Law Council
OF AUSTRALIA

Inquiry into the Migration Litigation Reform Bill 2005

Senate Legal and Constitutional Committee, Department of the Senate

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Executive Summary

Whilst the Law Council of Australia recognises the growth in migration litigation before the courts and the need to deal with migration (and general) judicial review caseloads efficiently, the mechanisms by which the Bill seeks to do this cause considerable concern.

The focus of the Bill upon imposing conditions and requirements on litigation and litigants appears designed to discourage both applicants and legal practitioners who might otherwise assist applicants. It therefore represents a barrier to access to justice. Similarly, whilst the court processes allowing for hearings on the papers and direction of cases to the Federal Magistrates Court may expedite cases, they may remove chances for vulnerable applicants to state their case. In this respect, the provisions will also stifle the ability of courts to develop the Common Law, because lower courts will be strongly discouraged from hearing cases in which a higher court has made a ruling adverse to the applicant's claim.

Provisions for summary decisions

The Law Council has previously expressed its reluctance to support any lowering of the standard for summary dismissal of proceedings established by *Dey* and *General Steel*. Passage of the new sections 17A (FMA), 31A (FCA) and 25A (JA) will effectively pre-empt further debate as to whether the legislature should impose a lower standard as the test for summary dismissal. Instead, attention will focus on the content of that new standard, as litigants look to give the phrase "*no reasonable prospect of success*" a meaning distinct from "hopeless" or "bound to fail".

If there is a problem being experienced in one area of immigration decision making, attention should be paid to that area, with consideration being given to the reasons behind the problem being experienced. There would appear to be no justification for heavy handed provisions that are of general application.

The provisions are of particular concern in the context of proposals to deter unmeritorious appeals. The combined effect of the scheme proposed may be to stifle the development of the Common Law in the immigration area. The system proposed could have the effect of making it difficult for a lower court to consider a novel submission on a point of law OR where an adverse precedent has been set by a higher court.

Provisions to deter 'unmeritorious' litigation

The Law Council has consistently expressed the view that legislation requiring the certification of proceedings should be carefully framed to ensure that fear of the risks of failure in litigation of a case which, for example, may seem hopeless on the current state of the law should not prevent the bringing of that litigation where it is proper to test the limits of what might otherwise be thought to be settled law. If Parliament is concerned with stopping unmeritorious litigation,

then certification provisions should apply across all jurisdictions. The insertion of these provisions in one area creates the impression that the government is trying to drive lawyers out of immigration cases. If this is indeed the effect of the measures, the effect on the Rule of Law could be substantial. The amendments could also encourage applicants to take their case to the Court as self represented litigants because legal practitioners, acting pro bono or otherwise, are not able to provide the required certification.

In this regard, it should be noted that the provisions are so broad that they could be read to apply to anyone who *encourages* an applicant to seek judicial review. On the face of the Bill, any solicitor who provides advice to a litigant could be caught by the provisions – even if the solicitor does not appear on the record as having given advice. The interaction of the certification and costs provisions have the potential to decimate free legal advice regimes such as the pro bono scheme run by the Federal Court or by Law Societies around the country. It could also have a negative impact on specialist immigration advice agencies.

Time limits imposed by the Bill

It is suggested that, as far as the High Court provisions in section 486A of the *Migration Act*, these may be unconstitutional as they restrict the jurisdiction of the High Court in section 75(v) of the *Constitution*. Insofar as the jurisdiction in section 75(v) was intended to be a broad power to allow the High Court to deal with substantive matters of justice, it is suggested that these provisions may restrict access to justice in the High Court.

This question may then be broadened to ask whether the mirror provisions for the Federal Magistrates Court and the Federal Court may not also restrict access to justice and in some cases leave an applicant with no recourse to the judicial system following their Tribunal decision. The ultimate effect of rigid time limits may again be to force applications in the original jurisdiction of the High Court, further delaying the hearing of cases in that Court.

The Jurisdiction of the Federal Magistrates Court

The Council proposes that the Litigation Reform Bill be amended so as to:

(a) relax the time limits on administrative appeals – giving the tribunals a discretion to extend limits in exceptional circumstances; and/or
(b) provide for the judicial review of primary decisions by the Federal Magistrates' Court where an applicant can demonstrate a compelling case for judicial review of a primary decision (such as a loss of merits review rights for reasons beyond their control).

