National Pro Bono Resource Centre

THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

SUBMISSION

BY

THE NATIONAL PRO BONO RESOURCE CENTRE

APRIL 2005

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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

I refer to your letter dated 17 March 2005 inviting the National Pro Bono Resource Centre to provide a submission to this parliamentary inquiry. The Centre welcomes this opportunity to provide the Committee with comments on the *Migration Litigation Reform Bill* 2005.

ABOUT THE NATIONAL PRO BONO RESOURCE CENTRE

1 The National Pro Bono Resource Centre **("the Centre")** commenced operation in August 2002 following a recommendation for its establishment made by the National Pro Bono Task Force to the Commonwealth Attorney-General June 2001. It is based at the University of New South Wales with its core funding provided through the Commonwealth Attorney-General's Department until July 2005 and assistance with accommodation and overheads provided by the Faculty of Law at the University of New South Wales.

2 The objectives of the Centre are:

- to promote pro bono work throughout the legal profession;
- undertake research and projects to inform the provision of pro bono legal services;
- provide practical assistance to pro bono providers (including information and other resources);
- develop strategies to address legal need; and
- promote pro bono law to community organisations and the general public.

THE CENTRE'S SUBMISSION TO THIS INQUIRY

3 This submission addresses the *Migration Litigation Reform Bill* **("the Reform Bill**") only in relation to how some of these reforms may affect pro bono service delivery. In particular, this submission will refer to how the

Reform Bill will affect pro bono litigation generally, and how it will affect test case litigation which is often conducted on a pro bono basis.

4 This submission also draws on the Centre's submission to the Attorney-General's Civil Justice Strategy upon which, in part, these amendments are based.[1]

5 The Centre notes that the amendments made by the Reform Bill purportedly aim to "improve the overall efficiency of migration litigation", including reforms to "improve court processes and deter unmeritorious applications". While the Centre accepts the need to facilitate efficiently the review of migration matters, the Centre submits that some of these amendments will not achieve that aim. On the contrary, the effect of these "reforms" will deny already disadvantaged migration applicants an avenue to access justice and risk making the work of the courts in migration litigation more burdensome. However, the main thrust of the Centre's submission is that the proposed reforms have a real potential to act as a strong deterrent for members of the legal profession to undertake pro bono work in this difficult area of law.

Pro Bono Litigation

6 One of the key areas of reform identified in the outline to the Explanatory Memorandum **("the EM")** to the Reform Bill is to deter "unmeritorious applications" to federal courts. This includes firstly broadening the grounds on which a court can summarily dispose of proceedings; and secondly applying a far-reaching regime of punitive costs measures against lawyers (and indirectly, their clients), and others, who assist applicants in litigious migration matters. In particular it provides for a new regime of certification as to the reasonable prospects of success in applications filed by lawyers acting for migration applicants.

7 Proposed s486E provides, amongst other things, that a person must not encourage another person (the litigant) to commence or continue migration litigation in a court if:

- the migration litigation has no reasonable prospect of success; and
- either the person does not give proper consideration to the prospects of success of the litigation or the purpose for which the proceedings were initiated is unrelated to the objectives of the court process (presumably meaning to prolong the applicant's stay in Australia).

Proposed ss486F and 486G provide a new regime for applying a personal costs order against a person who acts in contravention of s486E.

Proposed s486I provides for a new regime of certification by lawyers who file documents commencing migration litigation under which a lawyer must not

[1] As noted in the Attorney-General's Second Reading Speech at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2706369&TABLE=HANSARDR; *see also* the Centre's Submission to the Civil Justice Strategy at http://www.nationalprobono.org.au/publications/index.html

file such documents unless they can certify in writing that there are reasonable grounds for believing that the litigation has reasonable prospects of success.

The Centre's concerns

8 The Centre is concerned that the Reform Bill will have far-reaching effects on access to justice for migration applicants. The Centre appreciates the concern about the rise in protracted migration litigation, but it is not clear that these reforms appropriately deal with the mischief they are seeking to address. It is also not clear how these reforms will assist the courts in the administration of justice. The imposition of the threat of costs orders against those who act for, encourage or promote "unmeritorious" litigation is, in the Centre's opinion, an overly broad approach to addressing problems of protracted litigation or unworthy litigation.

9 As noted in our submission to the Civil Justice Strategy, [2] the Centre is concerned that these amendments may operate as a significant impediment to access to justice for migration applicants, and will act as a disincentive to the provision of pro bono legal services for such applicants. Practitioners may be willing to act for a person without charging a fee, but may well be unwilling to expose themselves to what may be perceived as an enhanced risk of personal liability for doing so. These amendments are likely to have a 'chilling effect' on their willingness to provide pro bono legal services.

