

Dissenting Report by the Australian Greens

1.1 The Australian Greens dissent from the majority report of the Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the Migration Amendment (Clarification of Jurisdiction) Bill 2018.

1.2 This bill is in response to the decision of the Full Court of the Federal Court in *Minster for Immigration and Border Protection v ARJ17*.¹ The focus of the appeal was on the scope of the jurisdiction of the Federal Court of Australia and the Federal Circuit Court to hear challenges to decisions under the Migration Act.

1.3 This bill is intended to provide clarification of jurisdiction between the Federal Court and the Federal Circuit Court for a non-privative clause decision affected by jurisdictional error. The bill inserts a new definition of 'purported non-privative clause decision' in the Migration Act so that such a decision will be classified as a migration decision. The practical effect is that such matters proceed in first instance to the Federal Circuit Court.

1.4 The majority of submitters expressed valid concerns that the measures in the bill will reduce access to justice, particularly in light of the Government's decision to withdraw legal assistance to people who arrived in Australia without a visa.

1.5 The Australian Greens agree with the submission of the Refugee Council of Australia that:

[the bill] does not clarify the jurisdiction of our courts to review migration decisions. Rather, it complicates an already impenetrable system of review that has no counterpart in any other area of law.²

1.6 The Refugee Council of Australia further stated that:

This Bill is highly technical and, even to the legally trained, virtually unintelligible.³

1.7 The Law Council of Australia notes in their submission:

...that the bill does little to address the overall complexity and inaccessibility of the judicial review scheme set out in the Migration Act.⁴

1.8 This bill adds a further level of complexity for an applicant who is trying to identify what their rights of review are and in which court they should bring their claim. As the Asylum Seeker Resource Centre recommended in its submission:

The Australian Government withdraw this proposed Bill in its totality and expand (not restrict) the grounds on which courts can provide oversight and

1 [2017] FCAFC 125.

2 Refugee Council of Australia, *Submission 5*, p. 1.

3 Refugee Council of Australia, *Submission 5*, p. 2.

4 Law Council of Australia, *Submission 11*, p. 2.

accountability especially for the decisions related to the conditions and treatment of people seeking asylum in immigration detention centres.⁵

1.9 The Australian Greens do not support any measure that restricts access to justice to people seeking asylum or in immigration detention. A raft of legislative barriers and the removal of virtually all legal assistance funding have left a vulnerable cohort of people in Australia having to self-represent without the legal knowledge required to navigate the complexities of the Migration Act.

Recommendation 1

1.10 The Australian Greens recommend that the bill not be passed.

**Senator Nick McKim
Senator for Tasmania**

5 Asylum Seeker Resource Centre, *Submission 6*, p. 5.