As they currently stand, these provisions of the Bill seem to contradict the stated aim to direct migration matter to the Federal Magistrates Court so as to reduce the caseload in the High Court.

The continuing use of privative clause provisions

The right to the judicial review of administrative action in Australia is one of the few 'rights' guaranteed by the *Constitution*. Short of a referendum on the issue, it is difficult to see how the insertion of the words proposed will alter the approach taken by the High Court to the review of a decision that is infected by a fundamental legal error (a 'jurisdictional error'). At the end of the day, the issue is a simple one: either the Rule of Law in Australia is to include in-put from the Courts, or it is not. The *Constitution* and the judgments of the High Court in *Plaintiff S157 v Commonwealth of Australia* (2003) 211 CLR 476 (*S157*) and *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002* (2003) 211 CLR 441 (*S134*). suggest that Parliament does not have the Constitutional authority to exclude judicial review in its entirety from an important area of the law such as migration law. It can only be harmful to respect for the Rule of Law in this country that Parliament should be invited to continue to support and maintain legislation that gives the appearance of ousting judicial review in this way.

The Council urges the Committee to recommend against the passage of the Migration Litigation Reform Bill in its present form.

1 Overview

The Migration Litigation Reform Bill ("the Bill") seeks to:

- Direct migration cases to the Federal Magistrates Court;
- Ensure identical grounds of review in migration cases;
- Impose uniform time limits in all migration cases;
- Facilitate quicker handling of cases through improved court processes; and
- Deter unmeritorious applications.

Whilst the Law Council of Australia recognises the growth in migration litigation before the courts and the need to deal with migration (and general) judicial review cases efficiently, the mechanisms by which the Bill seeks to do this cause considerable concern.

The focus of the Bill upon imposing conditions and requirements on litigation and litigants appears designed to discourage both applicants and legal practitioners who might otherwise assist applicants. It therefore represents a barrier to access to justice. Similarly, whilst the court processes allowing for hearings on the papers and direction of cases to the Federal Magistrates Court may expedite cases, they may remove chances for vulnerable applicants to state their case. In this respect, the provisions will also stifle the ability of courts to develop the Common Law, because lower courts will be strongly discouraged from hearing cases in which a higher court has made a ruling adverse to the applicant's claim.

The Law Council of Australia endorses the submissions of the New South Wales Bar Association and the Law Society of South Australia. The Council generally supports the issues and concerns raised by these submissions, and has sought to complement them rather than restate the issues.

As it has noted in many earlier submissions on this issue (in 1997, 1998 and 2004), the Law Council is concerned that problems in one area of migration decision making – refugee appeals – are driving reforms that impact on the rights of all migration applicants, stifling opportunities to challenge decisions and hampering the courts in their development of immigration jurisprudence.

It is the Council's view that Parliament has again been invited to focus once again on the wrong end of the process: trying to stifle review instead of addressing the question of why so many appeals are being lodged. The Council repeats its earlier submissions that attention should be paid to addressing problems that are manifest in the front end of the application process in the area of refugee decision making. These relate in particular to:

- the quality of primary decision making;
- the quality, independence and transparency of the migration tribunals, particularly the Refugee Review Tribunal;

- the availability of pro bono legal advice and assistance from experienced lawyers; and
- the need to provide avenues for the assistance of 'near miss' cases in the refugee area other than the current non-compellable, non-reviewable discretion vested in the Minister for Immigration and Multicultural and Indigenous Affairs alone. All immigration officers should have a discretion to grant visas to individuals with strong humanitarian or compassionate grounds for remaining in Australia.

The Litigation Reform Bill represents the latest in a series of attempts to stifle access to the Federal Courts system for aspiring migrants and refugees. The Bill will not succeed in its stated aims, but is likely to make a bad situation worse. It will prevent the lower Federal Courts from reviewing primary decisions in cases where applicants have lost their ability to access the migration tribunals, forcing applicants to go to the High Court. Similar provisions had a disastrous impact on the workload of the High Court in the mid to late 1990s.

In the short time available to the Council, the following specific issues have been identified as of concern and worthy of further consideration by the Committee.

It should also be noted that some of these issues have been dealt with in the Law Council of Australia submission to the Australian Law Reform Commission Report "Managing Justice: a Review of the Federal Civil Justice System" (1999).

