The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Clarification of Jurisdiction) Bill 2018 [Provisions]

June 2018

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Recommendation 1

2.37 The committee recommends that the bill be passed.

Chapter 1

Introduction and background

1.1 On 15 February 2018 the Senate referred the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 5 June 2018.[1]

1.2 The Senate Committee for the Selection of Bills recommended that the bill be referred for inquiry for the following reasons:

> The complex nature of the *Migration Act 1958* and the *Administrative Appeals Tribunal Act 1975* and the potential impact of these changes warrant further consultation and investigation to ensure there are no unintended consequences.[2]

Background and purpose of the bill

1.3 On 14 February 2018, the Assistant Minister for Home Affairs, the Hon. Alex Hawke MP, introduced the bill into the House of Representatives. In his second reading speech he explained that the proposed amendments in the bill are in response to a Federal Court decision[3] where it was held that an error in certain decisions did not fall within the definition of a 'migration decision'.[4] Assistant Minister Hawke outlined the purpose of the bill:

> The measures in this bill will restore the intended scope of the judicial review scheme under the Migration Act and restore the original policy intent so that there is a uniform judicial review scheme that clearly applies to all migration decisions. This will ensure a more consistent and official judicial review scheme in relation to migration decisions.[5]

1.4 The Explanatory Memorandum (EM) provides some background to the judicial review scheme under the *Migration Act 1958* (Migration Act) and challenges to a migration decision:

> Part 8 of the Migration Act establishes a judicial review scheme for migration decisions and limits the application of other legislation, including the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*. A key feature of this judicial review scheme is that a

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1 *Journals of the Senate*, No. 87, 15 February 2018, pp. 2738–2740.

2 Senate Standing Committee for the Selection of Bills, *Report No. 2 of 2018*, 15 February 2018, Appendix 4.

3 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125.

4 The Hon. Alex Hawke MP, Assistant Minister for Home Affairs, *House of Representatives Hansard*, 14 February 2018, p. 1340.

5 The Hon. Alex Hawke MP, Assistant Minister for Home Affairs, *House of Representatives Hansard*, 14 February 2018, p. 1340.

> challenge to a *migration decision* must (subject to limited exceptions) be instituted in the Federal Circuit Court at first instance, rather than in the Federal Court.[6]

Key provisions

1.5 The bill would amend the Migration Act as well as make consequential amendments to the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Definition of a migration decision

1.6 Currently the Migration Act defines a 'migration decision' to mean:

> (a) a privative clause decision; or
>
> (b) a purported privative clause decision; or
>
> (c) a non-privative clause decision; or
>
> (d) an AAT Act migration decision.[7]

1.7 A privative clause decision is defined in subsection 474(1) of the Migration Act as a decision that:

> (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.[8]

1.8 The bill proposes to repeal the current definition of a 'migration decision'. In addition to the decisions outlined above, the definition of a 'migration decision' would be expanded to also include a 'purported non-privative clause decision' and a 'purported AAT Act migration decision'.[9]

1.9 A 'purported non-privative clause decision' is defined in new subsection 5EA(1) of the bill to mean 'a decision purportedly made, proposed to be made, or required to be made…that would be a non-privative clause decision if there were not a failure to exercise jurisdiction; or an excess of jurisdiction'. The EM explains the intended effect of the proposed amendment:

> The effect of this amendment is to ensure that the jurisdictional arrangements made by the Migration Act for a *non-privative clause decision* apply in the same way to a decision that would be a *non-privative clause decision* were that decision not affected by jurisdictional error.[10]

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6 Migration Amendment (Clarification of Jurisdiction) Bill 2018, Explanatory Memorandum (Explanatory Memorandum), p. 4.

7 *Migration Act 1958* (Migration Act), section 5.

8 *Migration Act 1958*, subsection 474(1).

9 Migration Amendment (Clarification of Jurisdiction) Bill 2018 (bill), subsection 5(1).

10 Explanatory Memorandum, p. 5.

1.10 Similarly, new subsection 5EB(1) of the bill defines a 'purported AAT Act migration decision' to mean 'a decision purportedly made, proposed to be made, or required to be made, under a provision of the [AAT Act] that would be an AAT Act migration decision if there were not a failure to exercise jurisdiction; or an excess of jurisdiction; in the making of the decision.'

1.11 In addition, new subsections 5EA(2) and 5EB(2) respectively state that the term 'decision' includes anything listed in subsection 474(3) of the Migration Act and new subsection 474A(2) of the bill.

