ASRC
Asylum Seeker Resource Centre

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100 Parliament House
Canberra ACT 2600

12 April 2018

Dear Committee Secretary,

RE: Submission on the Migration Amendment (Clarification of Jurisdiction) Bill 2018.

We welcome the opportunity to comment on this Bill. The ASRC is concerned by the amendments raised in this Bill and strongly recommends that this Bill not be passed. We share the concerns raised in the submissions made to the Committee by the Australian Human Rights Commission and the Refugee Council of Australia, and endorse the recommendations made by them both in relation to this proposed Bill.

While this amendment bill has been put forward as necessary to address a narrow and highly technical point arising from the recent case of *Minister for Immigration and Border Protection v ARJ17*[1] *(MIBP v ARJ17)*, it is our submission that the implications of the Bill are significant as they further reduce court oversight of decisions in certain circumstances concerning people held in immigration detention centres. They also raise broader issues regarding access to justice for people seeking asylum who wish to have decisions concerning their protection status reviewed by a court.

We would like to bring the following key concerns and issues to the Committee's attention:

Key Legal Question Raised by MIBP v ARJ17

1. The key legal question in the Full Federal Court decision *MIBP v ARJ17* related to whether or not the Federal Court of Australia had jurisdiction to review decisions to confiscate the mobile phones or SIM cards of people in immigration detention under search powers in the *Migration Act 1958* (Cth) (Migration Act).[2]
2. These powers are one of several defined in s 474(4) of the Migration Act as 'non-privative clause' decisions. This issue of jurisdiction turned on the question of whether this decision to confiscate mobile phones and SIM cards of detainees fell in, or outside of, the definition of a 'migration decision' under s 5(1) of the Migration Act. Notably, this definition explicitly covers 'non-privative clause' decisions, but does not cover *purported* non-privative clause decisions; being non-privative clause decisions that may later be found to be infected by jurisdictional error and therefore taken to never have been made. The legislature has previously purposefully avoided inclusion of *purported* non-privative clause decisions due to the position clearly taken by the High Court of Australia that attempting to oust the jurisdiction of the Court to consider a non-privative clause decision infected by jurisdictional error, would breach s75(v) of the Australian Constitution.[3]
3. In *MIBP v ARJ17* the Minister argued that the decision to confiscate detainees' mobile phones and SIM cards fell inside the definition of a 'migration decision'. The Full Federal Court unanimously rejected the Minister's appeal confirming the primary court decision that this decision was not a 'migration decision' and that the Federal Court retained its original jurisdiction to review the decision

[1] [2017] FCAFC 125.
[2] s 252 Migration Act 1958 (Cth) and Ch 8 of the Detention Services Manual.
[3] See *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476. Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

under s39B of the *Judiciary Act 1903* (Cth) (Judiciary Act) . While *MIBP v ARJ17* settled the issue of the Federal Court of Australia's jurisdiction, (which this proposed Bill now seeks to reverse), the challenges to the lawfulness of the exercise of the search power vis-vis the confiscation of detainees' mobile phones and SIM cards, is yet to be finally determined by the Full Federal Court.[4]

Legal Significance of the *MIBP v ARJ17* Decision

4. One implication flowing from the characterisation of a decision as a 'migration decision', is that only the Federal Circuit Court, and not the Federal Court, has jurisdiction to review the decision at first instance. A further implication of limiting jurisdiction to the Federal Circuit Court is that its provisions and rules do not provide scope for bringing class actions or representative complaints. Notably, the application initially made by ARJ17 to the Federal Court[5] was a representative proceeding brought by a group of immigration detainees[6] and could not have been brought before the Federal Circuit Court, which can only hear cases filed by individual applicants[7] and not as representative proceedings.
5. Beyond determining the distribution of jurisdiction between the Federal Circuit Court and/or the Federal Court had jurisdiction, the case's consideration of the issue of whether 'purported non-privative clause decisions' can be characterised as 'migration decisions' or not, also affects the scope of available grounds of appeal in such decisions. For 'migration decisions', the Federal Circuit Court's jurisdiction[8] is limited to jurisdictional error, which cannot be legislatively removed owing to s 75(v) of the Constitution. Regular administrative law grounds for review such as those codified under *The Administrative Decisions Judicial Review Act 1977* (Cth) (ADJR Act), are excluded, limiting grounds of appeal to those that can be argued fall within jurisdictional error.[9] This means less scope for judicial scrutiny of whether the Commonwealth has acted lawfully in relation to its decisions, many of which relate to fundamental rights and liberties of people in detention, as further discussed below.

