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Submission to the Senate Legal and Constitutional Affairs Committee

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the *Migration Amendment (Clarification of Jurisdiction) Bill 2018.* The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

Submission

1. Context

In order to fully realise the implications of this Bill, we draw attention to the context in which decisions on refugee claims are made. Refugee status determination ('RSD') is a complex and difficult process requiring decision-makers to make findings on a wide range of evidence which is often highly contested. Often applicants are vulnerable within the process as they typically do not speak English and have little understanding of the Australian legal system.[1]

In order to assess the current Bill, we would underline the vulnerable position of asylum-seekers in terms of return to their home country and the importance of to the standards utilised in the RSD process. One of the central protections for asylum seekers is Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention) which prohibits *refoulement* of a refugee to a place where they may face persecution.[2] Application of this prohibition means that return of asylum seekers to their country of origin without properly ascertaining if they are refugees is considered to be contrary to Article 33. Indeed, both UNHCR and refugee law scholars have emphasised the importance of maintaining an adequate system of status determination to ensure refugees are not returned to harm pursuant to Article 33.[3] In practice, this means asylum seekers must be given an effective opportunity to express

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1 This may be exacerbated if the applicant does not have legal assistance. On the important of legal representation, see Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart, 2017), 25-26; Sule Tomkinson, 'The impact of procedural capital and quality counsel in the Canadian refugee determination process' (2014) 1(3) *International Journal of Migration and Border Studies* 276.

2 189 UNTS 150, supplemented by the 1967 Protocol relating to the Status of Refugees, 606 UNTS 267 (Refugee Convention).

3 eg UNHCR Executive Committee, 'Conclusion on Protection Safeguards in Interception Measures No 97 (LIV) – 2003', (Executive Committee 54th Session, UN General Assembly Doc A/AC.96/987and 12A (A/58/12/Add.1) 10 October 2003), [iv]; Mark Pallis, 'Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 31 *International Journal of Refugee Law* 329, 342; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford University Press, 3rd ed, 2007) 528; James Hathaway, *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005) 159–60.

their need for international protection and access to a **fair and effective** RSD process. As part of this, the procedures and tests applied to any **merits review and judicial review** procedures must be intelligible to and understood by applicants.

In this regard, we note that Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a party, provides due process guarantees in relation to legal proceedings. It provides:

> All persons shall be equal before the courts and tribunals. In the determination of … his 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 established by law.

The United Nations has also state that access to justice is a basic principle of the rule of law.[4]

In this context, we draw the Committee's attention to the need to avoid complexity in legislation. It is well-accepted by both the judiciary and legal academics that the law must be certain and understood by the ordinary person so that the government can maintain public confidence in the legal system. In this regard, we bring to the attention of the Committee the comments of Robert French, former Chief Justice of the High Court of Australia. Chief Justice French stated:

> In my opinion, the democratic legitimacy of our laws is more likely to be threatened by the complexity involved in over-detailed, prescriptive and inaccessible language, than in laws which set out broadly stated principles…
>
> The role of the profession should be one of challenging unnecessary complexity and advocating for simplicity in expression and clarity of purpose in our statutes. In that kind of advocacy it will support **the democratic legitimacy of our laws, their moral clarity and thus the rule of law**.[5]

We echo the words of French CJ and submit that unnecessary complexity in legislation can weaken public confidence in the legal system and, ultimately, the rule of law.

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4 United Nations, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.

5 Chief Justice Robert French AC, 'Law - Complexity and Moral Clarity', 19 May 2013, 12-13 http://www hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf.

2. Issues with the *Migration Amendment (Clarification of Jurisdiction) Bill 2018*

The background to this Bill (including a summary of the case law to which this Bill responds) is comprehensively and accurately set out at Pt 4.2 of the submission of the Australian Human Rights Commission.

We note that this Bill seeks to respond to a decision of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v ARJ17*. In that decision, the judges addressed a particular jurisdictional point. However, in doing so, they also made important comments about the operation of the Migration Act within the broader community. Justice Flick observed:

> 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. The question as formulated by the Respondent, and **necessarily so framed by reason of the manner in which the legislation is drafted, is as clear as mud.** Even to an experienced migration practitioner, the question is only slightly more comprehensible.[6]

Justice Kerr J also said that the resolution of the case 'requires analysis of some of the **less intuitively comprehensible expressions of statutory drafting to be found in Australian law'**.[7] We submit that this area of the law requires simplification and clarification, but not in the manner proposed in the present Bill.

As the Australian Human Rights Commission notes in its submission (Sub 1), the language used in the Migration Act is highly complex. A person making a decision as to which court to lodge an application is required to understand the differences between 'purported' and 'non-purported privative clause decisions'. This jurisdictional complexity has particularly serious consequences for access to justice for asylum-seekers for the reasons we stated above (in relation to the vulnerability of that cohort of applicants).

Here we support the views of the ALRC at paragraph 4 of its submission:

> It is appropriate when complex legislation is being amended to consider whether it could be simplified and made more accessible. Such consideration is necessary here because, as identified by the Full Court of the Federal Court, the

[6] *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC at [51]-[52].
[7] *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC at [86].

> complexity of Part 8 of the Migration Act raises significant **access to justice** issues.

We also wish to note that due to cutbacks in the provision of funded legal assistance, many applicants rely on the services of *pro bono* lawyers. The complexity of the jurisdictional provisions in this area impacts on the willingness and ability of *pro bono* lawyers to help out these vulnerable clients. Further, this situation means that many applicants are self-represented before the courts. Indeed, two of the appeal judges in *MIBP v ARJ17* identified that Part 8, in its current form, created barriers to justice for unrepresented litigants.

It is the Castan Centre's view that existing common law and the *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act') provide adequate guidance on the scope of the available grounds of review. We argue that parliament should not amend the Migration Act again in a manner which will further complicate the scope of available grounds of judicial review. In this regard, we note the words of Professor John McMillan, a leading administrative law commentator in Australia, who has underlined the importance of the ADJR Act:

> Beyond the courtroom, the ADJR principles and grounds have a wider value of elucidating the principle of legality and instilling administrative law values in government administration. There is wide recognition throughout the public service of core ADJR grounds, such as natural justice, relevant and irrelevant considerations, unauthorised purpose, inflexible application of policy, good faith, unreasonableness, evidence based decision making, and reasons for decision.[8]

The Castan Centre for Human Rights Law therefore makes the following recommendations in response to this Bill:

[8] John McMillan, 'Restoring the ADJR Act in federal judicial revie*w' Presentation by Prof John McMillan, Australian Information Commissioner to the Australian Institute of Administrative Law seminar, Canberra, 4 December 2012,* https://www.oaic.gov.au/media-and-speeches/speeches/restoring-the-adjr-act-in-federal-judicial-review.

Recommendation 1

The Australian Government should repeal the privative clause in s 474 of the Migration Act.

Recommendation 2

The Australian Government should restore the review of migration decisions in the Migration Act to the general grounds of review available under the Administrative Decisions (Judicial Review) Act. In doing so, the Centre recommends that Part 8 of the Migration Act be amended to identify clearly: (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.