1.12 New subsection 474A(2) of the bill provides a non-exhaustive list of administrative actions that would constitute a decision for the purposes of an 'AAT Act migration decision' and a 'purported AAT Act migration decision'. The EM notes:

> The definition of decision in new subsection 474A(2) identifies a non-exhaustive list of administrative actions and substantially mirrors the list in subsection 474(3)…New subsection 474A(2) relates only to establishing jurisdiction and the procedure of courts pursuant to Part 8 of the Migration Act, and does not affect any exercise of power under the AAT Act.[11]

1.13 The effect of the proposed amendments are that challenges to 'purported non-privative clause decisions' and 'purported AAT Act migration decisions' fall under the judicial review process of Part 8 of the Migration Act and therefore must be heard in the Federal Circuit Court rather than the Federal Court. The EM states that the proposed definition would make clear that such decisions fall under the definition of a 'migration decision' and therefore proceedings relating to a challenge of such decisions would need to be instituted in the Federal Circuit Court rather than the Federal Court.[12]

Consequential amendment

1.14 The bill contains a consequential amendment to the AAT Act. As stated in the EM, this 'ensures that the jurisdiction of the Federal Circuit Court and the Federal Court in relation to a *purported AAT Act migration decision* is determined by sections 476 and 476A of the Migration Act respectively, consistent with the original policy intention of Part 8 of the Migration Act.'[13]

1.15 Item 9 of the bill clarifies that the amendments will not affect the jurisdiction of the Federal Circuit Court or Federal Court before the commencement of this item.

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11 Explanatory Memorandum, p. 6.

12 Explanatory Memorandum, p. 4.

13 Explanatory Memorandum, p. 7.

Compatibility with human rights

1.16 According to the EM, the 'bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.'[14]

1.17 The Parliamentary Joint Committee for Human Rights considered the bill and concluded that the bill did not raise any human rights concerns.[15]

1.18 The bill was also considered by the Senate Standing Committee for the Scrutiny of Bills who noted that it 'has no comment on this bill.'[16]

Financial implications

1.19 The EM states that '[t]here is no financial impact on Government revenue from this Bill.'[17]

Conduct of the inquiry

1.20 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 13 April 2018. The committee also wrote directly to a number of relevant individuals and organisations inviting them to make submissions. The committee received 11 submissions, which are listed at appendix 1 of this report. All submissions are available in full on the committee's website.

Structure of this report

1.21 This report consists of two chapters:

- This chapter provides an overview of the bill's intent and provisions, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters about the proposed amendments, and outlines the committee's views and recommendation.

Acknowledgements

1.22 The committee thanks all organisations that made submissions to this inquiry.

14 Explanatory Memorandum, p. 8.

15 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 3 of 2018*, 27 March 2017, p. 137.

16 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 23.

17 Explanatory Memorandum, p. 2.

Chapter 2

Key issues

2.1 Issues raised in submissions to this inquiry primarily concerned the expansion of the definition of a migration decision to include a 'purported non-privative clause decision'. Accordingly, the issues discussed in this chapter will focus on this proposed amendment. These concerns include:

- the limited judicial review options for migration decisions;
- the complexity of the judicial review scheme under the *Migration Act 1958* (Migration Act);
- issues concerning the complexity of the judicial review scheme within the Migration Act resulting in applicants inability to access justice; and
- questions relating to the suitability of the Federal Circuit Court (FCC) to consider non-privative clause matters effected by jurisdictional error.

2.2 Submissions also recommended a number of alternatives to the amendments proposed in the bill, which will be outlined. Finally, the chapter will set out the committee's view and recommendation.

Judicial review of migration decisions

2.3 As noted by the Department of Home Affairs (the department) the current judicial review scheme within the Migration Act was first introduced and passed in 1992.[1] The Australian Human Rights Commission (AHRC) explained that Part 8 of the Migration Act sets out the allocation of jurisdiction to various courts to hear particular types of migration decisions.[2] Where a decision is not a 'migration decision' the Federal Court retains its jurisdiction under section 39B of the *Judiciary Act 1903*.[3]

2.4 The AHRC noted the more narrow basis for review of migration decisions:

> …while most other administrative decisions made by Commonwealth officers can be challenged on the ordinary grounds of administrative law found in s 5 of the [*Administrative Decisions (Judicial Review) Act 1977*], privative clause decisions by Commonwealth officers under the Migration Act can only be challenged if they involve a jurisdictional error. This is a narrower basis for review.[4]

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1 Department of Home Affairs, *Submission 7,* p. 5.

