expanded the grounds of refugee protection, in addition to offering complementary protection. That moves us on to our next

point, which is that we need a system for complementary protection so that people who have protection needs but who are not having those needs met within the regular visa classes should have an avenue of seeking protection from serious harm or protection from torture and so on.

Finally, we make the point that we have made many times before: maintaining a system of mandatory detention and detaining people while their asylum applications are being processed clearly creates an incentive for detainees to try to get out of detention in any way possible, including through judicial review applications, when they do not have much hope of succeeding. I will now pass on to George to deal with the privative clause issues.

Prof. Williams—The points I want to make relate only to a section of the bill, and they relate to the idea of reported privative clause decisions. I have two quick points to make about them. Firstly, I am concerned about the very idea of providing a legal framework for the regulation of purported decision. It seems to be a strange thing to do indeed, within a legal framework that is meant to be compliant with the rule of law, to seek to regulate something which, by its very nature, is illegal or an unlawful decision. In terms of the constitutional problems that might flow from that, significantly this does not make such decisions unreviewable. If it did, I think it is very likely that the bill would have been unconstitutional as a result of the decision in Plaintiff S157, but clearly a sensible decision has been made not to go down that path. However, there are further, less likely problems with the legislation, even in its current form. The mere idea of regulating a purported decision may give rise to a question about whether the regulation is a law at all, as is required by section 51 of the Constitution. There are some fairly oblique references to that idea in that recent High Court decision.

The other and separate point I want to make relates to time limits. I think there is a real constitutional argument that the imposition of time limits upon the ability of the High Court to review these decisions would be unconstitutional. I think it is quite possible for the High Court to be regulated in those time limits, but putting on a final and absolute limit is problematic. It is problematic because it is easy to imagine circumstances where that would operate in an unjust and inappropriate fashion and thereby inappropriately limit the capacity of the High Court to exercise its constitutionally protected right of review. Eighty-four days itself may seem fairly generous, but if you are dealing with a situation such as where someone is in a coma or has some other medical condition, or if a piece of information does not come to light within that period due to official malpractice or even corruption, they are exactly the sorts of issues the High Court may be concerned about in thinking that its time limit should not be restricted in that way.

In fact, both of those examples did come up in the oral hearing in the Plaintiff S157 case as the sorts of things the court might have in mind. My recommendation or suggestion with respect to time limits is that it is appropriate to regulate them but there should always be the capacity for the High Court to extend those time limits in the interests of justice. Even in circumstances where you have limitation clauses of many years in length, it is still possible to do so in the right circumstances. I would suggest that it is also appropriate here, both for policy and constitutional reasons. That is the end of our introductory statement.

CHAIR—Thank you. I do not know whether you have had a chance to look at any of the other submissions to the inquiry, but they have a significant concentration on the proposed encouragement clause—as I suppose I would term it—which imposes a penalty for 'a person', not defined, who 'encourages', not defined, someone to commence or continue migration litigation which has no reasonable prospect of success and the professional obligations that arise out of that for practitioners. One point which has been made repeatedly is that it does not even seem to be confined to lawyers. Are these issues to which you have turned your minds?

Prof. Williams—They are, and I think it is an issue we would both have something to say about. Ben might like to start.

Dr Saul—I take the point that it does refer only to 'a person' and is not restricted to lawyers in the case at hand or even to migration agents who may have given preliminary advice. Clearly, we think that goes much too far. As a practical matter it will be very difficult to impose cost orders against someone who is not a party to the proceedings, but nevertheless the possibility of that is left open by this legislation.

My central concern with these provisions about no reasonable prospect of success relates to the fact that they depart so drastically from the common-law test, which has been carefully constructed in case law over many decades in order to ensure that cases are not closed down before they have had a reasonable opportunity to give all the evidence required and to in fact assess whether these kinds of cases are not manifestly abusive. There is a very clear public policy interest in ensuring that cases are not shut down prematurely and that every opportunity is given for applicants to establish their case. It is particularly the case in these kinds of public interest cases where old and bad precedents may be challenged for good reasons. There may not be a reasonable prospect of success in the immediate case but it may lead to long-term law reform.

The final point that I would like to make is that imposing cost orders on community organisations and pro bono organisations which typically provide this kind of advice to applicants can be unfairly or unduly burdensome on those organisations, which already are run on very tight budgets and do not have sufficient access to legal aid and so on. It may have a very chilling effect on the capacity of these organisations to protect and advocate for the rights of asylum seekers.

Prof. Williams—I might add a couple of things. In general, I support the idea of cost orders being available to courts in circumstances where there is an abuse of process or a range of other matters that ought to lead to special types of costs or even damages being awarded. The problem with this is that it does go far beyond the carefully constructed limits that have been imposed. I am concerned at the absence of an appropriate knowledge requirement on the person who might be 'encouraging' another person. It may be possible that something said without knowledge that might not be seen as normally giving rise to any legal consequences in this case might. You can imagine many circumstances where well-meaning people might make comments encouraging people, and it is not normally accepted that that should lead to these types of cost orders.

The other issue is a different one. Again, it is a constitutional issue. I am troubled by the possibility of a court making an order in a matter against people who are not parties to the

matter and not normally seen as connected to the matter. I can see the possibility of constitutional issues arising from that in that it arguably extends beyond the power of the court to make orders beyond that group of people, particularly to people who clearly here would be third parties in that they do not actually have any active involvement in the litigation.

CHAIR—That is an interesting point.

Senator LUDWIG—On that point of third parties, it seems that there could be a position where you could have—as a number of speakers called it today—the underground movement encouraging self-represented litigants, which seems to be the target of this provision. There are three parts to it. One is the change in the law as it currently stands in Dey and General Steel to a 'no reasonable prospect of success' test that the court would use. The second would be that the undefined word 'encourage' is included—which I suspect would be read broadly. Third, there is the way that it would apply to persons rather than the legal representatives. So you would have a position where third parties, even unknown, may find themselves caught in that frame where they have encouraged self-represented litigants, put out literature or otherwise directed self-represented litigants or assisted them in a process. The litigants may not have any prospects but the third parties may have given them at least the necessary skills to be able to present a case. It seems to me that they could potentially be caught by the legislation.

You say that it may have constitutional problems. Could you outline what those problems may be?

Prof. Williams—The first point I would make is that I agree with the analysis that the word 'encourage' could be interpreted broadly. I think there is a real prospect that a court probably would interpret it as narrowly as it could, given the manifest problems that would arise. The word 'encourage' is used so broadly that you can imagine all sorts of situations that would be covered by it. Even forms of moral encouragement could be covered—for example, wishing somebody the best in their forthcoming litigation or encouraging them to continue with that litigation in the hope that it leads to a better life for someone. I think on a normal reading it could lead to the inclusion of those types of activities. As I say, it is possible a court would read it narrowly, but it may not work that way.

The other point about the constitutional issue is that I am not aware of any cases that give us a direct answer to this type of question, and that is probably because we are dealing with a very novel legislative idea in this legislation. Indeed, in other circumstances where I am aware of costs orders being applied when it is hopeless or bound to fail you are dealing there with costs orders against the parties. A good example was the proposal last year with regard to drug companies and the free trade agreement where the notion was that they should not be allowed to prevent generic drugs being marketed. In that case, it was only in regard to the actual parties.

The constitutional issue that would arise would be that courts are limited in their powers under the Constitution to disposing of 'matters'. The word 'matter' is explicitly used in the relevant provision—the High Court and other federal courts cannot deal with anything but 'matters'. That normally means a controversy or legal dispute that has arisen as a result of

some controversy between parties or through the interpretation of legislation. It is possible that the court would say a 'matter' does not include the power to make orders against people who are quite separate to that controversy in a constitutional sense. So a friend, who simply provided some personal friendship and encouragement, may not be seen as sufficiently connected to the idea of a controversial matter that gives rise to the High Court's own powers and jurisdiction. That is the sort of idea I had in this case.

