PRESS STATEMENT

In the course of this morning, Liberty Victoria and its legal advisers have had the opportunity, for the first time, to read and consider the reasons given by the members of the Full Federal Court in the *Tampa* case. On Monday, that Court (by majority) allowed the Federal Government's appeal against the orders of Justice North that the *Tampa* asylum seekers be brought to the Australian mainland.

On the basis of those judgments, Liberty Victoria has formed the view that there is a proper basis in law for an application to the High Court for special leave to appeal from the decision of the Full Court.

The questions addressed in the judgments are of profound and far-reaching significance. They concern –

(a) whether the executive power of the Commonwealth, under s.61 of the Constitution, enables Ministers, without Parliamentary authority, to detain and expel asylum seekers; and

(b) what degree of (unlawful) restraint on a person's liberty justifies an application for, and the grant of, an order in the nature of *habeas corpus* to restore the person's freedom.

The majority of the Full Federal Court concluded that –

(a) there was executive power to detain and expel, notwithstanding that Parliament has (in the *Migration Act*) addressed at length the question of detention and expulsion of unlawful non-citizens; and

(b) in any case, the asylum seekers on the *Tampa* were not detained, or their freedom restricted, by any action taken by the Commonwealth.

Naturally, Liberty Victoria prefers the conclusions reached by Chief Justice Black, to the effect that –

(a) the *Migration Act* covers the field, leaving no room for the operation of an untrammelled executive power; and

(b) as a matter of practical reality, the Commonwealth did (unlawfully) detain the asylum seekers.

There will, however, be no appeal. The Commonwealth has introduced a Bill, which the Labor opposition is committed to support, which will retrospectively make lawful any action taken by or on behalf of the Commonwealth in relation to the *Tampa* or any person on board the vessel.

In short, the Federal Government – aided by the Labor opposition – is about to do what no other litigant in the same position could do – wave the legislative magic wand and validate conduct which, in the view of two judges of the Federal Court, was unlawful.

While Liberty Victoria of course respects the sovereignty of Parliament, it is most regrettable that the exceptional power to legislate retrospectively should be used in a case such as this, where the Commonwealth's conduct involves –

(a) (unlawful) detention;

(b) a breach of Australia's international obligations under the Refugee Convention;

(c) the deliberate contriving of a situation where the asylum seekers would be denied the ordinary protections of Australian law and refused access to the procedures which Parliament has established;

(d) the denial of any access to, or communication with, the asylum seekers (including the outright refusal of a request by Liberty's solicitors for access to the asylum seekers in order to seek instructions); and

(e) the use of military personnel to enforce administrative detention.

It is clear from the four judgments in the Federal Court, and from the division of opinion between the Justices, that the issues at stake are complex. At the same time none of these issues has been the subject of an authoritative determination by the High Court.

Due process of law should have been allowed to proceed to its conclusion, so that these issues could be ventilated in Australia's supreme court.

As things now stand, Liberty Victoria (and Mr Vadarlis) are at risk of having an order for costs made against them in respect of the Federal Court proceedings. The Commonwealth's representatives have informed Liberty Victoria that their instructions are to seek an order that all the costs be paid.

The rule of law depends on access to the courts, never more so than when the rights of an unpopular minority are at stake. As the Commonwealth Attorney-General said himself recently, the readiness of lawyers to act pro bono for those unable to fund their own proceedings is an important way of expanding access to justice, and one which should be encouraged.

As Justice French has acknowledged (para 215), in bringing this proceeding Liberty Victoria has sought to advance the public interest. All the lawyers who have worked on this proceeding have done so pro bono.

How does the punitive pursuit of costs by the Commonwealth fit with the Attorney-General's encouragement of the legal profession to increase their pro bono work in public interest matters?

The Commonwealth should reverse the instructions it has given to its lawyers, and declare publicly that no costs orders will be sought.

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