2 Australian Human Rights Commission, *Submission 1*, p. 9.

3 Australian Human Rights Commission, *Submission 1*, p. 11.

4 Australian Human Rights Commission, *Submission 1*, pp. 15–16.

2.5 The Asylum Seeker Resource Centre (ASRC) submitted that expanding the definition of a migration decision to include a 'purported non-privative clause decision' would further reduce the scope of review for these types of decisions:

> If these amendments were passed and 'purported non-privative clause decisions' included in the definition of 'migration decisions', as noted above, this would make them subject to the restrictive provisions of s 474 of the Migration Act which prevent review of 'migration decisions' on any usual administrative law grounds except for jurisdictional error, being the only ground that cannot be removed by the legislature owing to its protection by s 75(V) of the Constitution.[5]

2.6 However, the Explanatory Memorandum (EM) notes that the intention of the bill is not 'to limit the availability of or access to judicial review, and access to judicial review will continue to be available for all relevant decisions…'[6] Additionally, the department submitted that the bill merely intends to restore the original intent of Part 8 of the Migration Act following the decision in *Minister for Immigration and Border Protection v ARJ17*[7] (ARJ17 case):

> The amendments in this Bill similarly respond to the decision in ARJ17, which has, in part, affected the intended operation of the Part 8 scheme. The measures in this Bill continue consistent efforts to ensure that the judicial review scheme set out in Part 8 of the Migration Act operates as intended and as already applied to other decisions under, or in relation to, the Migration Act.[8]

Complexity of judicial review of migration decisions

2.7 Submitters expressed their concern regarding the complexity of the judicial review scheme of the Migration Act.[9] For example, the Refugee Council of Australia (Refugee Council) highlighted the words of Justice Kerr in the ARJ17 case, that 'definitions have been built on definitions', making the Migration Act 'impenetrably dense'.[10] The Refugee Council submitted that '[t]his Bill is highly technical and, even to the legally trained, virtually unintelligible.'[11]

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5 Asylum Seeker Resource Centre, *Submission 6,* p. 3.

6 Migration Amendment (Clarification of Jurisdiction) Bill 2018, Explanatory Memorandum (Explanatory Memorandum), p. 10.

7 [2017] FCAFC 125.

8 Department of Home Affairs, *Submission 7,* pp. 5–6.

9 Australian Human Rights Commission, *Submission 1,* p. 9; NSW Council for Civil Liberties, *Submission 3,* pp. 8–9; Castan Centre for Human Rights Law, *Submission 2,* p. 2; Global Mobility Immigration Lawyers, *Submission 4,* pp. 3-4; Refugee Council of Australia, *Submission 5,* p. 2; Refugee Advice and Casework Service, *Submission 8,* p. 1; Australian Lawyers for Human Rights, *Submission 9,* p. 2; and Law Council of Australia, *Submission 11,* p. 2.

10 Refugee Council of Australia, *Submission 5,* p. 2. See also *Minister for Immigration and Border Protection v ARJ17*, [2017] FCAFC 125, [177].

11 Refugee Council of Australia, *Submission 5,* p. 2.

2.8 The AHRC explained that the process for deciding where to commence judicial review proceedings in relation to a decision made under the Migration Act involved a four stage process, which is outlined below:

a. Is the decision a 'migration decision'?

b. If so, which type of migration decision is it? This requires navigation of some complex provisions in ss 474 and 474A.

c. Is the decision one that falls within an exception described in s 476(2)(a), (b), (c) or (d) so that it is not reviewable by the Federal Circuit Court but instead by the Administrative Appeals Tribunal, the Federal Court or the High Court?

d. Is the decision one that falls within the limited class described in s 476A(1)(a), (b), (c) or (d) so that it is reviewable by the Federal Court?[12]

2.9 The AHRC concluded that '[t]hese are not straightforward questions to answer.'[13]

2.10 A number of submitters were concerned that while the bill seeks to address a jurisdictional issue as raised by the ARJ17 case, it failed to consider the broader issues relating to the complexity of the Migration Act.[14] As expressed by the Law Council of Australia (Law Council):

> …while the Bill seeks to address the narrow jurisdictional point decided in ARJ17 as it relates to judicial review of purported non-privative clause decisions, it fails to address the broader issues of complexity and uncertainty in the judicial review regime within the Migration Act as identified by the Court in that decision.[15]

2.11 Similarly, the Refugee Council stated the following:

> Rather than addressing the substance of this concern, this Bill seeks to remove the narrow ground on which the Federal Court found it had jurisdiction to consider this matter. This has been the routine habit of legislation addressing court decisions in this area.[16]

2.12 The AHRC recommended that at a minimum, Part 8 of the Migration Act be amended in the following way:

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12 Australian Human Rights Commission, *Submission 1*, p. 9.

