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16 April 2018

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE ON THE MIGRATION AMENDMENT (CLARIFICATION OF JURISDICTION) BILL 2018

Dear Sir/Madam,

Thank you for the opportunity to make submissions on the provisions of the Migration Amendment (Clarification of Jurisdiction) Bill 2018 ('the Bill').

The National Justice Project (NJP) is a not-for-profit human rights legal service. We work with some of Australia's most vulnerable people and communities, providing legal support to people who struggle to access justice. Our major projects focus on improving access to justice for Aboriginal communities, prisoners and asylum seekers in immigration detention.

We have represented, and continue to represent, many clients who will be directly impacted by the proposed provisions of the Bill. It is from the perspective of this experience that we make the following submissions.

INTRODUCTION

We endorse and adopt the accurate summary of the Asylum Seeker Resource Centre regarding the legal issues considered in *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (*ARJ17*). We further draw your attention to paragraphs 40 to 48 of the submissions of the Australian Human Rights Commission which aptly define the differences between a 'privative clause decision', a 'purported privative clause decision', and a 'non-privative clause decision', however we do not support the maintenance of this distinction.

We support the views, submissions, and recommendations of the Australian Human Rights Commission, Castan Centre for Human Rights Law, the Asylum Seeker Resource Centre and others who make submissions recommending a return to a right of judicial review for all decisions under the *Migration Act 1958* (Cth) (*Migration Act*). This is consistent with the judicial review of other administrative decisions under the *Administrative Decisions Judicial Review Act 1977* (Cth) (ADJR Act) and with Australia's human rights obligations to provide an effective judicial remedy for the review of government decisions that violate a person's rights or freedoms.

However, we acknowledge that in the current political environment it is unlikely that 'root and branch reform' will take place. Accordingly, we make the following recommendations

1. That the bill be rejected in its entirety.

2. 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*.

3. 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.

We make the following submissions in support of these recommendations.

JUSTIFICATION FOR THE BILL

The government provides two main justifications for the current Bill:

- To clarify what is a 'migration decision' and subject all migration decisions to 'uniform judicial review requirements';[1] and

- To ensure the 'effective and efficient management of migration legislation'.[2]

Both of these justifications are unfounded and not supported by the evidence. We will address each of these below.

CLARIFICATION AND UNIFORMITY OF MIGRATION DECISIONS

On their face, clarity, uniformity and consistency are laudable objectives but this amendment will not achieve that result. Notwithstanding that the Migration Act is a Byzantine maze to navigate, the proposed amendments will not change the convoluted nature of the Act and its drafting.

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2018, 1340 (Alex Hawke, Assistant Minister for Home Affairs).

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2018, 1340 (Alex Hawke, Assistant Minister for Home Affairs).

If passed, the Bill will, among other matters:

- repeal the current definition of a 'migration decision' and replace it with a new definition that includes a 'purported non-privative clause decision';[3] and
- define a 'purported non-privative clause decision' to include decisions purportedly made under the Act, and that would otherwise be decisions made under the Act, if there were not 'a failure to exercise jurisdiction' or 'an excess of jurisdiction'.

At page 10 of the Explanatory Memorandum, the government states that:

> The Bill will ensure that all migration decisions, regardless of whether the decision is affected by error or not, will be reviewable in accordance with the judicial review scheme set out in the Migration Act.

We submit that the attempt in this Bill to expand the definition of a 'migration decision' is unnecessary and is a blatant attempt to oust the jurisdiction of the Federal Court and impede Executive accountability for flawed decisions.

BACKGROUND TO JURISDICTION

The approach in the Bill neglects to consider the fundamental jurisprudence of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*).

Under s 75(v) of the Constitution, the High Court has an entrenched jurisdiction that cannot be ousted by statute. This jurisdiction enables the Court to grant remedies where an officer of the Commonwealth makes a decision 'infected' by jurisdictional error.

In *Plaintiff S157* the High Court held that a privative clause attempting to oust the jurisdiction of the Court to consider a whether a non-privative clause decision was invalidated by virtue of jurisdictional error would breach the Constitution in this respect. Accordingly, where a decision is *purportedly* made under the Migration Act, but the *purported* decision involves jurisdictional error, it is not a decision for the purposes of that Act at all and the privative clause is ineffective.

OUSTING JURISDICTION

Passage of this Bill will oust the jurisdiction of the Federal Court from considering whether a *purported* decision is invalidated by jurisdictional error. This means that where the Minister or other decision-maker has acted outside the scope of their legislative power, the *purported* decision will still be treated as a 'decision' under the *Migration Act*.

The government has stated that this amendment is in response to the decision in *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (*ARJ17*) where the Court found that it had jurisdiction to determine whether the relevant decision was affected by jurisdictional error. The NJP acted for the plaintiff in this matter.

[3] Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth) sch 1 item 1.

We submit that the justification for changes to the definition of a migration decision misconstrues the Court's concerns about migration decisions under the Act. Consistent with the findings of the Court we submit that the complexity of the existing legal framework which carves out the jurisdiction of the FCA over privative and non-privative clause decisions needs reform, and not the specific operation of s 474(4). In *SZSZM v Minister for Immigration and Border Protection* [2017] FCCA 819 and in *ARJ17*, both the FCC and the FCA have successfully resolved jurisdictional issues regarding migration decisions after giving the issue appropriate consideration.

