Chapter 2

Key issues

2.1 Submissions received by the committee expressed concerns regarding the Bill. The key concerns focussed on provisions in the following categories, which are the subject of this chapter:

- removal and statutory bars (Schedule 1);
- visa cancellation (Schedule 2);
- protection visa statutory bars (Part 1 of Schedule 3); and
- maritime powers (Schedule 4).

2.2 Several submitters commented also on the committee's inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014 [Provisions] and the concerns then raised in relation to the provisions of that Bill.[1] The committee tabled its report for that inquiry on 24 November 2014 and proposes to refer to the resulting legislation, the Character Act, only in so far as it is directly relevant to the current inquiry.[2]

Removal and statutory bars (Schedule 1)

2.3 Schedule 1 to the Bill proposes to amend sections 42 and 48A of the Migration Act (item 2 and items 6–7, respectively). Submitters argued that these amendments are unfair and disadvantage people who are returned to Australia after a failed removal or refusal of entry at the destination country. Submitters argued also that the amendments potentially breach Australia's international law obligations.

Return without a visa (item 2)

2.4 The Migration Act currently allows for a non-citizen who has been removed from Australia under section 198 to return without a visa, if the person was refused entry at the destination country (paragraph 42(2A)(d)). A person who is returned to Australia for any other reason cannot lawfully return without a visa.

2.5 Item 2 of Schedule 1 replaces paragraph 42(2A)(d) and inserts new paragraph 42(2A)(da), to provide that when a non-citizen is being removed from Australia under section 198 of the Migration Act and the removal is not completed, or the removal is completed but the person does not enter the destination country, and is returned to Australia, then that person has a lawful basis to return to Australia without a visa.

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1 For example: Refugee Council of Australia (RCOA), *Submission 3*, pp 2–3: Asylum Seekers Resource Centre (ASRC), *Submission 4*, p. 3; Law Council of Australia (LCA), *Submission 7*, p. 7.

2 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Character and General Visa Cancellation) Bill 2014 [Provisions]*, 24 November 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Character_and_Visa_Cancellation_Bill_2014/Report, accessed 13 October 2015.

2.6 The EM states that the amendments allow for greater flexibility in returning a removed non-citizen to Australia. Paragraph 42(2A)(d) now provides for situations where a removal is not completed (the non-citizen does not arrive at the destination country) and paragraph 42(2A)(da) provides for situations where the removal has been completed (the non-citizen has arrived at the destination country) but the non-citizen has been refused entry:

> Paragraph 42(2A)(da) covers a non-citizen in this in-between stage where the removal has been successfully completed, but they have not yet entered the destination country.
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> The broadened scope of paragraph 42(2A)(da) as compared to current paragraph 42(2A)(d) is intended to allow for greater flexibility in returning a removed non-citizen to Australia.[3]

2.7 The EM indicates that there are a range of situations in which a non-citizen who has been removed, or is in the process of being removed, could be returned to Australia:

> For example—the non-citizen could be refused entry to a transit country, an aircraft could be forced mid-flight to return to Australia, the Government could decide to cancel the removal in response to an Interim Measures Request from the United Nations, or despite being successfully removed from Australia the non-citizen could be refused entry into the destination country.[4]

Further applications for protection visas (items 6–7)

2.8 Section 48A of the Migration Act prevents non-citizens in the 'migration zone' from making a further application for a protection visa after a protection visa has already been refused or cancelled.[5]

2.9 Item 6 of Schedule 1 would insert new subsection 48A(1AB), to provide that when a non-citizen is returned to Australia, because a removal was not completed, the person will be taken to have been continuously in the 'migration zone', for the purposes of section 48A. A similar amendment is made in respect of non-citizens who are returned to Australia because they have not been able to enter the destination country (item 7 of Schedule 1).

2.10 The EM explains:

> The purpose of [new subsection 48A(1AB)] is to ensure that where an attempt to remove a non-citizen has been made, but that removal was not completed, the non-citizen does not gain an advantage (i.e. the ability to apply for another protection visa) due to the attempted removal.[6]

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3 EM, p. 9.

4 EM, p. 9.

5 The term 'migration zone' is defined in subsection 5(1) of the *Migration Act 1958* (Migration Act).

6 EM, p. 12.

2.11 Rather than preventing non-citizens from gaining an advantage, the Asylum Seeker Resource Centre (ASRC) argued that the amendment would disadvantage asylum seekers:

> …as it ignores an important aspect of their claim, undermines the principle of natural justice and means highly relevant information to an individual's protection claim cannot be considered.[7]

2.12 Several submitters elaborated, stating that an aborted removal or refusal of entry could lend support to a person's protection claims or trigger new protection claims (neither of which would be considered in a new protection visa application).[8] The Refugee Advice and Casework Service (Aust) Inc. (RACS) submitted, for example:

> Aborted attempts at removal resulting in a person being brought back to Australia will foreseeably attract significant attention from the authorities of the destination country in some cases. For people who fear harm at the hands of the authorities of that country, this may constitute a significant change in circumstances.[9]