13 Australian Human Rights Commission, *Submission 1*, p. 9.

14 See for example: Australian Human Rights Commission, *Submission 1*, p. 9; Refugee Council of Australia, *Submission 5*, p. 2; Refugee Advice and Casework Service, *Submission 8*, p. 1; Australian Lawyers for Human Rights, *Submission 9*, p. 2; and Law Council of Australia, *Submission 11*, p. 2.

15 Law Council of Australia, *Submission 11*, p. 2.

16 Refugee Council of Australia, *Submission 5*, pp. 2–3.

> The Commission recommends that, at a minimum, Part 8 of the Migration Act be amended to identify clearly, in language that an ordinary member of the community can understand:
>
> (i) the Court in which a person can seek judicial review of migration decisions; and
>
> (ii) the grounds on which a person may seek judicial review of migration decisions.[17]

Complexity leading to lack of access to justice

2.13 Submitters argued that the complexity of Part 8 of the Migration Act has made it difficult for applicants to access justice for two reasons: Firstly, the complexity of the system results in applicants being unable to understand the law. Secondly, the complexity has also resulted in lawyers being reluctant to take on cases.

2.14 Australian Lawyers for Human Rights (ALHR) submitted that '[a]ccess to justice is fundamental to the effective operation of a legal system based on the rule of law.'[18] Further, the Refugee Council emphasised that '[t]he consequences of getting a decision wrong on a refugee claim are, in many cases, literally life or death.'[19]

2.15 A number of submitters also noted that access to justice is also a fundamental right under international law. The AHRC explained that Article 14 of the International Covenant on Civil and Political Rights provides that 'All persons shall be equal before the courts and tribunals…[and that] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Further, that this 'right of access to courts and tribunals and equality before them, is not limited to citizens.'[20] Additionally, the Castan Centre for Human Rights Law outlined that Article 33 of the Convention Relating to the Status of Refugees 1951, prohibits refoulement of a refugee where they may face persecution.[21]

2.16 As previously noted, the EM states that the intention of the bill is not to 'limit the availability of or access to judicial review', but rather the bill 'simply aims to clarify the relevant framework and forum in which a judicial challenge to a migration decision should be instituted.'[22]

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17 Australian Human Rights Commission, *Submission 1*, p. 4.

18 Australian Lawyers for Human Rights, *Submission 9*, p. 3.

19 Refugee Council of Australia, *Submission 5*, p. 1.

20 Australian Human Rights Commission, *Submission 1*, p. 13. See also Castan Centre for Human Rights Law, *Submission 2*, p. 2.

21 Castan Centre for Human Rights Law, *Submission 2*, p. 2.

22 Explanatory Memorandum, p. 5.

2.17 However, the Law Council expressed concern about limiting the jurisdictional review rights of applicants:

> …the Law Council is concerned that by doing so, these measures may be narrowing an applicant's rights to a higher jurisdiction and thereby impacting their remedy, and suggests that further enquiries by the committee be made to ensure that this would not be the case given the types of decisions being considered is much broader. The Law Council remains concerned by reform measures that seek to further limit the original jurisdiction of the Federal Court to review a range of important administrative decisions, many of which have the potential to impact on the fundamental rights of those subject to immigration detention.[23]

2.18 A number of submissions also raised concerns that the complexity of the current legislative framework has resulted in lawyers being reluctant to take on cases.[24] The Refugee Council elaborates on this point:

> This area of law has become more and more abstruse, intelligible only to a niche group of lawyers. This has real effects on the willingness and ability of even enthusiastic pro bono lawyers to help out these most vulnerable clients.
>
> This labyrinth denies justice to those who need it most. Barristers need to be retained and cases heard even to identify which courts the case should be heard in. It has created a separate and patently much less fair system of justice for vulnerable non-citizens, in breach of the principle of equality of law. Yet all this has done is to displace the complexities and delays at the front end of the system to the much more expensive end of the system.[25]

