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

By e-mail: legcon.sen@aph.gov.au

Dear Secretary

Inquiry into the Migration Litigation Reform Bill 2005

Thank you for the opportunity to make submissions on the Migration Litigation Reform Bill 2005.

Australian Lawyers for Human Rights (ALHR) is writing to express its concerns about the latest round of proposed amendments to migration legislation.

Please find attached a detailed written submission on the human rights aspects of the Bill. ALHR looks particularly at the right to equality before the law for non-citizens under international law. ALHR also seeks to reinforce recommendations that ALHR and other organisations have made to this Committee on many previous migration bills seeking to limit judicial review.

ALHR is happy to attend a Canberra or Sydney hearing to make further submissions or to make its or research available to Committee members if required. I can be contacted by phone on (02) 8233 0300 or 0412 008 039, or by e-mail to president@alhr.asn.au .

Yours sincerely,

Simeon Beckett
President
Australian Lawyers for Human Rights

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Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the Migration Litigation Reform Bill 2005

Australian Lawyers for Human Rights ("**ALHR**") is a association with a membership of over a thousand Australian lawyers committed to promoting awareness of and adherence to human rights in Australia.

ALHR is taking this opportunity to express its grave concerns about the proposed migration legislation amendments set out in the Migration Litigation Reform Bill 2005 ("**the Bill**").

In summary, the Bill is not likely to fulfil the Government's stated aims of improving the overall efficiency of migration litigation, and instead promises to offend the well-establish principle of international human rights law that everyone should be equal before the law, including non-citizens.

Summary of Submissions & Recommendations

Costs Orders

ALHR opposes the provisions of the Bill that deal with costs orders against lawyers and migration agents pursuing unmeritorious claims. These are opposed for the following reasons:

- They are unnecessary. Lawyers are already bound by a professional obligation and a duty to the Courts not to pursue causes of action that have no reasonable prospects of success. The imposition of specific costs orders appears aimed at intimidating lawyers rather than improving access by asylum seekers to proper legal advice as to the merits of their claim.

- They will adversely affect asylum seekers' right to access to justice. The risk of a costs order will inevitably dissuade advocates from pursuing difficult but valid cases where there is a real issue to be determined; and

- It is an inappropriate means of reform. The lodging of unmeritorious claims by migration agents can be dealt with by reform to the Migration Agent Regulatory Authority ("**MARA**").

Constitutionality of Privative Clauses

ALHR submits that the changes are unlikely to achieve any marked improvement in efficiency of litigation. The High Court's original jurisdiction cannot be ousted except by constitutional change.

Summary Decisions

The Bill purports to redefine the well-known phrase "no reasonable prospects of success" by stating that the phrase does not mean the cause is necessarily hopeless or bound to fail.

ALHR submits that this will result in difficult cases being unfairly judged in a preliminary way and excluded from the opportunity to be fully argued before a judicial officer. The common law test is entirely adequate to identify cases without reasonable prospects of success and allow others to be fully argued. At common law for a court to exercise its summary disposal power the proceedings must be hopeless or bound to fail,

The legislative test proposed in the Bill is unclear and will result in further test case litigation and possible injustice, particularly in trying to determine whether the "purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve": proposed section 486E.

Time Limits

ALHR submits that the imposition of an absolute time limit on judicial review applications is likely to increase the risk of wrongful refoulement and, for this reason, opposes any such time limit being introduced. Any legislative time limit on applications for judicial review should ensure the Court retains its discretion to grant an unlimited extension of time in "special circumstances".

Inflexible time limits risk Australia breaching the refoulement obligations under Article 7 of the *International Covenant on Civil and Political Rights* ("**ICCPR**") and Article 3 of the *Convention Against Torture* ("**CAT**").

Other Efficiency Measures to be Preferred

ALHR proposes, at the end of this submission, a number of ways in which the efficiency of migration litigation could be improved without creating a discriminatory system for non-citizens.

Introduction

About ALHR

Australian Lawyers for Human Rights is an association of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

ALHR has over 1,000 members nationally, over 70% of whom are practising lawyers. Membership also includes judicial officers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory Sub-committees.

ALHR promotes the practice of human rights law in Australia through training, publications and advocacy. It works with Australian and international human rights organisations to achieve this aim.