It is not a particularly well-developed idea because we are dealing with a novel situation. 'Matter' is one of the more notoriously difficult terms in the Constitution to apply and define. The High Court itself has only given us limited guidance on it. But it is certainly an issue. I have looked to see if there is any legal advice or anything like that which I would want clarified in terms of the committee's inquiry just to find out whether this issue has been considered and whether there is legal advice to suggest that those constitutional concerns can be allayed.

Dr Saul—Some practical examples of the kinds of people who might be captured by this legislation might include, firstly, people commenting on a case in the media and expressing support for a particular applicant's judicial review application or, secondly, even politicians. Members of parliament representing people in their electorate or simply expressing support for a judicial review application may have no other connection with the case and yet might fall under the legislation.

Senator LUDWIG—Yes, but the definition of 'matter' that encourages is probably just as badly defined at the moment, as well. The other point is: are elements of the bill necessary and still workable? In other words, are there parts of the bill that are salvageable, in your view?

Dr Saul—In principle, we have no objection to giving the full extent of the High Court's jurisdiction to the Federal Magistrates Court as long as you then do not subject the Federal Magistrates Court to the kinds of time limits which may raise constitutional questions in terms of denying justice which would otherwise be available under section 75. Certainly, channelling cases to the Federal Magistrates Court is not in itself a problem—assuming that federal magistrates have sufficient training in these kinds of cases. Until now they have been mainly dealt with by the Federal Court, which has gained expertise in this area.

We have to point out that the flood of applications to the High Court of asylum decisions is a product of past government policy in this area under the old part 8 of the Migration Act. Denying procedural fairness in judicial review in the Federal Court then inevitably led to many more applicants applying to the High Court. The whole scheme of privative clauses attempting to oust jurisdiction creates the same problem. It encourages, or is an incentive to, litigants to take their case to the High Court, where constitutional limits allow them to be heard.

Prof. Williams—I would also support the idea, in principle, of a system that provides for more efficient disposal of these matters. Clearly, there are problems here. I think that is undeniable. The fact that so much of the High Court's time is involved in these matters is also of concern. So those types of objectives, to the extent they are made out in the bill, I think are worthy of support.

The thing that is missing here is that improving efficiency on the court's side is only half the problem. It is also a matter of looking carefully at why so many matters are coming on for review and why the tribunal process might need improvements. It is a weakness in the bill that it does not address some of the underlying causes of problems.

Senator LUDWIG—The issue of unmeritorious migration litigation has been raised, as far as I can recollect, for four or five years and it is likely to continue to be raised at least in the short term. A number of submitters have indicated that the problem is more at the start rather than trying to deal with it at the finish—that is, when they get to court. Are there any papers that you have written recently that might assist the committee in examining the problem more broadly?

Dr Saul—Mary Crock and I have a new edition of our book coming out in a few months. We deal with some of those issues, particularly comparative material from other jurisdictions like New Zealand, the European Union, the United States and Canada, in which similar problems have been experienced. The key difference with the Australian system is that we tend to reject many more asylum seekers than other countries do. For example, in 2003, Australia recognised about 18 per cent of onshore asylum seekers. In contrast, the rate was about 28 or 30 per cent in the UK and much higher in many other liberal democracies. That means either that the kinds of asylum seekers coming to Australia are incredibly different from the kinds of asylum seekers who seek protection in other countries or—this is the more probable argument—that Australian primary decision making and RRT decision making are simply flawed and are not producing the kinds of protection outcomes that are expected in other systems and indeed are required by international law. In fact, if you look at the statistics, the RRT overturns only about eight to 12 per cent of primary decisions, whereas, in contrast, in the European Union over 60 per cent of initial decisions are overturned at some stage of appeal, whether that is at the tribunal level or at the judicial review stage.

That means that the European Union has some bad decision making happening but it also means that, because of the difficulty of providing information in the asylum process—it may come out at different times or there may be issues to do with language, culture, torture, trauma and so on—information may not come out until a later stage in the proceeding. Therefore, it is to be expected that decisions might be overturned at a later stage of the process.

Senator LUDWIG—I was curious: how did you deal with the issue where especially 417s and so on have to go through the RRT and MRT respectively to obtain a negative decision before they can access ministerial discretion? For a fair comparison, I suspect, you would have to subtract those figures.

Dr Saul—That is true. There are difficulties in comparing some of this information. Of course in the EU since 2004 there has been a specific visa category for complementary protection; in other words, protection beyond refugee convention grounds for cases where people are at risk of serious harm or serious human rights abuses in their home country or where they are at risk of torture, for example. We do this at the other end of the process: we leave it to ministerial discretion, which can be beneficial in many cases but it is not an ideal solution. In our submission we make the point that it would be preferable to establish a regular visa category considered at the same time as a refugee claim, where you can consider

these serious human rights risks or torture risks without having to wait until relatively far down the process.

Senator LUDWIG—So the RRT would then be able to consider those issues?

Dr Saul—The best model I have seen is simply combining the process and the consideration into one simple procedure. So instead of applying separately either for refugee status or for complementary or subsidiary protection, the primary decision maker has the power to consider all of those factors at once and then decide whether to grant refugee protection on the one hand or complementary protection on the other. That would streamline the process, remove the problem of having to apply for different visa classes at different times, create a great deal of efficiency in the process and reduce the problems of ministerial discretion.

Senator LUDWIG—Could you let the secretariat know when your book is available?

Dr Saul—Yes.

CHAIR—Thank you very much. Is there anything you want to add, gentlemen?

Prof. Williams—I do not think so, except to say that my book, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, is already out.

CHAIR—I do not think we need to engage in touting, Professor Williams!

Prof. Williams—I could not let one of these opportunities pass without mentioning the words 'bill of rights' at least once!

CHAIR—Indeed. Now they are in the *Hansard* twice. Thank you both very much. We appreciate your submission, your time this afternoon and the fact that you were prepared to appear by teleconference, which has made it easier all round.

[5.04 p.m.]

MORTIMER, Ms Debra, Member (Senior Counsel), Victorian Bar; Representative, Public Interest Law Clearing House (Victoria)

Evidence was taken via teleconference—

CHAIR—Welcome. We have a submission from you, which we have numbered 15. Do you need to make any amendments or alterations to that submission?

Ms Mortimer—No.

CHAIR—We invite you to make an opening statement. At the conclusion of that, we will go to questions from the committee.

Ms Mortimer—There are eight points I want to make. I think they are all covered, more or less, in our submissions, but I want to emphasise some, with examples if it is helpful to the committee. If the committee wants me to address examples in answer to questions, I am happy to do that. The first matter that really concerns us is that this bill and these reforms are being considered without the release of the Penfold report. That is a matter of which I was not aware until I had something to do with these submissions. I actually spoke to Ms Penfold myself over some considerable period of time. I thought she was committed to undertaking a careful and thorough review of some of the issues the government had raised about problems in this area. I think it is highly inappropriate that the outcome of that review is not available for scrutiny and comment before these reforms are being considered. That is the first point.

The second is the question about the imposition of absolute time limits. The Bar and PILCH are both very concerned about that, as our submission indicates. We would strongly recommend that a measure of judicial discretion be retained. It is such a fundamental component of the rule of law and the way that our system of justice is administered that courts are able to do justice in an individual case. The introduction of absolute time limits defeats that aim. That is an issue on which I can give the committee a specific example of a case in which I have been involved, if that is of any assistance.

CHAIR—Do you want to do that now?

Ms Mortimer—Perhaps I will come back to that.

