LAWYER'S BEWARE? FURTHER BARRIERS TO ACCESSING JUSTICE IN MIGRATION MATTERS

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Overview

- Background to the *Migration Litigation Reform Act* 2005 (Cth)
- The new provisions
  - Costs orders against practitioners
  - Summary dismissal
- Effect of the reforms?
  - Decrease in filing of migration applications in the Federal Magistrates Court
  - Extensive use of summary dismissal powers
  - No judicial consideration of new Part 8B
  - Increase in demand for pro bono services since reforms
  - Chilling effect on provision of legal assistance?
- Where to from here?

THE NEW PROVISIONS

The amending Act made broad ranging amendments to jurisdiction and powers of the courts with respect to migration litigation. The new provisions of the Migration Act 1958 (Cth) which were introduced include provisions to:

- Direct migration cases to the Federal Magistrates Court (ss 476, 476A, 476B, Migration Act);
- impose uniform time limits in migration cases (ss 477, 477A, 486A Migration Act);
- make costs orders where proceedings have no reasonable prospect of success (Part 8B, Migration Act).
- The amending Act also gave new powers to the court to summarily dismiss migration litigation and make costs orders against practitioners in certain matters. These provisions are set out below.

COST ORDERS

The amending Act introduced a new Part 8B into the Migration Act which provides as follows:

Part 8B—Costs orders where proceedings have no reasonable prospect of success

486E Obligation where there is no reasonable prospect of success

(1) A person must not **encourage** another person (the ***litigant***) to commence or continue migration litigation in a court if:

(a) the migration litigation has **no reasonable prospect of success**; and

(b) either:

(i) the person does **not give proper consideration** to the prospects of success of the migration litigation; or

(ii) a **purpose** in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

(2) For the purposes of this section, migration litigation **need not be:**

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(3) **This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.**

COST ORDERS

486F Cost orders

(1) If a person acts in contravention of section 486E, the court in which the migration litigation is commenced or continued may make one or more of the following orders:

(a) an order that the person pay a party to the migration litigation (other than the litigant), the costs incurred by that party because of the commencement or continuation of the migration litigation;

(b) an order that the person repay to the litigant any costs already paid by the litigant to another party to the migration litigation, because of the commencement or continuation of the migration litigation;

(c) where the person is a lawyer who has acted for the litigant in the migration litigation:

(i) an order that costs incurred by the litigant in the commencement or continuation of the migration litigation, are not payable to the lawyer;

(ii) an order that the lawyer repay the litigant costs already paid by the litigant to the lawyer in relation to the commencement or continuation of the migration litigation.

(2) If the court, at the time of giving judgment on the substantive issues in the migration litigation, finds that the migration litigation had no reasonable prospect of success, the court must consider whether an order under this section should be made.

(3) An order under this section may be made:

(a) on the motion of the court; or

(b) on the application of a party to the migration litigation.

COST ORDERS

486F Cost orders contd

(4) The motion or application must be considered at the time the question of costs in the migration litigation is decided.

(5) A person is not entitled to demand or recover from the litigant any part of an amount which the person is directed to pay under an order made under this section.

486G Person must be given reasonable opportunity to argue against costs order

The court must not make an order under section 486F unless the person has been given a reasonable opportunity to argue why the order should not be made.

COST ORDERS

486H Limited waiver of legal professional privilege

(1) If, in proceedings to determine whether an order under section 486F should be made:

(a) a person wishes to produce a document, record or information for the purpose of arguing why an order under section 486F should not be made; and

(b) to do so would, but for this section, deny legal professional privilege to any person entitled to claim it;

the person may produce the document, record or information for that purpose.

(2) However:

(a) the document, record or information does not cease to be subject to legal professional privilege for any other purpose, or in any other circumstances; and

(b) the court must make any orders necessary to ensure that legal professional privilege is protected for other purposes and in other circumstances.

