Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION ON THE MIGRATION AMENDMENT (CLARIFICATION OF JURISDICTION) BILL 2018

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Migration Amendment (Clarification of Jurisdiction) Bill 2018. In our view, this Bill does not do what it claims to do. It 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.

This submission endorses the concerns identified by the Australian Human Rights Commission in its submission to this Committee and its recommendations. In particular, we focus on the ever-decreasing access to justice for people claiming refugee status and its implications not only for the fairness and efficiency of the system, but for the people who are effectively denied justice.

1 The decision on refugee status

1.1 A refugee is a person who fears persecution. Refugees may face a lifetime of living on the margins in a society that persecutes them and denies them their basic rights. They may fear torture, sexual abuse, or even death. The consequences of getting a decision wrong on a refugee claim are, in many cases, literally life or death. Getting decisions wrong also puts Australia in breach of its international obligations not to *refoule* (return) people to persecution or other serious harm.

1.2 Yet the risks of getting those decisions wrong are also high. People forced to flee rarely can bring all their documents or proof of their persecution. Often all a decision-maker will have is information produced by third parties ('country information') about the general situation of a country, and the evidence of the person claiming refugee status.

1.3 Decision-makers have to make very difficult decisions about countries and situations they are unlikely to have been exposed to, and claimants who have been raised in very different places who are trying to tell their most intimate stories before people they are afraid of.

1.4 Refugees will often suffer the continuing effects of persecution in their minds and bodies, which may make it hard for them to cope with daily life. These effects make it even more difficult for them to navigate a complex legal system in a country and language unfamiliar to them.

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1.5 In the case of people coming to Australia by boat, those very real barriers are made worse by punitive policies that effectively impede access to justice. People who come by boat have often been detained, or live in the community on a minimal income. They have very limited access to any government-funded services to help them learn English or to get through daily life. All too often, they have to rely on the hospitality of their communities and the charity of strangers.

1.6 The current government has also removed virtually all access to government funding for legal help for those who came by boat. Members of the Refugee Council of Australia which provide free legal services have been struggling with the perfect storm of the withdrawal of funding at a time of overwhelming need and in the midst of an ever-changing policy environment.

1.7 The risk of error in decision-making has also been significantly increased by changes to the system of refugee status determination for people who came by boat on or after 13 August 2012 (known as 'fast tracking'). Under this system, there have been a raft of legislative and practical barriers, including the changing of the definition of 'refugee', legislative barriers to providing late evidence, the absorption of the independent country information unit into the Department of Home Affairs, and the effective removal of the right to be heard by an independent merits review body.

1.8 The cumulative result of these changes is to force more and more desperate and vulnerable people to resort to the courts. The waiting time for judicial review of these decisions is now already several months and in some cases years long. In the meantime, those who came by boat are given no means of survival by the government. They have no right to legal representation before the courts, and to the extent they are represented at all it is usually because of the generosity of pro bono lawyers.

2 Access to justice

2.1 This Bill should be read with this context in mind. This Bill is highly technical and, even to the legally trained, virtually unintelligible. It is tempting therefore to treat this Bill as a narrow and technical Bill with limited relevance.

2.2 Yet its very incomprehensibility reflects the fundamental problem. As the Australian Human Rights Commission details in its submission, even just deciding which court to go to requires understanding the differences between 'purported' and 'non-purported privative clause decisions'. This jurisdictional labyrinth has especially serious consequences for access to justice for the most vulnerable. In the judgment that this Bill is said to respond to, 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.*[1]

2.3 Rather than addressing the substance of this concern, this Bill seeks to remove the narrow ground on which the Federal Court found it had jurisdiction to consider this matter. This has been the routine habit of legislation addressing court decisions in this area. As a result, as Justice Kerr said in the same case, "definitions have been built on definitions", making the *Migration Act 1958* (Cth) "impenetrably dense".[2]

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[1] *Minister for Immigration and Border Protection v ARJ17*, [2017] FCAFC 125 (17 August 2017), [51]-[52].
[2] *Minister for Immigration and Border Protection v ARJ17*, [2017] FCAFC 125 (17 August 2017), [177].

