ADMINISTRATIVE REVIEW COUNCIL

Our ref: 05/2872

4 April 2005

Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Mr Walsh

Migration Litigation Reform Bill 2005

The Administrative Review Council welcomes the opportunity to provide the Committee with comments on the Migration Litigation Reform Bill 2005.

The Council is a statutory body, established under Part V of the *Administrative Appeals Tribunal Act 1975* to advise the Commonwealth Attorney-General on a broad range of matters relating to the Commonwealth system of administrative law. In view of its statutory function, the Bill is of considerable interest to the Council.

Introductory comments

The Council notes that the Bill reflects the migration litigation reforms announced by the Attorney-General, the Hon Philip Ruddock MP, in his press release of 6 May 2004.[1]

[1] Media Release 058/2004.

Robert Garran Offices, National Circuit, Barton ACT 2600
Telephone: (02) 6250 5800 Facsimile: (02) 6250 5980 e-mail: arc.can@ag.gov.au
Internet: law.gov.au/arc

Broadly, the reforms centre around greater resourcing for the Federal Magistrates Court, the disposal of as many cases as possible within that court, the streamlining of judicial review into a single strand and the active discouragement of lawyers and others who may encourage applicants to lodge unmeritorious claims for judicial review.

The Bill incorporates amendments appearing originally in the lapsed *Migration Amendment (Judicial Review) Bill 2004,* notably those relating to time limits, which have been amended in the present Bill to accommodate criticisms of the earlier Bill by the Senate Legal and Constitutional Legislation Committee. [2]

Detailed comments

While supportive of the Bill and its objectives, the Council offers the following comments on the Bill. The references are to item numbers and provisions in Schedule 1 to the Bill.

Proceedings with no real prospect of success, summary judgment

The Bill provides for the summary disposal of the whole or any part of proceedings by the Federal Court (Item 7, s 31A), the Federal Magistrates Court (Item 8, s 17A), and the High Court (Item 9, s 25A) in circumstances where either prosecution or defence of the case is considered by the court to have 'no reasonable prospect of success'. To be summarily dismissed, the case does not have to be 'hopeless' or 'bound to fail'.

The Council notes that the provisions would extend to *all* applications before those courts, not just those relating to migration. However, the short title to the Bill gives no indication of this dimension to the Bill, a situation only assisted to a degree by its long title.

The area of summary judgment is one in which, having regard to fundamental principles of access to justice, the courts have traditionally trodden a careful path. In the Council's view, there would be little risk of the courts interpreting the proposed summary judgment provisions rashly or without careful regard to countervailing access to justice principles.

In terms of the scope of the proposed provisions, particularly in the migration context, the Council supports the approach adopted in the Bill that a case would not necessarily need to be 'hopeless' or 'bound to fail' before it could be categorised as having no reasonable prospect of success. [3]

---

[2] Senate Legal and Constitutional Legislation Committee report on *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004.

[3] Cf Chesterman J in *Gray v Morris* [2004] QCA 5 [22]: summary judgment should not be granted 'unless it can be seen that their case is hopeless, or bound to fail'.

Nonetheless, the Council is mindful of comments such as those made in the *Federal Civil Justice Strategy Paper* that leaving aside migration matters, special leave applications in the High Court and vexatious claims in the Family Court, there was no evidence of an increase in unmeritorious claims across the board.[4]

Privative clause provisions

The Council considers the clarification provided in the Bill in relation to certain decisions that are 'privative clause' decisions (Item 15, s 474(7)) is helpful and consistent with the greater legislative specificity favoured by the Council in circumstances in which individual rights are being curtailed or removed. [5]

Jurisdiction of Federal Magistrates Court, the Federal Court and the High Court

The Council considers that the new provisions contained in the Bill relating to the jurisdiction of these three courts (Item 17, ss 476, 476A & B) are clearly constructed, and support the stated Government objective of streamlining judicial review into a 'single strand'.[6]

In particular, the Council supports the measures in the Bill to:

- ensure identical grounds of review in the Federal Magistrates Court and the High Court, thereby enabling the courts to respond (by way of issues estoppel) to situations where applicants identify multiple bases for the review of a single decision

- limit the jurisdiction of the Federal Court in relation to migration decisions to complex cases referred from the Federal Magistrates Court, certain decisions involving review of the decision of a judicial member of the Administrative Appeals Tribunal and decisions by the Minister to cancel the visas of or deport people on 'character grounds'; and

- allow the direct remittal of many cases by the High Court to the Federal Court.

Time limits

The Bill includes a restatement of time limits for judicial review applications [Items 18, 30-33], ensuring that time limits in the High Court for applications in relation to migration decisions are the same as those in the Federal Magistrates Court and the Federal Court.

---

[4] Australian Government, Attorney-General's Department, December 2003, 213.

[5] See Administrative Review Council discussion paper, *The Scope of Judicial Review*, March 2003, ch 7.

[6] Attorney-General's May 2004 media release, ibid.

As mentioned earlier, the Bill incorporates the recommendation of the Senate Committee inquiry into the 2004 Bill that time run from actual notification of a decision, not deemed notification. The Council supports the revised approach.

The Council considers the time limit provisions to be consistent with the approach advocated by Callinan J in *S157 v Commonwealth.*[7]

Third party costs orders

The Bill proposes a new Part to the *Migration Act 1958* (Item 38) making it clear that courts have power to make costs orders against persons who encourage claims 'with no reasonable prospect of success' in migration litigation (ss 486E & F). This is additional to any power at common law. The power may be directed against a litigant's lawyer, but is not restricted to that use.

The Bill does not define "encouragement". As well as prohibiting encouragement without giving proper consideration to the prospects of success, the Bill also prohibits encouragement where ***a*** purpose, not necessarily the primary purpose, of the litigation "is unrelated to the objectives which the court process is designed to achieve" (s 4686E(1)(b)(ii)).

This is to be contrasted with the case law approach to stay of proceedings for abuse of process, where it has been held that while the improper purpose instigating litigation need not be the *sole* purpose, it must nevertheless be a *predominant* purpose,[8] a higher threshold test than the one proposed in the Bill. The Council does not consider that this difference is fully assuaged by the requirement in s 486G for a person to be afforded the opportunity to argue against a costs order before such an order can be made under s 486F.

The Council is aware that concerns have been expressed by some stakeholders at the potential of such a provision to discourage people from offering assistance to those considering applying for judicial review of migration decisions, particularly in the pro bono context. In the Council's view, there is a link between the breadth of such a provision and the likelihood of this consequence ensuing. The Council would not wish to see the expansion of this sort of provision into other subject areas.

The Council notes that the potentially broad ambit of this provision may also have a corresponding effect on the extent of the curtailment of legal professional privilege contemplated by s 486H of the Bill (Limited abrogation of legal professional privilege). The Council also notes however the provision in s 486H (2)(b) that a court must make such orders as are necessary to protect the confidentiality of a communication made under this provision.

---

[7] *Plaintiff S157 V Commonwealth of Australia* (2002-3) 211 CLR 476 per Callinan J [176]

[8] See for instance *Williams v Spautz* (1991-92) 174 CLR 509.

Concluding comment

I trust that our comments are of assistance to the Committee in its consideration of the Bill.

Should you wish to discuss further any of the issues raised in the course of this letter, please do not hesitate to contact the Council's Executive Director, Margaret Harrison-Smith (tel: 02 6250 5801/email: margaret.harrison-smith@ag.gov.au).

Yours sincerely

Wayne Martin QC
President