Senate Legal and Constitutional Legislation Committee Inquiry into provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006

Joint submission of the Public Interest Law Clearing House (Vic) Inc and the Victorian Bar 23 May 2006

I. REPUDIATION OF AUSTRALIA'S SUBSTANTIVE OBLIGATIONS UNDER THE REFUGEES CONVENTION

1. This Bill is a repudiation of Australia's obligations under the Convention Relating to the Status of Refugees 1951 ('**the Convention**')[1] which Australia, as a foundation member, has committed itself to uphold.

2. In the Explanatory Memorandum to the Bill, it is asserted that *"[t]he extension of offshore processing arrangements to all persons who arrive unlawfully by sea will not impact on Australia's implementation of its refugee protection obligations."* This statement is not correct.

3. Australia is asserting that it will meet its protection obligations by thrusting upon a non-contracting State, without any contractual obligation under the Convention to Australia or any other country, *all* of Australia's obligations. The Convention simply does not support this interpretation. These are non-assignable obligations. Even if they were assignable they could not be assigned to a non-contracting party, such as Nauru. On the most favourable interpretation, Australia is purporting to delegate its protection obligations to a non-contracting party. Also, it is doing so on the basis of criteria that do not guarantee anyone determined to be a refugee any *right* of protection under the Convention in Australia.

4. It must follow that the proposed legislation would constitute a failure by Australia to undertake protection obligations to people determined to be refugees. If each contracting State introduced the proposed legislation, it would render the Convention nugatory so that no refugee would be entitled to protection, and no contracting State would owe protection obligations. The reason for that outcome is that contracting States, by refusing to allow putative

[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954)

refugees access to the system they have established to determine a person's entitlement to refugee status, will prevent refugees from accessing the protection the Convention guarantees them.

5. Article 31 of the Vienna Convention on the Law of Treaties 1969 provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, including its preamble and annexes.[2] It is fundamental to the bona fide performance of a treaty obligation by a contracting party that it will not act in a manner that prevents it from performing its obligation. Yet, that is precisely what Australia is endeavouring to do by enacting this Bill.

6. This Bill, by refusing to allow persons who arrive in mainland Australia access to the benefit of its protection obligations, will mean the following protective provisions of the Refugees Convention could not apply in Australia to persons covered by the Bill unless they are entitled to return to Australia as refugees after completion of whatever processing occurred at the "declared country" to which they were sent:

   a. Article 16 which provides for the right of a refugee to have free access to the courts of law on the territory of all Contracting States.

   b. Articles 17- 24 which oblige States to accord refugees a range of rights and entitlements, including the right to engage in wage-earning employment, self-employment, liberal professions, housing, public education, public relief and the benefits of labour legislation and social security.[3]

   c. Article 26 which provides for the right of freedom of movement, giving refugees the right to choose their place of residence and to move freely within the territory of the State.[4]

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[2] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S 331 (entered into force 27 January 1980).

[3] There are various qualifications under Articles 17-24. For example, the right to elementary education is absolute and accords refugees the same rights as nationals. However, the right to education other than elementary, is only to: "treatment as favourable as possible, and, in any event, not less favourable thatn that accorded to aliens generally in the same circumstances". Other of these articles apply not to "refugees", but to "refugees lawfully staying in the territory".

[4] Article 26 applies only to "refugees lawfully in its territory [that of a contracting State]".

d. Article 31 which provides that there shall be no penalisation by reason of illegal entry or presence, other than necessary restrictions on movements until their status is regularised or they obtain admission into another country. In respect of admission to another country, Article 31 requires Contracting States to "allow such refugees a reasonable period and all the necessary facilities to obtain admission to another country". Plainly, involuntary deportation is not authorised by Article 31.

7. The driving force behind the Bill is the government's political embarrassment at the granting of asylum to 42 West Papuan refugees who arrived by boat on 18 January 2006. This Bill, which arises out of concern for damage, and potential further damage in the future, to relations with Indonesia, from which the West Papuan refugees seek refuge, is not a bona fide implementation of Australia's protection obligations and is therefore in violation of the Convention.

8. The Preamble to the Refugees Convention refers to assuring refugees the widest possible exercise of fundamental rights and freedoms to be achieved through international cooperation. It is important to remember the spirit and historical context in which the Convention was drafted. The Convention was the second major human rights treaty adopted by the United Nations, having been preceded only by the Genocide Convention.