2.13 The Law Council of Australia (LCA) and the Law Institute of Victoria (LIV) expressed concern that items 6–7 of Schedule 1, in conjunction with the refusal or cancellation of a non-citizen's visa, could render a person stateless and potentially place Australia in breach of its international obligations:

> Under these changes, asylum seekers who are refused a protection visa and are then subject to an unsuccessful attempted removal will not be able to apply for another protection visa. This is problematic…if the destination country is the asylum seeker's only country of nationality, and it refuses to allow the entry of the asylum seeker, this effectively renders the asylum seeker stateless. There is also the potential that this could lead to arbitrary detention under international law whilst the Australian Government looks for an alternative destination country[.][10]

2.14 The Department of Immigration and Border Protection (department) advised that removals are undertaken in a manner which minimises any effect on a person's protection claims. If, however, a removal creates *sur place* claims, then the Migration Act allows for those claims to be raised:

> In the rare event that a removal operation draws significant and adverse attention to a person being removed and creates possible sur place protection issues, the person can seek to have the s48A bar lifted to enable a fresh protection visa application to be lodged. Ministerial intervention

7 *Submission 4*, p. 7.

8 ASRC, *Submission 4*, p. 7; RCOA, *Submission 3*, p. 4; LCA, *Submission 7*, p. 6.

9 *Submission 5*, p. 6.

10 *Submission 7*, p. 6.

> under section 417 of the Act, or the Minister's powers under section 195A, may also be available to be exercised in certain cases.[11]

2.15 In response to the LCA and the LIV, the department referred to the Statement of Compatibility with Human Rights which assessed the proposed measure against Article 9 of the International Covenant on Civil and Political Rights (ICCPR). That assessment concluded:

> The proposed amendments engage this right by requiring the detention (under section 189 of the Act) of unlawful non-citizens who are returned to Australia following an attempted removal under section 198 of the Act. Australia takes its obligations to non-citizens in immigration detention very seriously. The Australian Government's position is that the detention of individuals is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, detention that is not 'arbitrary' must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved. While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Act, they present a reasonable response to achieving a legitimate purpose under the ICCPR, being the safety of the Australian community and integrity of the migration programme. Further, the re-detention of unlawful non-citizens who are brought back to the migration zone will also be for the legitimate purpose of completing their removal from Australia under section 198 of the Act.[12]

2.16 The committee notes that the Parliamentary Joint Committee on Human Rights has not yet published its assessment of the Bill.

Visa cancellation (Schedule 2)

2.17 Schedule 2 to the Bill proposes various amendments to the Migration Act, following commencement of the Character Act.[13] In general, submitters argued that the proposed provisions would exacerbate the unfairness and adverse impacts created

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11 Answers to questions on notice 21 October 2015 (received 2 November 2015), pp [2–3]. A person who, while in a country other than his own, becomes a refugee because of changes that occurred in the native country, thus making it impossible to return due to a fear of persecution, is a refugee sur place.

12 Answers to questions on notice 21 October 2015 (received 2 November 2015), pp [7–8].

13 The *Migration Amendment (Character and General Visa Cancellation) Act 2014* amended the Migration Act to: broaden the existing grounds for not passing the 'character test'; amend the general visa cancellation provisions; and introduce a mandatory cancellation power for non-citizens who objectively would not pass the character test and were serving a full-time custodial sentence: Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 September 2014, p. 10,325.

by the Character Act, as well as being procedurally unfair.[14] For example, the Refugee Council of Australia (RCOA) submitted:

> The Bill compounds the grave unfairness of recently introduced provisions relating to powers to refuse or cancel visas on 'character' grounds. These changes include: automatic cancellation of visas on certain grounds, new personal powers of the Minister to set aside decisions by the Administrative Appeals Tribunal or Departmental officers, and increasing the circumstances in which a person would fail the 'character test'. The powers have the practical effect of depriving a person of liberty and the right of residence in this country at the virtually unfettered discretion of the Minister, without any real review.[15]

2.18 The following specific concerns are discussed in this section:

- definition of 'character concern' (items 1–3);
- advice as to the consequences of detention (item 8); and
- general comments on retrospective application (Schedule 2).

Definition of 'character concern' (items 1–3)

2.19 Items 1–3 in Schedule 2 to the Bill would amend the definition of 'character concern' in subsection 5C(1) of the Migration Act, to reflect the wording of the character test in subsection 501(6). This definition is relevant to the lawful disclosure of identifying information, as provided for in section 336E of the Migration Act. According to the EM, the amendment will:

> …have the potential to increase the overall number of non-citizens who meet the definition of character concern and who may therefore have a personal identifier disclosed, where that disclosure is a permitted disclosure[.][16]

Submitters' comments and department response

2.20 The LCA and the LIV submitted that the expanded definition would 'widen the scope for the collection of personal identifiers' and recommended:

> The Privacy Commissioner consider the relevant provisions of this Bill, given that a broad range of personal identifiers will now be able to be legally disclosed in respect of a wider range of non-citizens[.][17]

2.21 The RACS and the ASRC were similarly concerned, with both submitters specifically noting that amended paragraph 5C(1)(d) omits the word 'significant'. RACS stated:

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14 For example: ASRC, *Submission 4*, p. 5; Refugee Advice and Casework Service (Aust) Inc., RACS, *Submission 5*, p. 1.