2.19 ALHR argued that funding cuts to legal centres have placed strain on the provision of free legal advice and representation to asylum seekers:

> Access to justice also entails the fundamental right to access legal services to allow persons to exercise their rights under the law. For many people seeking asylum in Australia, access to legal representation has been severely hampered by cuts to funded legal assistance in recent years. This has placed significant strain on community legal centres, non-government organisations and lawyers acting pro bono to provide legal advice to a marginalised segment of the community.[26]

2.20 However, the department submitted that the bill 'does not exclude judicial review of the purported decisions it deals with.'[27] Additionally, the department stated:

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23 Law Council of Australia, *Submission 11*, pp. 1–2.

24 Refugee Council of Australia, *Submission 5*, p. 3. See also Australian Lawyers for Human Rights, *Submission 9*, p. 3; Castan Centre for Human Rights Law, *Submission 2*, p. 5.

25 Refugee Council of Australia, *Submission 5*, p. 3.

26 Australian Lawyers for Human Rights, *Submission 9*, p. 3.

27 Department of Home Affairs, *Submission 7*, p. 5.

> The Bill does not introduce a new framework for accessing judicial review of a migration decision. Rather it ensures that a 'purported non-privative clause decision' and a 'purported AAT Act migration decision' are brought within the existing framework in Part 8 of the Migration Act for migration decisions as was always intended.[28]

2.21 However NSW Council for Civil Liberties (NSWCCL) argued that while technically, the bill will not restrict access to courts, 'the unsuitability of the Federal Circuit Court for certain types of actions, and the stifling delays experienced by the Circuit Court…mean that the accessibility of judicial review for plaintiffs and applicants *will* effectively be reduced.'[29]

Suitability of the Federal Circuit Court

2.22 A number of submitters questioned the suitability of the Federal Circuit Court to consider migration decisions given its inability to hear class actions. The ASRC stated that the provisions and rules of the Federal Circuit Court do not provide scope to bring class actions, or representative complaints, and explained the implications for applicants:

> Given the overwhelming lack of access to affordable, specialised legal assistance available to people seeking asylum, especially those in detention, the inability to bring representative complaints to address common legal issues related to conditions or treatment in detention, will further reduce access to justice for people held in immigration detention and the accountability of the Commonwealth regarding its treatment of them.[30]

2.23 Refugee Advice & Casework Service argued that the consideration of class actions provides 'an efficient method of dealing with systemic legal problems and an effective avenue for enhancing access to justice.'[31]

2.24 NSWCCL noted that the Federal Circuit Court 'was established to operate informally' and that these legal proceedings are 'short, simple and uncomplicated.'[32] NSWCCL explained that class actions 'are likely to involve significant issues of legal principle as well as multiple parties and plaintiffs' and as such, class actions are not consistent with the objectives of the Federal Circuit Court.[33]

2.25 The National Justice Project submitted that the effect of requiring purported non-privative clause decisions to be heard in the Federal Circuit Court would increase that court's workload:

> The [Federal Circuit Court] does not have the jurisdiction to hear class or representative action claims. Forcing *purported* non-privative clause

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28 Department of Home Affairs, *Submission 7,* p. 5.

29 NSW Council for Civil Liberties, *Submission 3,* p. 5.

30 Asylum Seeker Resource Centre, *Submission 6,* p. 4.

31 Refugee Advice & Casework Service, *Submission 8,* p. 1.

32 NSW Council for Civil Liberties, *Submission 3,* p. 6.

33 NSW Council for Civil Liberties, *Submission 3,* p. 6.

> decisions back to [Federal Circuit Court] will actually have the effect of increasing the number of matters before the [Federal Circuit Court], forcing a multiplicity of individual actions instead of enabling them to be dealt with as a single class or representative action before the [Federal Court of Australia]. We submit that the provisions of the Bill unduly burden disadvantaged people by denying them access to representative actions and by increasing (not decreasing) the complexity of the Migration Act. This will unnecessarily increase the caseload for the [Federal Circuit Court] and deny applicants access to a jurisdiction with representative action powers.[34]

2.26 However, the department noted that in the development of the bill, it consulted the Attorney-General's Department on the implications for the Federal Circuit Court's workload and resourcing and that '[n]o significant issues were raised during this consultation process.'[35]