ALHR is a member of the Australian Forum of Human Rights Organisations. It participates in the Commonwealth Attorney-General's NGO Forum on Human Rights, and the Department of Foreign Affairs and Trade ("**DFAT**") Human Rights NGO Consultations.

General Comments

The Government lists the proposed reforms from this Bill as including:

- directing migration cases to the Federal Magistrates Court;
- ensuring identical grounds of review in migration cases;
- imposing uniform time limits;
- improving court processes; and
- deterring unmeritorious applications.

ALHR opposes special provisions to impose costs orders against lawyers and migration agents, and the general attempts to distinguish the migration jurisdiction from other administrative review matters before the courts, such as summary decisions and the imposition of time limits. ALHR also offer its views on the constitutionality of the privative clause measures set out in this Bill in the light of the recent High Court decision in *Plaintiff S157 v Commonwealth of Australia*[1] ("***Plaintiff S157's Case***").

ALHR also notes the position in international law on access to domestic courts by non-citizens, which also covers migrants. Part of the problem in this area comes from the inappropriate conflation of migration and asylum issues, which are in fact and law completely separate.

The Bill should also be seen in the context of a series of bills attempting to limit the jurisdiction of the superior courts to provide judicial review on migration matters. These include Part 8 introduced into the *Migration Act 1958* in 2001, the Migration Legislation

[1] (2003) 211 CLR 476; [2003] HCA 2.

Amendment (Procedural Fairness) Bill 2002, and the Migration Amendment (Judicial Review) Bill 2004. As many of the issues have been canvassed previously before this Committee, ALHR's comments will be concise.

Relevant International Law

The United Nation's High Commission for Refugees' ("**UNHCR**") position is that, for States party to the 1951 *Convention Relating to the Status of Refugees*, asylum claims should be examined by a fully qualified and competent authority and an independent review/appeal process should be provided to review negative decisions, with suspensive effect. According to Conclusion No 8 (XXVIII) of the Executive Committee, the review authority may be administrative or judicial, according to the State Party's prevailing system.[2]

However, UNHCR has confirmed to the Executive Committee—in the context of the *Sanctuary Under Review* Inquiry and subsequent Bills—that it favours judicial oversight by States Parties. According to the UNHCR, the effect of these rulings is not confined to Australia:

> An ancillary international benefit of judicial oversight is the considered interpretation of the Convention. Australian judicial opinion on the meaning of the Convention is cited in virtually every country in the world where refugee status determination procedures exist. Equally, Australian legal precedent informs UNHCR's own interpretation of the Convention.[3]

This Committee has previously maintained, in the *Sanctuary Under Review* report, that judicial review of asylum decisions is desirable.

The focus of the Bill is not whether or not there should be judicial review of migration decisions, but whether judicial review in migration cases should be treated differently and have a lesser status than other judicial review processes.

On the point of equality before the law for non-citizens, the position at international law is clear.

Article 16 of the 1951 *Convention Relating to the Status of Refugees* ("**the Refugee Convention**") states:

- A refugee shall have free access to the courts of law on the territory of all Contracting states.

- A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *judictum solvi*.

- A refugee shall be accorded in the matters referred to in paragraph 2 in the countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

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2 *Submission No. 83,* United Nations High Commissioner for Refugees, p 1439.

3 *Submission No. 83*, United Nations High Commissioner on Refugees, p 1440.

Article 16 of the 1954 *Convention Relating to the Status of Stateless Persons* ("**the Stateless Persons Convention**") states:

> A stateless person shall have free access to the Courts of Law on the territory of all contracting states.
>
> • A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *judictum solvi*.
>
> • A stateless person shall be accorded in the matters referred to in paragraph 2 in the countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

As with refugee status, the fact that a person has not been determined to be stateless by the State does not mean that he/she is not.

Article 14 of the ICCPR dictates that "[a]ll persons shall be equal before the courts and tribunals".

Article 26 states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The United Nations Human Rights Committee ("**UNHRC**") has determined that Article 26 of the ICCPR prohibits discrimination in law or in fact in any field regulated by public authorities and that the scope of Article 26 is not limited to civil and political rights.[4]

The Committee on the Elimination of Racial Discrimination adopted *General Comment No 30* on 1 October 2004. This states that signatories must ensure that:

> legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens [and that] non-citizens enjoy equal protection and recognition before the law.