15 *Submission 3*, p. 2.

16 EM, p. 15. Also see: p. 14.

17 *Submission 7*, p. 9.

> The effect of a person satisfying [the] definition includes that the disclosure of their personal information by the Department for certain purposes is a permissible disclosure…The proposed expansion of the definition could therefore make the disclosure of the personal information in accordance with section 336E lawful in relation to almost any non-citizen.[18]

2.22 The department acknowledged:

> …the effect of the amendment is that there is likely to be a small number of non-citizens who meet the amended, broader definition of character concern and substantial criminal record and who may therefore have a personal identifier disclosed in accordance with the permitted disclosure provisions of the Migration Act. However, the extension of those definitions is no broader than the current definition of the 'character test' in subsection 501(6) and 'substantial criminal record' in subsection 501(7) of the Migration Act as amended by the Character Act.[19]

2.23 The EM also highlights that existing safeguards in relation to the collection, use and disclosure of identifying information would not be affected by the Bill:

> The robust privacy protection framework in Part 4A of the Migration Act, which creates a series of rules and offences that govern access to, disclosure of, modification of and destruction of identifying information (including personal identifiers) are not amended by this Bill.[20]

2.24 The committee notes that the Attorney-General's Department and the Office of the Australian Information Commissioner were consulted prior to the Bill's introduction into the Parliament. Further, the low impact of the Bill and the existence of robust privacy safeguards led to the conclusion in a privacy threshold assessment that a Privacy Impact Assessment was not necessary.[21]

Advice as to the consequences of detention (item 8)

2.25 Item 8 in Schedule 2 to the Bill would amend subparagraph 193(1)(a)(iv), to remove application of sections 194 and 195 to people detained under subsection 189(1) due to the cancellation of their visa by the Minister personally under section 501BA (see below). This means they would not be informed of the timeframe in which they may apply for a visa or the duration of their detention.

2.26 The EM states:

> The policy position is that a person whose visa is cancelled personally by the Minister under section 501BA does not need to be informed of these matters. This is because a person will generally have previously had their visa cancelled by a delegate under subsection 501(3A), and so will have

18 *Submission 5*, p. 3. Also see: ASRC, *Submission 4*, p. 5.

19 *Submission 6*, p. 5.

20 EM, p. 15.

21 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [10].

> been detained under section 189 and informed of [those rights] at that point.[22]

2.27 The LCA and the LIV rejected this rationale, stating that it did not appear to be a 'sufficient justification for denying a person in this situation a fundamental aspect of their right to procedural fairness'. The LIV (in the LCA's submission) considered:

> …it is not onerous for the [Department] to provide the person with notice of timeframes within which they can apply for a further visa and information pertaining to the duration of their detention. Even if the detainee has previously been informed of their rights, there is no adequate explanation provided as to why they could not be informed again after a new decision is made by the Minister, in order to guarantee procedural fairness.[23]

2.28 The LCA and the ASRC noted that some detainees might not remember, or have difficulty in understanding, their legal rights and options. Examples of how this might occur include language barriers and restricted access to legal representatives. The ASRC submitted:

> Given the potentially life-threatening consequences of removal if no other application is lodged, asylum seekers should not be intentionally deprived of information relating to the further options open to them and should have a full opportunity to exercise the rights available to them. People in detention must be advised about their rights to apply for any visa, otherwise they may be detained because they did not know of an option.[24]

2.29 The LCA highlighted its *Asylum Seeker Policy* which sets out key rule of law standards and principles relevant to asylum seekers in detention.[25] One such standard is that decisions to detain, or extend detention, are subject to procedural safeguards, including fully and promptly informing asylum seekers of the reasons for, and their rights in relation to, their detention. Accordingly, the LCA suggested that proposed subparagraph 193(1)(a)(iv) be amended to comply with the rule of law and procedural fairness:

> …such that all detainees the subject of subsection 193(1)(a)(v) [sic] are provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation.[26]

2.30 The committee notes that current subsection 193(1) sets out a number of categories of non-citizens in immigration detention to whom sections 194 and 195 do not apply. In this context, the measure proposed in item 8 in Schedule 2 is not

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22 EM, p. 17.

23 LCA, *Submission 7*, p. 9.

24 *Submission 4*, pp 4–5.

25 LCA, *Asylum Seeker Policy*, 6 September 2014, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf, accessed 20 October 2015.

26 *Submission 7*, p. 10.

unusual, although in principle the committee is of the view that people in immigration detention should be appraised of their legal rights.