CHAIR—All right; thank you.

Ms Mortimer—Thirdly, I want to talk a little bit about the particular difficulties of people in detention. I am sure that is something the committee has heard a lot about in various submissions. The reality is that there is such a problem with access to information and interpreters so that people can understand what the time limits are. I have a client at the moment who took five days, on and off, to compose a five-line letter in English to the Federal Court, mostly with the help of the Bible. Imposing absolute time limits on people who are experiencing those kinds of difficulties really makes it impossible to do justice to their claims.

Proposed section 486D is about previous judicial review applications. My personal experience of that is that the minister is always well aware of previous applications by people in the Federal Court and the Federal Magistrates Court and she vigorously contests the

relitigation of issues based on estoppel principles. Sometimes she wins and sometimes she loses, but those cases are decided on their merits. If in fact there is relitigation of the same issues, then the courts dismiss those kinds of applications or do not allow them to proceed. That is how the law should work. As we said in our submission, we see section 486D as unnecessary.

The next point I want to make is about the use of the word 'unmeritorious' in both the second reading speech and the explanatory memorandum. Our position on that is that it is a value laden word that is really inappropriate to use in this kind of situation. It is an especially inappropriate criticism when there is such a paucity of funding for representation of asylum seekers. People who are in this position are not the best judges of whether they have meritorious administrative law claims. What they know is that they are afraid to be sent home and that is what will happen if they do not review an RRT decision.

I am confident, based on my experience—and I have been working with asylum seekers in judicial review proceedings for about 10 years now—that if people in that position were all well represented then the success rates would be a lot higher. I have no doubt about that whatsoever. I think it is also important to emphasise that the figures that the government relies on in this area frequently do not include court proceedings that settle before trial. Post the case of plaintiff S157—the privative clause decision where now there is a real risk that some cases may succeed in judicial review—the minister has backed the position of regularly settling cases, which is a very responsible position for her to take. Again, in my experience none of the cases that I have been involved in that have settled before trial would have settled if the applicant had not been represented. What you come back to again is that it is easy to call something unmeritorious, but the merit of a case comes out, by and large, in my experience, only when a person is well represented.

The next point is about the summary judgment provisions. The Bar's position and PILCH's position on this is that they are also unnecessary. All federal courts have summary dismissal provisions as a matter of course. They are rarely invoked by the minister in these kinds of proceedings. If one asks why, then in my experience the answer is that it is because it is not possible to say independently and confidently that a case is manifestly hopeless. Anglo-Australian law has long respected, considered and entrenched an approach to letting people have access to the courts on the merits of their cases. The Bar and PILCH think that is an important principle that ought not to be cast aside. This area is littered with examples where, if one proceeds on the law as it is today, one might say that a particular argument or claim is hopeless, and then a decision will come down tomorrow that will tell, for example, the full Federal Court that it is wrong. A good example is the case of applicant S, where the full court said that young Hazara males could not be a social group. People acted on that basis; cases were considered hopeless on that basis. Then the High Court told the full Federal Court that it was wrong. It is a very difficult judgment to ask the court to make and to entrench, as this legislation does, a new threshold: no reasonable prospect of success. That is altogether unwarranted, in our view, because that raises the bar to a level which is completely unacceptable.

What we say about the costs provisions really stems also from the thrust of our submissions about the summary judgment provisions. It is really inappropriate to ask lawyers to make a

judgment about reasonable prospects of success in this area at the moment when a proceeding is issued. That is for a number of reasons. It has to do with the fluidity of the law itself in this area; but it also has to do with the reality of the way litigation is conducted. For drafters of these provisions to ask for such a certification, I think just demonstrates that they have no idea what happens in practice in this area. You do not sit down with these clients and have comfortable long conversations over days and weeks. You do not have access to all the information that was before the tribunal. Sometimes you might only see the RRT decision the day before the time limit is about to run out. You cannot make a judgment of that kind in those kinds of circumstances; that is not to say that that judgment is not made. In my experience it is made regularly, carefully and bona fide. And it is made before the trial, in my experience, by counsel who appear for applicants, but you cannot necessarily do it on the day that you issue the application. To impose that onerous responsibility on lawyers I think is highly inappropriate.

I do not have any experience of lawyers who have continued cases that they think are manifestly hopeless. In fact, I have the opposite experience. I have experience regularly of junior counsel ringing me to have anxious discussions about how they are going to tell clients for whom they are acting pro bono that they cannot continue to act for them because, having looked at all the material, they are not able to say that they have an arguable point. My experience in practice is that lawyers do precisely the opposite of what this bill in these provisions contemplates they do.

The final comment I want to make is about one issue that perhaps does not emerged too much in the bar submission, but it emerges in the submission by RILC, the Refugee and Immigration Legal Centre of Victoria. It is something that I also feel pretty strongly about in my own experience as counsel in this area. The issue is that the problems that the government identifies in terms of the quantity of litigation in this area stem much more from the poor quality decision making at merits review level than they do from any abuse of process of the courts. If there is a real desire to try and stem the tide of these applications, it is to the merits review level and the quality of decision making there that some attention should be paid. That is what I would like to say by way of an introductory comment, thank you.

CHAIR—Thank you very much, Ms Mortimer. It is very comprehensive and, indeed, we thank the Victorian Bar and PILCH for your submission as well. In relation to the costs order issue and proposed section 486F, read in conjunction with 486E, you have discussed it in terms of it being applied to legal practitioners. But when one looks at the provision, it is not so confined and, in fact, the terms are not defined.

Ms Mortimer—I accept that it is broader than that, but I am speaking from the perspective of legal practitioners who, it seems to me, will be caught by that. I can understand that if, for example, it is perceived that there are people standing behind applicants who are not on the record or are not otherwise disclosed as giving them advice or encouragement, they may have an influence that is undesirable. I can see that those circumstances might exist, but lawyers are caught by these provisions and that is highly undesirable.

Senator LUDWIG—The area that has been canvassed today and that we have heard submissions about principally goes to similar areas which you have raised in your submission—that is, 406D. Although it has been mentioned, it has not been significantly

canvassed by us as distinct from the submitters. You mentioned that there were cases where obviously Senator Vanstone or her representative would argue in the migration field that they should be stopped on the basis that it is relitigating the same point. Are there any statistics of which you are aware of? It is a good point that you make in that it is open to the parties to then say that 406D is really only restating what the current provisions are that the courts would turn their mind to in any event and is unnecessary in that case. Or the courts are not doing it and then one wonders why you would need 406D.

Ms Mortimer—My experience is that the minister is always well aware of a circumstance where an applicant is before the court not for the first time, and that is because she has been the respondent to the previous proceeding. In those circumstances, as I say, the question is always raised by the minister: is the person estopped from relitigating the same claim in those cases that are decided individually? It has happened a lot in relation to what is called the Muin kind of litigation where people have joined that class action having already had one go at judicial review, and then the High Court remitted all those cases back to the Federal Court. When those cases have been coming up, in a lot of those cases the minister has been raising estoppel issues. Sometimes she has been successful and sometimes she has not; it really depends on the closeness of the second claim to the first claim. The courts deal with that in other jurisdictions, particularly in administrative law, and other areas all the time, and they decide them on the facts. If the point of 486D is nothing more than to ensure that the minister, as a respondent to litigation in this area, is aware of previous judicial review proceedings, I find it difficult to believe it is necessary for that purpose.

Senator LUDWIG—You raise the issue of summary judgments and you say they are unnecessary and unclear. There already is the provision for summary judgments. Is it the way they could be utilised in this bill that you object to more specifically?