We submit that this Bill is not aimed at providing clarity and uniformity, except to the extent that it aims to impede the Minister being held to account for decisions that are outside his power. It prevents the Federal Court from examining whether a questionable decision of the Minister is actually a decision within his power under the *Migration Act*, and means that all decisions, whether within the power authorised by the Parliament under the *Migration Act* or not, are treated as 'migration decisions' under the *Migration Act*.

EFFECTIVE AND EFFICIENT MANAGEMENT OF MIGRATION LEGISLATION

JURISDICTIONAL ISSUES AT HEARING

At paragraph 12 of the Explanatory Memorandum, the government states in relation to *purported* non-privative clause decisions:

> If such proceedings were commenced in the Federal Court, a substantial hearing would be required in order to determine whether the relevant decision is affected by jurisdictional error in order to determine whether the Court has jurisdiction to hear the matter. This is an inefficient use of the Federal Court's time'.

We submit that this statement misconstrues the way courts deal with jurisdictional issues on a daily basis. There is no reason that jurisdictional issues cannot be dealt with at a final hearing along with substantive issues. It is the usual and common practice of the courts to ensure matter are dealt with expeditiously and efficiently.

INSTITUTING MATTERS IN THE FCC

By including *purported* non-privative clause decisions in the definition of a 'migration decision', all applications for review of these *purported* decisions will need to be instituted in the Federal Circuit Court (FCC) in the first instance. The government claims that this is appropriate to 'provide a uniform and streamlined framework for managing the high volume of migration decisions that are litigated and maintaining the efficient use of the court's resources'.[4]

There is no evidence of any increase in the volume of FCA matters dealing with *purported* non-privative clause decisions since *ARJ17*. The number of decisions that fall under the definition of 'non-privative clause decisions' under s 474(4) of the Migration Act are in fact small. This is because the nature of the non-privative clauses under s 474(4) of the Act simply do not lend themselves to mass individual legal

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2018, 1340 (Alex Hawke, Assistant Minister for Home Affairs).

action. They are decisions that affect privacy, liberty, rights against the person and personal economic and property rights, such as

- the searching of an individual;
- seizing personal possessions; and
- the wide power of the Minister to operate detention centres.

Further, because these decisions can impact the conditions under which individuals are held in detention, they may have broad application. In many circumstances class actions are the appropriate and most efficient mechanism to manage group actions. The single class action in *ARJ17* is an example of this.

CLASS ACTIONS AND REPRESENTATIVE CLAIMS

The FCC does not have the jurisdiction to hear class or representative action claims. Forcing *purported* non-privative clause decisions back to FCC will actually have the effect of increasing the number of matters before the FCC, forcing a multiplicity of individual actions instead of enabling them to be dealt with as a single class or representative action before the FCA. 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 FCC and deny applicants access to a jurisdiction with representative action powers.

We submit that there is no reason why these matters cannot be dealt with by the FCA. The proposed amendments will have substantial costs for applicants, the Commonwealth, and the judiciary which could be easily avoided. The proposed amendments would result in an inefficient allocation of court resources and as a result, will be at odds with the goal of the Government to decrease inefficient use of court time.

We submit that the most efficient and effective way to improve the management of migration legislation is for the Minister and other decision-makers to not make decisions affected by jurisdictional error, rather than removing the review rights of persons affects by these legally flawed decisions.

EXECUTIVE ACCOUNTABILITY

We note and endorse the submissions of others that highlight the continued erosion of the jurisdiction of the courts to hear migration related matters. We support and echo the submissions that emphasise the critical role the judiciary plays in ensuring the Executive makes decisions lawfully and within power. However, we submit that the provisions of this Bill place the separation of powers at risk on an additional level. Specifically, this Bill disregards the fundamental role of the Parliament to grant the power to make decisions in the first place.

Concurrent with the provisions of the current Bill, the government is progressing the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017. As the members of this Committee are aware, that Bill seeks Parliamentary approval to extend the Minister's powers under the *Migration Act* to include the type of decision that the Full Court of the Federal Court found was outside of power in *ARJ17*.

While noting that the present inquiry is not concerned with the above Bill, which has previously been considered by this Committee, we consider that these two bills together represent an unacceptable erosion of the separation of powers. We note that the report from this Committee on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 was split along party lines, with several serious concerns expressed about ensuring the rights of detainees are not infringed.

This Committee should reject this government's attempts to bypass the legislative process and ensure the government, and in particular the Minister for Home Affairs, is held to account for decisions that fall outside the legislated scope of the *Migration Act*. We submit that this Committee should not give free reign to the Minister to exceed, unchecked, the powers granted to him or her by the Legislature.

RECOMMENDATIONS

In the absence of political will to implement genuine and substantive reform to improve the management of the migration jurisdiction, we make the following recommendations:

1. That the bill be rejected in its entirety.

2. 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 1958* (Cth).

3. 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.

Thank you again for the opportunity to comment on this Bill. I would be pleased to have the opportunity to appear in person to answer any questions of the Committee should public hearings be held.

Yours sincerely

GEORGE NEWHOUSE | Principal Solicitor