(3) Nothing in this section prevents a person who is entitled to claim legal professional privilege in relation to the document, record or information, from waiving that privilege.

(4) In this section:

legal professional privilege includes privilege (however described) under any provision of Division 1 of Part 3.10 of the *Evidence Act 1995*.

COST ORDERS

486I Lawyer's certification

(1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.

(2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

486J Part does not limit other powers to order costs against third parties

This Part does not limit any power a court may otherwise have to make costs orders against a person who is not a party to proceedings.

486K Definitions

In this Part:

lawyer has the same meaning as in Part 3.

migration litigation means a court proceeding in relation to a migration decision.

SUMMARY DISMISSAL

The amending Act also gave identical new powers of summary judgment to the Federal Court (s 31A, Federal Court of Australia Act 1956 (Cth)), the Federal Magistrates Court (s 17A, Federal Magistrates Act 1999 (Cth)) and the High Court (Division 4A, Judiciary Act 1903 (Cth)).

Section 17A of the Federal Magistrates Court Act 1999 (Cth) provides:

17A Summary judgment

(1) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is prosecuting the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has **no reasonable prospect of successfully defending the proceeding** or that part of the proceeding.

(2) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has **no reasonable prospect of successfully prosecuting** the proceeding or that part of the proceeding.

SUMMARY DISMISSAL

17A Summary judgment contd

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding **need not be:**

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Federal Magistrates Court has apart from this section.

SUMMARY DISMISSAL

- The practical effect of the provisions for the practice of the Federal Magistrates Court are set out in the new Rules of the Federal Magistrates Court (Federal Magistrates Court Amendments Rules 2005 (No. 1).
- Part 44 of the Federal Magistrates Court Rules specifically relates to migration litigation. Other general rules concerning the conduct of litigation in the Federal Magistrates Court will also apply to migration litigation, provided that they are relevant and not inconsistent with the rules in Part 44 (for example R21.07 of FMC Rules).