9. A major impetus for the Convention was the racial discrimination of States towards Jewish refugees fleeing Nazi Germany and facing rejection at the frontier by neighbouring States. For example, Switzerland refused entry to between 24,500 and 30,000 Jewish refugees between 1938 and November 1944.[5]

10. The driving force behind this Bill, which is to deny protection obligations to West Papuan refugees, violates the object and purpose of the Convention, and is precisely the type of State action the Convention was intended to prohibit. It is no answer to that proposition to contend that the Bill also discriminates against other refugees.

[5] Independent Commission of Experts Switzerland– Second World War, *Switzerland, National Socialism and the Second World War*: *Final Report*, Pendo Editions, Zurich, 2002, page 118, access via http://www.uek.ch/en/_synthese.htm

11. Furthermore, there is no rational reason why a person arriving by sea should be treated differently to those who make asylum claims after arriving in Australia by air. In many cases, it will be the unauthorized arrivals, and particularly those who enter Australia by sea, who are the refugees under greatest threat. They will have had to leave their home countries urgently. They will have been unable to obtain a passport or a visa to Australia due to the critical situation in their home country.

12. In a study of the Edmund Rice Centre in 2000 based on statistics provided by DIMIA, 85% of recent detainees (ie unauthorised arrivals) were found to be genuine refugees fleeing persecution, a higher rate than that of refugee applicants living in the community.[6] As explained above, the proposed legislation would penalize refugees for the manner in which they arrive in Australia, and therefore is clearly inconsistent with the intention and purpose of Article 31.

13. Of course, the Convention provides for protection obligations to be owed to 'refugees'. However, for the Convention to operate in accordance with its intention, in the present context that must be taken to include putative refugees. The High Court of Australia in *Singh* recognised that, in the context of the implementation of the Convention under Australian law, the word "refugee" is to be taken to include a putative refugee ie, a person arriving in Australia and making a bona fide claim under the Convention, which claim has not been rejected by the contracting State.[7]

14. If the Convention were to be interpreted on the basis of 'refugee' meaning a 'person determined by a contracting state to be a refugee' (which is not what the Convention says):

    (a) contracting states can, as Australia is purporting to do, decline to determine whether bona fide claimants are refugees thereby declining to undertake *any* protection obligations under the Convention;

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[6] Zachary Steel and Derrick M. Silove, 'The mental health implications of detaining refugees' (2001) 175 *Medical Journal of Australia* 596, 598.

[7] *Minister for Immigration and Multicultural Affairs v Singh* 209 CLR 533 (2002). Although the case was decided by a 3/2 majority, the court was unanimous in holding that the phrase "his admission . . . as a refugee" referred to "his entry into that country" or "his putative admission as a refugee". *Id* at 539 (para 5) per Gleeson CJ; at 548 (para 31) per Gaudron J; at 557 (para 61) per McHugh J; at 563 (para 87) per Kirby J; and at 592 (para 162) per Callinan J.

(b) contracting states could engage in anticipatory repudiation of the Convention with impunity by refusing putative refugees access to the State's procedure for determining refugee status;

(c) protection obligations under the Convention would therefore become a matter of discretion, rather than obligation, which is contrary to the Convention.

15. Before Parliament rushes into legislation which is such a clear and flagrant repudiation of its treaty obligations, it should be satisfied that the above arguments are not well founded. It is respectfully contended that the arguments are not only well founded but should be accepted.

II. REPUDIATION OF AUSTRALIA'S PROCEDURAL OBLIGATIONS UNDER THE CONVENTION

16. The process for Contracting States to determine refugee applications is not prescribed by the Convention. It is an implicit obligation under the Convention that a contracting State establish its own process in order to determine whether a person making an on-shore claim in a contracting State is entitled to be owed protection obligations by that State. Australia, as a founding party to the Convention, has accepted that it was obliged to have a process for determination of the refugee status under the Convention of persons arriving in Australia and seeking its protection.