Ms Mortimer—There are two issues. The first is that the provisions in this bill raise the threshold—that is, the threshold that is set by judicial explanation of the ordinary summary dismissal proceedings is at the level that a case is manifestly hopeless or unarguable. What this bill does expressly is to say that the expression 'no reasonable prospect of success' does not mean that but something larger than that. It is raising the bar for applicants by requiring the courts to dismiss cases that do not fall into that traditional limited category but into a larger category that is yet, of course, to be defined. That puts migration applicants under a disadvantage that other litigants are not under. That is not a kind of process that we think is fair. That is the first point.

The second point is that, if it is the case that there are judicial review applications that are manifestly hopeless and unarguable, then the minister can apply to strike them out and, like everything else, they will be considered on an individual basis. We do not understand why that is not sufficient protection against truly unmeritorious claims.

Senator LUDWIG—The costs orders are very wide in scope. Do you think that they are amendable? In other words, do you think that the current bill could be amended to save those costs or do you think that they are a step too far?

Ms Mortimer—I suppose it depends on understanding a little more about to whom they are principally directed. If they are principally directed towards, for example, counsel, I think

that is offensive, completely unnecessary and does not reflect how counsel practise in this area. If they are directed towards lawyers in general, my experience, again, is that I do not know of lawyers that support or continue migration litigation for secondary purposes or anything like that. If there is evidence of that then perhaps something needs to be done. But the point is that there may be other ways in which one ought to attack individual lawyers who are supporting those kinds of practices, and that is through their professional conduct obligations—and the same with migration agents. If it is directed to a different category of person—people that are standing behind applicants—again, I am not aware from my experience of any evidence of that being the case.

Senator LUDWIG—Thank you—that is helpful. We too have asked for the Penfold review on a number of occasions but are yet to be successful. I will certainly ask for it again today.

CHAIR—Ms Mortimer, thank you very much for your assistance to the committee and for the combined submission from PILCH and the Victorian bar. It does provide the committee with some helpful information and we appreciate your recommendations as well. As Senator Ludwig has indicated, we intend to follow up again with the department the review document. If we should need to pursue further matters the secretariat will be in touch with you.

Ms Mortimer—We are very encouraged to hear the committee intends to pursue that and we are grateful for the time the committee has given us.

CHAIR—Thank you very much.

Proceedings suspended from 5.24 p.m. to 5.40 p.m.

POWER, Ms Sandra, Assistant Secretary, Civil Jurisdiction and Federal Courts Branch, Civil Justice Division, Attorney-General's Department

TURNER, Ms Deborah, Principal Legal Officer, Attorney-General's Department

IRELAND, Ms Cassandra May, Director, Legal Policy Section, Department of Immigration and Multicultural and Indigenous Affairs

WALKER, Mr Doug James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Ms Ireland—I am the Principal Legal Officer in the Legal Policy Section of the Department of Immigration and Multicultural and Indigenous Affairs.

CHAIR—Before we begin I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary they must also be given the opportunity to refer those matters to the appropriate minister. Does either agency have an opening statement?

Ms Power—No.

Mr Walker—No.

Senator LUDWIG—I have asked this before, I am sure, but is it still the case that the Penfold report is not publicly available?

Ms Power—Yes, that is correct. The Attorney-General has made clear that the report was prepared for the government and for the purposes of a cabinet decision and that therefore it would not be released apart from the limited material that has been provided to the committee.

Senator LUDWIG—And there is not a redacted or edited one available, or anything else?

Ms Power—That is the case. There is not one available.

Senator LUDWIG—The difficulty we always face with this is that there are provisions in this bill which you say, as I understand it, come from the Penfold report. Are there provisions in this bill which are not from the report?

Ms Power—A number of provisions in the bill draw on recommendations that were made in the department's *Federal civil justice system strategy paper*. Those recommendations relate to summary dismissal and certification by legal practitioners, and there was also a recommendation relating to the allocation of appeals within the Federal Court. So the bill also draws on some recommendations in the strategy paper.

Senator LUDWIG—And that strategy paper is on the web?

Ms Power—Yes. It is publicly available.

Senator LUDWIG—Of those matters which were drawn from the Penfold report, are they drawn from a general view that this area needs addressing or a more specific recommendation from Ms Penfold that this matter should be included in legislation?

Ms Power—I think they draw on recommendations and on general discussion in the report.

Senator LUDWIG—The more difficult question, of course, is: what part of the report has not been implemented? I know you cannot answer that because it is very circuitous, but the difficulty is that the bill as it stands is what has been presented to us to have a look at. What we do not know is whether or not there were better suggestions, different options or other ways to achieve the same result, or other provisions that may have required amendment to assist in making sure this bill works effectively. That is what we do not know and until the report is available we probably will not know it. We can take it on your advice, but I would prefer the report, if you do not mind. How can you help me with that? What I am trying to hear from you is an encouragement, at least, to the extent that the bill is drawn from those two papers and that it encompasses in a positive form the outcome of that report.

Ms Power—I think, in view of the Attorney's decision, or the government's decision, not to release the report, that it would not be appropriate for me to discuss the contents of the report at all.

Senator LUDWIG—So the position we are in is that we have a bill and we should view it in isolation? There is no point in referring to a report, or saying it has been drawn from a report, when you cannot see the report. In truth, I do not see any point in referring to the Penfold report. She was paid and spent a significant amount of time doing the report, but it seems to have been a pointless exercise, quite frankly.

A number of submitters have raised issues about the constitutional validity of various aspects of the bill. Some of them go to the purported decisions area. Professor George Williams makes a number of points in that area. Can you explain how the attempt to extend elements of part 8 and 8A of the Migration Act to a purported privative clause decision, including a decision involving jurisdictional error, is constitutionally valid? Why do you say that will work and will not be struck down by the court?

Mr Walker—As I think we said—

Senator LUDWIG—This is not a new question. We have been here before.

Mr Walker—No, it is not a new question. That is right. As I think we have advised the committee before on an earlier bill dealing with time limits, the advice that we had is that it would be constitutionally valid. It is on the basis that it does not change the grounds of review. It deals primarily with, and its purpose and focus are on, the procedural aspects. The Migration Act in its current form has a series of time limits and provides for the exclusive jurisdiction of the federal courts in relation to privative clause decisions. The effect of the High Court's decision is that the private clause decision, in effect, is a decision that is not tainted by jurisdictional error. The consequence is that, in order for the court to ascertain whether or not the person is within time limits, they have to conduct a complete judicial review. The purpose behind the amendment relating to a purported decision is to say that, in effect, any action or decision that is taken or purportedly taken under the Migration Act comes within those procedural requirements, such as the time limits, the primary decision restriction and also the exclusive jurisdiction of the federal courts.

Senator LUDWIG—Are you aware of any other federal legislation which has absolute time limits and which takes away discretion? That is what it is designed to do, isn't it—to take away the discretion of the court to extend a time limit?

Mr Walker—It is designed to put in place a specific time limit, yes. It has come from the backdrop of having in recent times a situation where somewhere between one-third and one-half of applications have been made in the range of three months or more after a person has received a tribunal decision. So that is what it is designed to do. It is designed to provide a time frame but also to give an extra time within which the court can exercise discretion to grant leave for the application to be made to the court.

Senator LUDWIG—But are you aware of any other federal legislation that has a similar provision?

Mr Walker—Off the top of my head, no, I am not.

Senator LUDWIG—So it is brand new, as far as you are aware?

Mr Walker—As far as I am aware, yes.

Senator LUDWIG—What about you, Ms Power?

Ms Power—I am not aware.

Senator LUDWIG—What about the state or territory jurisdictions? Do they have one like this that you are aware of or familiar with?

Ms Power—I am not aware.

Mr Walker—I am not aware.

Senator LUDWIG—Have you received any advice on how it would operate fairly?

Mr Walker—How it would operate fairly?