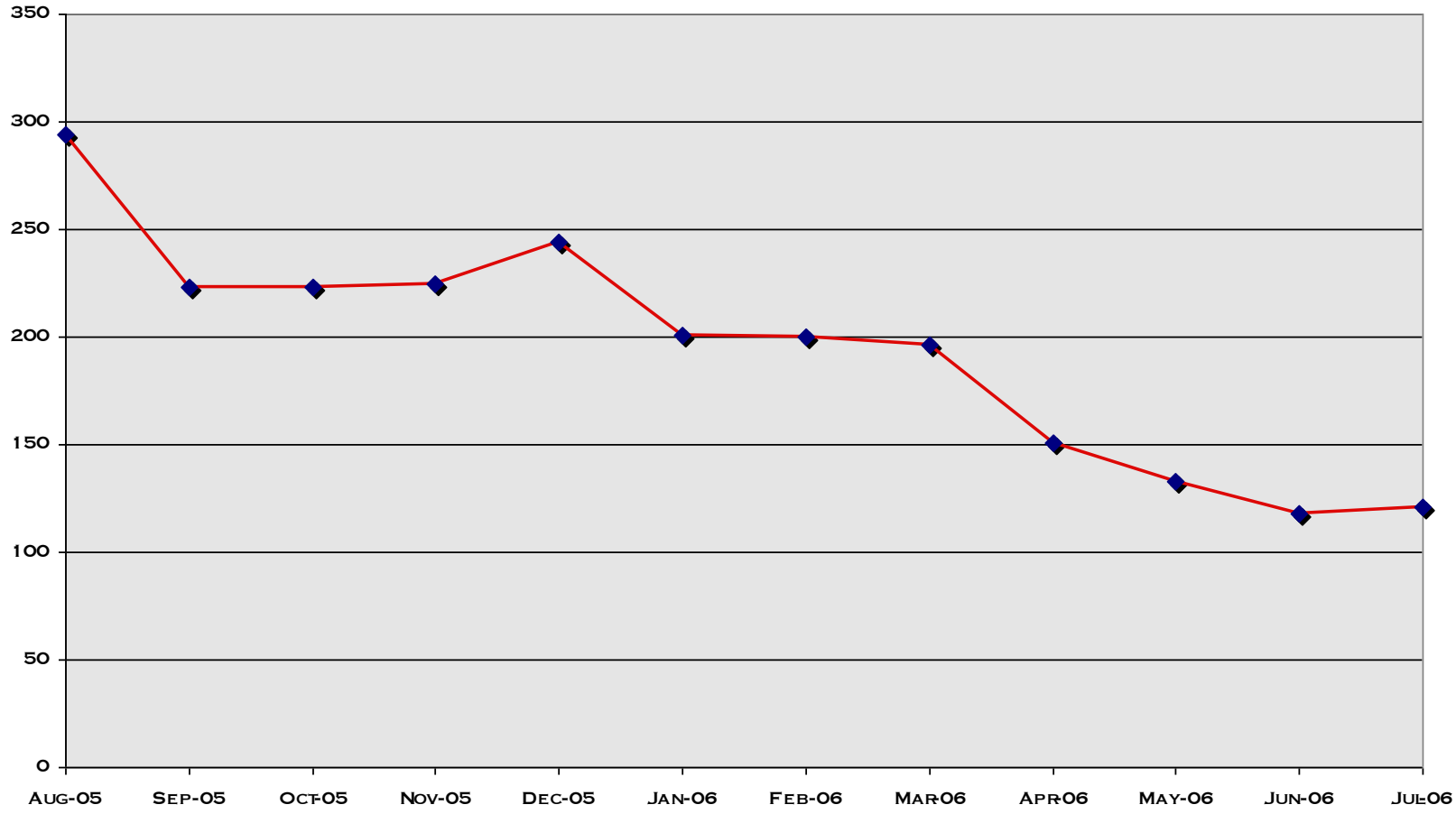
SUMMARY DISMISSAL

- Rule 44.11 sets out the powers of the Registrar or Magistrate at the First Court hearing and includes provision of an immediate hearing.
- Rule 44.12 provides that the Court may dismiss an application if it is not satisfied that the application has raised an arguable case and that such a dismissal is characterised an as interlocutory decision.

EFFECT OF THE REFORMS?

- Migration applications in the Federal Magistrates Court have decreased significantly
- But other factors may also explain this- eg influx of refugees in 2000- 2001 have had had claims finalised, class actions remitted from HCA have been finalised
- Federal Magistrates Court - 28% of decisions have been appealed to the Federal Court since the introduction of the reforms.
- Federal Magistrates Court expects the decrease to continue going forward, with more applications being filed in Sydney.

Migration applications filed in the Federal Magistrates Court August 2005- July 2006



EFFECT OF THE REFORMS?

- Powers of summary dismissal are being extensively used at an early stage of proceedings so that a large number of applications are dismissed at a preliminary hearing on the grounds that there is no reasonable prospect of success.
- Applications are being finalised in a much shorter period of time than previously
- Most of summary dismissals/ show cause hearing are litigant in person.

EFFECT OF THE REFORMS?

- The dangers inherent in summary dismissal were recently acknowledged and discussed in a decision of the Federal Magistrates Court recognised by the court in *Tran v Minister for Immigration & Anor* [2006] FMCA 961 (26 June 2006)

  11. I accept that in considering the question of summary dismissal, the court is now bound by s.17A of the Federal Magistrates Act 1999 (the FMA) as amended …

  12. That provision is claimed to make the task of a summary dismissal somewhat easier for respondents in particular, in applications of this kind, given that it specifically does not require the court to find the application is hopeless or bound to fail for it to have no reasonable prospect of success. … The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. …

EFFECT OF THE REFORMS?

