1st April 2005
Mr Alex Leszczynski
Co-ordination Committee
Refugee Action Coalition NSW
P.O. Box 443
NEWTOWN NSW 2042

Chair
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Chairperson,

RE: Submission on Inquiry into the Migration Litigation Reform Bill 2005

I, Alex Leszczynski of Ashfield, NSW, am I a member of the Co-ordination committee of the Refugee Action Coalition (RAC) New South Wales. I have been authorised to make this submission by the Co-ordination committee on behalf of the Refugee Action Coalition of New South Wales.

The purpose of this submission is to express the opposition of RAC to certain items in the *Migration Litigation Reform Bill 2005*.

The proposed legislation, under the premise of unclogging the courts of "unmeritorious applications" by asylum seekers, essentially restricts the rights of asylum seekers to seek judicial review of administrative decisions and processes of the Department of Immigration (DIMIA) and the Refugee Review Tribunal.

Access to judicial review should be a fundamental component of any system for assessing claims for protection, as invoked by numerous international conventions to which Australia is a signatory, including:

- The Universal Declaration of Human Rights;
- The Convention and Protocol Relating to the Status of Refugees;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- The Convention on the Rights of the Child;
- The International Covenant on Civil and Political Rights.

RAC considers access to judicial review a fundamental human right. Restricting access to this right also undermines the rule of law. The legislation seeks to deny access to judicial review through the mechanisms of time limitation and financial penalties.

RAC also considers access to judicial review as a fundamental component in any process that decides on the merits of claims for protection and the processes for deciding on such claims. It is the role of courts to adjudicate on whether or not cases are meritorious. This legislation undermines the courts ability to do this and erects barriers for asylum seekers, advocates and lawyers to seek such determinations.

If the mechanisms for fair and just determination of claims for protection are restricted, Australia may breach its obligations to numerous international conventions by refouling people into persecution and danger. The moral implications of such refoulements should also be obvious.

The report by the Edmund Rice Centre *Deported to Danger* documents dangerous refoulements that have already occurred. RAC believes the mechanisms of deciding on protection claims should be strengthened not further restricted.

It should be noted that previous legislation has already restricted asylum seekers' rights, and that immigration detention, bridging visas and temporary protection visas have been found by numerous commentators to breach Australia's obligations to conventions.

RAC notes that the Cornelia Rau scandal, as well as numerous other revelations, have revealed that the DIMIA has been overzealous in the enforcement of Immigration Law and has acted outside what the public would regard as acceptable behaviour.

We believe that DIMIA should be subject to increasing judicial oversight, particularly in regard to the detention of people. This legislation moves in the opposite direction in removing judicial overview of its operations, processes and decisions.

RAC and our thousands of supporters oppose this legislation for the basic reason that it takes away the rights of asylum seekers and is contrary to Australia's convention and moral obligations.

We recommend that the legislation be opposed or suitably amended to ensure the right to judicial review is not only maintained, but strengthened. RAC believes that fairer and more just piece of legislation should be introduced restoring the appeal rights of asylum seekers that have previously been taken away. We strongly believe that the normal avenues of appeal should be restored - in fact they are essential if effective judicial review is to mean anything.

RAC recommends that legislation be amended to make it easier for asylum seekers to get legal aid and legal advice and interpretation services. We note that such an amendment may work to reduce the amount of "unmeritorious" claims being lodged with the courts.

We note the comment of Wilcox J in *Muaby v Minister for Immigration and Multicultural Affairs* (1998) 1093 FCA (20 August 1998):

"…[a] better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that

were done, the number or applications for judicial review would substantially decrease".

RAC recommends that an open accountable system to grant humanitarian protection visas (complimentary to the definition of the current refugee convention) be established to ensure due process and fairness for such applications. This system would also ensure that people in need of complimentary protection are not refouled against our international convention and moral obligations.

We also note that the current government has not been shy in instigating numerous appeals against decisions favouring asylum seekers.

The specific items in the bill RAC is opposed to will be identified below, as well the reasons for RAC's opposition to these items.

IMPOSE UNIFORM TIME LIMITS IN MIGRATION CASES (item 18 and items 30-33)

Under these items, applications to the Federal Magistrates Court, Federal Court and the High Court must be made within 28 days of actual notification of a decision. The 28 day time limit can be extended by a further 56 days if a request for further time is made within 84 days of the actual notification of the decision. The bill amends the Migration Act so that it now specifically includes "purported decisions", which would now be subject to the above time limits.

