Mr Owen Walsh
Secretary
Senate Legal and Constitutional Legislation Committee
Via email to LegCon.Sen@aph.gov.au

Dear Mr Walsh

Re: Inquiry into the Migration Litigation Reform Bill 2005

Submitted by:
Sharon Dowsett, Policy Officer, Federation of Ethnic Communities' Councils of Australia (FECCA)
on behalf of Mr Abd-Elmasih Malak, FECCA Chairperson

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Thank you for the opportunity to provide comment to the Inquiry into the Migration Litigation Reform Bill 2005.

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australians from culturally and linguistically diverse backgrounds. Our role is to advocate, lobby and promote issues on behalf of our constituency to government, business and the broader community. We value the opportunity to express the views of our diverse constituency.

We have many concerns about the Migration Litigation Reform Bill 2005, and would have liked to consult widely with our constituency before developing our submission. However, given the very short time frame for comment, we have chosen to limit our submission to specific key points, rather than to comment on all questions raised by the Inquiry. We are disappointed at the unreasonably tight time frame for comment, and argue that true community consultation demands advanced notice, and sufficient time to develop comprehensive submissions. This is particularly relevant for organisations like FECCA who do not have specific legal expertise. We suggest that holding

public meetings to gain feedback from key community organisations might be another alternative which would allow for a wider range of views to be presented.

FECCA believes that some of the changes proposed under the Migration Litigation Reform Bill will lead to positive change.

We support in principle, the proposal that the bulk of migration cases be directed to the Federal Magistrates Court. However, we would seek reassurance that there will still be an option for extremely complex cases, that might break new legal ground to be heard by the High Court. This would necessitate the option of non-identical grounds of review in special cases.

We argue there is a case for extensive testing of legal rulings, where human rights are at risk of being violated, or where government decisions breach international human rights conventions (IHRCs) to which Australia is a signatory, such as the United Nations declaration on the elimination of racial discrimination. We believe that current border protection and mandatory detention policies do in fact breach our obligations under IHRCs. This is supported by concerns expressed recently by the UN Committee for the Elimination of Racial Discrimination, outlined below.

The Committee expresses concern about the mandatory detention of illegal migrants, including asylum-seekers, in particular when such detention affects women, children, unaccompanied minors, and those who are considered stateless. It is concerned that many persons have been in such administrative detention for over three years. (article 5)
Concluding Observations of the Committee on the Elimination of Racial Discrimination, adopted at the 1699th meeting, held on 10th March 2005

We also support in principle, the proposal that a single judge or a Full Court of the Federal Court may give a summary judgement in relation to a proceeding. However, we are concerned that this may in fact lead to migration litigants having unique restrictions placed upon them, which are not generalised to other areas of law.

FECCA's specific concerns about the Migration Litigation Bill 2005 are outlined below.

1. *The Bill is based on the premise that there is "too much litigation"*
FECCA is concerned that the Migration Litigation Reform Bill 2005, is based on the premise that asylum seekers with genuine claims are unable to have their cases heard because of a backlog of unmeritorious cases that are "clogging the system". FECCA would argue that there are in fact more fundamental reasons for the backlog of cases waiting to be heard.

Migration law is incredibly complex. Often people who appeal decisions through the courts have already told their story many times, have had to deal with government bureaucracy at many levels and have fought hard to achieve permanent residency in Australia. They are, by virtue of their status, unable to access legal representation and appropriate assistance at the start of a legal process. It is therefore not surprising they feel that their best chance of having a fair hearing is through seeking judicial review of government decisions. FECCA believes it is essential that access to proper judicial review of decisions and legal representation is available in all proceedings, but particularly those about refugee status.

FECCA argues that government policy makers and service providers must acknowledge and respond to the essential differences between immigrants and refugees. Refugees must be assured equal access to knowledge, information, rights, and entitlements, including the right to appeal decisions that they feel are unjust. The specific needs of refugee women and children, especially unaccompanied minors, must be recognised and catered for, and protecting people's right to seek asylum in safe countries like Australia must be a priority.

Mandatory detention is a policy which we believe creates a context for the numbers of people seeking appeals through the court system. Australia is the only country which detains asylum seekers for extended periods, whilst claims for asylum are being assessed. The policy of issuing temporary protection visas (TPVs) also has an impact, by increasing uncertainty and insecurity for people seeking permanent visas. FECCA argues that all asylum seekers who are granted TPVs should be provided with equal treatment and full access to services and rights. Mode of entry should not be used to penalize asylum seekers by denial of permanent residency or access to family reunion. We believe the policy of granting TPVs exacerbates the backlog of appeal claims.

FECCA believes that current policies are discrediting Australia's good name in the international community. The extent of the humanitarian problem at the international level is such that Australia (and other countries) must enact reasonable, compassionate, flexible and internationally co-ordinated approaches to the continuing global refugee program. There are alternatives to prolonged mandatory detention. FECCA believes that asylum seekers should be held on arrival only for a period necessary to determine initial issues of identity, health and national security measures. A maximum period in reception centres should be set. Beyond this period DIMIA must be required to demonstrate need for any extension. Following initial checks, release into suitable accommodation in the community should be made.