17. While there will undoubtedly be variance in the procedures each State will adopt the *essential* and *common* requirement is that the procedure provide for a bona fide determination of refugee status in order to determine if the State has protection obligations to the putative refugee. The Committee can be satisfied that the process in use in Australia's offshore processing facilities *does not meet* Australia's procedural obligations under the Convention to determine a person's refugee status. The Bill does not provide for any process to be used for processing refugee claims off-shore that will determine whether *Australia* owes protection obligations to the putative refugees it intends to deport for off-shore processing.

18. The Explanatory Memorandum to the Bill merely states that "*[i]n the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commission for Refugees (**'UNHCR')** or by trained Australian officers using a process modelled closely on that used by the UNHCR."*[8] The essential point is that the Bill contains no provision for a person found by that process to be a refugee to be *entitled* to protection obligations by Australia, or by any other contracting State.

19. The further fatal defect is that Parliament cannot be satisfied that the Bill confers a right to a bona fide determination procedure. The only reference to the process for determination in the Bill is in s 198A(3) which merely refers to "effective procedures" without adequate particularisation of what this entails. An "effective procedure" is not necessarily a fair procedure or a procedure regarded by Australia as reasonable or as one that meets its requirements. Section 198A(3) merely provides that:

> *"(3) The Minister may:*
> *(a) declare in writing that a specified country:*
> *(i) provides access, for persons seeking asylum, to **effective procedures** for assessing their need for protection; and*
> *(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and*
> *(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and*
> *(iv) meets relevant human rights standards in providing that protection; and*
> *(b) in writing, revoke a declaration made under paragraph (a)."*

20. There is no elucidation on what constitutes "effective procedures" for assessing refugee status. There is no requirement that the specified country be a signatory to the Convention. There is also a difference between the Minister's declaration as to a matter, and whether that matter in fact and law meets the Convention's requirements.

[8] Explanatory Memorandum, *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006 (Cth), paragraph. 6

III BONA FIDE DETERMINATIONS BY AUSTRALIA

21. Australia should fulfil its procedural obligations under the Convention by extending to the category of refugees who would be covered by the Bill the same system for processing as applies to all other refugees arriving in Australia by air. The Australian legal system is founded on access to legal assistance, transparency, accountability and mechanisms for review. Such characteristics are fundamental to ensuring fair and reasonable decision-making and protecting against the risk of error, and therefore refoulement in breach of the Convention. Any process Australia directly, or indirectly, implements for assessing refugee claims should have these qualities.

22. Available statistics regarding the decision-making of the Refugee Review Tribunal shows that there is a significant percentage of cases where the primary decision that a person is not a refugee is overturned on merits review. The percentage of cases where the decision of the Department is set aside varies according to the nationality of applicants, but is as high as 86% in relation to some groups, such as those for Iraq. The following table shows the percentage of decisions set aside by the RRT between 1 July 1993 and 28 February 2006 with respect to certain countries:[9]

Country	**Set aside rate**
Afghanistan	79 %
Democratic Republic of Congo	42 %
Eritrea	46%
Iran	38%
Iraq	86%
Kuwait	61%
North Korea	33%
Palestinian Territory (West Bank/Gaza)	39%
Papua New Guinea	30%
Solomon Islands	43%
Sri Lanka	25%
Zimbabwe	55%

[9] Refugee Review Tribunal, 'Cases finalized by country since 1993' (2006) <http://www.rrt.gov.au/statistics.htm > at 16 May 2006

23. In addition, statistics available from the RRT show that between 1 July 1993 and 28 February 2006, 12.4% of decisions of the RRT were subsequently set aside, either by consent or by court judgment.[10]

24. Access to legal assistance is of great value in maintaining the quality of the decision-making process because refugees are assisted in articulating their claims. Refugees already face significant barriers in making their claims, including lack of education, language barriers and cultural barriers. Access to independent legal assistance is crucial in ensuring that a person's claims are properly articulated to decrease the risk of error in decision-making. Under the present regime, refugees who arrive in Australia and are subject to mandatory detention are entitled to receive legal assistance provided by the Australian government under the Immigration Advice and Application Assistance Scheme (IAAAS).[11]

25. A process which lacks a guarantee of the mechanisms for review of decision-making and access to legal assistance will result in an increased risk of error in decision-making. Errors by decision-makers increase the risk of refoulement. Article 33 of the Convention contains a core obligation prohibiting a State to return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. In addition, Article 33 of the Convention and Article 3 of the Convention Against Torture[12] prohibits a State from returning a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

26. The Government asserts in the "Outline" in the Explanatory Memorandum on the Bill that "Australia's offshore refugee processing regime includes provisions for a merits review of refugee decisions".[13]

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[10] Ibid.
[11] Department of Immigration, 'Fact Sheet 63: Immigration Advice and Application Assistance Scheme' (2005) < http://www.immi.gov.au/facts/63advice.htm > at 16 May 2006.
[12] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 U.N.T.S 85 (entered into force 26 June 1987)
[13] Explanatory Memorandum, *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006 (Cth), paragraph 20 in the "Outline".