Impact on Federal Court Oversight of Treatment of People in Immigration Detention

6. If these amendments are passed, their effect will be to remove the jurisdiction of the Federal Court of Australia to review decisions relating to searches of people in immigration detention, including strip searches, seizure and retention of prohibited items including mobile phone and SIM cards. These proposed amendments will further worsen the existing deficit of accountability and oversight for exercise of powers over people in immigration detention.
7. While the scope and exercise of the search and confiscation powers under the Migration Act in themselves raise very significant human rights concerns, what is even more worrying about these amendments is that they would also potentially similarly affect a wider category of decisions; being all of those set out as 'non-privative clause decisions', which could also be 'purported non-privative clause decisions, as per the decision in the ARJ17 case.
8. Many of the powers listed in s 474(4) of the Migration Act concern the rights, freedoms, conditions of detention and property of people in immigration detention. In particular, these amendments would potentially oust from Federal Court review many decisions made under s 273 of the Migration Act.

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[4] On 28 February 2018 the Full Federal Court heard together both ARJ17 as well as another related matter *SZSZM v Minister for Immigration & Ors (2017) FCCA 819 (3 May 2017)* and has reserved its judgement.

[5] ARJ17 v Minister for Immigration and Border Protection [2017] FCA 263.

[6] Under Part IVA of the Federal Court of Australia Act.

[7] See s 478 of the Migration Act.

[8] Invested with the High Court of Australia's original jurisdiction.

[9] Codified grounds excluded include errors of law based on breach of rules of natural justice, unreasonableness, taking into account irrelevant considerations or its converse and bad faith, and these can only be argued if they fall within jurisdictional error.

This is the broad power for the establishment of detention centres and regulations for 'the operation and regulation of detention centres'[10]. Section 273 specifies that the scope of regulations under this power may include, (but are not limited to) matters dealing with the 'the conduct and supervision of detainees'[11] and 'the powers of person performing functions in connection with the supervision of detainees'.[12]

9. Thus, if these amendments are passed, a wide range of decisions relating to conditions of detention may potentially become less reviewable under the broader scope for review in the Federal Court. These may include matters of fundamental rights of people in immigration detention, including their access to legal assistance; the adequacy of health care and treatment provided to them; their access to visitors and means of communication with the outside world; the use of force and restraints upon them; the punitive use of detention procedures including risk assessment processes to impose restrictions on their liberties; decisions to transfer them to other centres including in remote locations, which may interrupt their ability to stay in contact with family members and sever their support networks; and likely many other facets concerning basic rights of people in detention.
10. This is extremely concerning, especially given the existing paucity of proper oversight and accountability for the treatment of people in Australia's immigration detention centres, including those owed special protection as people seeking asylum. It is submitted that it is precisely these kinds of decisions which warrant the most careful and fulsome scrutiny of our courts in order to act as an effective brake on the exercise of unlawful executive power. People in immigration detention have very limited access to justice and face many levels of disadvantage in raising and having complaints of human rights abuses in immigration detention, effectively dealt with under Australian law. This is especially relevant given that the mandatory protracted detention of people seeking asylum has been consistently found by the UN Human Rights Committee to constitute arbitrary detention and therefore in breach of Australia's international obligations under the ICCPR,[13] as well as the subject of sharp criticism by the UN Special Rapporteur on Torture[14] and many other UN bodies over many years.
11. It is also of note that these proposed amendments are but one part of a broader effort to expand Commonwealth powers to restrict the liberties of people in immigration detention. Notably, in September 2017 the Australian Government sought to introduce new legislation *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (Cth), to expand and clarify the Minister's power to define things prohibited in relation to a person in detention or an immigration facility. This Bill is currently before the Senate, and it is submitted, should also be opposed in its totality.

Proposed Amendments Further Expand the Discriminatory Approach Taken to Review of Migration-Related Matters

12. 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.