2.4 As the Australian Human Rights Commission details, since 1994 the review of migration decisions by courts has been decoupled from the grounds of administrative review that governs other decisions by the government, as codified in the *Administrative Decisions (Judicial Review) Act 1997* (Cth). There have been decades of court decisions and legislation addressing the ever more peculiar grounds for the review of migration decisions. This area of law has become more and more abstruse, intelligible only to a niche group of lawyers. This has real effects on the willingness and ability of even enthusiastic pro bono lawyers to help out these most vulnerable clients.

2.5 This labyrinth denies justice to those who need it most. Barristers need to be retained and cases heard even to identify which courts the case should be heard in. It has created a separate and patently much less fair system of justice for vulnerable non-citizens, in breach of the principle of equality of law. Yet all this has done is to displace the complexities and delays at the front end of the system to the much more expensive end of the system.

2.6 We therefore strongly support the recommendations made by the Australian Human Rights Commission in its submission. These would restore the grounds of judicial review to the mainstream of administrative law. We also endorse their recommendations to promote efficiency through better and swifter decision-making by the first decision-maker, and the fairer and more cost-effective means of providing legal assistance to those who need it. In our view, these recommendations would much more effectively respond to the concerns identified by the Federal Court in the case that has prompted this Bill.

3 Detention conditions

3.1 We also endorse the Asylum Seeker Resource Centre's concerns in its that this Bill will restrict access to the courts for people in detention. We have long been concerned by the lack of oversight and accountability of Australia's system of detention.

3.2 There is no substantive judicial review of the decision of detention. There is no maximum time limit for detention. The organisations that hear complaints about detention can provide advice to the Department, but the advice can and is routinely ignored. While the Department of Home Affairs states that there is a process of administrative review of detention, the details of that review are mysterious to even the seasoned observer, let alone the vulnerable person in detention.

3.3 In recent years, conditions in detention have worsened significantly. While the numbers of people seeking asylum in detention have decreased significantly, those who are there have now often been in there for years.

3.4 Increased security and the introduction of the Australian Border Force have made conditions increasingly prison-like. The use of force has escalated, and the use of inappropriate restraints on people visiting torture and trauma counsellors is a continuing concern. People have been separated more frequently from family and friends within detention. Visits outside detention have been curtailed, and visits to detention have recently become extremely difficult.

3.5 The Refugee Council of Australia published a report on the restrictions on visits to detention in 2017, *Unwelcome Visitors,*[3] but in early 2018 a new system of visiting has made things even harder. Visitors are unable to visit multiple detainees without special permission, many more everyday items cannot be taken in, and the online system is extremely difficult for people to use.

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[3] Refugee Council of Australia, *Unwelcome Visitors: Challenges Faced by People Visiting Immigration Detention* (August 2017) <https://www.refugeecouncil.org.au/publications/reports/detention-visitors/>.

3.6 This Bill was prompted by a challenge to the government's decision to take away mobile phones from people in detention. For people in detention, mobile phones are often a lifeline to family and friends. They are often the only way they can access legal representatives and support networks, and have often been the only way people have found out that their friends in detention are about to be transferred to another detention centre or removed from Australia.

3.7 The decision to take those mobile phones away was made despite those significant concerns by many stakeholders. Such a life-changing decision should properly be subject to review as with all government decisions, consistently with the principle of the rule of law.

Recommendation 1

This Bill should not be passed.

Recommendation 2

The Australian Government should restore the review of migration decisions to the general grounds of review available under the Administrative Decisions (Judicial Review) Act, and repeal the privative clause in s 474 of the Migration Act.

Recommendation 3

The Australian Government should promote efficiency through more robust and swifter decision-making by the Department, and through restoring funding for legal assistance to those in the process of refugee status determination.