Senator LUDWIG—How it would operate in general in the sense that it would not be struck down as being unconstitutional?

Mr Walker—I think the advice that we had is that it is dealing with providing procedural requirements for the making of an application rather than being seen as a restriction. In the form that is in the bill, of course, the government has taken up the committee's recommendation in relation to the earlier proposed provision that operated from deem notification. This is from actual notification. So I understand that there is far greater confidence that this is constitutionally valid because of that actual notification provision. You will not have the situation where, potentially under the deem notification provision, a person may not have been aware or they may have only become aware of the decision somewhere within that broadly 84-day period. Here they will in fact have the 84-day period from actually knowing about the decision and having the reasons for that decision in which to seek judicial review.

Senator LUDWIG—So you are not kite flying this provision?

Mr Walker—We don't believe that we are.

Senator LUDWIG—I think we have done this before. In fact, I have a vivid memory of it. In relation to statistics on issues, it has probably been long enough since either estimates or

the last time I asked for us to revisit this area. How many judgments are we now talking about? I will put it in its frame to make it a bit easier, at least for me; I am sure you are very familiar with the statistics in this area. Could you give me the number of unrepresented litigants in the High Court in migration matters, a breakdown of the number of migration matters which are obviously represented, that percentage as a total in the High Court or in the Federal Court and those which are currently in the Federal Magistrates Court. I am happy for you to take those on notice, because I know it stretches across a range of areas.

Mr Walker—Yes, I will have to take those on notice.

Senator LUDWIG—Proposed 406(d) then goes one step further; there seems to be a requirement to notify where a matter is being relitigated. The interesting point about that is: how many times has the minister intervened in cases on the basis of estoppel to say exactly that—'This matter has already been litigated and should not be relitigated'? It seems it is stating the obvious where the department has raised the issue and sought to progress that.

Mr Walker—Certainly since November we have been having a closer monitoring and watching of repeat judicial review applications. Currently one-third of all our judicial review applications are repeat judicial review applicants. We most certainly advise the court where we believe that the person is a repeat applicant. A lot of work is being done, as I understand it, between the Federal Court registries and the migration and refugee review tribunals. Generally, the common factor in identifying these repeat judicial review applicants is the actual tribunal decision. Often it is not readily apparent, either to the court registry or to ourselves, that people are in fact repeat applicants, because they sometimes reverse family and first names. They will often change the spelling of their name slightly. So it is not just a matter of running the name; it is actually delving a little bit further. There are some procedural aspects underlying it. Disclosure by the applicant is another mechanism that we believe will help the court at an earlier stage to be able to identify those who have been before the court before.

Senator LUDWIG—With regard to people swapping their first and last name and coming before the court again, is that inadvertence, bad drafting, or are you saying that there are more underlying notions?

Mr Walker—I would not like to speculate on how or why that happens; I just do not know.

Senator LUDWIG—There is also a matter raised in paragraph 31 of submission No. 15 by the Public Interest Law Clearing House of Victoria and the Victorian Bar, which states:

> The proposed s.486D ... 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.

The submission goes on to say that they:

> ... 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.

I am happy for you to take that on notice. I raise it as a matter that you want to provide the committee with an answer to.

Ms Power—As Mr Walker has said, the explanatory memorandum to the bill says that the provision is designed to assist the courts to identify applications which have already been the subject of proceedings for judicial review and also to discourage applicants from attempting to relitigate these matters, including as a means to delay their removal from Australia. In the absence of a specific provision in that section, to say that an application in breach of that provision would have the effect that you have described would not be construed in that way by a court.

Senator LUDWIG—What do they do then?

Ms Power—What is the effect of the provision?

Senator LUDWIG—Yes.

Ms Power—As I said, the provision is designed to—

Senator LUDWIG—We know what it is designed to do, but what is the effect? It says it 'could be interpreted as a condition on the jurisdiction of the relevant court, in that any failure to disclose'—so if a person failed to disclose. What if A inadvertently swapped their name—they were AA or AB and they then became BA—and they failed to disclose that they were an earlier litigant? What action would the court then take?

Ms Power—The court, if it finds that that has been the case, is more likely to be able to use a summary judgment power at an earlier stage.

Senator LUDWIG—They could not indicate that it would mean that the proceedings would not have been effectively commenced?

Ms Power—In my view, no.

Senator LUDWIG—But it would be open to the court to say that, wouldn't it?

Ms Power—The government's view would be that the courts can be trusted to behave appropriately and not discontinue proceedings for this reason, if there were sufficient grounds for it to continue. In the majority of repeat applications, there is frequently no proper matter to be brought.

Senator LUDWIG—Should it happen, should I come back to see you, Ms Power?

Mr Walker—There is also one thing there in relation to paragraph 31 that has me wondering—that is, the final sense that this could have quite drastic consequences in conjunction with the absolute time limits. In the situation where somebody has already been to the court, there will be no doubt that they have in fact received actual notification of the decision and they would probably be out of time anyway.

Senator LUDWIG—It is hard to say. It has crossed my mind that they could be out of time. It could be one of those circumstances where they have that extension or it has been relatively quick. It is all more than unlikely, though.

Mr Walker—The context of it is very much that the court has adjudicated on the particular matter that is the subject of review.

Senator LUDWIG—It may not have been all of it. A person may have only been on part of the matter that was adjudicated on. Otherwise, all the issues that you raised where a person

has already been before the court would be successful. It is not the case that if you have been through the court once you cannot go again. There might be another part that had not been considered or decided that allows you to go again, so to speak, or relitigate, or there might be a newer or different issue. It is hard to say, but if you are not successful in making that application all the time the court obviously sees that there is the ability for an applicant to try again, so to speak. Therefore, it should not be a bar that just because they have been once they should be completely barred for having another go. Is that your view?

Mr Walker—Our view is that, once the matter has been considered by the court—and our experience has been that the applicants are in fact putting in identical applications based on basically the same grounds of review—where we are aware of it we advise the court and seek that the matter be struck out.

Senator LUDWIG—Are they struck out in all instances?

Mr Walker—I believe that they are, but one of the concerns is quite clearly identifying them and it does take time. The process of having them struck out probably takes roughly the same time as a case coming in for the first time and the issues under challenge being considered by the court.

Senator LUDWIG—I would be interested in the former issue as to whether or not there are matters which are raised by the court and the court decides not to strike out, where you have discovered that they are seeking to relitigate—you have raised it with the court and the court decides not to.

Mr Walker—We will take that on notice.

Senator LUDWIG—On the definition of 'encourage', there seem to be a couple of mechanisms that are used in this bill: firstly, there are time limits; and, secondly, in terms of unmeritorious applicants, you then use the phrase 'encourage persons'. With regard to the definition of both 'encourage' and 'persons', I would be interested to see what you thought that would encompass. Does it encompass one of the submitters here today who provides information to unrepresented litigants about how to proceed with cases and who suggests or encourages them to lodge applications in certain ways to advantage them? Are they then one of the persons who could be caught by the legislation with regard to the issue of the third party—in other words, how remote can the person be from the proceedings? An issue was raised by one of the submitters who indicated that, of course, there is a constitutional issue as to how far you can go if a person is not a party to the proceedings. Can the jurisdiction of the court extend to the third party, so to speak, to bring them into the proceedings?

Mr Walker—A starting point would be to describe some of the circumstances that we are aware of happening. There are admittedly practical issues of there being sufficient evidence for the court to be confident to impose a cost order on a third party. But the situation we are aware of happening from time to time is that individuals, who are not registered agents, not lawyers, sometimes sell, for a modest fee, a pro forma to an unsuccessful visa applicant, saying 'Here it is; here's the kit,' virtually with the name put in and then the application will be submitted to the court. It is those sorts of circumstances that are of concern to the government, not the people who provide advice in the context of saying: 'There is a court process; you can seek review.' It is those who go further than merely providing the

information of there being a court that can review the matter to providing advice and assistance in the context of further encouraging people to make these applications without having regard to making any assessment of whether there is any merit or whether it is clearly for an ulterior motive or purpose.