- *Tran v Minister for Immigration & Anor* [2006] FMCA 961 (26 June 2006) contd

14. However, the fundamental principles remain that the decision of a court to summarily dismiss, or even under the new rules to dismiss an application on the grounds that there is no arguable case, **is a significant step for the court to take, as it effectively disentitles an applicant from presenting at a proper hearing further arguments** which may be advanced in support of an application where, as in this case, a number of grounds are at least detailed in the application filed on 2 March 2006. …

15. In my view, applications for summary dismissal or applications relying upon Rule 44.12 should not be regarded as mere process, and should not be in automatic response to applications which have been filed, albeit without the particulars or contentions one might expect from a party who is non-English speaking and self-represented.

EFFECT OF THE REFORMS?

- *Tran v Minister for Immigration & Anor* [2006] FMCA 961 (26 June 2006) contd

18. In my view, care should also be taken in the use made of Rule 44 of the Rules. To shift at an early stage the onus upon an Applicant to show cause why the application should not be dismissed on the grounds that there is no arguable case, is again a significant step. **The problem in cases of this kind confronting the courts in an application at this early stage, is in part the difficulty encountered by the courts when dealing with self-represented, non-English speaking applicants who are required to deal with difficult concepts of law. The problems are further compounded, as indicated earlier in this judgment, by the absence of a Court Book**

EFFECT OF THE REFORMS?

- As yet no reported decision where cost orders made against practitioners personally under the new provisions of Part 8B
- Commentary on cost orders under general rules of FMC, including specific comment where practitioner acting pro bono, in following cases, which is relevant.

EFFECT OF THE REFORMS?

- How much further is the bar lowered for making cost order against practitioner by new Part 8B? Unclear until court comments on provisions.
- *Xue Mei Bai v Minister for Immigration* [2006] FMCA 389: Riethmuller FM considered the principles relating to making an order for costs against counsel and solicitor for applicant under R21.07 FMCR.

Xue Mei Bai v Minister for Immigration [2006] FMCA 389

9 There is an inherent power to make costs orders against a person not a party to the proceedings provided they have notice and an opportunity to be heard. There is also a statutory power set out in the FMC Rules as follows:

Reg 21.07 - Order for costs against lawyer

(1) The Court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs:

(a) to be incurred by a party or another person; or

(b) to be thrown away;

because of undue delay, negligence, improper conduct or other misconduct or default.

...

Xue Mei Bai v Minister for Immigration [2006] FMCA 389

12 **The review of the cases shows that the court will not readily impose costs upon a solicitor even if the case appeared unlikely to succeed as a litigant is not to be restricted in pursuing a claim that is at least arguable.** There are other processes for the court to make orders terminating proceedings before a final hearing.

13 The exercise of the discretion usually arises with respect to two areas: (a) solicitors participating in the pursuit of a hopeless claim for an ulterior purpose; and (b) solicitors conducting the litigation in a manner that causes wholly unnecessary costs to be incurred for no real purpose…

14 The manner in which counsel and the solicitor presented the applicant's claims is the real issue. … It is a significant failing for a solicitor not to ensure that the factual allegations and outline of argument filed in the court accord with his personal knowledge from attendance at the hearing. …

Xue Mei Bai v Minister for Immigration [2006] FMCA 389

15 … **This was not a case where the practitioners were engaged late or acting pro bono where circumstances place far more difficult demands upon practitioners.**

16 Whilst in some cases a solicitor who was not present at a hearing may only become aware of the significance and detail of allegations about how a tribunal hearing was conducted after the litigation is at an advanced stage, sometimes even at a hearing, as the issues were not apparent on the materials or earlier instructions the same cannot be said where the solicitor was present during events in question.