General comments on retrospective application (Schedule 2)

2.31 Item 22 in Schedule 2 to the Bill would provide for the retrospective application of some of the proposed provisions (items 10–12 and 20–21). In its examination of the Bill, the Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) observed:

> In each case the justification is brief and does not expressly address the question of whether it is possible that the approach may create unfairness for affected persons (for example, by defeating a reasonable expectation based on the current provisions).[27]

2.32 In its submission, the LCA focussed on the issue of retrospective measures in the Bill—both in Schedule 2 and Part 1 of Schedule 3 (see below)—which it argued do not comply with rule of law principles.[28]

2.33 Principle 1 of the LCA's *Rule of Law Principles* states:

> 1. The law must be both readily known and available, and certain and clear. In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason: (a) Legislative provisions which create criminal or civil penalties should not be retrospective in their operation.[29]

2.34 The LCA stated that the Bill would change the current legal framework, allowing visas to be cancelled for previous actions or omissions that did not then give rise to cancellation (items 10–11 and 20).[30] The LCA commented also on item 12.

2.35 Item 12 in Schedule 2 would amend paragraphs 476(2)(c) and 476A(1)(c), to provide that decisions made by the Minister personally under sections 501BA and 501CA are reviewable by the Federal Court rather than the Federal Circuit Court.

2.36 According to the EM, this amendment is 'consistent with all other character decisions made personally by the Minister'.[31] The department elaborated:

> The Federal Court, rather than the Federal Circuit Court, already has the power to review character-related decisions made by the Minister personally under 501, 501A, 501B and 501C, including 501(3A), which is

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27 Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2015*, 14 October 2015, p. 26, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Alerts_Digests/2015/index, accessed 23 October 2015.

28 *Submission 7*, p. 11.

29 LCA, *Policy Statement: Rule of Law Principles*, March 2011, p. 2, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf, accessed 22 October 2015.

30 *Submission 7*, p. 11.

31 EM, p. 19.

> the decision that may also lead to a decision of the Minister personally under 501CA and 501BA.[32]

2.37 The LCA contended, however, that while the provision might achieve the desired consistency, sub-item 22(4) would apply item 12 to decisions made before and after commencement of item 12 (the day after the Act receives Royal Assent). As such, item 12 might affect existing legal proceedings:

> The effect of this amendment is that the procedural fairness provisions under section 501CA (concerning a decision by the Minister or the Minister's delegate to cancel the visa of a person serving sentence of imprisonment), and the Minister's personal power under section 501BA (to set aside a non-adverse decision relating to the visa of a person serving a sentence of imprisonment) will not be reviewable by the Federal Circuit Court.
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> Although this brings these sections into line with other character decisions made under the Act, such that they are reviewable only by the Federal Court, the retrospective nature of this amendment is concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.[33]

2.38 In this context, the LCA noted also item 21 that would amend sections 503A and 503B, to protect confidential information communicated to an authorised migration officer by a gazetted agency (except in limited circumstances), for exercise of a power under section 501BA or 501CA, including confidential information relevant to proceedings before the Federal Court or the Federal Circuit Court:

> The Law Council is concerned by this provision, as it prevents the applicant from effectively challenging the basis on which their visa has been cancelled due to their ignorance of the evidence used against them. The retrospective nature of this amendment is also concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.[34]

2.39 The ASRC agreed with the LCA that the Federal Circuit Court would no longer have any role in reviewing decisions made under sections 501BA and 501CA. Its submission argued that amended paragraphs 476(2)(c) and 476A(1)(c) would reduce a person's options for review and contrast with the rights of people whose visas are cancelled pursuant to section 501 of the Migration Act.[35]

2.40 In answer to a question on notice, the department provided an explanation for the retrospective application of items 10–12 and 20–21 in Schedule 2. For example, in relation to item 12, the department wrote:

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32 *Submission 6*, p. 6.

33 *Submission 7*, pp 11–12.

34 *Submission 7*, p. 12.

35 *Submission 4*, p. 4.

> The retrospective application of the amendment at item 12 means that all applicants for judicial review of the Minister's decision under section 501CA or section 501BA will have access to the same level of the Court (the Federal Court) as other applicants seeking judicial review of personal decisions of the Minister under 501, 501A, 501B and 501C. Character decisions often involve similar issues and legal principles and it is important that they are heard in the Federal Court, which is experienced in this area.[36]

2.41 In his second reading speech, the Minister informed the Parliament that the amendments would ensure that 'the government has the capability to proactively and robustly address character and integrity concerns'.[37]

Protection visa statutory bars (Part 1 of Schedule 3)

2.42 Part 1 of Schedule 3 to the Bill would amend section 48A of the Migration Act, with effect from 25 September 2014. Submitters did not support these amendments, contending that the proposed provisions have the potential to adversely and unfairly affect a vulnerable group (young people and people with cognitive impairment), and are likely to breach Australia's international law obligations.