In conclusion, to deny or limit access for any one group of people to judicial review that is afforded to all others, is contrary to the established international law human rights principle of equality before the law.

Costs Orders

Introducing penalties for lawyers is a troublesome development, especially in the antagonistic atmosphere of previous litigation regarding costs in *Ruddock v Vadarlis*[5] ("**the**

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4 S*imunek,Ttuzilova and Prochazka v The Czech Rrepublic* [1995] IIHRL 45 (19 July 1995)

5 [2001] FCA 1329.

Tampa Case") and many other cases where the applicant has relied on legal assistance provided on a *pro bono* basis, or on legal aid.

The Commonwealth states in relation to the current Bill:

> It is grossly irresponsible to encourage the institution of unmeritorious cases as a means simply to prolong an unsuccessful visa applicant's stay in Australia.
>
> It is equally irresponsible for advisers to frustrate the system by lodging mass produced applications without considering the actual circumstances of each case.

The assumption by the Commonwealth of *mala fides* on the part of claimants and their representatives is concerning. The number of cases may also be due to:

- dozens of legislative amendments to the *Migration Act 1958* over recent years;
- the lack of legal aid for judicial review so that many asylum-seekers (many of whom also have language difficulties and mental health problems) are self-represented;
- uncertainty about the Ministerial discretion process; and
- a belief genuinely held by the claimant that they are a refugee (even though they may not fall into the narrow legal requirements at international law as modified by the definition of persecution in the *Migration Act 1958*.

The "no reasonable prospect of success" test is not defined at law. There are many recent High Court cases that have been held to be valid cases even if many experienced advocates may have worried they had "little prospect of success" given the tenor of recent legislative amendments: see, for example, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors*[6], and *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[7]. Refugee law is complex and evolving.

ALHR also believes the legislation is redundant. Every court already has the power to throw out vexatious or frivolous claims, or summarily dispose of "hopeless" cases. All lawyers already owe a duty to the court and can be subject to punitive action by the relevant professional regulatory body if they fail to comply with this duty.

As Malcolm Turnbull, Federal Member for Wentworth, noted in the Second Reading Speech debate on the Bill:

> Some people would say that the bill just gives statutory form to a subsisting professional obligation. Certainly it would relate to the professional obligation of lawyers—I cannot say what the professional obligations of migration agents are. Lawyers are obliged already by their professional obligations to comply by the substance of this provision.

A better way of combating the perceived problem is to change the restrictions on representation of migration claims. Qualified solicitors cannot provide any advice under the *Migration Act 1958*, even on a *pro bono* basis, unless they are a registered migration

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6 (1996) 185 CLR 259.

7 [2005] HCA 6 (2 March 2005).

agent. However, anyone can become a registered migration agent after a short—but expensive—course that does not necessarily equip people to deal with the complexities of refugee law.

A preferable system would be to have lawyers with specialist training in representing asylum seekers conducting all asylum seeker cases (other than those where the claimant is unrepresented).

But it is not just representation that needs to improve. The consequences of getting these decisions wrong may be life or death for the individual concerned. The issues have proved themselves both difficult and politicised. It is imperative for the proper administration of refugee programs that Australian courts have full oversight.

Recommendations

ALHR urges the Committee to reject the provisions of the Bill dealing with costs orders against lawyers and agents pursuing unmeritorious claims for four main reasons:

- Lawyers are bound by a professional obligation and a duty to the court not to pursue causes of action that have no reasonable prospects of success.
- The imposition of specific costs orders appears aimed at intimidating lawyers rather than improving access by asylum seekers to proper legal advice as to the merits of their claim.
- The risk of a costs order will inevitably dissuade advocates from pursuing difficult but valid cases where there is a real issue to be determined.
- The lodging of unmeritorious claims by migration agents can be dealt with by reform to the MARA.

Constitutionality of Privative Clauses

The question of the constitutionality of privative clauses has essentially been resolved by the High Court in the *Plaintiff S157's Case*.

According to Chief Justice Gleeson, any type of privative clause would be invalid if:

> … on its proper construction, it attempted to oust the jurisdiction conferred on the High Court by section 75(v).