27. However, there is nothing anywhere else in the Explanatory Memorandum that supports this – nothing about any provision for merits review in the "Notes on Individual Clauses" or the notes to the "Schedule 1 Amendments". Nor is there anything in the *Migration Act* 1958 (Cth) as it stands; or in the *Migration Regulations* 1994 (Cth), Part 4 Review of Decisions; or in the Bill about any right to merits review.

28. The Department of Immigration and Multicultural and Indigenous Affairs Fact Sheet 76 on Offshore Processing Arrangements (last revised 23 May 2005) asserts the fact of review of decisions, but no right to any review.

29. There is certainly no right to review by the Refugee Review Tribunal because section 411(2)(a) of the *Migration Act* excludes "decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made".

30. Nor are offshore decisions amenable to judicial review or supervision in any Australian court, whether under the *Administrative Decisions (Judicial Review) Act* or by way of application for Constitutional writs, because any offshore decision about refugee status will not have been made under Australian law. Refugees sent offshore under the proposed legislation will be abandoned to a legal black hole.

31. The process for determining a person's refugee status in offshore detention facilities is unparticularised. The Committee therefore cannot be confident that these processes comply with Australia's Convention obligations or sufficiently protect against the risk of refoulement.

32. The provision of information concerning the proposed procedure for determination of refugee claims in declared countries will not suffice. What is necessary as a procedural minimum is a legislative stipulation that ensures the procedure is not only 'effective' but is fair and reasonable and is one that provides for merits review to minimise the risk of error.

IV. DETENTION AS A PUNITIVE MEASURE IN VIOLATION OF ARTICLE 31 OF THE CONVENTION

33. The proposed legislation would also penalize refugees for the manner in which they arrive in Australia by subjecting them to detention. This is a clear violation of Article 31 of the Convention. Article 31 provides that:

> *'1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*
>
> *2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'*

34. The proposed changes to the *Migration Act* allow for indefinite detention offshore. Persons subject to the new regime could well be left stranded. The proposed system of discretionary detention with no right to seek review before a court exercising judicial power is in violation of Article 9 of the International Covenant on Civil and Political Rights ('**ICCPR'**).[14] The Australian practice of non-reviewable detention has been declared by the Human Rights Committee to be in breach of Article 9.[15]

35. The proposed offshore processing regime will have serious adverse consequences for the mental health of refugees. Evidence indicates that where individuals have suffered human rights violations they are vulnerable to mental disturbances including Post Traumatic Stress Disorder ('**PTSD'**), anxiety, and depression. Such persons require a safe, stable and supportive environment in which to recover.[16] Detention exacerbates the effects of the trauma the detainees are suffering from to the extent that they are extremely vulnerable to

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[14] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 71 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

[15] Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', p 208 < http://www.unhcr.org/cgi-bin/texis/vtx/publ > at 16 May 2006 (citing *A v Australia*, Communication No. 560/1993, Human Rights Committee, 3 April 1997, which the article discusses at greater length on p 226).

[16] Zachary Steel and Derrick M. Silove, above n 7, 598-599

acts of self-harm and suicide. Such tragic incidents have already been reported by the Human Rights and Equal Opportunity Commission.[17] Furthermore, the Commission has reported that psychological assistance was of little help for detainees who perceived the cause of their mental health problems to be their detention. Some detainees who have also experienced prisons in Australia have stated that 'prison is better'.[18]

36. Article 37 (b) of the Convention on the Rights of the Child,[19] ('**CROC')** provides that:

> "*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*"

37. The Bill violates Article 37(b) because there is no provision to ensure practice conforms with Article 37(b) in ensuring detention is used as a last resort and for a short term only with respect to children.