2 Specific comments

Items of specific concern for the Council include:

- Provisions for summary decisions;
- Provisions to deter 'unmeritorious' litigation, including lawyers or individuals certifying reasonable grounds for success in an application for review to the Courts, and allowing costs orders to be awarded against lawyers and organisations;
- Time limits imposed by the Bill
- Provisions relating to the review jurisdiction of the Federal Courts and the implications these will have on the workload of the High Court; and
- The continuing use of the privative clause provisions in the *Migration Act 1958* (the *Migration Act*).

2.1 Summary decisions

The Bill inserts a new "Summary Judgment" section 17A into the Federal Magistrates Court Act (FMA) and corresponding sections in the Federal Court of Australia Act (FCA) (new section 31A) and the Judiciary Act (JA) (new section 25A).

These new summary judgment provisions are of general application, albeit that they are being introduced as part of a package of "mitigation litigation reform". They therefore warrant careful consideration.

The new sections provide that the Courts concerned may give summary judgment for a party where satisfied that the other party:

- has no reasonable prospect of successfully defending a proceeding or part of a proceeding; or
- has no reasonable prospect of successfully prosecuting a proceeding or part of a proceeding.

Sub-section (3) of each new section expressly provides that for the purposes of the sections:

> *"… a defence or a proceeding or part of a proceeding need not be:*
> *(a) hopeless; or*
> *(b) bound to fail;*
> *for it to have no reasonable prospect of success".*

These sections will clearly lower the bar for the summary disposal of actions. The tests propounded by the High Court in cases such as *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CRL 125 are more demanding than that now proposed. Indeed, the Notes issued in relation to the Bill contain the observation that these cases demonstrate:

> *"…the great caution which the courts have exercised in regard to summary disposal [of an action]"*

and that the new sections will move away from that approach.

In his second reading speech, the Attorney General included one paragraph in relation to these provisions, in which he recorded that:

> *"[i]t is appropriate that [these provisions be] of general application. [They] will be a useful addition to courts' powers in dealing with any unsustainable case".*

The Law Council of Australia Federal Litigation Section discussion paper "Inquiry into Possible Innovations in Case Management" that was circulated to practitioners last year raised for the consideration of practitioners this very issue. The Law Council has previously expressed its reluctance to support any lowering of the standard for summary dismissal of proceedings established by *Dey* and *General Steel*. Responses thus far received to the discussion paper have yet to be compiled and published, but most respondents have indicated their support for the Law Council's position.

However, passage of the new sections 17A (FMA), 31A (FCA) and 25A (JA) will effectively pre-empt further debate as to whether the legislature should impose

a lower standard as the test for summary dismissal. Instead, attention will focus on the content of that new standard, as litigants look to give the phrase "*no reasonable prospect of success*" a meaning distinct from "hopeless" or "bound to fail".

Again, if there is a problem being experienced in one area of immigration decision making, attention should be paid to that area, with consideration being given to the reasons behind the problem being experienced. There would appear to be no justification for heavy handed provisions that are of general application.

The provisions are of particular concern in the context of proposals to deter unmeritorious appeals. The combined effect of the scheme proposed may be to stifle the development of the Common Law in the immigration area. The system proposed could have the effect of making it difficult for a lower court to consider a novel submission on a point of law where an adverse precedent has been set by a higher court.

2.2 Deterring 'unmeritorious' litigation

In his second reading speech in relation to the Bill, the Attorney General stated that:

> *"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".*

The Attorney noted that it was equally irresponsible for advisors to frustrate the system by lodging mass produced applications and said that

> *"[t]he measures in this Bill seek to deter such conduct".*

If passed, the Act will impose a deterrent in the following form:

- a requirement in a new section 486D that a person who commences proceedings in a court in relation to a Tribunal decision disclose to the court any judicial review proceedings already brought by that person in relation to that decision;
- a prohibition in a new section 186I against a lawyer filing a document commencing migration litigation "unless the lawyer certifies in writing that there are reasonable grounds for believing the mitigation litigation has a reasonable prospect of success".
- Sub-section (2) provides that a court **must** refuse to accept a document commencing migration litigation that is required to be certified unless it has been certified.
- A prohibition in a new section 486E on *a person* encouraging another person to commence or continue migration litigation if:
  (a) the migration litigation has no reasonable prospect of success; and
  (b) either:

(i) the person does not give proper consideration to the prospect of success of the migration litigation; or
(ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

- providing in a new section 486F for the making of costs orders against a person who acts in contravention of the prohibition contained in section 486E.