Current section 48A

2.43 Subsection 48A(1) of the Migration Act prevents non-citizens in the 'migration zone' from making a further application for a protection visa, or having a further application made on their behalf, if they have previously been refused a protection visa. Subsection 48A(1B) prevents non-citizens in the 'migration zone' from making a further application for a protection visa, if they previously held a protection visa that was cancelled.[38]

2.44 Subsection 48A(1AA) of the Migration Act prevents non-citizens in the 'migration zone' from making a further application for a protection visa, or having a further application made on their behalf, if an application was previously made on their behalf and the grant of a protection visa was refused, whether or not:

> (b) …
>
> (i) the application has been finally determined; or
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> (ii) the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or
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> (iii) the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor;

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36 Answers to questions on notice 21 October 2015 (received 2 November 2015), pp [15–16].

37 Minister, *House of Representatives Hansard*, 17 September 2015, p. 20.

38 These provisions are subject to section 48B—Minister may determine that section 48A does not apply to non-citizen.

2.45 Subsection 48A(1C) provides that subsections 48A(1) and 48A(1B) apply to a non-citizen regardless of:

- the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy;
- whether the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy existed earlier;
- the grounds on which an earlier application was made or the criteria which the non-citizen earlier claimed to satisfy; or
- the grounds on which a cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.

2.46 Item 1 in Part 1 of Schedule 3 would amend subsection 48A(1C), by inserting a reference to subsection 48A(1AA). The EM states that the amendment would clarify:

> …that a person who has previously been refused a protection visa application that was made on their behalf (e.g. because they were a minor at the time), cannot make a further protection visa application, irrespective of the ground on which the further protection visa application would be made or the criteria which the person would claim to satisfy, and irrespective of the grounds on which the previous protection visa application was made.[39]

2.47 UNICEF Australia expressed particular concern that the proposed provision would prevent a child from making a further protection visa application, when an earlier application made on their behalf may have been prejudiced by the child's level of maturity, understanding and participation:

> ...it is concerning that the bar, as provided by existing section 48A and seemingly extended by the amendments now proposed, functions to prevent ***all*** further applications from being made, regardless of whether they are meritorious or unmeritorious. There is no flexibility or opportunity for an applicant, who might still be a child, to demonstrate why a further application should be lodged or the legitimacy of his or her claims for protection. This essentially creates a "one shot" system whereby an applicant (including a child) has one opportunity only to apply for protection. For a child, levels of maturity, understanding and participation at the time an adult lodges an application on their behalf may unfairly prejudice the strength of that child's sole application allowed under this system. A non-compellable and non-reviewable Ministerial discretion [such] as that provided for by section 48B is not sufficient to ensure that a

39 EM, p. 1.

> further application could be lodged by a child or person with a mental impairment.[40]

2.48 The RCOA considered that it is already difficult for asylum seekers to best present their protections claims, and amended subsection 48A(1C) would compound this problem for the most vulnerable people:

> For many asylum seekers, it is very difficult to prepare a complete protection visa application, given the consequences of their persecution, the complexity of the refugee status determination process, and the difficulties of living in a new country on a bridging visa. These difficulties have been compounded by the very significant changes made under the 'fast tracking' process of refugee status determination introduced last year, and the removal of access to free legal advice and representation for most asylum seekers. The changes to section 48A only make it even more difficult for the most vulnerable to ensure that their claims for protection are fairly heard.[41]

2.49 The RACS and UNICEF Australia queried whether the amendment might conflict with Australia's international law obligations. For the RACS, the concern revolved around the accurate and fair assessment of protection claims, consistent with Australia's obligations:

> Protection visa applications are the primary mechanism by which Australia assesses protection status in order to ensure compliance with its international protection obligations. Despite this, the current form of s 48A is not designed to ensure that protection claims are assessed accurately and fairly, but to bar the further application of any person who has previously been listed as an applicant on an application, irrespective of the circumstances.[42]

2.50 UNICEF Australia argued that the statutory bar would 'operate to effectively remove safeguards against *non-refoulement* of children and other persons with valid protection claims'. UNICEF Australia emphasised:

> …this is not acceptable and risks inconsistency with the Convention on the Rights of the Child and the [Convention relating to the Status of Refugees].[43]

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40 *Submission 2*, p. 3 (emphasis in original). According to the Department, in the period 2012–15, the Minister has exercised the section 48B power 30 times, reflecting that the vast majority of requests do not raise substantially new or different claims from those already assessed in the initial, unsuccessful protection visa application: Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [5].

41 *Submission 3*, p. 3. The ASRC similarly commented that the statutory bar so far as it affects minors and people with mental impairment 'entrenches the manifest unfairness of the original amendments towards the most vulnerable people': *Submission 4*, p. 6.

42 *Submission 5*, pp 3–4.

43 *Submission 2*, p. 4. UNICEF Australia expressed particular concern in relation to unaccompanied minors. Also see: RACS, *Submission 5*, p. 4.

2.51 The two case studies below provide a useful description of and guide to possible concerns with the retrospectivity provisions in the Bill.