38. The Bill abrogates in relation to people who enter Australia unauthorized and by sea the effect of changes introduced in 2005 in which the Parliament affirmed in section 4AA(1) of the *Migration Act* 1958 as a principle that a minor shall only be detained as a measure of last resort.[20] It does so because children in that class are, with everyone else, taken to a declared country where they are detained – detention is not at all a measure of last resort. Moreover, such children are denied the possibility of other mitigating possibilities introduced in the same amending Act that introduced section 4AA(1), the *Migration Amendment (Detention Arrangements) Act* 2005, such as the Minister's power under section 197AA (and following) to make residence determinations in relation to one or more specified persons.

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[17] Australian Human Rights and Equal Opportunity Commission, 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner' (2001) p28

[18] Australian Human Rights and Equal Opportunity Commission, 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner' (2001) p25
< http://www.hreoc.gov.au/Human_RightS/idc/index.html > at 16 May 2006

[19] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990)

[20] *Migration Act* 1958 (Cth), section 4AA

39. The Government claims that people taken to declared countries under section 198A of the *Migration Act* 1958 are not in detention. Section 198A(4) provides that an "offshore entry person" taken to a declared country under that section is "taken not to be in immigration detention". As amended by the Bill, that provision will be section 198A(4(b), merely substituting "designated unauthorized arrival" for "offshore entry person". DIMIA Fact Sheet 76 on Offshore Processing Arrangements asserts that "Asylum seekers are not detained under Australian law, or the laws of Nauru or Papua New Guinea, but are instead granted Special Purpose Visas by those countries to facilitate their stay while they await processing and resettlement or return". It also notes that "since 1 March 2005, the centres in Nauru have been maintained on an 'open centre' basis which allows residents freedom of movement between 8 am and 7 pm from Monday through to Saturday, with some exclusion zones such as the airport". As stated by John von Doussa QC, president of the Human Rights and Equal Opportunity Commission and Human Rights Commissioner Graeme Innes AM in their 12 May 2006 press release on this Bill, "Being held in an offshore processing centre is *without doubt* a form of detention" (emphasis added).

40. Detention is not a place for children to spend their formative years as the cost to their physical and mental health is severe. The proposed legislation will deny young refugees a childhood and a nurturing environment in which to grow and develop.

41. No further information is needed given that the fundamental breach amounting to repudiation of the Convention is apparent from the Bill and the *Migration Act* it is designed to amend, and the other materials to which this submission refers. However, should any member of the Committee be in any doubt as to the need to withdraw this Bill, they might consider whether it might be appropriate to obtain information on the following lines:

    a. Qualitative and empirical data regarding the impact of the arrangements to date on the long-term health of those who have been detained including the incidence of long term mental health problems.

    b. Information regarding the number of children and young persons who

have been detained under the offshore processing arrangements and the length of time, and average length of time, of such detentions.

c. Information regarding the length of detention of adult persons in offshore processing arrangements, and the average length of such detention.

d. Independent information regarding the conditions of the offshore detention centres to date, including information regarding access to and standards of health care, education, sanitation and nutrition.

RECOMMENDATIONS

PILCH and the Victorian Bar recommend to the Committee that the Bill should be withdrawn in its entirety as it is a repudiation of Australia's substantive and procedural obligations under the Convention and has the potential to seriously undermine Australia's international standing and repute. Allowing the prospect of a short term gain (ie Australia's relationship with Indonesia) to override principle (ie Australia's international treaty obligations) will come at a long term cost namely, a serious stain on Australia's human rights standing and record.

Public Interest Law Clearing House and the Victorian Bar

23 May 2006

APPENDIX

1. This submission to the Senate Legal and Constitutional Legislation Committee is made jointly by the Public Interest Law Clearing House (Vic) Inc (**'PILCH'**) and the Victorian Bar, and is based on the collective experience of PILCH and the Victorian Bar. This experience is drawn from, amongst other things, appearances before the Refugee Review Tribunal (**'RRT'**) and the Migration Review Tribunal (**'MRT'**), reading and listening to large numbers of transcripts and tapes of hearings before these Tribunals, and scrutiny of a large number of the Tribunal decisions and the material on which they are based. It also derives from facilitating representation for, and acting, in migration cases at the judicial review stage in the Federal Magistrates Court, Federal Court of Australia and High Court of Australia.

