Refugee Advocacy Service of South Australia Inc

A Community Legal Service for Refugees and Asylum Seekers

Submission to the Senate Legal and Constitutional Legislation Committee regarding the Migration Litigation Reform Bill 2005

We have had the opportunity of reading the submissions made by RILC and the joint submission of QPILCH and SBICLS. We support those submissions with our own observations below.

The possibility of costs orders against lawyers and voluntary organisations

Fisrstly we so no valid reason for segregating migration cases from the remainder of matters before the courts for differential treatment.

Further, migration law can be very complex and a matter may need to be pursued to the High Court (with initial losses in the Federal Court and Full Federal Court) before a successful result is achieved for our clients.

In these circumstances to place a costs risks on pro bono lawyers and voluntary organisations such as the Refugee Advocacy Service of South Australia Inc (RASSA), together with the uncertainty of an untested phrase 'no reasonable prospect of success' may put competent legal representation of refugees and asylum seekers at risk.

The Migration Litigation Reform Bill 2005 (the Bill) is said to seek to improve court processes and deter unmeritorious applications. By effectively putting legal representation of refugees and asylum seekers at risk the inroduction of costs orders against lawyers and voluntary organisations may in fact lead to more unrepresented litigants making extra demands on court time. We submit that the voluntary organisations involved in refugee litigation enjoy a good reputation with the courts and to put these organisations at risk would be counterproductive to the stated aims of the Bill.

Provisions for summary decisions

There is already provision for summary decisions to be made by the courts. There has been no indication that these provisions are inadequate to the purpose of screening out clearly unmeritorious actions. Again, we see no need for segregating migration cases from the remainder of matters before the courts for differential treatment.

We repeat that migration law can be very complex and therefore the current safeguards on the use of summary judgement are even more pertinent to these cases to avoid the injustice of summarily restricting a person's right to have their day in court. Even more so because of the potential for a forced return of refugees to persecution including torture, imprisonment and death.

Ph: 08 8211 9097 ♦ Fax: 08 8211 6955 ♦ E-mail: rassa@rassa.org.au
Rms 223-224 Epworth Building, 33 Pirie St, Adelaide SA
PO Box 54, Rundle Mall, SA 5000
ABN 65 354 907 988

We submit that 'if it ain't broke, don't fix it'.

Constitutionality of privative clauses

We see no reason why the High Court's decision in *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2 (4 February 2003) should not apply to 'proposed privative clause decisions' as it does to privative clause decisions.

The time limits imposed by the Bill

Any inflexible time limit will lead to serious injustice to refugees and asylum seekers.

The impediments to accessing justice that our clients suffer are significant. They suffer cultural and language barriers. Those who are detained are physically isolated, restricting their access to legal advice. Voluntary organisations set up to assist refugees and asylum seekers are underfunded and therefore legal and interpreting resources to assist these vulnerable people are limited. RASSA is not permitted to advertise its service to those in immigration detention so refugees and asylum seekers may be unaware of their legal right to access the courts due to their detention by the Department of Immigration. We also refer to the barriers to justice outlined in paragraphs 3.14 to 3.16 of RILC's submission.

The vast majority of our clients are in immigration detention. There have been a number of instances where our clients would have been denied access to the courts with a strict time limit imposed on appeals to the courts. Some clients have been unable to file applications and notices of appeal themselves within the current time limit because detention officers have been unwilling to fax these documents to the Federal Court within the set time frame. We are yet to discover how refugees and asylum seekers in detention will meet the High Court Rules requirement to file documents by hand in a High Court Registry.

Further, there are regular developments in migration law that may make an appeal appropriate where there was no likelihood of success previously. Migration law is by and large decided by the High Court. The time frame of waiting for a relevant decision from the High Court greatly exceeds the 84 day time limit proposed in the Bill and such an inflexible time limit would therefore result in the inconsistent application of Australian law.

Other matters

The Bill also seeks to inroduce a requirement for only deemed notice for High Court appeals (rather than actual notice). We refer to the RILC submission at paragraph 5 and agree that the circumstances in which many asylum seekers live may lead to significant injustice should deemed notice be considered satisfactory notification.

The proposed bar to judicial review of primary decisions could also lead to significant injustice. The difficulties in accessing justice outlined above also leave refugees and asylum seekers vulnerable to delays in appealing to the Refugee Review Tribunal, regardless of whether their case has merit. To deny such people access to the courts could result in a genuine refugee being denied protection in contravention of Australia's international obligations.

RASSA has had a sufficient number of wins in the courts to highlight the necessity of judicial review from administrative decisions regarding migration in order to achieve justice for asylum seekers. The proposed Bill will serve to severely (further) restrict access to the courts for asylum seekers whose welfare and safety will be determined by such litigation. It would be grossly unfair to restrict such access to the courts in the arbitrary way proposed in the Bill.

RASSA therefore submits that the aspects of the Bill referred to above should not be passed by Parliament.

Yours sincerely
Refugee Advocacy Service of SA Inc
Per:

Thea Birss
Principal Solicitor

1 April 2005