In some respects it may well be a situation of: 'You will get a bridging visa and you will be here lawfully for the time that it takes the court to dispose of the matter.' From time to time various ads have been run in the ethnic press—some by lawyers—that seem to have as a selling point the fact that there is a bridging visa and that people's status can go from being an unlawful noncitizen to a lawful noncitizen by virtue of making the application.

Senator LUDWIG—Do you say they are 'encouraging'; they would fall within that definition? As I have correctly pointed out, there is not a definition.

Mr Walker—They would fall within the provision.

Senator LUDWIG—How would they do that? They would be retailers of the kit. Their answer is: 'We're not encouraging it at all; we're simply providing the kit. What the person does with it is up to them. We're not encouraging them to take the litigation.' It is similar to a divorce kit. I can buy a $30 divorce kit, but it does not encourage people to divorce.

Mr Walker—Some of them go further. The kits, the processes and the involvement that we see go a little bit further than merely providing the kit. But I should point out that the issue is very much about what the court does. We believe that the court would be quite conservative. There would have to have quite compelling evidence before it, not merely a suspicion.

Senator LUDWIG—Who would run the case, though? You would provide the evidence to the DPP and the DPP would seek—

Mr Walker—Here, the consequence is a cost order.

Senator LUDWIG—It would be your representative?

Mr Walker—Yes. Most likely we would be putting evidence before the court. There would be very few cases where we would have evidence, or acceptable evidence, for a court. There may well be situations where we do. In fact, in other circumstances solicitors have filed a very large number of applications and made a concession to the court that they have not read tribunal decisions and they are unaware of whether there are any legal errors within the tribunal decisions or decision-making process because they have not turned their mind to it. Those people would also come within these parameters.

CHAIR—How would they know? The committee has received 24 submissions to this inquiry and we have heard from eight or so witness groups today. The concern directed at this particular aspect of the legislation ranges from a concern by the most senior levels of the profession that it is a sweeping attack on the profession to a concern exhibited by independent refugee and not-for-profit immigration organisations and community organisations that they will be virtually incapable of determining what the breadth of the clause is, what its impact will be and how to take steps to minimise the risk of being caught within it.

Mr Walker—I believe, as the Attorney said in his second reading speech, that those organisations that go about providing advice and assistance to visa applicants, making assessments and, in effect, giving consideration to the prospects of success will have no

difficulty with the overall scheme. They will not be in jeopardy. Also, some of the submissions have said that the courts have been quite cautious in relation to provisions like this. Our belief is that they would remain quite cautious.

CHAIR—It is fair to say, I suppose, that I am comforted by that. I find your assurances comforting; I find the explanatory memorandum comforting. But, at the end of any assessment of what an individual has to rely on so that they understand what risks they may be taking and what their obligations are, they rely on the legislation—and it is simply not clear in the legislation.

Senator LUDWIG—You could lodge a protective appeal if time is running short and they have come to your door late. You look at the time limits, which are absolute, you have not had an opportunity to look at the case for a whole range of issues because it has been brought to you late, time is ticking and you lodge what one would call a protective appeal. It may then be called on very early, before you have turned your mind to the issues at point. What you hear then from the person is that they have not turned their mind to it, but that is because it may only be a preliminary step in the process and they will at some point, before the substantive hearing, file better and further particulars. But with this provision do they stop at that point and say: 'Hang on a minute. I haven't got time to deal with it. I haven't got time to turn my mind to ensure that it meets all these tests. No.' Or do they do it and run the risk? That is what you are asking people to do, I suspect, if you then have a positive view of these issues.

Mr Walker—I think that to a certain extent now they run a risk. If you were putting in what you have called a protective appeal without turning your mind to it and—

Senator LUDWIG—Under the normal circumstances they could ask for an extension of time and they would not, but they might say that.

Mr Walker—An extension of time in what sense?

Senator LUDWIG—In relation to the time that runs. In yours it is absolute, so there is no extension they can ask for.

Mr Walker—The situation is essentially that it comes back to the court and whether the court believes that in the circumstances it is appropriate to make a costs order.

Senator LUDWIG—If that is the case, why wouldn't you leave it the way it is? Dey and General Steel provides for how the court looks at these things. You have decided to impose what I would see as a lower test threshold in relation to that—it is also the view of the Law Council of Australia—and add to it two undefined terms. You have changed the rules and you say you will leave it to the court, but you have given the court a very open check in this respect, one that they may find that they have to follow. So it is not legitimate, in my view, to say that you are leaving it to the court. You are giving the court reasonable instruction about how they should turn their mind to it.

Ms Power—The provision has a number of conditions in it for it to operate and, as you say, it is expressed in terms that a person must not encourage the litigant to commence or continue migration litigation. In the government's view, merely advising a person about their prospects of success—or examining their case to ascertain what their prospects of success are and to advise them of them—is not encouraging them to pursue litigation. Encouraging a

person is urging or advising or assisting them to actually do something. In this case it is to actually commence or continue litigation, as distinct from advising them about the prospects of their case. So if a person does take it upon themselves to actually encourage or urge a person to pursue litigation, the person does have an obligation imposed by this provision to consider whether or not there are reasonable prospects of success and to give proper consideration to the prospects of success in a case. I think, as an earlier witness commented—possibly Mr Martin—it is likely when a court looks at a provision like this, bearing in mind the caution with which courts approach provisions of this kind, that what is the test of proper consideration will depend as well on the capacity in which the person is acting, so that you do not expect of a professional—

Senator LUDWIG—Who is the person?

Ms Power—It is the person who is actively encouraging a person to pursue litigation.

Senator LUDWIG—Have you got any examples of that?

Ms Power—I think Mr Walker has given examples of people whose names do not necessarily appear on the records as representatives, but behind the scenes—

Senator LUDWIG—So have you looked at whether the High Court can reach out to those people and invite them in to suffer a costs order?

CHAIR—But they are not a party to any proceeding.

Ms Power—In general that will not be a matter of which a court would be aware.

Senator LUDWIG—I did not ask in general. I am saying that you say that someone is behind the applicant—we are trying to remember who that person is, I must say—and next we are then saying that the likely consequence is that a costs order can be made against them. The next question is: can the High Court make a costs order against a third party that distant from the proceedings who is not an applicant? Have you looked at that issue? Is it constitutionally sound?

Ms Power—I think the provision—

Senator LUDWIG—Have you looked at that issue?

Ms Power—We have been advised about the constitutionality. We have received advice on the constitutionality of the bill.

CHAIR—What about the practicality? Have you received any advice on that?

Ms Power—I think one of the practicalities in it is that there would indeed need to be a link between this person, if they were not a lawyer or a migration agent, and the litigant.

CHAIR—What is a link?

Ms Power—There would have to be something that would bring to the attention of the court that this person was actively involved in encouraging a person to pursue the litigation.

CHAIR—So if you are a purveyor of a kit, to choose Mr Walker's example, and you provide that kit for the purposes of encouraging somebody—under this undefined term 'encourage'—to commence or continue migration litigation in a case which does not have reasonable prospects of success, what expertise is the purveyor of the kit bringing that equips

them to determine whether a legal matter has reasonable prospects of success? How are they meant to make that assessment that then makes them liable for a costs order?

