

18 April 2018

Senator the Hon Ian Macdonald
Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

Migration Amendment (Clarification of Jurisdiction) Bill 2018

The Law Council of Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (**the Bill**).

Comments on the Bill

The Bill seeks to clarify the allocation of jurisdiction between the Federal Circuit Court and the Federal Court in relation to a migration decision, as defined in the *Migration Act 1958* (Cth) (**Migration Act**).

The Bill has been introduced in response to the decision of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v ARJ17* (**ARJ17**).¹ In that decision, the Court held that the definition of a migration decision for the purposes of judicial review under Part 8 of the Migration Act does not include a purported non-privative clause decision, that is, a non-privative clause decision that is affected by jurisdictional error. The consequence of ARJ17 is that the Federal Court maintains original jurisdiction over such decisions, rather than the Federal Circuit Court.

The Bill seeks to alter this outcome by inserting a new definition of 'purported non-privative clause decision' in the Migration Act, meaning that that such a decision will be classified as a migration decision, and therefore subject to the judicial review scheme contained at Part 8. Should the Bill proceed, the practical result will be that such matters must proceed in the first instance to the Federal Circuit Court.

The Law Council notes that the measures contained in the Bill attempt to provide a level of certainty as to the allocation of jurisdiction between the Federal Court and Federal Circuit Court for a non-privative clause decision affected by jurisdictional error. However, the Law Council is concerned that by doing so, these measures may be narrowing an applicant's rights to a higher jurisdiction and thereby impacting their remedy, and suggests that further

¹ [2017] FCAFC 125 (ARJ17).

enquiries by the committee be made to ensure that this would not be the case given the types of decisions being considered is much broader. The Law Council remains concerned by reform measures that seek to further limit the original jurisdiction of the Federal Court to review a range of important administrative decisions, many of which have the potential to impact on the fundamental rights of those subject to immigration detention.

The Law Council further points out that that the Bill does little to address the overall complexity and inaccessibility of the judicial review scheme set out in the Migration Act. This is discussed further below.

Broader comments on the judicial review scheme within the Migration Act.

The Explanatory Memorandum to the Bill identifies the purpose of the amendments as clarifying the judicial review scheme set out in the Migration Act, asserting that the measures will provide certainty to the nature, scope and types of decisions that may be subject to judicial review.²

However, while the Bill seeks to address the narrow jurisdictional point decided in ARJ17 as it relates to judicial review of purported non-privative clause decisions, it fails to address the broader issues of complexity and uncertainty in the judicial review regime within the Migration Act as identified by the Court in that decision. In this respect, the Law Council draws on the observations of Flick J in relation to the operation of Part 8 of the Migration Act where His Honour noted:

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.

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.³

These broader comments within the ARJ17 decision reflect substantial access to justice concerns with the judicial review scheme contained in the Migration Act which have been repeatedly identified as a problematic barrier to effective judicial review. The Law Council submits that reform in this area should aim to address the underlying deficiencies within the judicial review scheme set out in the Migration Act, rather than continue to add piecemeal amendments in response to jurisdictional challenges which impact applicants in judicial review matters.

As previously highlighted by the Administrative Review Council 'complexity can be a barrier to accessing the legal system'.⁴ In this regard, the Law Council supports the submission of the Australian Human Rights Commission (**AHRC**) to the current inquiry⁵ which has highlighted the unreasonable barriers to judicial review that have been put in place as a result of the complex operation of Part 8 of the Migration Act. Further, the Law Council shares the concerns of the AHRC in relation to the separate statutory regime for judicial

² Explanatory Memorandum to the Migration Amendment (Clarification of Jurisdiction) Bill 2018, page 9.

³ *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125, at [51]-[52].

⁴ Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012), p 131.

⁵ Australian Human Rights Commission *Submission to the Senate Legal and Constitutional Affairs Legislation Committee* (4 April 2018)

<www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Clarification_Juris/Submissions>.

review of migration decisions, together with the use of a privative clause in decision-making, which has failed to reduce the number of applications being lodged, and has made processes increasingly complex for applicants to navigate through, often without any legal assistance.

While it is appreciated that it may be beyond the scope of the Committee's current consideration of the Bill, the Law Council recommends that a broader review should be undertaken which carefully examines the judicial review of migration decisions with the view to removing complexity and aligning grounds of review with those under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Should you have any queries, please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au .

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smither', with a long horizontal stroke extending to the right.

Jonathan Smither
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