

20 October 2003

Ms Louise Gell  
Secretary  
Legal and Constitutional Legislation Committee  
Australian Senate  
Parliament House  
Canberra ACT 2600

By email [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Gell,

**Inquiry into Migration Legislation Amendment (Migration Agent Integrity Measures)  
Bill 2003**

I refer to your letter dated 9 October 2003 addressed to Mr Cameron Murphy, the President of this Council, inviting a submission in relation to inquiries on the above legislation.

Thank you for your invitation. The NSW Council for Civil Liberties (NSWCCL) makes the submission set out below.

*General observation*

In making this submission, the Council asks the Committee to note that this submission has been prepared on short notice, and that the Council would be happy to develop its submissions at any public hearings.

*Submission*

**1. Schedule 1 – Item 17 – Amendment to s280(5)**

- 1.1 The effect of this amendment is to make it an offence for persons who are not registered migration agents to give *pro bono* immigration assistance, except in relation to special requests to the Minister personally. The NSWCCL strongly objects to this amendment.

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- 1.2 The amendment further undermines access to legal rights, and further places in the hands of the executive arm of government tools to limit and restrict access to legal rights.
  - 1.3 Private organisations and individuals ought to have the right to fund the provision of *pro bono* immigration assistance without regulation and control by the executive arm of government. They ought to have the right to choose their own policies as to how they provide assistance, and the cases in which they provide assistance.
  - 1.4 This is particularly the case in the current circumstances where many private organisations and individuals disagree strongly with executive government policy in relation to immigration on human rights grounds and are providing immigration assistance in an effort to promote human rights.

## **2. Division 3AA**

- 2.1 The NSWCCCL strongly objects to the amendment to introduce Division 3AA. The premise that vexatious activity by a professional (such as a migration agent) is indicated by the success rate of matters in which he or she acts is dangerous and unprecedented.
- 2.2 A high failure rate in relation to a professional may be an indication of high skill and reputation, such as would attract the most difficult cases to that professional. It is commonly said that Sir Garfield Barwick did not enjoy a high success rate as a senior counsel at the bar, and that he attributed this to having been briefed in difficult cases. No-one would suggest that this was due to him being vexatious or otherwise unfit to practise.
- 2.3 A migration agent must act in accordance with the client's instructions (see Migration Agents Code of Conduct<sup>1</sup> clause 2.8(b)). If the mere fact of an unsuccessful application is to have the potential result of putting the migration agent's practice and livelihood at risk, then the migration agent is to become a judge of the client's claim, as well as his or her advocate. This is contrary to the Code's premise that the migration agent acts as a professional.
- 2.4 Where a migration agent considers the client's application to be without merit, his or her duty is to properly advise the client as to their prospects (and any consequences of a failed application), and then to act in accordance with the client's instructions. It is the client who should face the consequences of a vexatious application, not the professional adviser.
- 2.5 There are sufficient mechanisms in the existing regulations to enable migration agents who engage in misconduct to be disciplined.
- 2.6 If the professional adviser is to suffer consequences as a result of acting in failed applications, the effect will be to deny persons access to professional services to assist them to make an application which they are entitled to validly make.
- 2.7 This extent to which this effect is induced will be entirely discretionary in the hands of the Minister (subject to parliament's power to disallow an instrument) who is empowered to determine the relevant percentages.

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<sup>1</sup> *Migration Agents Regulations 1998*, Schedule 2

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2.8 Apart from these fundamental objections, certain other features of the amendment are also objectionable. For example, it is objectionable for an authority with disciplinary powers over a professional body to be required to make mandatory orders (s306AG) – cf the position in relation to mandatory sentencing.

2.9 It is likewise objectionable that disciplinary decisions are able to be overturned by Ministerial discretion. This is a form of legislation which is apt to create corruption.

### **3. Items 116 and 141 – Sections 306J and 311EA**

3.1 The abrogation of the right against self-incrimination made by this amendment is fundamentally objectionable.

### **4 Other matters**

4.1 Item 8 – Amendment to s277. A reference to section 48B should be included in addition to the other sections referred to. This would be consistent with the apparent intention of the amendment.

For and on behalf of the  
Committee of the NSW Council for Civil Liberties

**Stephen Blanks**

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