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[10] See s 273(2) Migration Act.
[11] See s 273(3)(a) Migration Act.
[12] See s 273(3)(b) Migration Act.
[13] See for example views of UN Human Rights Committee D and E v Australia (2007); A v Australia (1997);
[14] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, AHRC/28/68/Add.1

13. These proposed amendments are part of a broader long-term retrograde project to restrict the jurisdiction of Courts to review migration decisions to the maximum extent allowed by the Constitution and the High Court of Australia. This was most notably achieved via insertion of the privative clause in the Migration Act in 1994,[15] removing review of 'migration decisions' from the *Administrative Decisions Judicial Review Act (ADJR Act) 1977* (Cth). Since that time, unless grounds can be argued as jurisdictional error, decision makers can, unchecked by the courts, exercise their powers unreasonably, in bad faith, can deny natural justice to applicants, ignore relevant considerations or take into account irrelevant considerations, making such decisions fundamentally unfair, especially when they relate to decisions that impact on basic human rights.
14. This continuous erosion of the courts' jurisdiction in migration related matters including those that are not 'migration decisions' greatly reduces the ability of courts to perform their fundamental role to scrutinise the lawfulness of the exercise of executive power against vulnerable groups including people seeking asylum in immigration detention.

Loss of Option to Bring Class Actions on Common Issues re Immigration Detention Powers and Conditions

15. As noted above, a further consequence of removing the jurisdiction of the Federal Court relating to this category of decisions listed in s 474(4) of the Migration Act is that it precludes the possibility of applicants being able to bring class actions (formerly 'representative complaints'). This is because only individual applicants have standing to file in the Federal Circuit Court, whereas class actions can be brought before the Federal Court.[16]
16. 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.

Proposed Amendments Pose Further Barriers to Access to Justice for People Seeking Asylum

17. In addition, while the proposed amendments purport to help clarify the distribution of jurisdiction between the Federal Circuit Court and the Federal Court, in reality these proposed amendments simply add a further level of complexity to already bewildering provisions that obfuscate applicants' access to the court by making it very difficult for them to obtain basic information to make informed decisions regarding which courts they should bring their claims, and what their rights of review will be. Access to this information is made all the more difficult due to the lack of adequate funding for legal assistance in refugee status determination processes, including in relation to applications for judicial review. These problems were explicitly identified by all members of the bench in the decision that triggered this Bill, with the Part 8 jurisdiction provisions described as 'clear as mud'[17] and 'a morass of confusion'[18]. As further elaborated by Justice Flick:

[15] Under s 474 of the Migration Act.
[16] See Part IVA of the *Federal Court of Australia Act 1976* (Cth) and Division 9.3 of the Federal Court Rules 2011 (Cth).
[17] Flick J in MIBP v ARJ17 at 51.
[18] Ibid at 38.

> '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.' [19]

These proposed amendments in fact do the opposite of 'clarifying jurisdiction' as claimed. Rather the Bill simply follows the long established pattern of the legislature seeking to remove the narrow grounds on which the Federal Court finds jurisdiction to consider such matters and adds further complexity to the jurisdiction issue. As noted in the Australian Human Rights Commission and RCOA submissions, this is an opportunity to properly clarify jurisdiction by abolishing the privative clause that restricts grounds for judicial review in 'migration decisions' and restoring migration matters to the mainstream of administrative law.

Recommendations

Recommendation 1:

The Australian Government withdraw this proposed Bill in its totality and expand (not restrict) the grounds on which courts can provide oversight and accountability especially for decisions related to the conditions and treatment of people seeking asylum in immigration detention centres.

Recommendation 2:

The Australian Government restore funded legal assistance to people seeking asylum at all stages of the refugee status determination process, including for:

- People held in immigration detention to challenge decisions relating to their treatment in detention
- Those subject to 'fast track' processes before the Immigration Assessment authority
- Meritorious applications for judicial review of applications refused protection

Recommendation 3:

The Australian Government restore the review of migration decisions to the general grounds of review available under the Administrative Decisions (Judicial Review) Act, and repeal the privative clause in s 474 of the Migration Act.

Yours faithfully,

Kon Karapanagiotidis

OAM, Chief Executive and Founder

[19] Ibid at 52.