  The section will further provide that a solicitor may be deprived of his costs or, in the alternative, be ordered to repay the costs already paid by a litigant in an unmeritorious action. In cases where applicants may have a case which rests on the boundaries of established law this will deter solicitors or legal services from taking these cases and testing the established law, and supporting possibly vulnerable and meritorious applicants because of the possibility of these financial penalties.

  It should be noted that it is **mandatory** that the court, at the time of giving judgment in a case that has been found to have had "no reasonable prospect of success", consider whether such costs orders should be made.
- providing in a new section 486G that no costs order must be made unless the person has had a reasonable opportunity to argue why it should not be made. For that purpose, section 486H will provide that on such an argument, legal professional privilege in a document is waived.

These are a very strong provisions, particularly in light of the sub-section (2) of section 486E which, like the summary judgment provisions referred to earlier, specifically provides that, for the purpose of that section,

> *"…migration litigation need not be:*
> *(a) hopeless; or*
> *(b) bound to fail;*
> *for it to have no reasonable prospect of success".*

The Law Council has consistently expressed the view that legislation requiring the certification of proceedings should be carefully framed to ensure that fear of the risks of failure in litigation of a case which, for example, may seem hopeless on the current state of the law should not prevent the bringing of that litigation where it is proper to test the limits of what might otherwise be thought to be settled law. It can be expected that the courts will exercise the power conferred on them by such sections judicially and not capriciously. However, the controversy surrounding the conduct of migration litigation in recent years suggests that if the Bill is passed, it is in the field of migration law that the scope of the solicitor's certificate, the solicitor's duty on giving such a certificate and the concept of "unmeritorious litigation" is likely to be given flesh and substance.

If Parliament is concerned with stopping unmeritorious litigation, then certification provisions should apply across all jurisdictions. The insertion of these provisions in one area creates the impression that the government is

trying to drive lawyers out of immigration cases. If this is indeed the effect of the measures, the effect on the Rule of Law could be substantial.

Again, as noted, the provisions could stifle the development of the Common Law by preventing lower courts from testing the limits of the law. They could also encourage applicants to take their case to the Court as self represented litigants because legal practitioners, acting pro bono or otherwise, are not able to provide the required certification.

In this regard, it should be noted that the provisions are so broad that they could be read to apply to anyone who *encourages* an applicant to seek judicial review. On the face of the Bill, any solicitor who provides advice to a litigant could be caught by the provisions – even if the solicitor does not appear on the record as having given advice.

The interaction of the certification and costs provisions have the potential to decimate free legal advice regimes such as the pro bono scheme run by the Federal Court or by Law Societies around the country. It could also have a negative impact on specialist immigration advice agencies.

2.3 Time limits imposed by the Bill

The Bill seeks to impose uniform time limits on applications for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court. These provisions are new sections 477, 477A and 486A of the *Migration Act* respectively

These time limits will be 28 days from actual (as opposed to deemed – a change from the current provisions) notification of a decision. These time limits will apply in all Courts. The Courts have a discretion to extend this time limit by 56 days to a maximum of 84 days if the application is made within the 84 days and the Court is satisfied that it is in the interests of the administration of justice to extend the 28 day period.

The 84 day time limit applies so that if an applicant with an otherwise meritorious case applies to a Court on the 83rd day, they will still only gain a single further day to make their application. Those who apply past the 84 days will not have their application accepted.

It is suggested that, as far as the High Court provisions in section 486A of the *Migration Act are concerned*, these may be unconstitutional as they restrict the jurisdiction of the High Court in section 75(v) of the *Constitution*. Insofar as the jurisdiction in section 75(v) was intended to be a broad power to allow the High Court to deal with substantive matters of justice, it is suggested that these provisions may restrict access to justice in the High Court.

This question may then be broadened to ask whether the mirror provisions for the Federal Magistrates Court and the Federal Court may not also restrict access to justice and in some cases leave an applicant with no recourse to the judicial system following their Tribunal decision. The ultimate effect of rigid time

limits may again be to force applications in the original jurisdiction of the High Court, further delaying the hearing of cases in that Court.