10 The Centre believes that the profession has responded generously to the call to undertake pro bono work. The Centre notes that the legislature has strongly supported the enhancement of pro bono services, as evidenced by its implementation of court pro bono schemes.[3] The Centre also notes that it is not only disadvantaged clients who are assisted by pro bono schemes and pro bono assistance, but the courts are also greatly assisted by pro bono practitioners in migration matters. For example, in recent migration proceedings before the High Court, Kirby J pointed out to the self-represented litigant that pro bono assistance was "not only a matter of protecting your own position, but it is a matter of assisting the Court to see whether there are some points in your case that argue for your being granted special leave." [4]

The pre-certification threshold

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[2] see Centre's Submission at http://www.nationalprobono.org.au/publications/index.html

[3] for a summary of the court-based schemes, see National Pro Bono Resource Centre and the Victoria Law Foundation, *The Australian Pro Bono Manual: A Practice Guide and Resource Kit for law firms*, (VLF 2005) at p 208, also available at http://www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#2

[4] see, *NAAT of 2002 & Anor v MIMIA* [2003] HCATrans 322 (21 August 2003) at http://www.austlii.edu.au/au/other/HCATrans/2003/322.html;
see also *WABM v MIMIA* [2004] HCATrans 175 (28 May 2004) at http://www.austlii.edu.au/au/other/HCATrans/2004/175.html; *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 123.

11 The Centre is concerned that it can be difficult for any practitioner, particularly one acting pro bono, and within the strict time limits applicable to judicial review, to have the time or resources immediately available to undertake the necessary research and give due consideration to a matter to be able to be satisfied to certify in writing that a matter has reasonable prospects of success before filing the application. It is not suggested that their professional approach to these matters is any less diligent. However, in reality pro bono many cases pro bono clients will often present to lawyers seeking assistance only days before the expiry (if not on the same day) of a statutory deadline.[5] Lawyers being required to certify as to the reasonable prospects of success of a matter may be facing these time pressures; but they are also facing the difficulties of trying to assist a client who is possibly in detention, without a good command of English, often disadvantaged by lack of access to legal assistance or information, and more often than not with little or no understanding of the complex Australian migration law system. It should be noted that this is in contradistinction to the situation in NSW [6] where the "reasonable prospects of success" pre-certification provisions only apply in civil cases for damages and thus the above pressures do not exist.

12 There is clearly a lack of understanding by migration litigants of the Australian judicial system and the nature of judicial review as opposed to merits review.[7] As noted above, migration applicants are already disadvantaged, and more so by increasingly limited access to legal aid. Adding the risk of penalty of a costs order against people trying to assist migration applicants only serves to put applicants at a further disadvantage. A commonsense approach to addressing the clear need for assistance to applicants, to reduce the high volume of so-called "unmeritorious" cases and to meet the Government's objectives of maximizing the efficiency of the migration system would surely include directing resources to providing free legal assistance and community legal educational resources for migration applicants, in community languages.[8]

13 Even if a pro bono practitioner is satisfied of the reasonable prospects of the matter, they may be deterred from representing the party by the prospect of incurring time and expense in having to subsequently justify their view to the court which can almost take on the form of separate proceedings. The Centre is also concerned that the waiver of legal professional privilege set out in s486H for the purpose of this ancillary proceeding undermines the

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[5] It should be noted that this is in contradistinction to the situation in analogous costs order provisions of the *Legal Profession Act 1987* (NSW) where the "reasonable prospects of success" pre-certification provisions only apply in civil cases for damages, not requiring adherence to such tight time frame pressures.

[6] Division 5C of the Legal Profession Act 1987 (NSW)

[7] Joint submission of PILCH (Vic) and the Victorian Bar to the Migration Litigation Review, 25 November 2003, at paras [29] to [31].

[8] See also UNHCR submission to this Inquiry and reference to the UNHCR's earlier submissions noted in para [14]. The Centre also points this Inquiry to useful alternative approaches to dealing with the purported migration litigation problem set out in the Law Institute of Victoria's submission to the Migration Litigation Review in December 2003 at http://www.liv.asn.au/members/sections/submissions/index.html

lawyer/client relationship of confidentiality, creating a new class of client for whom the fundamental ethical principles of trust and confidence is displaced.

14 Section 486G provides for a 'new' jurisdiction for recovering costs against lawyers. Given one of the stated aims of these reforms are to "facilitate quicker handling of cases by improving court processes" and to reduce waste of court resources, [9] it is arguable that these amendments will only serve to prolong migration litigation. As noted in our submission to the Attorney-General Department's Civil Justice Strategy, recent UK research about costs orders against lawyers indicated that that the "wasted costs jurisdiction" (as the jurisdiction for recovering costs against lawyers is there known) is flawed for many reasons, including the evidence that it is mostly used against lawyers representing legally aided litigants.[10] On this basis it would seem that introducing such impediments may, indirectly, have a disproportionate detrimental effect on disadvantaged clients. This is accentuated by the fact that those litigants are not in a position to fund further inquiries (such as opinions from counsel) unlike clients of greater means.

