RILC **Refugee & Immigration Legal Centre Inc**

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Litigation Reform Bill 2005

1. Introduction

1.1 The Refugee and Immigration Legal Centre (RILC) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2. RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme (IAAAS) and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over nine years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited Port Hedland Curtin, Perth and Baxter immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the policy debate on refugee and general migration matters.

1.3 In the 2003-2004 financial year, RILC gave assistance to almost 3,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

2. Overview and summary of submissions

2.1 By way of introductory comment, we note that RILC[1] has previously expressed strong opposition to this Committee concerning a wide range of provisions in proposed and passed legislation which have related to further restrictions on the ability of applicants to access judicial review, particularly by way of introduction of privative clauses. In this regard, we attach herewith our most recent submission to this Committee concerning the Migration Legislation Amendment (Judicial Review) Bill 2004 (the Judicial Review Bill), together with our submission to the Attorney- General's Migration Litigation Review in 2003. In this context, we remain acutely concerned that any residual, basic safeguards which are afforded by the common law or statutory rules be preserved for the purposes of judicial review. We are concerned that some of the key areas of the Migration Litigation Reform Bill 2005 (the Bill) would dangerously erode such safeguards: namely, discretionary time limits; access to

[1] And its predecessor organisations, RACS and VIARC.

review of primary decisions; primary direction of most migration cases to the Federal Magistrates' Court (FMC); summary dismissal powers; and costs penalties and other provisions concerning legal advisers. In strongly opposing the introduction of the Bill, we intend to focus primarily on the impact of such provisions on individual applicants, and on the jurisdiction more generally.

2.2 In this regard, we note that the Bill essentially seeks to immunise certain migration decisions in certain circumstances from any form of judicial review.

2.3 In summary, we submit that:

- The proposed strict, non-extendable time limit of 84 days to seek judicial review would result in substantial unfairness and injustice in some cases where individuals are denied the right to appeal. It also has the real potential to frustrate its own objective, by encouraging the lodgement of 'protective' appeals. A residual judicial discretion to extend statutory time limits for seeking judicial review should be preserved to avoid such situations.
- The proposed requirement of confining review of primary decisions to the High Court is inappropriate, unwarranted and inconsistent with the objects of the Bill which include more "efficient' handling of matters. Powers to bring such applications in the Federal Court or for the High Court to remit matters to the Federal Court, should be preserved.
- The proposed direction of matters to the FMC for judicial review at first instance is inappropriate, unwarranted, and unnecessary. The Federal Court is the jurisdiction generally best placed to handle such matters and to decide which 'less complex' cases could be handled by the FMC.
- The proposed broadening of summary dismissal powers is unwarranted and may result in summary judgment of applications which have viable grounds. The current principles governing the Courts' powers of summary dismissal are more than adequate to deal with 'unmeritorious' applications.
- The proposed provisions to enable the courts to make personal costs orders against persons who encourage the making of unmeritorious applications are unnecessary and are likely to result in further depriving applicants of access to pro bono advice, thereby increasing the number of unrepresented applicants, diminishing the quality of decision making and unacceptably interfering with rights of a person to access legal advice and, in turn, the Courts.

Each of the above proposed amendments could limit or preclude meritorious cases from seeking relief, thereby undermining the central objective of barring unmeritorious judicial review applications from being made. More alarmingly, for the perceived benefits of achieving increased efficiencies, cost reduction and reduction of unmeritorious claims, the amendments would necessarily place some people's lives at further, grave risk. Such a sacrifice of fundamental safeguards to individual rights – including protection from persecution or family unity - cannot be justified.

