LEGAL SERVICES COMMISSION OF SOUTH AUSTRALIA

Inquiry into the provisions of the Migration Litigation Reform Bill 2005

Submission

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Introduction

The Legal Services Commission of South Australia provides assistance in migration matters both in the Access Services Program and Representation Program. The Immigration Advice and Application Assistance Scheme funds are not channelled via the Commission as they are in other states. In South Australia the Immigration Advice and Application Assistance Scheme funds are channelled through the Australian Refugee Association however those monies are limited and do not satisfy the demand for assistance.

Access Services Program

This program provides information and minor assistance in migration matters

Representation

The grants of aid for representation of any migration matters, including refugee matters has been extremely restricted by the current Commonwealth Guidelines. Funding of these has been interpreted by the Legal Services Commission strictly in accordance with those guidelines.

The matters which are funded in South Australia tend to cost substantial amounts because in the majority of cases, particularly High Court Appeals the matter is heard interstate and therefore the cost of travel, accommodation, photocopying and transcript costs are added to the regular expenses

The Legal Services Commission of South Australia previously made brief comments to the Migration Litigation Review endorsing the comments of National Legal Aid and the Australian Refugee Association. Further to those, we make the following comments on the Migration Litigation Reform Bill 2005

Overview

While we recognise the need to process migration cases efficiently, measures proposed for that purpose should not jeopardise fundamental safeguards or risk placing Australia in breach of its international obligations. We are opposed to provisions in legislation that has the effect of further restricting the ability of migration matter applicants to access judicial review, particularly by way of introduction of privative clauses. Any basic safeguards which remain should be preserved.

We note the government has refused to make available to the public the findings of its Migration Litigation Review.

In seeking to reduce the number of matters before the courts, the government response has focussed on implementing barriers and restrictions on the judicial process. It has failed to consider the structural reasons behind the problem. In particular, it has failed to introduce measures designed to improve the quality and transparency of primary decision making.
Further, the government has made no proposals designed to strengthen the availability of legal advice and assistance, whether pro bono or otherwise, to applicants before the tribunals which will leave some of the most vulnerable members of society to attempt to represent themselves in these matters.

Migration Litigation Reform Bill 2005

486JATime Limits imposed by the Bill

Whilst there is merit in uniformity a 28 day time limit may be too tight if there are delays in applicants accessing legal advice particularly if they are in detention and/or have language difficulties.

Part 8B

486E Obligation where there is no reasonable prospect of success.

(1) A person must not encourage another person to commence or continue migration litigation in a court if:

(a) the migration litigation has no reasonable prospect of success; and

(b) either

(i) the person does not give proper consideration to the prospects of success of the migration litigation

(ii) a purpose in commencing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

This test is vague and uncertain. What amounts to proper consideration to the prospects of success? What is the standard? Lawyers must show that they have given "proper consideration to the prospects of success". It is unclear how lawyers are supposed to give this proper consideration without having access to documents often available only through discovery proceedings. It is often the nature of legal proceedings that prospects can change dramatically between the time that proceedings are issued and when judgement is given. The volume of case law in this area requires constant and lengthy reading to stay in touch with new developments. It is also a very complex area of the law. New decisions can result in significant changes to arguments and even concessions.

Migration litigation may have a number of legitimate secondary purposes e.g. keeping a family together. If that is only one of a number of purposes in commencing the litigation, is that caught by the provisions of 486E(1)(b)(ii)?

(2) For the purposes of this section, migration litigation need not be
(a) hopeless; or
(b) bound to fail;
for it to have no reasonable prospect of success

The test of "no reasonable prospect of success" is something less than hopeless or bound to fail but how much less is unclear.

We note for example that in matters coming before the Refugee Review Tribunal many person are assisted by legal representatives acting on a pro bono basis. It is unlikely that such practitioners would encourage unmeritorious litigation.

486F Cost Orders

Access to justice for migration clients is already extremely limited because of the availability and restrictions place on legal aid to potential litigants. The current guidelines imposed upon legal aid service providers is that grants of aid can only be provided in test case matters in the Federal or High Court. Funding is limited by a requirement that there be "*differences of judicial opinion".* This limitation is very narrow and results in disadvantaged clients with meritorious cases being denied assistance.

There is no funding for primary stage applications. Adequate representation, and funding for that representation, would likely result in a reduction of costs incurred by the justice system as a result of poorly prepared applicants or self-represented litigants.

The amendments are intended to reach to advice-only services of the legal aid and other community centres. The Explanatory Memorandum to the Bill makes clear this intention when it speaks of costs orders against those who "promote litigation behind the scenes". While it is unclear how the Minister would be able to determine this, it has the direct result of further limiting applicants' access to justice.

Additionally, the funding is minimal. DIMIA's statistics indicate that, Australia-wide, in the financial year 2001-02, funded representation was provided in 398 non-detention cases. There are over 8000 Temporary Protection Visa holders applying for further visas, many of whom are unable to pay for representation. These persons are often unrepresented, thereby adding to their experience of

marginalisation and discrimination. It also contributes to the downgrade of Australia's commitment to the elimination of discrimination and the promotion of human rights.

The Attorney General has recognized the significant contribution of legal practitioners who are prepared to act on a pro bono basis for indigent clients. Voluntary organizations have been formed to assist with this need the Refugee Advocacy Service of South Australia was formed to assist clients in migration litigation. The threat of costs orders is likely to result in pro bono efforts coming to a halt. This will result in the an increase in numbers of unrepresented litigants with consequent delays and inevitable cost to the system. It will achieve the opposite to the outcome allegedly desired.

At the very least voluntary organizations and lawyers acting pro bono should be exempted.