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Robert Garran Offices  
National Circuit  
Barton, ACT, 2600

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Dear Madam,

**RE: NLA SUBMISSION TO THE MIGRATION LITIGATION REVIEW**

Thank you for the opportunity to contribute to the Migration Litigation Review.

The Legal Aid Commissions have for many years provided advice and representation in migration matters. Currently the Commissions grant aid, subject to means, merit and legal aid guidelines, in migration litigation and provide advice and representation to visa applicants under the Immigration Advice and Application Assistance Scheme.

In view of the short time period allowed for submissions we have concentrated on making the most salient points, concentrating in particular on the first term of reference *"Measures for the more efficient management and quicker disposition of migration cases, and for the reduction of the large numbers of unmeritorious cases"*.

The Commissions are committed to improving access to justice. We consider that management of migration cases in the courts cannot be looked at in isolation from the management of migration cases throughout the decision making process from applications to the Immigration Department to review applications to the Migration Review Tribunal, Refugee Review Tribunal and the Administrative Appeals Tribunal.

Fair and transparent decision making and access to advice and representation for financially disadvantaged applicants will lead to improved and more timely outcomes at an earlier stage and discourage unmeritorious applications.

**Terms of Reference**

***a) Measures for the more efficient management and quicker disposition of migration cases, and for the reduction of the large numbers of unmeritorious cases, including procedures, time limits, grounds for dismissal of applications, restrictions on appeals such as leave requirements and fee rules including provisions for waivers and exemptions***

We believe that it is not possible to consider a review of migration litigation in the courts without considering the migration system as a whole to understand why many applicants have recourse to the courts.

We believe that the following important matters need to be taken into account

- legal aid for migration matters
- confusion concerning the scope of judicial review
- natural justice in migration decision making
- monitoring and following court decisions

**Legal aid for migration matters**

From July 1998 the Commonwealth government imposed new guidelines on all Legal Aid Commissions for the granting of legal aid in matters arising under Commonwealth law. These guidelines severely restricted the situations in which legal aid could be provided for migration matters. Despite many submissions calling for the expansion of these guidelines from National Legal Aid, on behalf of all Legal Aid Commissions, there has been little change in the guidelines since 1998.

The guidelines limit the granting of legal assistance for migration proceedings in courts to situations where:

- 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.

The effect of these guidelines is to severely limit the availability of legal aid for applicants in migration matters before the courts.

The guidelines also provide that assistance may be available through the Immigration Advice and Application Assistance Scheme (IAAAS). However, those Legal Aid Commissions who receive funding under this scheme receive funding for very limited purposes. The amount of funding provided to most Commissions under this scheme is so limited that funds are inadequate to meet the high demand. These funds are not available to provide representation in migration matters before the courts.

It is our view that the limited availability of legal advice and assistance for migration matters contributes to the high number of unmeritorious migration

cases in the courts and the high number of cases which are withdrawn by applicants before the court reaches a decision.

If potential applicants in migration matters were able to apply for grants of legal aid for court matters, Legal Aid Commissions would apply a general merit test, as is applied to other Commonwealth legal matters in which Commissions provide assistance. This merit test involves a Commission considering the likely prospects of success of a matter. If a matter is unlikely to succeed, legal aid will be refused. For those matters where aid is refused on the grounds that the matter is unlikely to succeed, there is at least an opportunity for legal advice to be provided as to why the matter is unlikely to succeed. This may have the effect of reducing the number of unmeritorious applications being brought before the courts and limit the number of unmeritorious cases, which go on to hearing.

Similarly, if Legal Aid Commissions could provide representation in migration matters before the courts access to justice would be improved for applicants with genuine claims.

In January 2000, the Australian Law Reform Commission surveyed Federal Court cases and found that 31% of sampled migration cases involved an unrepresented litigant. The Commission's report, *Managing Justice*, quoted Justice Wilcox as follows:

*“the solution is not to deny a right of judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focused and the grounds of review more helpfully stated. If applicants cannot afford legal advice, as is ordinarily the case, it ought to be provided out of public funds. The cost of doing this would be considerably less than the costs incurred by the Minister under the present system, in instructing a solicitor (and usually briefing counsel) to resist all applicants, a substantial number of which have no merit and are ill prepared.”*<sup>1</sup>

Unfortunately, Justice Wilcox's suggestions have not been adopted and there has been no improvement in the system since that time.