2.4 Moreover, the proposed Bill fundamentally fails to address the complex, core factors involved in increased judicial review applications in the migration area, including

where applicants have missed the statutory time limit for appeal, have failed to seek administrative review, or have made ultimately unsuccessful applications. Many of these factors are, in our experience, not primarily due to vexatious or abusive applicants. The approach in this Bill is consistent with a alarming trend in recent years to deal with concerns about increased judicial review applications by seeking to restrict the Courts' role, rather than properly examining the actual as opposed to imagined, causes and developing policy and legislative measures which are responsive to these matters. This is of particular concern given that the proposed restrictions seek to erode well-established and entrenched basic principles which are designed to safeguard access to legal advice and the Courts.

2.5 In our experience, the Bill represents a fundamental failure to address or seek to implement reforms which are at the core of problems in the use of the judicial review process, namely:

- improving the quality and timeliness of decision making at the administrative levels;
- improving access to competent, pro bono legal advice and assistance;
- creating a 'complementary protection' model of administrative decision making to assess claims which involve compelling 'humanitarian' claims, which fall outside the narrow parameters of Refugee Convention protection; and
- strengthening programmes and access to non-legal case management for refused applicants.

In many respects, the failure of the Bill to address these matters represents a radical and irresponsible distraction from the key issues and core problems, many of which formed the basis of recommendations in previous reports of this and other Parliamentary Committees.[2]

2.6 We further note that at least three serious questions remain concerning the fundamental basis upon which the proposed amendments in Bill have been made. First, quite inexplicably, the very report and/or recommendations of the Migration Litigation Review conducted by Hilary Penfold QC at the request of the Attorney-General's Office, which purportedly gave rise to the Bill, itself remain unpublished and unavailable to the public. Thus, Parliament and the public continue to be deprived of scrutiny of the very evidence and findings which allegedly formed the basis of this radical proposed legislation. Second, we understand there has been a dramatic decrease in the number of judicial review migration applications, casting doubts over the purported need for the Bill at all.[3] Third, manifestly incomplete evidence has been provided about the success rates of judicial review applications in the migration area. The rates of remittal by consent where the Minister has conceded without the matter running to judgment are nowhere disclosed. Our experience is that the numbers of cases

[2] For example, 'A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes', Senate Legal and Constitutional References Committee, June 2000.
[3] 'Migration Litigation Reform Bill 2005, Parliamentary Library, Laws and Bills Digest Section, Peter Prince, 15 March 2005, no.132, 2004-05, p 4.

in this category are not insignificant. Given that one of the government's key justifications for this Bill is its high success rate at hearing, this omission is conspicuous and of concern.

2.7 In summary, one would at very least expect that radical proposals, such as those in the Bill, to alter the delicate balances struck in the areas of access to legal advice and the Courts for independent review of executive actions, would be based on demonstrable evidence of their need and justification. In neither case is this clearly apparent.

3. The need for a residual discretion in time limits for seeking judicial review

3.1 RILC is fundamentally opposed to the provisions of the Bill which, like those which were contained in the Judicial Review Bill, seek to introduce a regime of strict, non-extendable time limits for applicants seeking judicial review of migration decisions. In substance, we note that these proposed amendments are designed to completely bar an applicant from seeking judicial review of any migration decision where he or she fails to apply within 28 days, or, if the Court's discretion is invoked, at best 84 days. Thus the judicial discretion to extend the time limit for appeals to 56 days is statutorily defined and non-extendable, regardless of the reasons for delay.

3.2 RILC's central objection to these measures is that they would, in our experience, cause substantial unfairness and injustice in some cases where individuals are denied the right to appeal, which in turn, we consider wholly unnecessary and unjustified. Some individuals would not only be deprived of the fundamental right to access judicial review and to thus have their case heard, but in some cases, would also be deprived of relief from failures of administrative decision makers to exercise their jurisdiction lawfully. Substantial failures of justice would be want of a remedy.

3.3 Thus, the Bill fundamentally fails to properly distinguish between meritorious and unmeritorious applications for judicial review by applying the non-extendable time limits to all applicants. All will be caught by the provisions regardless of the merit of the case or reasons for delay. In our submission arbitrary and absolute time limits are a crude and inflexible instrument inherently incapable of operating fairly and doing justice in many circumstances.