Mr Walker—As I said earlier, it is going to very much depend on the evidence that is available in the context, and it can vary, from what we understand can happen. There are circumstances where we have had solicitors assisting without having them being the solicitor on the record. As to the extent to which they help and assist and encourage, the issue that very much comes out here is precisely what they have done in the circumstances and whether the court believes it appropriate in the circumstances to make that costs order. An important safeguard that is in the bill, of course, is proposed section 486G—that before a costs order can be made, the court has to give the person an opportunity to argue why it should not be made. So they do have the opportunity to come and explain precisely what their role is.

If it is a situation where they have merely provided some advice that there is this capacity to go to a court, without making any judgments or taking it further to actually directing the person to the court—and it can happen at times that they do direct these people to the court—then, once again, given the court's cautious approach to these matters, it is unlikely that a costs order would be made.

Senator LUDWIG—But we have a position here where, on the say-so of your legal representative, they nominate some person that has to be brought before the High Court for the potential for a costs order. That is what you are saying—you have to then ping somebody.

Mr Walker—It is not merely the nomination.

Senator LUDWIG—How else do you then go and tell the High Court who it is?

Mr Walker—We would have to have evidence to support—

Senator LUDWIG—How would that evidence be introduced?

Mr Walker—It would be at the time of—

Senator LUDWIG—It would be an affidavit from X officer, wouldn't it?

Mr Walker—It could well be an affidavit, it could be further, but—

Senator LUDWIG—And the only way that that could be contested is by the unrepresented litigant.

CHAIR—Please let the witness finish.

Mr Walker—It is going to need more than merely an affidavit making a series of assertions; there is going to have to be strong evidence of what that person's involvement has been. It may well be at times that it is in fact the unrepresented applicant who provides the evidence.

CHAIR—We are dealing largely in the world of the hypothetical here, but I do want to go to the example that you chose, Mr Walker: the person who provides a kit—

Mr Walker—I did not use the term 'kit'. There are people who provide the pro forma and will in fact complete the pro forma.

Senator LUDWIG—I used the word 'kit'.

CHAIR—I am sorry, we conflated 'kit' into your observation. The person who provides the pro forma, if I might be very specific, then, who will not necessarily be a solicitor—is that correct?

Mr Walker—That is correct.

CHAIR—So they can just be a person. I cannot see the link—and I would be very grateful if you could explain it to me—between the person who provides the pro forma and any capacity for that individual, if they are not legally qualified or experienced, to make an adequate assessment of the reasonable prospects of success of a case in an instance such as this that would stand up in a court to lead to a costs order. How is a person who provides a pro forma able to make an assessment of the reasonable prospects of success of a legal case?

Mr Walker—In many respects—and it is the circumstances of our experience of the past that we are talking about—people will assist in the completion of the pro forma, and they will act in a very cavalier way in the context of saying, 'Well, you can go to the court and you can make this application.' They do not turn their mind to whether there are prospects of success. They do not turn their mind to directing the individual to finding or availing themselves of legal advice.

CHAIR—How can they? It is not what they do. It is not their job, it is not a professional obligation and it is not an aspect of their training. The example we are talking about is a person who provides a pro forma for somebody to complete—

Mr Walker—Or they complete the pro forma—

CHAIR—Or it will be completed for them, one way or the other—

Mr Walker—There is a bit more behind it, factually. It will vary from case to case but essentially the starting point is the pro forma.

CHAIR—I absolutely understand the case—

Mr Walker—But the pro forma by itself is unlikely to be sufficient.

CHAIR—With enormous respect, I think we are now drawing very fine lines. I am trying to work with the example you have provided to the committee. Whether the person provides a pro forma, whether they complete the pro forma, whether they place the pro forma in an envelope and file it in the court to assist—or, rather, 'encourage', to use the word in the legislation—the litigant, I still do not understand how you expect to achieve a result which has them determined by a court as appropriately qualified to determine whether there is a reasonable prospect of success in their legislation. My milkman could assist with the filling out of a pro forma. How can the court then determine whether that person is qualified to determine whether there is a reasonable prospect of success?

As an example you used solicitors who file cases en masse without having any regard to the merits of what they are doing and without reading RRT decisions—ridiculous propositions like that. That is totally unprofessional and inappropriate behaviour, even if they are not in a solicitor-client relationship with the individual. I absolutely understand the point that the legislation seeks to address. But I do not understand how you will get any result when you simply talk about a person—undefined—who will not even be able to go to the act to find out what 'encourage' actually means. I do not know how you expect any success or how any court

would be expected to say that the milkman or the well-meaning former nun who is a volunteer at the refugee centre can appreciate the reasonable prospects of success in the court case. That is where you have lost me.

Senator LUDWIG—I was lost a bit earlier than that.

Ms Power—I would draw a distinction between a person who is actually encouraging this particular litigation and a person who is advising a person on the process, advising a person that there is this possibility, but not encouraging that person to pursue that specific litigation. In general a person who is advising like that will be saying: 'This is how you go about it. It is up to you to work at whether you have a chance of success in this litigation.' I do not quite understand the example being used.

CHAIR—I did not start with the example, Ms Power; it was given to me. I am working with it as best I can. The point that you have just made is that you are drawing a line between what someone does to assist and guide versus encourage. But I cannot go to the legislation and draw that line. Nor can anyone else—nor can the person who is going to be liable for this behaviour.

Senator LUDWIG—You would have to advise people more generally that this legislation exists. Do you use the word 'assist' or 'encourage'? What they are to make of it? I am not so sure they would know. If it is designed to generally discourage people from helping, that is probably what it will do. That is not what the legislation is proposing to actually do, but that would be the result. If you want this bill to say that people are not going to help then that is what it will do, if that is your intention. Is that your intention?

Ms Power—No, that is not the government's intention.

Senator LUDWIG—But can you see that that potentially could be the result? Lawyers and people out there in the community, community groups, would then generally say to people, 'If you try to encourage, or in other words help, someone to do it without trying to assess the merits, because you are not legally qualified—which you should not do anyway, because you are not legally qualified—then you could be liable. So don't do it.' That would be the result, I imagine. It seems quite at odds with our whole obligation in this area—to me, anyway; maybe not to you. The immigration department might be more pleased about the result.

Are the migration lawyers and the Migration Institute of Australia aware of these issues? In other words, have you raised your concerns with the professional group about the litigation and the number of cases that have come before them and asked them to assist in ensuring that unmeritorious applications are not filed and pursued?

Mr Walker—I will have to take that on notice. It may well have been raised in the discussions the department has with the MARA. The MARA is the MIA in a different role. But I will take that on notice.

Senator LUDWIG—They are different organisations—they are the same people.

Mr Walker—I recognise that.

Senator LUDWIG—In terms of the collection of information from you, this provision would then enable cases to go to the Federal Magistrates Court. How many more cases might go as a consequence of this bill passing?

Mr Walker—Overall, the number of new applications per quarter is slightly over 1,000. The situation at the moment is that there has been a significant increase in the number of applications that are made to the Federal Magistrates Court, rather than the Federal Court—in fact, I think it is now considerably higher to the Magistrates Court than the Federal Court. One of the reasons for that is that the practice in the Federal Court has been to refer most of the applications that have been made to the Federal Court to the Magistrates Court because of workload issues and the belief that it is more appropriate that these be dealt with in the Federal Magistrates Court. So in that context, yes, the Magistrates Court numbers will increase, but only increase by the proportion that would have been going to the Federal Court in the first instance anyway. This will streamline that double handling issue of the Federal Court having to refer them down to the Magistrates Court.

Senator LUDWIG—Has any consideration been given to the resources of the FM, the magistrates service, in dealing with these, if there is going to be an increased flow?

Ms Power—Yes, the government provided additional funding for the Federal Magistrates Court in the 2004-05 budget of $34 million over four years. The government is continuing to monitor the workload of the Federal Magistrates Court and will have regard to its workload in considering any additional resources for the court.

