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

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Migration Litigation Reform Bill 2005

I write to make a submission in relation to the above Bill on behalf of Victoria Legal Aid. VLA welcomes the opportunity to comment on the Migration Litigation Reform Bill 2005.

VLA recognise the need to process migration cases efficiently, however we are concerned that the measures proposed will undermine fundamental safeguards. At its heart, this legislation clearly seeks to deprive often vulnerable people of the right to seek judicial review of administrative decisions through the imposition of strict time limits and the threat of cost orders against lawyers. The imposition of strict time limits and cost orders in effect interferes with the courts' right to exercise judicial power. The legislation sets a dangerous precedent in restricting judicial review of government decision making and expanding executive power.

1. The possibility of costs orders against lawyers and voluntary organisations

VLA is opposed to this proposal. Article 16 of the Refugees' Convention provides that:

1. *A refugee shall have free access to the courts of law on the territory of all Contracting States*
2. *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.*
3. *A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.*

VLA appreciates that the Convention is designed to protect refugees' rights, and that judicial review applicants are people who are not characterised as refugees, but unsuccessful asylum seekers. However, some judicial review applicants are eventually recognised as refugees (after a

court remits the case back to the Refugee Review Tribunal) and therefore there is a potential that these proposals render Australia in breach the Refugee Convention.

As a result of this proposal lawyers will be required to certify an application has merit. It is unclear how lawyers will be able to certify cases in the absence of access to documents that are often only made available as a result of an FOI application. Further, as stated in the submission from the United Nations High Commissioner for Refugees, not all unsuccessful cases are unmeritorious. A high success rate by the Government in cases that proceed to hearing does not necessarily mean that applicants are using judicial review inappropriately to prolong their stay in Australia. Further, Australian migration law is complex there is no clear demarcation between meritorious and unmeritorious court applications. It is also important to recognise that on occasion arguments that may appear novel, lacking in merit and/or contrary to settled law, will ultimately be successful.[1]

Access to justice for migration clients is already extremely limited because of the availability and restrictions placed on legal aid to potential litigants. The current guidelines imposed upon Victoria Legal Aid by the Commonwealth are as follows:

1. *Legal assistance may be granted for proceedings in the Federal Court or Hight Court dealing with a migration matter, including a refugee matter, only if:*

   (a) there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or

   (b) the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.

   Subclause (1) applies to a matter, even if the matter could also be characterised as falling within another Commonwealth priority or guideline.

2. *In all other cases applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance*.

This is a very narrow range of cases. Clearly the new proposals will be a disincentive to voluntary organisations and pro bono lawyers and further restrict representation for these clients.

2. Strict time limits

The normal 28 day time limit is too restrictive as there are often delays in applicants' ability to access legal advice particularly in the circumstances where applicants are in detention, require an interpreter, or both.

[1] For example see *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005).

3. Constitutionality of privative clauses

VLA also opposes the proposed extension of the definition of privative clause decisions and argues that it is inconsistent with Section 75(v) of the Constitution, which seeks to protect persons against unlawful incursions by government.

I trust that the above comments are of assistance to the Committee.

Yours faithfully

TONY PARSONS
Managing Director