3.4 In this regard, we refer to and repeat our previous submissions to this Committee concerning the Judicial Review Bill at paragraphs 3.4 to 3.19 inclusive.

3.5 Further, we refer to the extraordinary and alarming mechanism which has been implemented in Departmental policy to provide recourse for applicants in cases where through no fault of their own, but rather, through wrongdoing of the Department of Immigration, a person in immigration detention has missed the deadline for judicial review and thereby been deprived the ability to seek such review at all. The relevant policy states thus:

> **153 28 DAY TIME LIMIT FOR LODGING APPEALS WITH THE FEDERAL COURT**
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> 153.1 Background

> There have been a few cases (for example WAFE v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 254) where persons in immigration detention have, as a result of delay by immigration detention centre staff, lodged a judicial review application outside the 28 day time limit provided for in the Migration Act. The Full Federal Court has ruled that it is unable to extend the 28-day time limit.
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> To overcome this, the Minister has asked that these cases be assessed under ministerial intervention powers.
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> An assessment of the judicial review application should be undertaken and:
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> - if there is a strong case with substantial issues for the court to address and
> - no s417 power is available (or it has been ruled out as an appropriate option)
> - the case should be referred to the Minister for him to consider exercising his discretion under s48B.[4]

In our submission, the attempted resolution to 'overcome' this manifest injustice is a blatant and completely untenable conflict of interest. In practice, the Minister for Immigration, at her unfettered discretion, is the final arbiter of whether a decision of one of the government's own administrative decision making bodies was properly made, and whether, as the prospective respondent in judicial review, she forms the view that the other side which is seeking review has a *"strong case"* against her. We further note that, inexplicably, the threshold requirement extends well beyond the threshold proposed in the Bill under s 486E for unmeritorious cases which would warrant summary dismissal, being "no reasonable prospect of success". Thus, it clearly precludes any remedy for meritorious cases if they do not also have "strong" prospects.

3.6 Further, the available remedy under this policy is quite inappropriate and discordant with the remedy sought and lost by the applicant. The applicant's key remedy, if judicial review were available, is remittal to the administrative review body for reconsideration according to law. The remedy proposed under policy is for lodgment of a second protection visa application with the primary administrative decision making body (DIMIA). The section 48B power is not designed to deal with cases, but rather, cases where new information and/or changed circumstances arise related to claims for protection which were not previously available for consideration. A Refugee Review Tribunal decision potentially infected by jurisdictional error has nothing to do with such new or changed circumstances.

3.7 In our submission, this DIMIA policy underscores the importance of preserving a residual discretion for Courts to extend time limits, and the serious undermining of the doctrine of the separation of powers between the Executive, Judiciary and Legislature. The importance of judicial review of administrative decision-making is deeply rooted in

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[4] DIMIA, Protection Visa Procedures Manual - Purported further applications, Annexure 2 – Procedures - Minister's Guidelines - s48A cases and requests for s48B ministerial intervention.

the doctrine of the separation of powers, and in particular, the fundamental necessity of ensuring that the executive is made accountable for decisions affecting the rights and entitlements of individuals. We endorse the comments of the Senate Standing Committee for the Scrutiny of Bills on the perilous nature of ousting judicial review:

> Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with the law. It is cause for the utmost caution when one arm of government (in this case the executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.[5]

4. Jurisdiction of the Courts

(a) Direction of migration matters to the Federal Magistrates' Court (FMC)

4.1 One the key areas of the Bill are provisions designed to direct that the primary jurisdiction for judicial review at first instance is the FMC. To effect this, the FMC is conferred with original jurisdiction for most migration matters, whilst the Federal Court's original jurisdiction in such matters is largely removed, and it maintains a its function as an appellate Court. The Explanatory Memorandum to the Bill states, inter alia, that these changes will result in increased efficiencies and more expeditious handling of such matters, and that the FMC is a suitable forum for doing so in light of its function to deal quickly with " a high volume of less complex and shorter matters."