Funding of a duty solicitor service at the Federal Magistrates Court would also allow applicants to obtain legal advice at an early stage, which could reduce the number of unmeritorious matters which go to hearing.

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<sup>1</sup> *Mbuaby Paulo Muaby v MIMA* (1998) 1093 FCA 20 August 1998, in “*Managing Justice – A Review of the Federal Civil Justice System*”, Report no 89, Australian Law Reform Commission, January 2000, at p. 494

### **Recommendation**

*Commonwealth legal aid guidelines should be amended to expand the migration matters in which Legal Aid Commissions can provide assistance in matters before the courts and review tribunals and adequate funding should be provided to enable them to do so.*

### **Confusion concerning the scope of judicial review**

It is extremely difficult for applicants to understand the law on judicial review in migration cases. Section 474 of the Migration Act states

Decisions under Act are final

(1) A [privative clause decision](#):

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

However, when the privative clause was introduced it was conceded by the Government that in some cases Migration Act decisions could be successfully challenged, despite the apparent finality of the wording. Following the High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia (2003) HCA 2 (4 February 2003)* and other court cases there is continuing uncertainty about the scope for judicial review of Migration Act decisions.

This uncertainty can encourage ill informed applicants to file unmeritorious applications as they have no understanding of the scope of judicial review and see an application to a court as a further step in the review process which they expect may lead to a favourable result.

### **Recommendation**

*That the law on judicial review of migration matters be redrafted so that it is clear and comprehensible.*

### **Natural justice in migration decision-making**

The Migration Act was amended by The Migration Legislation Amendment (Procedural Fairness) Act to provide an “*exhaustive statement of the requirements of the natural justice hearing rule*” which severely limits the right of applicants to know the evidence being considered by a primary or review decision maker unless it is information about the applicant or another person. An applicant may not know all the evidence considered in his or her case until an application is made to a court for judicial review. In our submission this leads to great confusion for applicants and is unfair.

The situation is particularly difficult for protection visa applicants where decision makers rely extensively on information about the applicant's country of origin, information that may not be made available to the applicant.

The issue of provision of language analysis (LA) and interview tapes is one area where better practices by DIMIA and the RRT can reduce the possibility of judicial review, as well as making a decision more transparent.

It has been the policy of DIMIA for some years not to provide a full copy of a LA obtained for the purpose of assessing a refugee application. Access to a copy of the interview tape between DIMIA and a visa applicant is also refused.

The use of LA is becoming more frequent, especially in the assessment of Afghan asylum claims. DIMIA has indicated that where a case officer is minded to find that the Afghan asylum seeker is a refugee, an LA will be obtained before the delegate makes a decision.

In a recent decision of the Full Federal Court (*WAFV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 240 (31 October 2003), all three judges made strong criticism of the fact that both DIMIA and the RRT had refused to provide copies of the LA and interview tapes to the applicant in circumstances where the LA obtained by DIMIA suggested the applicant was not from Afghanistan. Although the appeal was dismissed by 2:1, the majority stated:

“However, we share with Carr J (dissenting) the concern regarding the effect of the finding reached by the Tribunal in breach of procedural fairness in its potential impact on the appellant's detention and future administrative treatment. Although this appeal will be dismissed, it should be well understood by those responsible for such administration that the finding adverse to the appellant's claims to be from Afghanistan is not a finding properly made in law.” (para 7)

At a meeting of the NSW Asylum Seeker and Refugee Forum (NASRF) held in Sydney on 18 November 2003, the DIMIA representatives from Onshore Protection (NSW) informed the meeting that DIMIA's Central Office had advised that the Department did not consider itself bound by the decision, and considered that there was no breach of natural justice if the only the substance of a LA was put to the applicant for comment. At the same meeting, the NSW District Registrar for the RRT advised that if such an issue arose at the Tribunal, each case would be dealt with on a “case by case” basis.