15 The Centre notes that the breadth of the costs orders provisions in ss 486E and 486F extend to those persons who "promote litigation behind the scenes." The Centre shares concerns expressed in the Law Society of South Australia's submission to this Inquiry that this could adversely affect the capacity of legal aid and community legal centres to provide background legal advice and assistance to migration applicants. It is also unclear whether these provisions could extend to interpreters, translators and any other person involved in a migration applicant's case. The cumulative effect of these provisions is that it may lead to a withdrawal of legal and other assistance to disadvantaged migration applicants. This in turn will inevitably lead to courts being faced with a rise in unrepresented applicants thus increasing the already onerous workload of the courts. In this respect, these amendments will not maximize the performance of the system,[11] and indeed will only serve to place extra strains on the courts and migration system by placing additional levels of judicial scrutiny on court processes.[12]

Public Interest cases

16 In his Second Reading Speech, the Attorney-General stated "[l]awyers acting ethically and in accordance with their professional duties have no

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[9] *Migration Litigation Reform Bill 2005*, Explanatory Memorandum at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=1975&TABLE=EMS

[10] See Hugh Evans, "The Wasted Costs Jurisdiction" (2001) 64 MLR 51, quoted by Lord Hobhouse in *Medcalf v Mardell* [2003] 1 AC 120 at [57-58]; see also research in this area in the USA: see "Plausible Pleadings: Developing Standards for Rule 11 Sanctions, (1987) 100 *Harvard Law Review* 630.

[11] this is a reference to these measures being implemented in part, as a result of the Civil Justice Strategy, referred to in the Attorney-General's Second Reading Speech at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2706369&TABLE=HANSARDR

[12] for example, by involving courts in additional proceedings against lawyers to determine whether orders under s486F should be made.

need for concern."[13] However, there is some concern that the provisions of the Reform Bill are likely to discourage test case litigation where the prospects of success are not clear but nevertheless it is in the public interest that the matter be considered by a court. These matters are often done by pro bono lawyers. 'Public interest' cases are less likely to have identifiable reasonable prospects of success at the outset – the nature of these cases is that testing new ground in law is inherently risky. They may at first instance appear to lack merit and/or are contrary to earlier precedent, may or may not be successful in judicial review, or it may not be until the matter has reached the highest appellate level that the matter is successful. The Centre is aware that a large proportion of these cases have been undertaken on a pro bono basis. The hurdle of assessing and certifying whether these kinds of cases have reasonable prospects of success may mean that important areas of law remain untested, and that deserving applicants are denied access to justice. In its submission to the Civil Justice Strategy, the Law Council of Australia noted its concern in the following terms:

> that ultimately the basis for certification being a case having 'reasonable prospects of success' will mean that practitioners will be dissuaded from running difficult meritorious cases which may prevent the evolution of legal argument and stifle development of the law.

17 The Centre is aware that many pro bono programs and schemes administered by the legal professional bodies, public interest law clearing houses and private law firms include a "public interest" test in their eligibility criteria. This test may or may not include a merits test. For example, one private law firm's pro bono policy states -

> If the matter is of public interest it might be accepted even though the prospects of success are not strong.[14]

The Centre is concerned that application of a "reasonable prospects of success" may impede on the development of pro bono programs.

18 The Centre also notes the Law and Justice Foundation of New South Wales' report on *Access to Justice and Legal Needs* which noted that costs order provisions in the *Legal Profession Act 1987* (NSW) may mean that litigants will not be able to secure representation or assistance in deserving, albeit difficult cases which may involve important questions of law which need to be tested. The report identified this as a potentially significant issue for prospective disadvantaged clients.[15]

Order sought on the application of a party to the migration litigation

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[13] http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2706369&TABLE=HANSARDR

[14] see Victoria Law Foundation and National Pro Bono Resource Centre, *Australian Pro Bono Manual*, (VLF 2005,) at p.148.