4.2 In this regard, RILC strongly supports any proposal which seeks to handle such matters more expeditiously and at less cost, but strongly opposes the Bill's proposal for doing, primarily given that it is completely inconsistent with key purposes and expertise of the FMC, and there is no clear evidence that the FMC has or could deal more effectively with migration matters.

4.3 We submit that judicial review of migration cases involves notoriously complicated matters of administrative law. Central to these matters is the identification of whether there has been there has been "jurisdictional error" in the making of the administrative review decision. Further, the law governing jurisdictional error involves particularly complex legal analysis, and is often difficult to apply in individual cases. We refer to the following comments by Kirby J in the High Court decision of *Respondent S152* concerning the complexity of the law of jurisdictional error and the duty of the Court in refugee matters involving unrepresented applicants:

> The applicants appeared before the Tribunal (and in the Federal Court) without legal representation. This made it appropriate for the Tribunal and that

[5] Scrutiny of Bills Committee report quoted in Submission No 8, National Council of Churches in Australia, page 3.

> Court to adopt an approach of special vigilance. This is because of the duty imposed on the Tribunal by the Act to approach its own functions in a generally inquisitorial and not strictly an adversarial manner[76]. Furthermore, the Federal Court would be aware of the importance of refugee decisions under the Act and that unrepresented applicants could not be expected to know about all the many nuances of that law. **Trained lawyers often find it difficult to distinguish jurisdictional from non-jurisdictional error. I have confessed to difficulty myself.** In such circumstances, it was proper for the Federal Court to engage in its own scrutiny of the approach adopted by the Tribunal and by the primary judge to see if a relevant undisclosed error appeared warranting a rehearing before the Tribunal. This is what the Full Court did.[6] (emphasis supplied)

4.4 Further, the development of jurisprudence in the administrative law area by the High Court in recent years has primarily involved migration cases. Thus, migration cases been at the cutting edge of administrative law.

4.5 We understand that the central function of the FMC has been deal with cases which are primarily factual in nature and lacking in legal complexity, including a substantial amount family law matters. Further, in accordance with the nature of the jurisdiction, we understand that those appointed to the FMC tend to have a background of experience in family or common law matters, rather than in judicial review and/or administrative law, which have tended to be one of the Federal Court's areas of expertise. Thus, we are concerned the Bill would result in a redirection of cases from the Federal Court, which is better placed to deal with such matters, to a jurisdiction less-equipped to handle such matters. We submit that this would represent an unjustified and inappropriate use judicial expertise and resources.

4.6 In addition, we submit that the current arrangements for remittal of less complex cases from the Federal Court to the FMC are appropriate, as it should be the Court which is likely to have greater expertise in such matters which should form the view as which jurisdiction is appropriate to handle a case.

4.7 Further, from our experience and anecdotal evidence, it simply not the case that the processes currently employed by the FMC for migration cases have generally resulted in more efficient or expeditious hearings or decisions. In fact, in some cases, the converse has been the case.

4.8 Finally, we submit that the Federal Court should be retained as the most appropriate jurisdiction to handle judicial review of migration matters, and that, in turn, it should be both better resourced and retain the power to remit less complex matters to the FMC.

(b) Review of primary decisions

4.9 RILC is opposed to the proposed measures in section 476(2) which would result in the High Court being the only jurisdiction empowered to review primary decisions. In RILC's experience, there are numerous examples where it is necessary for an applicant to

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[6] Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 (21 April 2004), at para 92.

seek review of a primary migration decision. This includes circumstances where an applicant has missed the deadline for seeking merits review of the decision through no fault of their own, or because of negligence on behalf of advisers. In addition, many migration decisions are not merits-reviewable, and it is therefore necessary for an applicant to seek review of the primary decision in the court. For example, a person in immigration detention may wish to seek judicial review of a determination by the Department of Immigration that their application for a bridging visa was invalidly made. In such a case, the Migration Review Tribunal would have no jurisdiction to review the determination. Another illustration is the case of a relative of an offshore applicant for a visa where there is no merits review available for the decision.