17 I find that the conduct of this matter has in this respect fallen short of the standards that must be met by a solicitor. It appears to me that it is within the meaning of "gross negligence" and "improper conduct" for a solicitor to allow a case to be presented to the court on a factual foundation that he or she knows to be false. …

VWSW v Minister for Immigration (NO.2) [2006] FMCA 848

The first respondent seeks costs against the lawyer acting for the applicant on a personal basis. The first respondent relies upon r 21.07 of the Federal Magistrates court Rules 2001 as discussed in MZWOR v Minister for Immigration [2005] FMCA 845. I note that in this case the application was made before the Migration Litigation Reform Act 2005 took affect. It is argued that should the lawyer acting for the applicant have raised this issue in the written material filed before the application then no adjournment would have been required.[6] … Counsel for the applicant was acting pro bono, having agreed to waive any professional fees in respect of the matter.[7] **It is important to be mindful of the fact that it is always easier to look back at a case with hindsight and see what might have been a better course or a better point to be run than to face the difficulties of presenting a case from the outset. A pro bono lawyer has the added difficulty of rarely being involved in the initial filing of the application, and often having less time and resources to prepare an argument in a case.**

VWSW v Minister for Immigration (NO.2) [2006] FMCA 848

While counsel's arguments were largely unhelpful in the matter, it was not a case where counsel had come to specifically argue the point and recklessly failed to disclose the issue prior to the hearing, rather, a case where counsel responded to interest from the bench with respect to a particular issue. He only realised that it had some substance where it was raised in questions from the bench during the course of the hearing.[8] **In one sense this case highlights the difficulty that judicial review in Refugee Review Tribunal cases presents to the court. The ultimate outcome of the case, potentially being one of life and death for the applicant, is as serious as any case that comes before the court. For this reason, when applicants are unrepresented or are under represented, the court feels obliged to none the less carefully consider the potential arguments that are available on the material to ensure that a lack of legal knowledge or presentation skills does not thwart an otherwise deserving litigant, in a serious matter**.[9]

… taken up by the applicant who was represented by a pro bono counsel.[10] In these circumstances, I refuse the application for costs against the Counsel for the applicant.

MZWOR v Minister for Immigration [2005] FMCA 845

[41] In this case the solicitor filed proceedings seeking judicial review of a decision of the RRT, yet the applicant had never made application to the RRT and the RRT had never considered the case. The applicant had no basis whatsoever in fact or law.[42] In my view, in a case such as this, where there was no impending time limit (any potential or arguable time limit having expired for some years) or other urgency, there was a duty upon the solicitor to ascertain that there was some basis in fact or law for a case to be put to the Court. The failure to do so indicates that the solicitor has acted with a flagrant disregard of his obligations to the court.