Further tinkering with the privative clause is likely to lead to further complex litigation to tease out the actual effect of the privative clause.

ALHR cannot foresee any substantial problem with having asylum cases heard by the Federal Magistrates' Court; the court already hears complaints made under the *Human Rights and Equal Opportunity Commission Act 1986*, and those Federal Magistrates that hear such cases have a heightened level of awareness of human rights principles. It may also be more accessible and affordable. However, ALHR submits that there will be no marked "efficiency" in moving the cases as it is clear that the High Court's jurisdiction cannot be ousted.

This Bill must be considered in the light of the consequences of removing safeguards for the review of decisions in the asylum process. As the Public Interest Law Clearing House (Victoria) wrote in its submission to this Committee in 2004 regarding the privative clause:

> Errors by the RRT [Refugee Review Tribunal] can lead to the rejection of genuine refugees who may face serious persecution and even death upon removal to their country of origin. High standards of decision-making and access to judicial review reduce the risk of wrongful refoulement. Conversely, blunt legislative measures such as the imposition of an absolute time limit on judicial review applications are likely to increase the risk of wrongful refoulement.

Any further weakening of the review process through the expansion of the privative clause will, in an unequal fashion compared with other seeking judicial review, undermine the proper review of decision making in asylum cases.

Recommendations

ALHR recommends that the Committee reject any amendment to the privative clause in this Bill or future Bills on the basis that such amendments:

- are likely to further complicate review in this area of judicial review through further test cases litigation on the meaning of the amended clause;
- will be ineffective in ousting the High Court's original jurisdiction.

Summary Decisions

The Bill purports to redefine the well-known phrase "no reasonable prospects of success" by stating that the phrase does not mean the cause is necessarily hopeless or bound to fail.

The danger with this aspect of the Bill is that difficult cases will be unfairly judged in a preliminary way and not permitted to be fully argued before a judicial officer. The existing common law test is entirely adequate to identify cases without reasonable prospects of success and allow others to be fully argued.

At common law for a court to exercise its summary disposal power the proceedings must be hopeless or bound to fail: *General Steel Industries Inc v Commissioner for Railways (NSW)*.[8] The new legislative test set out in the Bill is unclear and will, in fact, result in further litigation to test its limits. It is also likely to result in injustice, particularly where a court is required to determine whether the "purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve": proposed section 486E.

Recommendation

ALHR recommends that the Committee reject the provisions in the Bill that attempt to provide a legislative definition of "no reasonable prospects of success" that is different from the common law meaning.

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8 (1964) 112 CLR 125.

Time Limits

Any legislative time limits on applications for judicial review must ensure the court retains the discretion to grant an unlimited extension of time in "special circumstances" or where the interests of justice demand it.

The imposition of an absolute time limit on judicial review applications is likely to increase the risk of wrongful refoulement. ALHR's submission to the Committee on the Migration Amendment (Judicial Review) Bill 2004 also noted:

> By setting an absolute limit on the period for judicial review, and thereby depriving people who may be refugees from the opportunity to have their status recognised, Australia risks violating not only the refoulement obligations under the Refugee Convention, but also the more extensive refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). Australia's conduct under the ICCPR and CAT is subject to United Nations scrutiny through complaints and reporting mechanisms.

ALHR refers the Committee to the submission made by the Human Rights and Equal Opportunity Commission ("**HREOC**") in the Ministerial Discretion Inquiry where HREOC set out Australia's non-refoulement obligations under international law in detail. These obligations are not limited to the Refugee Convention.

Article 3 of CAT provides:

> No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The right of such a person to resist expulsion is not made dependent upon him or her satisfying the Refugee Convention definition of "refugee".

As a State Party to the ICCPR, when considering the potential deportation or removal of a person, Australia is obliged to consider whether there is a real risk that the following rights, at a minimum, will be violated:

- the right to life: Article 6 of the ICCPR;
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment: Article 7 of the ICCPR;
- the right not to be arbitrarily detained: Article 9(1) of the ICCPR; and
- the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person: Article 10(1) of the ICCPR.

Australia's responsibility for such potential breaches of the ICCPR follows in part from the primary obligation of each State Party, pursuant to Article 2 of the ICCPR:

> ... to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.