Where practices that are applied at lower levels in the decision making process are at such divergence with very strong judicial opinion on a particular issue, applicants will (quite justifiably) be encouraged to seek judicial review of a negative decision.

We fail to see any good reason for the Department's failure to provide a copy of the LA to an applicant, and the current policy does not enhance the efficient and expeditious processing of a refugee case. In fact, the policy is more likely to lead to more and unnecessary litigation in the Federal Court and in the

Administrative Appeals Tribunal (AAT). In the AAT, a person may bring an application to attempt to obtain the LA and tapes under the *Freedom of Information Act* (FOI) and it is DIMIA policy to also refuse access to LA's under FOI. The comments of His Honour Justice Carr (dissenting) in *WAFV of 2002* are important in the context of this review (emphasis added):

“41 The appellant's expert should have been provided with all of the information which would have resulted *if these simple and inexpensive steps had been taken*. Furthermore, both experts should have had access to each of the tapes upon which they had respectively relied, and a copy of each other's reports when expressing their responsive opinions.”

We recommend that applicants throughout the migration process have access to material, which will be taken into account by decision makers. Having this information, they are able to address the relevant issues and evidence and understand and accept an adverse decision.

### **Recommendation**

*That the rules of natural justice apply in migration decision making to allow applicants throughout the migration process to have access to material which will be taken into account by decision makers.*

### **Monitoring and following court decisions**

DIMIA case-officers do not appear to monitor Federal and High Court decisions and vary their determination processes accordingly. For example the processing of applications from East Timorese asylum seekers was delayed after 1994 because of the issue of Portuguese nationality. The issue was determined in the applicants' favour on three occasions by the Full Federal Court in 1997, the Federal Court in 1998, and the Administrative Appeals Tribunal in 2000. Yet DIMIA did not respond to the precedent established in the decisions and recommence processing. As judicial determinations are an essential guide to interpretation of the *Migration Act*, it is essential that DIMIA monitors decisions and ensures that determination procedures are varied in accordance with current law.

As outlined above we consider that fairer and more transparent decision-making at the primary and review stages would reduce the number of unmeritorious court applications and we do not support restrictions on appeals to courts unless this is put in place.

Removing fee waivers and exemptions would not achieve the aim of “preserving access to justice for cases with merit”, it would have the opposite effect of denying access to justice for the financially disadvantaged.

***b) the adequacy of the existing framework for ensuring that migration agents and members of the legal profession do not encourage the bringing of unmeritorious migration cases;***

The Migration Agents Registration Authority has extensive powers to investigate and deal with agents (including members of the legal profession) who do not comply with the Code of Conduct for migration agents and we do not consider that further changes are necessary.

The great majority of judicial review applicants in migration cases are unrepresented and most have no appreciation of the law.

***c) the effect that non-compliance with specific provisions of the Migration Act 1958 should have on review rights;***

It is not clear what this means. We consider that applicants should have equal access to review rights. All applicants should have the right to have their claims considered in accordance with the law. If “(t)he Government is committed to applicants with genuine claims having their case properly considered” then non-compliance with specific provisions of the Migration Act should not affect access to judicial review.

Attempting to further limit review rights would encourage more applicants to apply directly to the High Court.

***d) any other matter that the review considers is relevant to the more efficient management and disposition of claims relating to migration status.***

The situation of temporary protection visa holders and the management and disposition of their claims relating to migration status is very difficult.

Thousands of temporary protection visa holders whose three-year visas have expired or are soon to expire are to have their claims reassessed. Many of them are from countries like Afghanistan, Iran, Iraq and Sri Lanka where there are serious ongoing human rights violations.

Most of them cannot access free advice and representation under the Immigration Advice and Application Assistance Scheme. Immigration Department statistics indicate that, Australia wide, in the financial year 2001-02, representation was provided under the scheme in only 398 non-detention cases.

Applicants need to address complex issues concerning changes in their country of origin and the cessation clauses of the Refugees Convention. In the case of Iraqi temporary protection visa holders the Immigration Department has decided not to process their claims even if their 3-year visas have expired.

These delays, coupled with lack of representation for a very disadvantaged group, are inefficient and unfair.

Yours faithfully,

N.S. Reaburn  
Chairperson,  
National Legal Aid