4.10 We submit that it is inappropriate that the High Court becomes the only court able to deal with review of primary decisions. In RILC's submission, it is undesirable for the High Court to become the court of first instance in such matters, on account of the inaccessibility of High Court procedures and the purpose of the High Court to primarily serve as an appellate court. We submit that the Federal Court is much more accessible to unrepresented applicants, and is therefore the appropriate court for dealing with first instance applications for review of primary decisions, many of which will be made by unrepresented applicants. In addition, the Federal Court has the power under Part 12 of its rules to make "Order 80" referrals to a pool of barristers willing to act pro bono. The High Court has no such mechanism. It is our submission that the proposed measure represents an unwarranted increase of the burden on the High Court, and that the power to review primary decisions should be retained by the Federal Court.

5. Summary judgment

5.1 The Bill proposes to give the Courts identical powers to give summary judgment where the court is satisfied that the other party has "no reasonable prospect of successfully defending the proceeding". Further, an application need not be "hopeless" or "bound to fail" for it to have a reasonable prospect of success.

5.2 At present, the Courts have the general power to make summary judgment where there is "no reasonable cause of action" or where the grounds of an application are clearly untenable. The Courts have developed a principles which strike a delicate balance reflecting the need to ensure efficiency in the judicial system while recognizing the fundamental importance of access to judicial review of administrative decisions. The Explanatory Memorandum states that the intention of the amendment is to broaden the power of the courts to summarily dispose of proceedings (p2, para v). In RILC's submission, the proposed amendment to broaden the Courts' power to summarily dismiss is unnecessary, lacks clarity, and has the potential to undermine the basic safeguard of judicial review with potentially grave consequences. Access to the courts to seek judicial review is a fundamental Constitutional, common law and human right and it is therefore appropriate that summary dismissal is exercised with caution.

5.3 The proposed powers would apply to all matters before the court, not just migration matters, and therefore represent a radical departure from the current cautious approach to exercise of the power to summary dismiss by the courts.

5.4 We submit that the Courts already have appropriate and sufficient powers to make summary judgment where an application is manifestly groundless, and there is no need to broaden the powers of the court. RILC submits that the stated justification for the

proposed amendment is itself open to question. In RILC's submission, the statement in the Explanatory Memorandum that "the Government has won over 90 per cent of all migration cases decided at hearing" is potentially misleading, as it does not include the amount of applications which the Minister agrees to remit the matter by consent prior to the matter coming before a hearing, which we understand is not an insubstantial number. We submit that there is no evidence that the courts are unable to perform their functions or that the current powers of the court have miscarried.

5.5 In RILC's experience, many applicants in migration matters are unrepresented or often are not able to secure pro-bono representation until some time after proceedings have commenced. In such circumstances, an unrepresented applicant faces great disadvantage in properly articulating the grounds of an application. The burden on the court in assessing whether an application is meritorious is far greater where an applicant is unrepresented. RILC is concerned that if the powers of summary judgment are broadened, this may lead to the summary dismissal of an application where the application has merit but an unrepresented applicant, unfamiliar with the technical aspects of jurisdictional error, has been unable to properly articulate the grounds of review. In this regard we refer to the following comments of Kirby J in the High Court decision of *Dranichnikov*, where a viable ground of judicial review was not apparent until the case was before the High Court:

> Like the primary judge, the Full Court appears to have been distracted by a multitude of untenable points argued by the applicant. One of these was described, fairly, as a "quite ridiculous quibble"[21]. Others were rejected as "slight" and "of no significance"[22]. Unfortunately, this is what commonly happens when litigants, unfamiliar with the intricacies of the law, are obliged (or choose) to present their cases without legal representation. **The risk is that the compounded effect of so many irrelevancies and false grounds will divert the court and obscure a viable ground that passes unnoticed…. I do not consider that the lack of focus, confusion, poor judgment about arguable issues and failure earlier to specify the basis on which he now succeeds constitute reasons, on discretionary grounds, for refusing the applicant constitutional relief[64].**[7] (emphasis supplied)

