Chapter 4

Key Issues – Schedule 2

4.1 This chapter discusses the key issues raised in submissions and evidence in respect of Schedule 2.

4.2 Schedule 2 relates to the ability of a small group of individuals:

(a) who are in the migration zone, and

(b) who had their application for a protection visa on the grounds of being a refugee rejected prior to 24 March 2012,

being eligible to apply again for a protection visa, this time on the grounds of complementary protection.

4.3 The committee notes that it is concurrently conducting a separate inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 would remove the complementary protection provisions from the Migration Act. As a result there would be no statutory basis for making a claim on complementary protection grounds. Instead, complementary protection claims would be assessed by the minster in accordance with his discretionary powers under section 417 of the Migration Act.

4.4 The committee acknowledges the difficulty many witnesses faced in separately considering the two pieces of proposed legislation. The committee notes witnesses concerns such as:

> The Law Council is also concerned that the current inquiry is occurring before the fate of these complementary provisions are known, making it difficult for the committee to assess the validity of the proposed rationale for the amendments to schedule 2.[1]

4.5 Nevertheless, this chapter will focus solely on the submissions and evidence in relation to schedule 2 of the Bill considered in this inquiry.

Key issues identified by submitters and witnesses

4.6 The committee received eight substantive submissions in relation to Schedule 2. Only the department's submission supported the amendments contained in Schedule 2.

4.7 Refugee Advice & Casework Service (Aust) Inc. (RACS) submission was representative of the views of many submitters in relation to Schedule 2:

---

[1] Mr Erskine Rodan OAM, Chair, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 24.

> RACS' position is that asylum seekers who were not previously assessed against complementary protection ought to have the right to have their claims assessed now that complementary protection is integrated into the eligibility for a protection visa.[2]

4.8 Similarly, the Immigration Advice and Rights Centre submitted in relation to Schedule 2:

> The number of cases is realistically a limited class as those who had their cases finally determined prior to 24 March 2012 never had an opportunity to have claims raising complementary protection issues assessed in a more thorough process. Also, it may be that because their complementary protection claims were not considered to be relevant for the purposes of the Refugee Convention, that they were not raised at either the primary or review levels.[3]

4.9 The Law Council of Australia's evidence was consistent with many submissions received by the committee when it highlighted the following:

> The amendments in schedule 2 raise concerns as they have the effect of precluding a certain cohort of asylum seekers affected by the Federal Court's decision in SZGIZ from having their protection claims assessed against the complementary protection criteria now contained in section 36 of the Migration Act. In other words, this particular group of asylum seekers—some of whom may have substantiated claims for protection under the convention against torture, the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child—would not be able to apply for a protection visa on these grounds, because an earlier claim made on different grounds had been rejected. This would be an unfair result for this cohort of asylum seekers who, due to the timing of legislative provisions, missed out on the chance to have their protection claims assessed under the current statutory process. [4]

4.10 Many submitters also questioned the need for the amendments in Schedule 2 given the small number of individuals who would be able to make new complementary protection claims following the court's decision in *SZGIZ*. For example:

> The Law Council also queries why these amendments are necessary, particularly given that the number of applicants potentially affected by SZGIZ is relatively small given that the changes were nearly two years old since the complementary provisions came in. [5]

4.11 However, whilst the department was unable to quantify the likely numbers that would be subject to the amendments in Schedule 2, the department indicated it

---

[2] *Submission 4*, p. 5.

[3] *Submission 12*, p. 2

[4] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 24.

[5] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 24. See also *Submission 10*, p. 1.

had already received 760 repeat protection visa application since the decision in *SGZIZ*.[6]

4.12 Moreover the department submitted it was not simply the case that those who had unsuccessfully applied for a protection visa on the grounds of being a refugee applying again for a protection visa on the grounds of complementary protection. Unsuccessful applicants could make a number of applications for a protection visa:

> ….for example a person who previously applied unsuccessfully in their own right, may now seek to reapply as a member of the family unit of another person on and vice versa…. [7]

4.13 In evidence before the committee, the department reiterated its view that the changes proposed in Schedule 2 were simply designed to restore the legal position that existed prior to the court decision in *SZGIZ*:

> This is again just reinstating what was previously understood to be the position: that, if you had been refused a protection visa or had a protection visa cancelled since last entering Australia, you were not able to apply for another protection visa without the bar being lifted.[8]

4.14 Further, the department clarified that the group of individuals impacted by Schedule 2 had in fact had their complementary protection claims assessed by the department:

> …we need to consider as well that it is not that those people did not get any consideration of their complementary protection claims; they got them considered in a different way. There was a separate process for consideration of complementary protection that was in place for many years before the amendments made on 24 March.[9]

4.15 Whilst a number of submitters acknowledged this, the Refugee Council of Australia's views were consistent with many submissions when it noted that:

> in the department's submission they talk about additional safeguards existing to prevent the forcible return of people who are at risk of significant harm, on complementary grounds, and the Refugee Council does not accept that these processes offer an adequate means of assessing complementary protection claims[10]…. [For example] it is not a compellable

---

[6] Department of Immigration and Border Protection, *answer to questions on notice*, 4 February 2014 (received 7 February 2014), p. 2.

[7] Department of Immigration and Border Protection, *answer to questions on notice*, 4 February 2014 (received 7 February 2014), p. 3.

[8] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 39.

[9] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 40.

[10] Ms Rebecca Eckard, Research Coordinator, Refugee Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 12.

> or reviewable process, so the minister is actually not obligated to intervene in those cases.[11]

4.16 In response to concerns such as this, the department outlined the steps the government would take to ensure that Australia upheld it obligations under international law:

> The way that the government would make sure that our protection obligations are met is that, in the appropriate cases where, for instance, new information comes forward that suggests the person is owed protection obligations, that would be put before the minister for his consideration to lift the bar to allow another protection visa application to be made.[12]

[11] Ms Rebecca Eckard, Research Coordinator, Refugee Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 13.

[12] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 39.