

## Additional Comments – Centre Alliance

1.1 Centre Alliance supports the passage of the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (the Bill) in circumstances where it will provide clarity in the wake of *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (ARJ17).

1.2 The Centre Alliance senators do however note that as a consequence of restricting the Federal Court's ability to hear and determine migration decisions, as per the original policy intent, that applicants will no longer be able to bring a class action when appealing against purported non-privative clauses. The Centre Alliance senators suggest consideration be given to amending the Bill to enable representative actions to be commenced in the Federal Circuit Court.

1.3 While the Bill addresses a specific legal technicality, it has also highlighted the complex and at times unreasonable operation of Part 8 of the *Migration Act 1958 (Cth)* (Migration Act).

1.4 Centre Alliance senators consider the judicial review process in Part 8 to be a barrier to access to justice by virtue of the complex legislative pathway facing litigants, many of whom do not have the benefit of legal representation.

1.5 This concern is shared by the Australian Human Rights Commission,<sup>1</sup> the Law Council of Australia,<sup>2</sup> the Refugee Council of Australia<sup>3</sup> and has been the subject of comment by the Full Court of the Federal Court.<sup>4</sup>

1.6 In the ARJ17 decision, the Full Court of the Federal Court commented on the operation of Part 8, being the judicial review process, and noted the following:

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.<sup>5</sup>

...

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**.<sup>6</sup>

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1 Australian Human Rights Commission, *Submission 1*, p. 12.

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

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

4 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125.

5 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [51].

6 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [52].

Core concepts such as what is meant by a purported privative clause decision **defy the understanding of any ordinary reader.**<sup>7</sup>

1.7 Judicial review is the cornerstone of government accountability and transparency. It enables individuals to challenge decisions made by the executive, and ensures that the executive does not act beyond the powers granted to it by Parliament.

1.8 Ordinarily the *Administrative Decisions (Judicial Review) Act 1997 (Cth)* (the ADJR Act) determines the process to be followed when challenging most administrative decisions. The ADJR Act enables individuals and businesses to clearly identify both the grounds of review that they may seek to rely on, and the Court in which they should file their application for review.

1.9 However, review of migration decisions has been slowly but systematically segregated from the ordinary ADJR Act review process. Applicants seeking judicial review of migration decisions now no longer have the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions.

1.10 Instead, individuals must navigate the labyrinthine provisions of the Migration Act which was described by the Full Court of the Federal Court in the ARJ17 decision as 'impenetrably dense',<sup>8</sup> 'a morass of confusion'<sup>9</sup> and 'requires analysis of some of the less intuitively comprehensible expressions of statutory drafting to be found in Australian law.'<sup>10</sup>

1.11 This is not a new problem:

- a) In 2011, the Migration Review Tribunal–Refugee Review Tribunal stated that 'the time is right....for migration and refugee decision making to be brought back under the umbrella of the ADJR Act.'<sup>11</sup>
- b) In a 2014 Commonwealth wide review of legislation the Australian Law Reform Commission (ALRC) identified particular clauses within the Migration Act as unjustifiably encroaching on the rights of individuals by restricting access to review courts.<sup>12</sup>

The ALRC review was conducted at the request of the former Attorney-General, the Hon George Brandis QC.

1.12 The Centre Alliance senators note the comments of the Refugee Council of Australia on the importance of migration review decisions:

Unlike any other area of administrative law, an incorrect decision in refugee determination can, quite literally, cost a refugee his/her life. Surely the

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7 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [177].

8 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [177].

9 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [38].

10 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, [86].

11 Australian Human Rights Commission, *Submission 1*, p. 19.

12 Australian Human Rights Commission, *Submission 1*, p. 16.

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checks and safeguards in this jurisdiction should be far more rigorous than in an area where the stakes are far lower.<sup>13</sup>

1.13 Centre Alliance senators support the submissions made by both the Australian Human Rights Commission and the Refugee Council of Australia, and note the need to simplify the judicial review pathway found in Part 8 of the Migration Act to better identify:

- 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.

### **Recommendation 1**

**That the government consider directing the Australian Law Reform Commission to inquire into the current judicial review pathways contained in Part 8 of the *Migration Act 1958* with a view to removing complexity and aligning grounds of review with those under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).**

**Senator Stirling Griff**

**Senator for South Australia**

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13 Australian Human Rights Commission, *Submission 1*, p. 16.