The RAC opposes this proposed legislation on two grounds: firstly we believe that these items are invalid and unconstitutional, and secondly we believe that such time limits are an impediment to justice being achieved by limiting the ability of people to appeal unfavourable decisions against them.

As you would be aware, in the High court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 said that a migration decision affected by 'jurisdictional error' had to regarded as no decision at all. As such these migration decisions with such mistakes, known as 'purported' decisions, would not be a decision made under the Migration Act and was therefore not subject to the prohibition on judicial review in section 474 of the *Migration Legislation Amendment (Judicial Review) Act 2001.*

Thus these items, designed to make purported decisions subject to these time limits are invalid. In *Plaintiff S157* the High Court said that purported decisions are outside the scope of the Migration Act, and amending the Migration Act itself cannot bring them within its scope.

We also question the constitutional validity of the items in that they amount to an absolute prohibition on appeals under section 75 of the constitution outside this time.

Section 75(v) of the constitution states that the High Court has the authority to hear cases in all matters:

"*in which a writ of Mandamus* [directing that an officer do a certain action] *or prohibition* [preventing an officer from

doing a certain action] *or an injunction* [halting a current or future action for a period] *is sought against an officer of the Commonwealth."*

The judges in *Plaintiff S157* stated that section 75(v):

Is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them… In the end… this limits the powers of Parliament or of the executive to avoid, or confine, judicial review.

However the proposed legislative changes attempt to confine judicial review by placing a defined time limit on migration appeals. Thus we believe these proposed changes are unconstitutional under section 75(v) for the very reason they are being proposed; they limit judicial review.

We are also of the firm opinion that any attempts to place a time limit on judicial review for migration decisions is inherently unjust given the circumstances some affected individuals may find themselves in.

Some of those people who may seek to appeal a migration decision may not speak English, live or be detained in remote areas, and have limited access to legal advice and/or interpreters. As such they may not be aware of their ability to appeal a decision within the 28 day period, or the period in which they can apply for a extension of the time limit.

Due to the above mentioned factors, potential appellants may not be able to seek suitable legal advice on the merits of their case within the time limit or period in which they can apply for an extension. While this in itself is unjust, it is even more so given the proposed penalties for "unmeritorious applications" which may prevent potential appellants from appealing a decision as they are unable to obtain legal advice in time, for fear of a personal costs order.

Thus RAC opposes placing time limits on appeals of migration matters as we believe the proposed changes are invalid and because such time limits are an impediment to justice being achieved by limiting the ability of people to appeal unfavourable decisions against them.

DETER UNMERITORIOUS APPLICATIONS

The proposed legislative changes are also designed to prohibit what it calls "unmeritorious applications" by directing the courts to consider whether a personal costs order should be made against potential applicants or lawyers, migration agents or others who may have encouraged an appeal against a migration decision.

Again, RAC opposes such legislative changes on the grounds that it is unconstitutional and that it is inherently unjust.

The Australian constitution delineates a clear separation of powers between the legislative and judicial branches of government. The proposed legislative changes, by directing a court to consider whether a personal costs order should be made, amounts to an unconstitutional intrusion into federal

judicial power. As such, the proposed legislative changes are unconstitutional.

RAC also believes that all people have the right to have their case dealt with to its fullest extent. Any punitive measures designed to discourage appeals would seriously infringe upon this right.

The potential for an order of personal costs against lawyers and migration agents may also discourage them from representing potential appellants. This may lead to a greater number of these people not lodging an appeal as they have been unable to secure legal representation, or being unsuccessful in their appeal due to the lack of legal representation, regardless of the merits of their case.

RAC also has concerns about how an "unmeritorious application" will be defined. One individual's view of the prospect of success may differ greatly from another person's view. Again, the fear of costs being imposed upon lawyers and migration agents based on another person's view of their prospect of success may discourage them from taking a potential appellants case, even when there is a significant prospect of success.

Therefore RAC again oppose the proposed legislative change to deter "unmeritorious applications" on the grounds that such changes are unconstitutional and a hindrance to justice.

CONCLUSION

RAC NSW would like to urge the Senate to block the proposed legislative changes to the Migration Act designed to impose uniform time limits in migration cases and to deter "unmeritorious applications". Such changes, RAC believes, are invalid and unconstitutional, and are likely to be an impediment to justice for those seeking to appeal a migration decision.