61 2 9850 7686

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Fax: 02 6277 5794

MACQUARIE
UNIVERSITY ~ SYDNEY
DIVISION OF LAW

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Dear Secretary

Inquiry into the Migration Litigation Reform Bill 2005

Thank you for this opportunity to respond to this Bill.

I am a lecturer in the Division of Law at Macquarie University, where I teach Litigation in the context of professional ethics and access to justice. There are two sections in this Bill that I wish to comment upon.

<u>486E Obligation where there is no reasonable prospect of success.</u>

As potential legal practitioners, law students are taught that litigation is a powerful tool for seeking redress, and a tool that must be available equally to all who seek justice. After studying a long line of superior court decisions, every law student becomes aware that the term "reasonable prospect of success" is a legal fiction. They learn that many causes of action which – on their facts and in applying the current state of the law – ought to have succeeded, did not. Furthermore, they study cases that seemed to have remote prospects for success, and these cases nevertheless succeeded.

Law students learn that litigation is an essential method of testing the boundaries of legal doctrine. Many of the superior court decisions that establish doctrine began as test cases, where an unsettled question was resolved, or where an established principle was overturned.

The proposed 486E forecloses the possibility for legal practitioners to use litigation to establish, resolve or remedy the current state of the law in the area of migration. For an entire class of litigant to be excluded from legal remedies that are available to other litigants, and to punish practitioners who seek redress for those litigants, is to remove all of the principles of ethics, access and equity from legal practice. For law students to learn that their potential career no longer enables them to pursue the ideals that encouraged them to enrol in legal studies, creates a powerful disincentive for them to become ethical practitioners.

<u>486H Limited waiver of legal professional privilege</u>

This limited waiver proposes that, without the consent or voluntary disclosure by the client, confidential information may be disclosed by a practitioner.

Whilst the Bill states that this does not pierce the privilege for other purposes, this proposal is at odds with the principles for which the privilege exists.

Legal professional privilege ensures a relationship of trust and confidence between a lawyer and client. It gives tangible meaning to the professional ethical obligations by which practitioners are bound. The privilege belongs to the client, and only the client is permitted to waive the privilege, either expressly, impliedly, or by consent.

To say – as 486H states – that a practitioner who discloses privileged information does not interfere with the client's right to privilege, is contrary to the objectives of Part 3.10 of the *Evidence Act 1995*. Where an entire class of litigant is not entitled to the same standard of privilege as would apply to every other litigant, this raises genuine concerns about the ethics of legal practice. Law students would learn that the confidentiality of disclosures made by migration litigants can be held to a lower standard than that of other clients. They would learn that, as practitioners, if they seek to defend an order made against them under 486F, they are permitted to disclose confidential client information. Whilst the Bill suggests that the legal professional privilege is not lost by the disclosure, it nevertheless undermines the assumption of trust and confidence that ought to pervade every facet of the relationship between lawyer and client.

As a legal scholar and teacher, ethical standards of practice and a commitment access to justice must inform everything that I do. My students, as potential legal practitioners, must be assured that every litigant who seeks justice is entitled to do so. Law students must learn to represent their clients fairly and in accordance with the highest ethical standards. Law students ought not to have to learn that those clients who seek their assistance in resolving their migration status are disentitled to the ethical and equitable principles that apply to everyone else.

Thank you for the opportunity to explain the impact upon law students and their teachers of these proposed reforms.

Yours sincerely

Katherine Biber