FECCA believes genuine refugees and asylum seekers must be treated with compassion, and we should not violate their basic human rights. There can be a more humane approach to Australia's treatment of refugees and FECCA is concerned that current border protection legislation violate a number of international conventions to which Australia is a signatory. Removing the option of exhausting all legal avenues of appeal for people seeking to

remain in Australia would we believe, be a violation of their rights and set a dangerous precedent for others seeking judicial review of government decisions.

2. *Amendments to improve court processes and deter unmeritorious applications*

Court processes must facilitate the best possible outcomes for people seeking judicial review of decisions. Where appropriate, the use of interpreters with appropriate cultural skills is vital to ensure that there are no language barriers or cultural barriers to people being able to effectively engage with lawyers, judges and the legal system generally. Information must be provided in a person's first language, to ensure that people understand the process that is being undertaken and are able to work effectively with their legal representatives. If the litigant's first language is a spoken language only, or the litigant is illiterate in their first language, then information must be provided appropriately with a skilled interpreter.

Amendments being considered must ensure that the rights of those undertaking migration litigation are upheld at all times. Time limits must be flexible enough to ensure that litigants are able to access information to support their claims for permanent residency, and to effectively brief their legal representatives. We therefore have some real concerns that the time limits proposed under the Migration Litigation Reform Bill will prevent some applicants from exercising their right to judicial review.

FECCA believes that one way to facilitate a reduction in the large numbers of unmeritorious cases will be achieved through the following steps:

- Strengthening the role of the Migration Agents Registration Authority (MARA) to ensure that it can effectively monitor the conduct of registered migration agents,
- MARA being given greater powers to determine which migration agents are registered and to investigate agents over vexatious claims, and
- Improved entry requirements for new entrants into the industry.

FECCA supports the Government's recent proposal that new entrants into the industry must undertake both a prescribed course of study, and must successfully pass a set of exams when that study is completed. We also agree that the only exemptions should be applicants with a law degree and current practicing certificate.

FECCA believes that an effective migration advice industry is essential to ensure that peoples rights are protected. We argue that an effective migration advice industry must be:

- **Accessible** - the system must be easy to access for all people who wish to engage the services of a migration agent. Migrations agents must ensure that they provide equal access to all for services, and do not discriminate on the grounds of language, culture, gender, religion, disability, geographic location or age,

- **Fair** - migration agents must ensure that they provide appropriate information to consumers, including frank information about prospects of success when assessing requests for assistance. Where appropriate, translating and interpreting services must be employed, to ensure that consumers are able to make informed decisions. MARA must also ensure that registered agents maintain a solid working knowledge of the relevant acts and regulations to prevent the lodging of cases with little chance of success,
- **Affordable** - as consumers, particularly those whose first language is not English, are vulnerable to exploitation, migration agents must act in an ethical manner and charge fees which are reasonable,
- **Transparent and open to scrutiny by the public** – this is particularly important when contentious and complex cases are being considered. Complaints mechanisms must also be open to scrutiny,
- **Timely** – the provision of accurate and frank advice will assist with the quicker disposition of migration cases, and
- **Accountable** – MARA must ensure that migration agents act in a professional manner, and take appropriate disciplinary action in cases where migration agents act in an unethical or unprofessional manner.

Profiling of migration agents, to gain a "snapshot" of their case success could be used to gain an understanding of whether agents are making vexatious claims. However FECCA believes that such a profiling system needs to be sufficiently flexible to accommodate the many reasons why some agents have higher refusal rates than others (for example, having a greater number of clients from certain parts of the world who, as a consequence, may find it harder to provide documentary evidence to support their claim). Given the complexity of examining claims, and the potentially contentious nature of some of these investigations into migration agents, we believe that MARA would be the most appropriate body to monitor and investigate the lodging of claims.

3. *The possibility of costs orders against lawyers and voluntary organisations*

FECCA argues that it is not reasonable for cost orders to be imposed against lawyers and voluntary organisations. There are times when the human rights of refugees, people seeking asylum and permanent residency in Australia are at risk, and the need for strong and informed advocates is essential. Lawyers prepared to conduct migration law work pro bono are an important protection for those who rights are at risk of being violated. The possibility of imposing costs orders against lawyers and voluntary organisations will, we believe, discourage lawyers from conducting pro bono work, make it impossible for voluntary organisations and non government organisations to support people through judicial review processes and remove this important safeguard.

FECCA would welcome the opportunity to discuss our submission in greater detail. If you would like to do so, please do not hesitate to contact me on 0417 489 066 or the FECCA Director, Conrad Gershevitch, on (02)6282 5755. I would also be happy to appear before a hearing of the Committee if necessary.

Yours sincerely

Abd-Elmasih Malak AM
FECCA Chairperson

1st April 2005