2.27 The department also explained why the proposed amendment would result in a more efficient process for applicants:

> It follows that at the time judicial review is commenced in relation to a non-privative clause decision or an AAT Act migration decision, it is not clear whether judicial review of the decision is subject to Part 8 of the Migration Act. It is therefore not clear whether the judicial review proceedings should be subject to the procedural requirements set out in Part 8, and should therefore be instituted in the Federal Circuit Court. If a challenge to a decision were commenced in the Federal Court, a substantial hearing would be required to determine whether the relevant decision is affected by jurisdictional error, and in turn, whether the Federal Court has jurisdiction to hear the matter. This is an inefficient use of the Court's time, and does not reflect the original policy intention of Part 8 of the Migration Act that a migration decision, subject to limited exceptions, must be instituted in the Federal Circuit Court at first instance.[36]

2.28 The Refugee Council suggested that rather than expanding the jurisdiction of the Federal Circuit Court, the government should 'promote efficiency through more robust and swifter decision-making by the [d]epartment, and through restoring funding for legal assistance to those in the process of a refugee status determination.'[37]

2.29 Similarly, the AHRC also recommended that the department 'promptly finalise its primary decisions on the outstanding applications for protection visas from asylum seekers who arrive in Australia by boat between 13 August 2012 and

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34 National Justice Project, *Submission 10*, p. 5.

35 Department of Home Affairs, *Submission 7*, p. 6.

36 Department of Home Affairs, *Submission 7*, pp. 4–5.

37 Refugee Council of Australia, *Submission 5*, p. 4.

31 December 2013.[38] The AHRC also suggested that funding be restored for legal advice to certain groups of asylum seekers in Australia.[39]

Alternatives to the bill

2.30 In light of the concerns raised, many submitters recommended that the bill not pass and rather, that the privative clause provision in subsection 474(1) of the Migration Act be repealed.[40] In its place, submitters recommended that the grounds of judicial review of migration decisions be amended in line with the general grounds of review available under the ADJR Act.[41] Furthermore, AHRC suggested that the 'Australian Government task an appropriate body to inquire into how to transition judicial review under the Migration Act to the general statutory review process under the ADJR Act.'[42]

2.31 A number of submitters also suggested that the bill presents an opportunity for Part 8 of the Migration Act to be reviewed. For example, the Law Council stated:

> While it is appreciated that it may be beyond the scope of the Committee's current consideration of the Bill, the Law Council recommends that a broader review should be undertaken which carefully examines the judicial review of migration decisions with the view to removing complexity and aligning grounds of review with those under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[43]

2.32 The National Justice Project noted that it was 'unlikely that 'root and branch reform' will take place', and as an alternative recommended the following:

> In the first alternative, that the Bill be amended so that the Federal Court retains jurisdiction to hear all class or representative actions bought as a review of 'non-privative clause decisions' under s 474(4) of the *Migration Act*.
>
> In the second alternative, that the Bill be amended to provide the Federal Circuit Court with jurisdiction to hear all class or representative actions bought as a review of 'non-privative clause decisions' under s 474(4) of the Migration Act.[44]

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38 Australian Human Rights Commission, *Submission 1*, p. 5.

39 Australian Human Rights Commission, *Submission 1*, p. 5.

40 Australian Human Rights Commission, *Submission 1*, p. 5 and pp. 14–16. See also NSW Council for Civil Liberties, *Submission 3*, p. 9; Refugee Council of Australia, *Submission 5*, p. 4; Castan Centre for Human Rights Law, *Submission 2*, p. 6.

41 Australian Human Rights Commission, *Submission 1*, p. 5 and pp. 17–21. See also NSW Council for Civil Liberties, *Submission 3*, p. 9; Refugee Council of Australia, *Submission 5*, p. 4; Castan Centre for Human Rights Law, *Submission 2*, p. 6.

42 Australian Human Rights Commission, *Submission 1*, p. 5 and pp. 17–21.

43 Law Council of Australia, *Submission 11*, p. 3.

44 National Justice Project, *Submission 10*, p. 2.

Committee view

2.33 The committee has reflected carefully on the issues raised by submitters to this inquiry. In particular, that the bill could be limiting the scope of judicial review; that the judicial review scheme of the Migration Act is too complex; that this complexity has made it more difficult for applicants to access justice, and that the Federal Circuit Court is not the appropriate court to consider these types of matters.

