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Submission to the Senate Legal and Constitutional Affairs Committee

*Inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018*

## Introduction

The Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make a submission in relation to the Migration Amendment (Clarification of Jurisdiction) Bill 2018. Overall, our position is that the Bill highlights significant issues in relation to access to justice in Australia — particularly for non-citizens — that would be better addressed by thorough and considered simplification of Part 8 of the *Migration Act 1958* (Cth).

The context in which this Bill is being introduced is well explained in the submission of the Australian Human Rights Commission (AHRC).[1] The issue that the Bill seeks to address is the scope of the jurisdictional delineation between the Federal Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA). In *Minister for Immigration and Border Protection v ARJ17*,[2] a Full Court of the FCA dismissed the Minister's submission that because of provisions in Part 8 of the *Migration Act*, the

[1] Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Submission 1) 6-11.
[2] ARJ17 v Minister for Immigration and Border Protection [2017] 250 FCR 474.

FCA did not have original jurisdiction to review a "purported non-privative clause decision" and that such original jurisdiction belongs to the FCCA.[3] This Bill, if passed, would provide that the FCCA has jurisdiction, such that decisions including "purported non-privative clause decisions" are to be heard first in the FCCA.[4]

**An unnecessarily complex framework**

As highlighted in the AHRC's submission, Part 8 of the *Migration Act* sets out when 'migration decisions' can be the subject of judicial review by the High Court of Australia, the FCA and FCCA.[5] Determining whether a decision is a 'migration decision' and which court has original jurisdiction is no easy task. In reaching its decision, members of the Full Court of the FCA noted that, "the jurisdiction entrusted to one or other of these Courts is a morass of confusion"[6] and that the issues in the case "requires analysis of some of the less intuitively comprehensible expressions of statutory drafting to be found in Australian law".[7]

This observation is easy to confirm when one attempts to first consider whether a decision made is a "migration decision" referred to in various sections of Part 8 of the *Migration Act*. According to s 5 of the *Migration Act*, a "migration decision" includes:

- A privative clause decision;[8] or
- A purported privative clause decision;[9] or
- A non-privative clause decision;[10] or
- An AAT Act migration decision.[11]

Each of these types of "migration decisions" are further defined in the Act. The Bill seeks to add to this list two further types of decisions: "a purported non-privative clause decision"[12] and a "purported AAT Act migration decision".[13]

After working through whether a decision is a "migration decision", as defined, one must then proceed to work out whether a decision is reviewable by the Administrative Appeals Tribunal, the FCA, or the High Court.[14] The result is a complex statutory framework according to which it is difficult to determine, at the best of times, whether a decision is reviewable and by which court.[15] This has significant access to justice implications for those who are affected by decisions made under the *Migration Act*.

[3] Ibid.
[4] This has significant implications, among other things because class actions are available in the Federal Court and are not available in the Federal Circuit Court.
[5] *Migration Act 1958* (Cth), Pt 8, ss 474-484.
[6] Minister for Immigration and Border Protection v ARJ17 [2017] 250 FCR 474 at [38] (Flick J).
[7] *Minister for Immigration and Border Protection v ARJ17* [2017] 250 FCR 474 at [86].
[8] See *Migration Act 1958* (Cth) ss 472(2)
[9] Ibid s5E.
[10] Ibid s 476A(1)(c) setting out circumstances where appeal of a migration decision, being a non-privative clause decision can be made to the Federal Court.
[11] Ibid s 474A.
[12] Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth) proposed s5EA.
[13] Ibid proposed s 5EB.
[14] This requires one to navigate the interaction between numerous provisions under Part 8 of the *Migration Act*, including ss 476, 476A, 476B and 484.
[15] See Australian Human Rights Commission, *above n 1.*

**Refugee and asylum seeker access to justice**

Access to justice is fundamental to the effective operation of a legal system based on the rule of law. In ALHR's view, access to justice demands that the law be, as far as possible, simple and clear enough to allow all persons to understand their rights and obligations. 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.[16] 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. Further, many people seeking asylum are self-represented and as such do not have the legal knowledge required to navigate complex provisions of the *Migration Act*.

In this context, the provisions of this Bill would do little to make Part 8 of the *Migration Act* less complex than it already is. As observed by Flick J in ARJ17:

> *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. …*
>
> *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.*[17]

ALHR supports moves to simplify the *Migration Act* and to streamline the law around the delineation of court jurisdiction. However, we agree with the recommendations in the AHRC submission that there are far more effective ways of achieving this aim. Accordingly, we support the AHRC's recommendations to the Committee.

13 April 2018

[16] For an overview, see Kaldor Centre for International Refugee Law, *Factsheet: Legal Assistance for Asylum Seekers* < http://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>.
[17] *Minister for Immigration and Border Protection v ARJ17* [2017] 250 FCR 474 at [51]-[52] (Flick J).