[15] Law and Justice Foundation of New South Wales ("LJF") , Access to Justice and Legal Needs: Stage 1 Public Consultations (LJF 2003) at p 43, also available at http://www.lawfoundation.net.au/publications/reports/a2jln/1C/

19 The Centre notes para 53 of the EM to the Bill concerning the Commonwealth's model litigation policy as follows:

> 53. While observing that the model litigant obligation does not prevent the Commonwealth and its agencies from applying for a personal costs order, the Office of Legal Services Coordination in the Attorney-General's Department has issued guidance to Commonwealth agencies on the model litigant approach to applying for such an order including the following: a personal costs order should be sought only where such action is demonstrably warranted; the litigant should be properly informed why, in the Commonwealth's view, their argument has no reasonable prospect of success; and an intention to seek a personal costs order should not be used tactically to intimidate a litigant or their lawyer into abandoning a legitimate case.

20 It is laudable that these guidelines state that such orders should only be sought where such action is demonstrably warranted but the case of *the Hon. Philip Ruddock MP and ors. v Vadarlis* (No 2) (2001) 115 FCR 229 should be noted. The underlying case was conducted in a highly politically charged environment where the applicant sought orders of habeas corpus and mandamus to compel the release and delivery into Australia of 433 non-citizens then said to be detained by the Commonwealth on the Norwegian vessel, MV Tampa, off the coast of Christmas Island.

Orders were granted in favour of the applicant at first instance and Government appealed to the Full Federal Court where the appeal was allowed. Government then sought orders that the Victorian Council for Civil Liberties Inc (VCCL) and Vadarlis pay the appellants' costs, or a proportion thereof, of the appeal and of the proceedings before the judge at first instance even though these parties were represented by pro bono lawyers and had won at first instance. No order was sought against the other parties to the proceedings, namely the Human Rights and Equal Opportunity Commission and Amnesty International Limited. Ultimately, the court made the order that each party pay its own costs and so the government's application was unsuccessful.

What is "reasonable prospects of success" and how is it proved

21 The Centre is concerned that the proposed amendments, in effect, conflate unsuccessful cases, cases with no "reasonable prospects of success and "unmeritorious" cases.[16] The fact that there is a high volume of migration litigation in Australia, and that a large number of those cases are unsuccessful does not mean that they should be characterized as unmeritorious or an abuse of process warranting costs orders against those

[16] The Centre also notes the statistics on unsuccessful applications often cited by the Attorney-General, and notes the numerous alternative explanations of these figures which include settled matters, withdrawn applications, remittals by consent : see Joint submission of PILCH (Vic) and the Victorian Bar to the Migration Litigation Review, at paras [26] – [32]; *see also* the Joint QPILCH, SBICLS and RAILS submission to this Inquiry.

who have assisted the unsuccessful applicant either on the record, or "behind the scenes".

22 The meaning of the term 'reasonable' invokes the notion of proportionality and therefore leaves open the question of what degree of success the legislature intends is required to be the minimum required to justify initiating proceedings. The notion of reasonableness is in itself uncertain. [17]This uncertainty, combined with the accompanying risk of penalty, has the potential to deter the uptake of pro bono in an area where there is clear and stated need for such assistance.[18]

23 In the *Legal Profession Act 1987* (NSW) referred to above there is legislative guidance as to the responsibility being placed on a certifying lawyer unlike the proposed new s 486I. The NSW provisions require that the solicitor or barrister must form the view "on the basis of provable facts and a reasonably arguable view of the law that the claim or defence (as appropriate) has reasonable prospects of success"[19] This provides some guidance for a lawyer who is considering certifying that matter has reasonable prospects of success.

CONCLUSION

24 In conclusion, the Centre submits that these amendments will fail to meet their stated aim to facilitate efficiency in migration litigation. It is regrettable that this legislation has failed to take into account the messages from the courts themselves in relation to managing self-represented litigants in the courts: both the Federal Court and the Federal Magistrates Court have stated that the complexity of the migration law regime makes it difficult for them to proceed efficiently without maximizing the opportunities for legal representation and the generous pro bono assistance from the legal profession.[20]

25 The Centre is concerned that the proposed amendments in the Reform Bill will create unnecessary apprehension for lawyers, and others, who assist, advise and act for disadvantaged clients in migration matters, and in particular will deter lawyers to assist in these matters on a pro bono basis.

Yours faithfully

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[17] As was stated in the NSW Law Society Journal when the *Civil Liabilities Act 2002* was introduced: "In other areas of law it is often observed that the term 'reasonable' imports value and even moral judgments of a scope which is not always certain. See Nicholas Beaumont, "What are Reasonable Prospects of Success," *Law Society Journal,* August 2002 at p 45.

[18] See footnote 20 below, where the courts have expressed a need for pro bono assistance in migration matters.

[19] See s198J(1) *Legal Profession Act 1987* (NSW).

[20] See Federal Court of Australia, *Annual Report 2002-2003* at p 46; and Federal Magistrates Court of Australia, *Annual Report 2002-2003* at p 26; see also Submission to this Inquiry by the Migration Institute of Australia.

John Corker
Director
April 2005