2.4 The jurisdiction of the Federal Magistrates Court

A primary objective of the Litigation Reform Bill is to make the Federal Magistrates Court the main locus for the judicial review of migration cases. The Council has no in-principle objection to this occurring, as long as the system does not stifle the development of the law. The Council notes that the Court will maintain their discretion to refer more complex cases to the Federal Court.

The Council is concerned that the Federal Magistrates Courts would lose their ability to review "primary decisions" made under the Migration Act. The term is defined by s.476(4) of the MA as follows:

> **primary decision** means a privative clause decision or purported privative clause decision:
>
> (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
> (b) that would have been so reviewable if an application for such review had been made within a specified period.

In other words, "primary decision" means departmental decisions which attract merits review rights, irrespective of whether those rights have been exercised or not. Sub-section (2)(a) of the same provision would exclude "primary decisions" from the jurisdiction of both the Federal Magistrates Court and the Federal Court – even where a jurisdictional error had been made. The High Court is precluded by s.476B from remitting matters to the Federal Magistrates Court if the court does not have jurisdiction.

Put simply, the proposed amendments would return the Migration Act to the situation that pertained under the old Part 8 of the Migration Act. The effect of these provisions on the work load of the High Court in the late 1990s was catastrophic. The experiment should not be repeated.

The Council proposes that the Litigation Reform Bill be amended so as to:

(c) relax the time limits on administrative appeals – giving the tribunals a discretion to extend limits in exceptional circumstances; and/or
(d) provide for the judicial review of primary decisions by the Federal Magistrates' Court where an applicant can demonstrate a compelling case for judicial review of a primary decision (such as a loss of merits review rights for reasons beyond their control).

As they currently stand, these provisions of the Bill seem to contradict the stated aim of this Bill to direct migration matter to the Federal Magistrates Court so as to reduce the caseload in the High Court.

2.5 Continuing use of privative clause provisions in the Migration Act

The Bill seeks to define separate classes of migration decisions in the *Migration Act* including a privative clause decision (existing section 474(2), a purported privative clause decision (new section 5E) and a non-privative clause decision (new subsection 474(6)).

These definitions are inserted to address the uncertainty about defining a decision as a privative clause decision following the judgments of the High Court in *S157* and *S134*. These cases found that section 474 of the *Migration Act* did not apply to a decision which was infected by jurisdictional error and was therefore a 'decision purportedly made under the [Migration] Act'.

The intent of these definitional provisions in the Bill is to ensure that the other provisions in the Bill apply to all migration decisions, however defined. These definitions incorporate a further level of complexity into an already complex legislative regime. It will not be clear, on the face of the *Migration Act*, or in fact the other Acts so amended, how a particular decision, on the face of it, is to be defined.

This level of complexity and uncertainty may have the unintended consequence of deterring self-represented applicants from seeking judicial review of their migration decisions because they do not understand the provisions of the *Migration Act* as amended by this Bill following the decisions of the High Court in *S157* and *S134*.

It is suggested that the Committee investigate the possibility that the privative clause regime, following these High Court judgments, be simplified or removed from the *Migration Act* and replaced with a simpler regime.

On one level, there seems to be an irony in introducing provisions to limit judicial review that will encourage litigation: once again the High Court will be asked inevitably to rule on the effect of the amendments. On the other hand, it is difficult to see that the amendments will have any effect at all on the ultimate jurisdiction asserted by the High Court (and through it, the lower Federal Courts).

The right to judicial review of administrative action in Australia is one of the few 'rights' guaranteed by the *Constitution*. Short of a referendum on the issue, it is difficult to see how the insertion of the words proposed will alter the approach taken by the High Court to the review of a decision that is infected by a fundamental legal error (a 'jurisdictional error').

At the end of the day, the issue is a simple one: either the Rule of Law in Australia is to include in-put from the Courts, or it is not. The *Constitution* and the judgements of the High Court in *S157* and *S134* suggest that Parliament does not have the Constitutional authority to exclude judicial review. It can only be harmful to respect for the Rule of Law in this country that Parliament should

continue to support and maintain legislation that gives the appearance of ousting judicial review in this way.

The Council urges the Committee to recommend against the passage of the Litigation Reform Bill in its present form.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.