What is PILCH?

2. PILCH is a not-for-profit, community legal service based in Melbourne. PILCH facilitates the provision of pro bono legal assistance through four schemes:

   (a) Public Interest Law Scheme;

   (b) Victorian Bar Legal Assistance Scheme (**'VB LAS'**);

   (c) Law Institute of Victoria Legal Assistance Scheme (**'LIV LAS'**); and

   (d) Homeless Persons' Legal Clinic (**'HPLC'**).

   HPLC does not assist in migration matters and therefore will not be discussed further in this submission.

3. The Public Interest Law Scheme, VB LAS and LIV LAS (**'the Schemes'**) receive, assess and refer requests for pro bono legal assistance to law firms and barristers. The Schemes only refer matters for assistance where clients meet a means test, where their matter has legal merit and community assistance is not available from another source (*e.g.* legal aid or a community legal centre).

4. The Public Interest Law Scheme has an additional criterion. It only refers *public interest* matters for assistance. Public interest matters are:

(a) legal matters for not-for-profit organisations with public interest objectives; or

(b) individuals' matters which raise an issue which requires addressing for the public good and which:

(i) affects a significant number of people, not just the individual;

(ii) is of broad public concern; or

(iii) impacts on disadvantaged or marginalised groups.

PILCH and the Victorian Bar

5. The Victorian Bar is a member of PILCH. It has also sub-contracted the administration of VB LAS to PILCH. The administration of VB LAS by PILCH is also subject to the supervision of the Victorian Bar Council. Barristers who are members of the Victorian Bar volunteer and provide pro bono legal assistance through the Public Interest Law Scheme and VB LAS.

PILCH and Migration

6. At PILCH, the majority of migration matters are dealt with by VB LAS. In the year from January 2005 to December 2005, migration matters constituted the largest body of pro bono referrals made by VB LAS. There has been a significant increase in migration matters since the passage of the *Migration Litigation Reform Act* 2005 (Cth). The new provisions have resulted in migration matters accounting for approximately 70% of referrals by VB LAS in the months January to May 2006.

7. The majority of inquiries to the Schemes for legal assistance in migration matters are from refugees before the courts in existing judicial review proceedings that have been commenced prior to making a request for legal assistance. In these cases, arrangements are made for a barrister to assess the merits of the client's application for judicial review and, if it is determined that the application has legal merit (*i.e.* an arguable case with reasonable prospects of success), to represent the client in the proceeding, by preparing for and appearing at the hearing.

8. The Schemes receive inquiries in refugee matters from a number of sources, including from:

- refugees directly;
- community legal centres, including specialist migration centres;
- welfare agencies that assist refugees;
- Victoria Legal Aid; and
- members of the community who are friends or supporters of refugees.

Generally, the Public Interest Law Scheme and VB LAS do not assist with referrals to lawyers for clients at the merits review stage before the RRT or MRT or with applications under ss 48B, 351 or 417 of the Migration Act.[21] The Public Interest Law Scheme has also facilitated legal assistance to refugees in relation to issues concerning the lawfulness of their detention and removal from Australia. For example, in 2005 PILCH facilitated legal assistance for an refugee who had been deported while a United Nations complaint was still under determined. He was returned to Australia following Federal Court proceedings brought on his behalf.

Previous Relevant Submissions on Migration Act Reform

9. PILCH and the Victorian Bar have previously provided a number of relevant written submissions.

10. PILCH and the Victorian Bar jointly contributed a detailed written submission to the Migration Litigation Review conducted by Hilary Penfold QC on 25 November 2003.

11. On 29 April 2004 PILCH and the Victorian Bar made a submission to the Committee on the *Migration Amendment (Judicial Review) Bill 2004*. Mr Christopher Horan of the Victorian Bar also gave oral submissions on behalf of the PILCH and the Victorian Bar to the Committee on 12 March 2004. In its report of June 2004, the Committee referred to these submissions (see par 3.71 of Report). This submission challenged the underlying assumptions of the Government's views on litigation in the migration jurisdiction and, in particular, raised concerns with the definition of 'unmeritorious' cases.

12. In 2005, PILCH and the Victorian Bar subsequently made a submission to the Committee regarding the *Migration Litigation Reform Bill* 2005 (Cth).

[21] *Migration Act* 1958 (Cth)