Australia's obligations under that provision are owed to all those within its territory and subject to its jurisdiction.

The UNHRC has stated, as a general principle:

> If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the covenant. [9]

It would contravene Australia's obligations under the ICCPR to deliver a person by compulsion into the hands of another State or third party that might inflict harm proscribed by the ICCPR, or that may expel that person to a third state that might inflict such harm. That is so regardless of whether that person falls within the definition of "refugee" in the Refugee Convention.

Inflexible time limits may risk Australia breaching the more extensive refoulement obligations under the ICCPR and the CAT.

Recommendations

ALHR recommends that the Committee reject the imposition of an absolute time limit on judicial review applications because this is likely to increase the risk of wrongful refoulement.

ALHR recommends that any legislative time limits on applications for judicial review be accompanied by provisions that ensure the courts retain the discretion to grant an unlimited extension of time in "special circumstances".

Other Efficiency Measures to be Preferred

ALHR notes that timely access to a fair and final decision is a good outcome for all parties, especially when asylum seekers are in, or face automatic, unreviewable detention. ALHR also notes that the superior courts have expressed frustration with the number of migration cases lodged over the past five to six years in particular.

Despite these concerns, it is a very serious step to introduce a discriminatory two-tiered system of access to courts: one for Australian citizens and another for non-citizens. This is contrary to well-established human rights principles and so, if there are other methods to achieve the desired policy outcomes, they should be preferred.

In this Committee's *Sanctuary Under Review* report in Chapter 6, Justice Wilcox was cited with approval:

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9 Senate Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, HREOC Submission, pp 3-4. <http://www.aph.gov.au/Senate/committee/minmig_ctte/submissions/sublist.htm>

> The solution is not to deny a right to judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated.[10]

Recommendations

ALHR strongly urges the Commonwealth to use other means to achieve improved efficiency of migration litigation rather than creating a limited and therefore discriminatory standing before the courts for non-citizens.

ALHR proposes that the alternative and preferable means might include:

- improvements to the quality of primary decision-making at the Department of Immigration and Multicultural and Indigenous Affairs and Refugee Review Tribunal ("**RRT**") levels;
- structural changes to primary decision-making such as the involvement of officials from other relevant departments such as the Attorney-General's Department and DFAT;
- increased training for primary decision makers in refugee law and specialised levels of recruitment for officials determining asylum claims;
- mandatory regular debriefing and counselling opportunities for officials dealing with asylum cases;
- increased co-operation with the UNHCR at the merits review level, drawing on policy advice as well as country of origin information;
- improved counselling at the merits review stage from a neutral party so that claimants understand the process and accept its outcomes, and understand the limits of judicial review;
- removing the ability of migration agents to deal with asylum claims and/or better regulation of migration agents;
- removing the requirement for lawyers to become registered migration agents in order to give advice on the *Migration Act 1958* and replacing its with a requirement that lawyers undertaking this work completed specialist training;
- establishing a forum for advocates, law societies and community groups, convened by an independent entity such as HREOC, about ethical advocacy for asylum claimants;
- restoring funding and improved access to legal aid for asylum seekers from the application stage, through RRT to judicial review;
- incorporating at an early stage the more extensive refoulement obligations under the ICCPR and the CAT;
- improving transparency regarding the guidelines and use of Ministerial discretion;

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[10] *Mbuaby Paulo Muaby v Minister for Immigration and Multicultural Affairs* [1998] 1093 FCA (20 August 1998), referred to in Australian Law Reform Commission, *Managing Justice: A review of the federal civil system, Report No 89* (2000) AGPS p 494.

Penfold Inquiry

In late 2003, the Federal Attorney-General announced a review of migration litigation. That review was undertaken by Hilary Penfold QC. Ms Penfold completed her review and reported to the Attorney-General on 8 January 2004.

Ms Penfold's report has not yet been made available to the public. The failure to make the report available for public scrutiny impairs the capacity of the public and their elected representatives to participate fully in any debate on the merits or otherwise of amendments to legislation aimed at improving the processes in migration litigation.

Recommendation

As a corollary to this inquiry, ALHR recommends that the report of the review of migration litigation undertaken by Hilary Penfold QC report be made available to the public so the debate can be better informed by its findings.