2.34 The committee has also considered the advice from the department; that the bill merely restores the original intent of the judicial review scheme which was originally introduced in 1992, and that the intent of Part 8 of the Migration Act is for migration decisions, subject to limited exceptions, to be instituted in the Federal Circuit Court. The committee also notes, as outlined in the EM, that the objective of the bill is not to limit the availability of, or access to, judicial review.

2.35 The committee is mindful of the department's submission, that if purported non-privative clause matters were to be heard in the Federal Court, a substantial hearing would be required to determine whether the Federal Court has jurisdiction to hear the matter, which is an inefficient use of the Court's time.

2.36 The committee considers that fundamental to Part 8 of the Migration Act is the discrete judicial review scheme whereby a challenge to a 'migration decision' must, in the first instance, be instituted in the Federal Circuit Court, subject to limited exceptions. The committee agrees with the department's submission that the bill primarily seeks to restore the original policy intent of this scheme. Having regard to the views expressed, the committee considers it is appropriate and necessary to retain the intent of Part 8 of the Migration Act and therefore recommends that the bill be passed.

Recommendation 1

2.37 The committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair

Dissenting Report by the Australian Greens

1.1 The Australian Greens dissent from the majority report of the Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the Migration Amendment (Clarification of Jurisdiction) Bill 2018.

1.2 This bill is in response to the decision of the Full Court of the Federal Court in *Minster for Immigration and Border Protection v ARJ17*.[1] The focus of the appeal was on the scope of the jurisdiction of the Federal Court of Australia and the Federal Circuit Court to hear challenges to decisions under the Migration Act.

1.3 This bill is intended to provide clarification of jurisdiction between the Federal Court and the Federal Circuit Court for a non-privative clause decision affected by jurisdictional error. The bill inserts a new definition of 'purported non-privative clause decision' in the Migration Act so that such a decision will be classified as a migration decision. The practical effect is that such matters proceed in first instance to the Federal Circuit Court.

1.4 The majority of submitters expressed valid concerns that the measures in the bill will reduce access to justice, particularly in light of the Government's decision to withdraw legal assistance to people who arrived in Australia without a visa.

1.5 The Australian Greens agree with the submission of the Refugee Council of Australia that:

> [the bill] does not clarify the jurisdiction of our courts to review migration decisions. Rather, it complicates an already impenetrable system of review that has no counterpart in any other area of law.[2]

1.6 The Refugee Council of Australia further stated that:

> This Bill is highly technical and, even to the legally trained, virtually unintelligible.[3]

1.7 The Law Council of Australia notes in their submission:

> …that the bill does little to address the overall complexity and inaccessibility of the judicial review scheme set out in the Migration Act.[4]

1.8 This bill adds a further level of complexity for an applicant who is trying to identify what their rights of review are and in which court they should bring their claim. As the Asylum Seeker Resource Centre recommended in its submission:

> The Australian Government withdraw this proposed Bill in its totality and expand (not restrict) the grounds on which courts can provide oversight and

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1 [2017] FCAFC 125.

2 Refugee Council of Australia, *Submission 5*, p. 1.

3 Refugee Council of Australia, *Submission 5*, p. 2.

4 Law Council of Australia, *Submission 11*, p. 2.

> accountability especially for the decisions related to the conditions and treatment of people seeking asylum in immigration detention centres.[5]

1.9 The Australian Greens do not support any measure that restricts access to justice to people seeking asylum or in immigration detention. A raft of legislative barriers and the removal of virtually all legal assistance funding have left a vulnerable cohort of people in Australia having to self-represent without the legal knowledge required to navigate the complexities of the Migration Act.

Recommendation 1

1.10 The Australian Greens recommend that the bill not be passed.

Senator Nick McKim
Senator for Tasmania

5 Asylum Seeker Resource Centre, *Submission 6*, p. 5.

Additional Comments – Centre Alliance

1.1 Centre Alliance supports the passage of the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (the Bill) in circumstances where it will provide clarity in the wake of *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (ARJ17).

1.2 The Centre Alliance senators do however note that as a consequence of restricting the Federal Court's ability to hear and determine migration decisions, as per the original policy intent, that applicants will no longer be able to bring a class action when appealing against purported non-privative clauses. The Centre Alliance senators suggest consideration be given to amending the Bill to enable representative actions to be commenced in the Federal Circuit Court.

1.3 While the Bill addresses a specific legal technicality, it has also highlighted the complex and at times unreasonable operation of Part 8 of the *Migration Act 1958 (Cth)* (Migration Act).