Senator LUDWIG—A number of submitters raised the issue that it might discourage borderline or difficult cases—in other words, where they are at the margin. They might otherwise be trying to examine the law at the border to determine whether or not cases fall within or outside the current jurisprudence.

Ms Power—You are referring to the summary—

Senator LUDWIG—Yes.

Ms Power—The view of the government is that in novel and test cases there is always something arguable in the circumstances of the case, which means that the court would not be satisfied that there is no reasonable prospect of success. Accordingly, an adviser would not be at risk of a cost order in those cases and the summary dismissal provisions would not be activated. It is important to read these provisions in the context of a legal system with the key characteristic that all statutory provisions are subject to judicial interpretation and that this is an evolving process. That feeds into the construction of these provisions.

Senator LUDWIG—And their view is that it might also discourage people taking on pro bono work?

Ms Power—Again, the government's view is that it should not do that—that pro bono lawyers have similar professional obligations and do need to consider what the prospects of success are in the case.

CHAIR—I did not hear the end of your last sentence.

Ms Power—The government's view is that whether pro bono assistance has been provided or the lawyers are acting for a fee, lawyers who present properly prepared arguments, including raising novel arguments, have no reason for concern if they have given proper regard to the law and facts as they apply in these individual cases, so that pro bono lawyers are at no disadvantage under these provisions.

CHAIR—I am curious that the legal profession in relation to pro bonos—so not a matter that one could traduce their intentions on—are very concerned about the implications of this particular aspect of the legislation. In a number of submissions the Law Council, through the other representative bodies, have raised their concerns about the potential impact on pro bono work. There is a job to be done in communicating with those organisations—which I am sure the department has consulted with in advance of drafting the legislation—to allay those fears, because they are most certainly extant.

Senator LUDWIG—One of the submission's—I am sure you have read it—states:

> The provisions relating to personal liability for legal costs are highly ambiguous, needlessly broad, and have significant potential to discourage lawyers from representing and assisting deserving applicants with complex or uncertain cases, particularly when legal services are required on a pro bono basis.

That is what the people who work in this area say. Do you reject that? Do you say that that is not going to happen, that they should not be that concerned? If that is the case, what have you done to allay their concerns?

Ms Power—As I said, the government's view is that the pro bono lawyers are not at risk of cost orders if they are acting properly and in accordance with their professional obligations.

Senator LUDWIG—So they should take comfort from that statement and ignore the High Court judge when he invites them in to explain why they have been assisting or encouraging? That is the difficulty—it will be remote from here and they will have to use the words of the statute to determine whether or not they are caught by it. It seems that they are saying it is broad and ambiguous—and you deny that; you say that it is clear and concise, as all drafting should be.

Ms Power—I am saying that there are a number of protections built into the provision that are applicable whether or not a pro bono lawyer is involved. Pro bono lawyers do have to give proper consideration to the prospects of success in advising their clients.

CHAIR—There is absolutely no suggestion in any of the submissions that that would not be the case—absolutely none, whether it is the submission of the National Pro Bono Resource Centre—which I think is supported by the Attorney-General's Department, isn't it?—

Ms Power—Yes.

CHAIR—the Law Council of Australia, which expresses a concern about decimating free legal advice in pro bono schemes, or the South Australian law society, which from memory says that is a significant issue for them. What was the nature of the consultation with the professional legal organisations in the drafting of this aspect of the legislation specifically?

Ms Power—The government announced in the budget last year that these measures would be introduced, but there has not been specific consultation with the pro bono sector.

CHAIR—What consultation has there been with the legal profession?

Ms Power—The provisions for cost orders and certification draw on the recommendations made in the *Federal civil justice system strategy paper*, on which there was quite extensive consultation with the legal profession, but the legal profession are not being consulted on the details of the bill in advance of its introduction.

Senator LUDWIG—The Law Council submission argues that the bill focuses on the wrong end of the process and that attention should be focused instead on why so many appeals are lodged. Have you looked at that issue?

Mr Walker—The department—and it is probably fair to say that the committee or various parliamentary committees—have looked at various aspects of immigration decision making. We certainly do have extensive examination of the quality of our primary decision making. We take seriously the outcomes of the merits review tribunals, look at ways of improving and watch very closely the decisions that are made by the Federal Court. We factor that into our training and have quite a comprehensive, good decision-making training process that takes account of all those aspects.

On the tribunal side, the situation is that the number of decisions that are set aside by the courts is in fact very small. I know that some people have taken issue with the statistics but, certainly of the cases heard, the current success rate is about 93 per cent. When you take into account those that are remitted by consent—in other words, the government withdraws from the case—that in itself is also very small. Currently, on the basis of the RRT's statistics on their web site, about 12 per cent of cases are litigated where an applicant is in fact successful. In the overall scheme of the number of decisions that are made, that is quite good. I know the tribunal also monitors what is coming from the court and has processes in place for feeding back and training members and alerting members to the faults. I cannot go into the detail because obviously I am not a tribunal staff member. It is a matter that certainly the tribunal could provide in more detail.

CHAIR—We can take that information from the tribunal through the estimates process.

Senator LUDWIG—Of course one of the reports that are not available is the Penfold report. We know that. In the statistics can you also look at those that are decisions of the RRT or MRT which have to go through that tribunal irrespective of whether they are seeking a positive outcome from that tribunal because, of course, they are really interested in getting a 417 or a 351?

Mr Walker—We can certainly look at it.

Senator LUDWIG—The difficulty is that they may sway people's thinking about the litigation process. For example, they may get a failed response from the RRT or MRT and therefore feel compelled to appeal it. In other words, they end up in that system whereas, in truth, it was designed at the start to gain access to the discretion of the minister. Of course, that can get lost in the process, with solicitors changing or people becoming unrepresented and representing themselves—that number or cohort is of concern to me as well. They might also be reflected in your statistics, but there is no way to unpack them, as far as I can see, to understand what impact that group or cohort might have.

Mr Walker—Certainly, I do not dispute anything that you have said there. Our statistics would not be able to break down how many applicants to a tribunal are using it in the belief that, while they have very little prospect of success before the tribunal, they can seek ministerial intervention. People tend not to identify themselves quite in that bald way.

Senator LUDWIG—And I can understand why they do not. They may know that they are going to meet the refugee convention.

Mr Walker—I am not disputing that or making any criticism of it. It is merely that we would not be able to provide any statistics or a breakdown on how many fall within whichever area.

Senator LUDWIG—We meet our complementary protection, effectively, by the ministerial discretion, in the sense that if they do not fall within the refugee convention then their only avenue is an application for ministerial discretion. But the ministerial discretion path requires the person to have gone through one of the tribunal's first.

Mr Walker—Yes, that is right. They have to go through the tribunals.

Senator LUDWIG—That can in part encourage them that they might have a borderline case that could get up in the tribunal, whereas it may not. If in fact it does not, by and large, they are left with ministerial discretion. That also suggests that they might have a good case and so they might want to proceed with it to exhaustion. Or they might be encouraged in a broader rather than a narrow sense to finalise matters, both in the primary decision making and then on appeal, because there might be further suggested avenues of appeal. Do you see how it could also be feeding into there as well?

Mr Walker—I do not dispute anything you say, but I do not want to make any comment because I do not feel confident that I can add anything one way or the other about whether there are people who do or do not do that.

CHAIR—There are no further questions this evening. You have taken some matters on notice which the committee would appreciate responses on. If there are any other matters in the preparation of the report on which we do need advice we would be grateful for your assistance with that as well. I want to thank all of the witnesses who have given evidence to the committee today and particularly this evening's witnesses from the Attorney-General's Department and the Department of Immigration and Multicultural and Indigenous Affairs.

Committee adjourned at 6.48 p.m.