5.6 Further, as mentioned above, the law governing jurisdictional error is notoriously complex and difficult in application. The complexity of this area of law significantly increases the risk of error in a decision on summary judgment. An application, which may prima facie appear to be unmeritorious, may nevertheless have prospects of success when properly considered and articulated by a represented applicant. RILC is concerned that the proposed measures may well lead to the summary dismissal by lower courts of meritorious applications. In this regard, we further refer to our comments regarding the Federal Magistrates Court's suitability for determining administrative law matters.

5.6 RILC is also concerned that were the proposed amendments enacted, there may be a significant increase in applications by the Minister for summary judgment. The proposed amendment therefore has the potential to be used as a strategy to discourage applicants

[7] *Dranichnikov v Minister for Immigration and Multicultural Affairs*; Re Minister for Im [2003] HCA 26 (8 May 2003)

from pursuing applications, before an applicant has had the opportunity to properly articulate the grounds of review with the benefit of legal assistance. There is also likely to be an increase in litigation seeking review of summary judgments or challenging applications for summary dismissal. This would undermine the very intention of the proposed amendment to decrease litigation and delays.

5.7 As RILC has submitted to this Committee previously, we are gravely concerned about any amendment which limits the fundamental safeguard of judicial review. RILC is concerned that for the perceived - albeit potentially illusory - benefit of achieving increased efficiencies and cost reduction, the proposed amendments would necessarily place some people's lives at further, grave risk. Such a sacrifice of fundamental safeguards to individual rights and obligations – including protection from persecution or permanent separation of family- cannot be justified. Laws which seek to preclude judicial review by summarily dismissal should be exercised with a high degree of caution in the context of any case in which an individual is seeking review of alleged injustice of an administrative decision. However, as previously submitted to this Committee, the importance of adequately protecting a basic safeguard such as the right to judicial scrutiny is particularly acute when the decision is one affecting refugees. In such cases, where the consequences of an unlawful decision are extremely grave, namely, being sent back to a situation of persecution, it is vital that sufficient safeguards are preserved. In our submission, the proposed amendment to broaden the power to summarily dismiss runs the very real risk and alarming consequence that a person may be sent back to a place where they face torture or death, in contravention of Australia's international obligations. These obligations include those of non-refoulement under the Refugees Convention, the Convention against Torture and the International Covenant and Civil and Political Rights.

6. Measures intended to discourage 'unmeritorious' litigation

6.1 The Bill proposes to insert a new Part 8B into the Act which would prohibit a person from encouraging a litigant to commence or continue migration litigation where the litigation has "no reasonable prospect of success" and either the person has not given proper consideration to the prospects of success or the purpose of the litigation is unrelated to the objectives of the application. Contravention of this prohibition may result in a personal costs order against the person, or where the person is a lawyer an order that the lawyer's costs are not payable by the client. Further, there is a proposed provision for overriding legal professional privilege in proceedings to determine whether such orders should be made. In addition, the Bill would introduce a requirement that when filing a document to commence migration litigation, a lawyer must certify in writing that there are reasonable grounds for believing the migration litigation has a reasonable prospect of success.

6.2 RILC submits that the existing framework for ensuring that migration agents, lawyers and members of the legal profession do not encourage the bringing of unmeritorious migration cases is adequate. The courts already hold powers to make costs orders against lawyers and to dismiss vexatious proceedings. The proposed amendments represent a radical departure from the current framework and the onus is on the Government to show why the current provisions are inadequate for dealing with unmeritorious applications. To require a lawyer to certify that an application has reasonable prospects of success is a redundant measure, which may have the extraneous effect of intimidating lawyers and

have a 'cooling effect' on the provision of pro bono legal advice in a complex and changeable area of law. RILC is concerned the effect of the provisions will be to decrease the access of applicants in migration matters to legal advice, which will in turn increase the making of applications by applicants who are unable to obtain pro bono legal advice and assistance in properly articulating the grounds of review. This can only increase the burden on courts and diminish the quality and efficiency of the decision making process.