1.4 Centre Alliance senators consider the judicial review process in Part 8 to be a barrier to access to justice by virtue of the complex legislative pathway facing litigants, many of whom do not have the benefit of legal representation.

1.5 This concern is shared by the Australian Human Rights Commission,[1] the Law Council of Australia,[2] the Refugee Council of Australia[3] and has been the subject of comment by the Full Court of the Federal Court.[4]

1.6 In the ARJ17 decision, the Full Court of the Federal Court commented on the operation of Part 8, being the judicial review process, and noted the following:

> To an applicant seeking to invoke the jurisdiction of this Court, especially those not fluent in English, **it would be difficult to devise a greater** barrier to an informed decision being made as to the selection of the Court with jurisdiction to resolve the claim.[5]
>
> …
>
> If the Commonwealth Legislature by these provisions is seeking to promote access to justice by a readily comprehensible identification of the Court in which a proceeding should be commenced, **it has failed**.[6]
>
> …

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1 Australian Human Rights Commission, *Submission 1*, p. 12.

2 Law Council of Australia, *Submission 11*, p. 2.

3 Refugee Council of Australia, *Submission 5*, p. 2.

4 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125.

5 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [51].

6 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [52].

> Core concepts such as what is meant by a purported privative clause decision **defy the understanding of any ordinary reader**.[7]

1.7 Judicial review is the cornerstone of government accountability and transparency. It enables individuals to challenge decisions made by the executive, and ensures that the executive does not act beyond the powers granted to it by Parliament.

1.8 Ordinarily the *Administrative Decisions (Judicial Review) Act 1997 (Cth)* (the ADJR Act) determines the process to be followed when challenging most administrative decisions. The ADJR Act enables individuals and businesses to clearly identify both the grounds of review that they may seek to rely on, and the Court in which they should file their application for review.

1.9 However, review of migration decisions has been slowly but systematically segregated from the ordinary ADJR Act review process. Applicants seeking judicial review of migration decisions now no longer have the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions.

1.10 Instead, individuals must navigate the labyrinthine provisions of the Migration Act which was described by the Full Court of the Federal Court in the ARJ17 decision as 'impenetrably dense',[8] 'a morass of confusion'[9] and 'requires analysis of some of the less intuitively comprehensible expressions of statutory drafting to be found in Australian law.'[10]

1.11 This is not a new problem:

a) In 2011, the Migration Review Tribunal–Refugee Review Tribunal stated that 'the time is right…..for migration and refugee decision making to be brought back under the umbrella of the ADJR Act.'[11]

b) In a 2014 Commonwealth wide review of legislation the Australian Law Reform Commission (ALRC) identified particular clauses within the Migration Act as unjustifiably encroaching on the rights of individuals by restricting access to review courts.[12]

   The ALRC review was conducted at the request of the former Attorney-General, the Hon George Brandis QC.

1.12 The Centre Alliance senators note the comments of the Refugee Council of Australia on the importance of migration review decisions:

> Unlike any other area of administrative law, an incorrect decision in refugee determination can, quite literally, cost a refugee his/her life. Surely the

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7 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [177].

8 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [177].

9 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [38].

10 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [86].

11 Australian Human Rights Commission, *Submission 1*, p. 19.

12 Australian Human Rights Commission, *Submission 1*, p. 16.

> checks and safeguards in this jurisdiction should be far more rigorous than in an area where the stakes are far lower.[13]

1.13 Centre Alliance senators support the submissions made by both the Australian Human Rights Commission and the Refugee Council of Australia, and note the need to simplify the judicial review pathway found in Part 8 of the Migration Act to better identify:

a) The Court in which a person can seek judicial review of migration decisions; and

b) The grounds on which a person may seek judicial review of migration decisions.

Recommendation 1

That the government consider directing the Australian Law Reform Commission to inquire into the current judicial review pathways contained in Part 8 of the *Migration Act 1958* with a view to removing complexity and aligning grounds of review with those under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Senator Stirling Griff

Senator for South Australia

13 Australian Human Rights Commission, *Submission 1*, p. 16.

Appendix 1

Public submissions

1 Australian Human Rights Commission

2 Castan Centre for Human Rights Law

3 New South Wales Council for Civil Liberties

4 Global Mobility Immigration Lawyers

5 Refugee Council of Australia

6 Asylum Seeker Resource Centre

7 Department of Home Affairs

8 Refugee Advice & Casework Service

9 Australian Lawyers for Human Rights

10 National Justice Project

11 Law Council of Australia