2.52 The committee notes that the department has provided a comprehensive explanation of the operation of the proposed provisions, which are intended to correct a drafting oversight and reinstate the original policy underpinning section 48A. The committee further notes the department's assurances that, as far as the department is aware, there are currently no individual cases that would be captured by the retrospective provisions in Part 1 of Schedule 3.

Box 1: Case Studies

Case study

Brenda, aged 15, and her sister Mary, aged 17, arrived in Australia with their parents from Papua New Guinea. Brenda and Mary's father, Peter, wanted to lodge a protection application that included his wife and children based on [his claims] for protection, lest the family be separated.

Peter's claims for protection were not strong. However, his daughters were deeply afraid of returning to Papua New Guinea because of the traditional practice in their community of child marriage. Peter, as a senior member of the community, was involved in this traditional practice and his daughters were afraid to raise their concerns to their father.

Brenda and Mary would both be able to seek protection in Australia in their own right. However, under the changes proposed, they would not have the opportunity to…make this subsequent application and could be sent back to Papua New Guinea to face the very practices which they feared.

Case Study

Ahmed came to Australia from Iran with his parents as a young child. His father lodged a protection application which included Ahmed as an applicant when Ahmed was 12 years old. The protection application was based on [his] father's claims for protection. While his father's application was being determined, Ahmed attended school in Australia, learned English and developed an Australian accent. In his teenage years, Ahmed became interested in politics in his home country, and developed outspoken views strongly against the Iranian government.

Ahmed's father's application for protection was eventually unsuccessful; however in the intervening years, Ahmed had himself developed claims that would likely attract Australia's protection obligations.

Under the changes proposed, Ahmed would be unable to have his own claims for asylum considered, and could be returned to Iran despite the life-threatening risks he would face.

Source: ASRC, Submission 4, pp 6–7.

2.53 UNICEF Australia noted that the Parliamentary Joint Committee on Human Rights and the committee have examined and commented on these matters when the statutory bar in section 48A was first introduced into the Parliament by the Migration Legislation Amendment Bill (No. 1) 2014 (MLA Act).[44] At that time, the committee commented:

> …the committee remains concerned about the potential impact on children and people with a mental impairment seeking to make a subsequent visa application in circumstances where these individuals are unaware of a previous application having been made on their behalf. In the committee's view, it would be unfair to prevent these individuals from making a subsequent visa application. The committee appreciates that addressing this issue would likely require the Department of Immigration and Border Protection to make certain inquiries and decisions of a complex nature; irrespective, the committee is eager to ensure that children and people with a mental impairment are not unfairly treated as a result of the proposed amendments.
>
> The committee therefore recommends that the Commonwealth government consider additional safeguards to ensure children and people with a mental impairment are not unfairly prevented from making a subsequent visa application where they were unaware of a previous application having been made on their behalf.[45]

2.54 The department considered that item 1 in Part 1 of Schedule 3 would not breach Australia's *non-refoulement* and other international law obligations:

> The Department's view is that the amendment is a technical amendment that clarifies the interaction between subsections 48A(1AA) and (1C) of the Act, and does not broaden the situations in which a minor or a person with a mental impairment who was previously refused a protection visa applied for on their behalf is prevented from making a further protection visa application.[46]

2.55 In addition, the department stated that the Migration Act and existing procedures provide adequate safeguards for minors and people with cognitive

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44 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, 18 June 2014, pp 35–37 and 40–41, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2014/744/index, accessed 14 October 2015.

Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, 21 August 2014, Chapter 2, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_Bill_2014/Report, accessed 14 October 2015.

45 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, 21 August 2014, paras 2.28–2.29. Also see Recommendation 1.

46 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [9].

impairment whose personal claims for a protection visa were not included in an earlier unsuccessful protection visa application, including:

- the Minister's intervention powers under section 48B;
- the right to seek judicial review and be heard in a judicial proceeding; and
- pre-removal clearance processes that provide another opportunity for protection claims to be assessed to ensure compliance with Australia's international obligations.[47]

2.56 On account of these existing safeguards, the department advised that it has not implemented additional safeguards for minors and people with cognitive impairment.[48]

General comments on retrospective application of amended section 48A

2.57 According to the EM, the proposed amendment 'was always the policy intention' and a technical oversight between the MLA Act (which inserted subsection 48A(1AA)) and the *Migration Amendment Act 2014* (which inserted subsection 48A(1C)).[49] Consequently:

> This item has been given retrospective effect to avoid any suggestion that in the period between 25 September 2014 (when subsection 48(1AA) was inserted) and the commencement of this item, a person who was previously refused a protection visa that was made on their behalf and covered by subsection 48A(1AA) was not barred from making a valid protection visa application relying on a different ground or satisfaction of a different criterion, because subsection 48A(1C) did not apply to them.
>
> If the amendment were made prospective in effect, there would be an implication that the amendment does not clarify section 48A, but instead alters the effect of section 48A. By making the amendment retrospective to the time when subsection 48A(1AA) was inserted, that implication is avoided and it is clear that a person who is otherwise covered by subsection 48A(1AA) could not have validly made a protection visa application relying on a different ground or criterion in between the commencement of subsection 48A(1AA) and the commencement of this amendment.[50]

2.58 The Scrutiny of Bills Committee commented on this rationale as follows:

> It appears that the rationale for retrospective commencement amounts to a claim about the intended operation of the amendments introduced on 25 September 2014. While a particular outcome was being sought through the 2014 amendments, the actual content of those provisions as enacted did not (properly interpreted) reflect the intended operation of the amendments.

