New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

MIGRATION AMENDMENT (CLARIFICATION OF JURISDICTION) BILL 2018

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The NSW Council for Civil Liberties (NSWCCL) thanks the Legal and Constitutional Affairs Legislation Committee for its invitation to make a submission concerning the Migration Amendment (Clarification of Jurisdiction) Bill 2018.

BACKGROUND

The *Migration Act 1958* (Cth) provides that 'privative clause decisions' must not be reviewed, appealed, challenged, quashed or questioned in any Court.[1] Further sections operate to restrict the Federal Court's original jurisdiction to review 'migration decisions', including the categories of privative clause decisions, non-privative clause decisions, and 'purported' decisions.[2]

'Purported' decisions are decisions which are found to be *ultra vires* – beyond the power of the decision-maker or involving jurisdictional error. The High Court of Australia has held that a decision involving jurisdictional error is regarded, in law, as no decision at all.[3] Therefore 'purported' decisions, made beyond power, were not 'decisions' under the *Migration Act,* and were therefore outside the ambit of the privative clause restricting the Federal Court from reviewing them.

The *Migration Amendment (Clarification of Jurisdiction) Bill 2018* ('the Amendment') seeks to bring such decisions within the ambit of the privative clause, excluding the Federal Court from reviewing such decisions.

SUMMARY

In relation to the Amendment, it is submitted that:

1. Avenues to commence actions in the Federal Court should remain open;

[1] Section 474(1).
[2] See *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [9]-[10] (Kenny J).
[3] *Plaintiff S157/2002* (2003) 211 CLR 476, [76].

2. The Federal Court is more suitable for hearing class actions than the Federal Circuit Court;
3. The Federal Court is more suited to hearing significant migration appeals;
4. The amendment is likely to affect human rights; and
5. There is concern about the complexity of the *Migration Act* provisions.

1. AVENUES TO COMMENCE ACTIONS IN THE FEDERAL COURT SHOULD REMAIN OPEN

A. Attempts to restrict the scope of judicial review are a matter of concern

In general, it is a concern when governments seek to limit the scope of judicial review. Access to courts for the purpose of judicial review is a common law right. The High Court has stated that 'judicial review is neither more nor less than the enforcement of the rule of law over executive action... The interests of the individual are protected accordingly.'[4]

The Australian Law Reform Commission has recommended that the Australian Government undertake a review of privative clauses in Commonwealth laws. These are clauses which seek to restrict or oust judicial review. The Report stated that where the underlying policy reason is warranted, consideration should be given to alternative solutions which do not restrict access to the courts.[5]

Section 39B of the *Judiciary Act* confers a broad general jurisdiction on the Federal Court. This jurisdiction is not to be taken away by uncertain and obtuse language: the language must be clear and unmistakable.[6]

By distinguishing between 'decisions' and 'purported' decisions in the *Migration Act*, Parliament recognised a difference between decisions made in exercise of valid statutory power, and those made outside power. The intention of Parliament was arguably that the

[4] *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).
[5] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws,* Report No 129 (2016) [15.65].
[6] See *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [21] (Kenny J).

Federal Court would retain jurisdiction to review decisions purportedly made under power but vitiated due to jurisdictional error or excess of power.[7]

Considering these points, caution should be exercised in removing an avenue of review for such *ultra vires* decisions, especially as the decisions affected by this amendment are likely to affect the rights and freedoms of detainees.

B. Access to judicial review is a human right

Access to judicial review is a human right recognised under the *International Covenant on Civil and Political Rights*.[8] Article 2(3)(a) provides that 'a person whose rights and freedoms are violated shall have an effective remedy'. Article 14(1) provides that 'in determination of rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal'.

It was recognised in *Minister for Immigration and Border Protection v ARJ17* and in the Explanatory Memorandum to the Amendment that the decisions which will fall within this amendment are matters which engage human rights.[9]

The Explanatory Memorandum to the Amendment states that the Bill 'does not, and does not intend to limit the availability of or access to judicial review'.[10] While it will not technically 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 (discussed below), mean that the accessibility of judicial review for plaintiffs and applicants *will* effectively be reduced.

[7] Ibid [17-18], [25] (Kenny J).
[8] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[9] Explanatory Memorandum, *Migration Amendment (Clarification of Jurisdiction) Bill*, Appendix A – Statement of Compatibility with Human Rights.
[10] Ibid.

2. THE FEDERAL COURT IS MORE SUITABLE FOR HEARING CLASS ACTIONS THAN THE FEDERAL CIRCUIT COURT

The Amendment will mean that class actions such as that in *Minister for Border Protection and Immigration v ARJ17* will be commenced in the Federal Circuit Court.

The Federal Circuit Court was established to operate informally. The *Federal Circuit Court Act* states that the Court is to operate informally and ensure that proceedings are not protracted.[11] The purpose of the Federal Circuit Court is therefore to keep legal proceedings short, simple and uncomplicated.

Class actions are likely to involve significant issues of legal principle as well as multiple parties and plaintiffs. Hearing these types of cases is not consistent with the stated objectives of the Federal Circuit Court.

Further, the Federal Court has an established and effective regime for commencing and hearing class actions under the *Federal Court of Australia Act 1976* (Cth) Part IVA and the *Federal Court Rules 2011* (Cth) Division 9.3.[12] As such it is more appropriate for such actions to be commenced in the Federal Court.