6.3 As RILC has argued previously, we are seriously concerned that measures which seek to limit a migration agent's or lawyer's ability to properly advise a client do not create a situation of conflict of interest. RILC is concerned that any measures adopted do not drive a wedge between applicant and adviser to the extent that advisers are placed in a situation in which they are prevented from freely and fully acting in the best interests of their client. A fundamental, guiding obligation of legal advisers is not to act for a client where there is a conflict of interest which would in any way affect the agent's ability to act in the best interests of their client.[8] In addition, in the area of provision of legal and other advice in the context of fiduciary relationships (e.g. lawyer/client; doctor/patient etc), acting in the 'best interests' of the 'client' is, for good reason, considered essential and sacrosanct.

5.1 Further, with scant justification, the provision would effectively require a legal adviser to surrender legal professional privilege to defend an allegation that did not beach the requirement not to encourage unmeritorious litigation, by reason of having to give evidence that they gave "proper consideration to the prospects of success". Legal professional privilege is well-recognised by the Courts as one of the core principles which ensures protection of a person's fundamental right of access to full and proper legal advice, without external interference. In this regard, Kirby J commented thus in the High Court decision of *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer C* :

> …In so far as this Court has dealt with the topic of legal professional privilege…it has consistently emphasised the importance of the privilege as a basic doctrine of the law and a 'practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated. However, vigilance is required against accidental and unintended erosions of the right. [86] Legal professional privilege is also an important human right deserving of special protection for that reason… .[9]

In our submission, this measure is a manifestly disproportionate response which lacks sufficient justification, particularly in light of importance of the rights it seeks to erode.

6.4 RILC is also concerned that the proposed measures are unclear in their scope and have the potential to impact on a broad range of providers of pro bono legal assistance. The Explanatory Memorandum states that the intention of the measures proposed is to enable Courts to "make a personal costs order against an adviser promoting litigation behind the

[8] See Item 2.1A (d), Schedule 2 of Regulation 8 of the Migration Agents Regulations 1998
[9] [2002] HCA 49.

scenes if the person has given no proper consideration to the prospects of success or has acted for an ulterior purpose". RILC is concerned about the completely unclear scope of this proposed provision and the chilling effect it is likely to have on the provision of advice to applicants about their legal options.

6.5 In this regard, many pro bono providers and community legal services offer limited advice and assistance where an impecunious person is offered basic advice about the right to seek judicial review or other appeals. Such services are necessarily limited by lack of resources and often not able to provide comprehensive advice on the merits of judicial review. Typically, a client will be provided with preliminary advice about the options for seeking further review or Ministerial interview of an administrative decision, the potential costs of certain actions and the immigration consequences with respect to bridging visas and future applications. A number of agencies provide pro bono advice concerning the merits of seeking judicial review and the procedure for making an application, while the agency may be unable to actually represent the applicant in court. Under the proposed provisions, a worker at a community legal centre who advised a client of her rights to seek review including time limits and how to make an application may consequently be penalised if they are seen to have encouraged the making of an unmeritorious application. The proposed measures therefore run the risk of further limiting the access of impecunious applicants to basic legal advice about their rights. It is difficult enough at present to access competent advice in this complex area of law. In RILC's experience, such measures are likely to discourage pro bono advisers from assisting due to the potential penalties and arguments about whether the penalties are justified. In our submission the proposed measures are likely to further deprive applicants of access to competent pro bono advice, and are therefore likely to lead to an increase in unmeritorious applications by unrepresented applicants, thereby compounding rather than lessening the burden on the court.

Refugee & Immigration Legal Centre Inc.
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