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47 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [9].

48 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [9].

49 EM, p. 3. Also see: Minister, *House of Representatives Hansard*, 17 September 2015, p. 20, who described the proposed amendment as 'technical'; EM, p. 25.

50 EM, p. 5.

> Nonetheless, even in this circumstance retrospectively aligning the law with those intentions significantly undermines the rule of law, particularly when the consequences for affected individuals are significant. In general, individuals should be entitled to rely on the current law to determine their rights, including rights to apply for important benefits such as a protection visa. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.[51]

2.59 At the time of writing, the Scrutiny of Bills Committee had not published a response from the Minister in relation to these comments. However, some submitters echoed these concerns, stating that retrospective application of item 1 in Part 1 of Schedule 3 would be contrary to the rule of law, adversely affecting asylum seekers who have made a protection visa application in the period from 25 September 2014 to commencement of the amended provision, and would potentially risk the *refoulement* of people with legitimate protection claims.

2.60 The RACS, for example, commented that retrospective application of amended section 48A would render invalid any previous or ongoing protection visa applications that are 'currently not invalid but which fall within the gap that Schedule 3 proposes to patch'.[52] RACS stated its support for:

> …the principle that migration laws should be prospective and transparent, and we consider that it is a fundamental principal of the rule of law that the government in all its actions is bound by rules that are fixed and certain. This position would be offended by the passage of legislation to extinguish existing rights arising from a visa application that has been lodged in reliance on the current position of the law.[53]

2.61 The LCA was similarly concerned and suggested that 'the proposed amendments in Schedules 2 and 3 of the Bill that apply retrospectively are amended such that they only apply prospectively'.[54]

2.62 The department maintained that item 1 in Part 1 of Schedule 3 is a technical amendment, to rectify an earlier inadvertent omission. Further:

> …the Department is not aware of any case since 25 September 2014 in which a minor or a mentally impaired person who was previously refused a protection visa has sought to apply for a further protection visa relying on a ground or criterion that is different from the ground or criterion on which the refused application was based. Therefore, the retrospective

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51 Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2015*, 14 October 2015, p. 28.

52 *Submission 5*, p. 5.

53 *Submission 5*, p. 5. Also see: ASRC, *Submission 4* , p. 6, commenting that applicants would not have been aware of and advised in relation to the statutory bar at the time of the initial application.

54 *Submission 7*, p. 13.

> commencement of the amendment is not expected to have any adverse impact.[55]

Maritime powers (Schedule 4)

2.63 Schedule 4 to the Bill would amend section 40 of the Maritime Powers Act, to 'confirm the operation of [that Act] in circumstances where vessels and aircraft are considered to be exercising passage rights consistent with the Convention'.[56] In contrast to this objective, submitters argued that the amendment would potentially breach Australia's international law obligations.[57]

Current section 40

2.64 Section 40 of the Maritime Powers Act currently 'does not authorise the exercise of powers at a place in another country unless the powers are exercised' in certain circumstances (paragraphs 40(a)–(e)). The word 'country' is defined in section 8 to include 'the territorial sea, and any archipelagic waters, of the country'.

2.65 According to the EM:

> Section 40 could be interpreted as preventing the exercise of powers under the Maritime Powers Act in waters within another 'country' in circumstances where, under the Convention, it would be permissible to exercise those powers, for example when a vessel is in the course of 'transit passage' through an international strait.[58]

2.66 Item 2 in Schedule 4 to the Bill would amend section 40, so that powers under the Maritime Powers Act could be exercised if:

> (2) …
>
> (a) the exercise of powers:
>
> > (i) is part of a continuous exercise of powers that commenced in accordance with any applicable requirements of this Part (disregarding this subsection); and
> >
> > (ii) occurs in the course of passage of a vessel or aircraft through or above waters that are part of a country; and
>
> (b) a relevant maritime officer, or the Minister, considers that the passage is in accordance with the Convention.
>
> (3) An exercise of powers in reliance (or purported reliance) on subsection (2) is not invalid because of a defective consideration of the Convention.

2.67 The EM explains that the amendment is intended to ensure that powers under the Maritime Powers Act are exercised in a manner consistent with the principle of territorial sovereignty at international law:

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55 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [16].