…

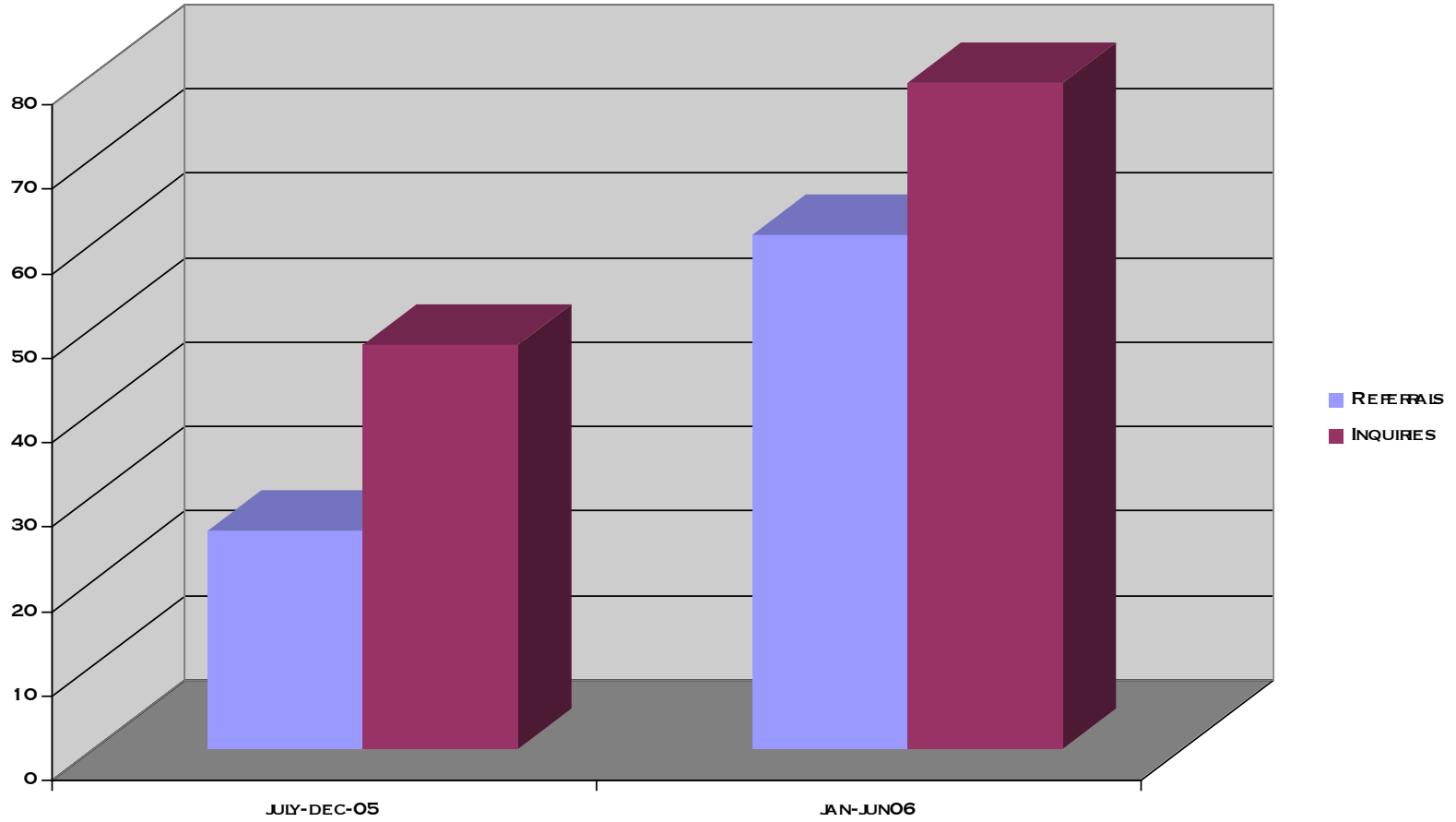
In the absence of any evidence from the solicitor, or even an appearance before the Court, to provide any explanation for conduct which, on its face, appears to be without any basis in fact or law, I find that this is a breach of the solicitor's duty to the Court.[45] ..

The only reasonable conclusion to be drawn in this case is that the proceedings were for an ulterior purpose.[48] **I am satisfied that the solicitor's conduct in this case fell so far short of that of a reasonable practitioner that it amounted to misconduct… it is appropriate to make an order for the solicitor to pay the Minister's costs both under Rule 21.07 and in the exercise of the Court's inherent jurisdiction.**

EFFECT OF THE REFORMS?

- Chilling effect on provision of legal assistance?
- Riethmuller FM at session at National Pro Bono Conference on 11 August 2006 in Melbourne regarding litigants in person, commented on the new Part 8B.
- In the six months after the reforms, the Victorian Bar Legal Assistance Scheme experienced a significant increase in the demand for assistance. Was this as a consequence of the limitations placed on other legal advice previously available due to concerns about the effect of the reforms on advisers and a perceived need for caution in providing assistance ?

Inquiries and referrals to VBLAS in migration matters- July 05- June 06



Where to from here?

- Undesirable chilling effect creates additional barrier to access to justice – a disproportionate response to new part 8B?
- Effect of reforms requires scrutiny, and use of new powers needs monitoring
- Importance of information sharing
- Part 8B is undesirable if it is not used and merely duplicates existing powers- but has chilling effect- should it be repealed?