3. THE FEDERAL COURT IS MORE SUITED TO HEARING SIGNIFICANT MIGRATION APPEALS

The Federal Circuit Court is already experiencing significant delays. In 2016-17, the Court's targets to dispose of 90% of final order applications within 12 months, and 90% of all other application within six months, were not met.[13] The number of migration cases has increased 40% in the year 2016-17.[14]

[11] See sections 3(2)(a) and 42.
[12] Please see <http://www.fedcourt.gov.au/law-and-practice/class-actions> for specific information regarding the procedure for commencing class actions.
[13] Federal Circuit Court of Australia, '2016-17 Annual Report' (Annual Report, Federal Circuit Court of Australia, 19 October 2017) 43.
[14] Ibid 65.

The Annual Report identifies that this increase is placing significant pressure on judicial resources,[15] and an 18-month delay in listing of migration cases is set to worsen amid judicial retirements and job cuts.[16]

The Federal Circuit Court has itself raised concerns about the impact these delays may have on matters proceeding expeditiously as per the legislatively stated objectives of the Court, particularly where there are substantive issues of law to be resolved.[17] Migration matters often involve such substantive issues as migration is a specialist area of law which is often the subject of constitutional challenge.[18]

A further point involves the process by which cases may be transferred from the Federal Circuit Court to the Federal Court if the Circuit Court has insufficient resources to hear the proceeding[19] or in the interests of the administration of justice.[20] The Amendment may affect the ability of the Circuit Court to transfer proceedings even if under-resourced or if the interests of justice require a transfer.

4. THE AMENDMENT IS LIKELY TO AFFECT HUMAN RIGHTS

In *Minister for Immigration and Border Protection v ARJ17,* Justice Kenny pointed out that the decisions under question in that case can reasonably be seen as likely to affect the rights and freedoms of detainees. In fact, her Honour stated that decisions under section 252 of the *Migration Act (*governing searches of persons) will almost always be of this kind.[21]

Justice Flick also stated in that case that decisions made under section 252 will unquestionably affect the liberty, privacy and property of persons.[22] His Honour also raised

[15] Ibid 66.
[16] See Nicola Berkovic, ''Radical' overhaul of courts imminent', *The Australian* (National), October 23, 2017, 7.
[17] Federal Circuit Court of Australia, above n 13, 66.
[18] Ibid.
[19] *Federal Circuit Court of Australia Act 1999* s 39(4)(c).
[20] *Federal Circuit Court of Australia Act 1999* s 39(4)(d).
[21] [2017] FCAFC 125 [25].
[22] Ibid [65].

the concern that in migration matters, applicants are often unrepresented and have a poor command of English.[23]

Broader concerns have been raised that amid the 'tsunami' of family, migration and other disputes, Federal Circuit Court judges are under pressure to make decisions based on expediency and efficiency, sometimes at the expense of a fair hearing.[24] It must be pointed out that migration decisions involve the 'real risk of someone being sent back to torture or death'.[25]

The Explanatory Memorandum to the Amendment states that the amendments are compatible with human rights 'because they do not seek to limit the human rights they may engage'.[26] This unfortunately does not mean that rights will not be affected. As discussed above, restricting avenues for judicial review where matters of human rights are at issue *is* likely to affect those rights.

As there is a likely effect on applicants' rights when these decisions are made, any changes to the ability of courts to review such decisions must be made with caution. As per the recommendation of the Australian Law Reform Commission,[27] Parliament should find a more desirable way of clarifying the review system than removing jurisdiction from the Federal Court.

5. CONCERN ABOUT THE COMPLEXITY OF THE *MIGRATION ACT* PROVISIONS

The Court in *Minister v ARJ17* raised concerns regarding the complexity of the *Migration Act* provisions both in relation to jurisdiction of courts and the categories of 'decision' under the

[23] Ibid [37].
[24] See generally, Nicola Berkovic, 'Court in controversy', *The Australian* (National), 6 March 2018, 11.
[25] Refugee lawyer David Manne, cited in Nicola Berkovic, 'Court in controversy', *The Australian* (National), 6 March 2018, 11.
[26] Explanatory Memorandum, *Migration Amendment (Clarification of Jurisdiction) Bill*, Appendix A – Statement of Compatibility with Human Rights.
[27] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws,* Report No 129 (2016) [15.65].

Act. Jurisdictional issues were described as a 'morass of confusion'[28] and the categorisation of types of decision as 'clear as mud'.[29]

Justice Flick commented that it would be 'difficult to devise a greater barrier' to applicants who are often unrepresented and have a poor command of English, and that even an experienced migration practitioner would have difficulty understanding the Act.[30]

As discussed in detail in the Australian Human Rights Commission's (*AHRC*) submission[31] to the Senate Legal and Constitutional Affairs Legislation Committee regarding the Amendment, this raises significant access to justice issues.

NSW CCL endorses the submission of the AHRC.

RECOMMENDATIONS

NSWCCL recommends that:

1. **The Bill is rejected in its entirety.**
2. **Consistent with the view of the AHRC, the privative clause in s474(1) of the Migration Act be repealed and the Migration Act be amended to align the grounds of judicial review of migration decisions with the grounds for review under the Administrative Decisions (Judicial Review) Act.**
3. **The Government adopt the recommendations of the Australian Law Reform Commission in its report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws to review the operation of privative clauses in Commonwealth legislation.**

[28] [2017] FCAFC 125 [38].
[29] Ibid [50].
[30] Ibid [51].
[31] Australian Human Rights Commission Submission dated 4 April 2018 to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Clarification of Jurisdiction) Bill 2018.

This submission was prepared by Dr Martin Bibby (Convenor Asylum Seeker and Refugee Working Group), Angela Catallo and Lauren Catanchin on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Legal and Constitutional Affairs Legislation Committee.

Yours sincerely,

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