56 EM, p. 38.

57 For example: RCOA, *Submission 3*, p. 4; ASRC, *Submission 4*, p. 8; RACS, *Submission 5*, p. 6.

58 EM, p. 37.

> …the use of enforcement powers within another country normally would require some form of agreement by that country. However, the section did not explicitly allow for the exercise of powers in the course of passage through and over waters within another country already permitted under international law, as reflected in the Convention. Examples of such passage include a vessel in the course of innocent passage, transit passage or archipelagic sea lanes passage. In those circumstances, under international law, no further agreement or approval by the coastal state is required.[59]

2.68 The Andrew and Renata Kaldor Centre for International Refugee Law (Kaldor Centre) submitted that the rationale for proposed subsection 40(3)—consistency with international law—is not reflected in the substance of the provision, which authorises the exercise of powers even in circumstances that are contrary to Australia's obligations under the Convention:

> The fact that a relevant maritime officer or the Minister mistakenly considers that the exercise of powers is consistent with the Convention cannot render the exercise of powers lawful as a matter of international law.
>
> In authorising its officers to act in contravention of international law, Australia not only risks violating substantive treaty provisions, but also breaches the fundamental principle that a State must interpret and perform its treaty obligations in good faith.[60]

2.69 The LCA made similar comments and agreed that proposed subsection 40(3) could breach international law:

> Although the High Court has found that international human rights instruments to which Australia is party do not automatically give rise to enforceable legal rights or obligations under Australian domestic law, and while it is within the power of the legislature to decide to change the application of international obligations, Australia may be liable at the international level for breaches of instruments to which it is party.[61]

2.70 The Kaldor Centre and the RCOA hypothesised that the amendment might be aimed at legitimising activities conducted under Operation Sovereign Borders. Their submissions argued, however, that the types of passage permitted under the Convention do not encompass the types of activities required in that operation:

> …turning back boats and patrolling for this purpose within the territorial waters of another State do not constitute innocent passage under the Convention.[62]

2.71 The LCA contended that the Bill would increase ministerial discretion and empower the Minister to declare that turn backs and tow backs are consistent with the

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59 EM, p. 37.

60 *Submission 1*, p. 2.

61 *Submission 7*, p. 19.

62 Andrew and Renata Kaldor Centre for International Refugee Law, *Submission 1*, p. 2. Also see: RCOA, *Submission 3*, p. 4.

Convention based on a subjective assessment. In addition, the Bill could place people subject to these powers at risk of *refoulement*, contrary to Australia's international obligations.[63]

2.72 The department submitted that current section 40 requires clarification and did not agree with the interpretation that the amendment potentially breaches international law:

> The amendment to section 40 in fact facilitates compliance with Australia's obligations under the Convention in that it requires the relevant maritime officer or the Minister to consider that the passage is in accordance with the United Nations Convention on the Law of the Sea (the Convention). In giving consideration to Australia's obligations under the Convention, the Executive will apply accepted principles of treaty interpretation including the requirement to interpret those obligations in good faith.[64]

Committee view

2.73 The purpose of the Bill is to strengthen and clarify the legislative frameworks in the Migration Act and the Maritime Powers Act, to ensure consistency with the original policy intention and to ensure effective operation.[65] The committee acknowledges submitters' concerns with various provisions of the Bill and comments as follows.

2.74 The committee agrees that the amendments proposed in Schedule 2 to the Bill will assist the government to 'proactively and robustly address character and integrity concerns'.[66] However, the rule of law should not be set aside without clear and compelling justification: prior to the Bill's passage, the department should provide sufficient justification for the retrospective application of certain items in Schedule 2 and Part 1 of Schedule 3.

2.75 In relation to item 1 in Part 1 of Schedule 3, the committee notes the department's evidence that the proposed amendment is technical and its view that the existing safeguards for young people and people with cognitive impairment are adequate. The committee agrees that there are options available where a previous protection visa application has not been successful. However, the committee is concerned that the existing safeguards may not be adequate for vulnerable people. The committee has previously made a recommendation in this regard.[67] It is disappointing that that recommendation did not result in strengthened protections for

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63 *Submission 7*, p. 20.

64 Answers to questions on notice 21 October 2015 (received 2 November 2015), p. [13]. Also see Department, *Submission 6*, p. 8.

65 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 17 September 2015, p. 19.

66 Minister, *House of Representatives Hansard*, 17 September 2015, p. 20.

67 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, 21 August 2014, paras 2.28–2.29. Also see Recommendation 1.

young people and people with cognitive impairment who have previously been refused a protection visa and the committee remains concerned about the treatment of these vulnerable people.

2.76 Throughout the inquiry, the committee heard concerns that the Bill potentially breaches Australia's international law obligations. The department assured the committee—most vehemently in respect of Schedule 4—that the Bill does not breach, and is consistent with, those obligations. The committee accepts this advice, subject to the concerns already expressed in relation to young people and people with cognitive impairment.

Recommendation 1

2.77 The committee recommends that the Explanatory Memorandum to the Bill be amended to clarify the operation of the retrospective provisions of the Bill and the safeguards around the impact of these provisions on young people and people with cognitive impairment.

Recommendation 2

2.78 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

Senator the Hon Ian Macdonald
Chair