The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment Bill 2013 [Provisions]

February 2014

ISBN 978-1-74229-939-6

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald, **Chair**, LP, QLD

Senator Gavin Marshall, **Deputy Chair**, ALP, VIC

Senator Penny Wright, AG, SA

Senator the Hon Lisa Singh, ALP, TAS

Senator Zed Seselja, LP, ACT

Senator Sue Boyce, LP, QLD

Substitute members for this inquiry

Senator Sarah Hanson-Young (AG, SA) to replace Senator Penny Wright (AG, SA)

Secretariat

Ms Sophie Dunstone, Committee Secretary

Mr Matthew Corrigan, Principal Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

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Recommendations

Recommendation 1

The committee recommends that the Department of Immigration and Border Protection put in place policies and procedures, consistent with the Migration Act 1958, which would support applicants to seek leave to apply out of time or apply for alternative forms of review in the rare situations where the department or a tribunal fails to correctly notify the applicant and the applicant has been directly disadvantaged as a result.

Recommendation 2

The committee recommends that the Australian Government consider putting in place a regulatory framework to underpin the powers, authority and role of the Independent Reviewer of Adverse Security Assessments.

Recommendation 3

The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendations.

Chapter 1

Introduction

The referral

1.1 On 12 December 2013, the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the Migration Amendment Bill 2013 (the Bill) to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 12 February 2014.[1]

1.2 The Bill was introduced in the House of Representatives on 12 December 2013, by the Hon Scott Morrison MP, Minister for Immigration and Border Protection.[2] The Bill seeks to amend the *Migration Act 1958* (the Act) to address a number of recent court and administrative tribunal decisions which have affected the interpretation of key provisions of the Act. These decisions have impacted on the Department of Immigration and Border Protection's (the department) operations including the processing of visa applications made by asylum seekers.[3]

Rationale for the Bill

1.3 The Bill has three schedules that address distinct issues. Accordingly, the context of, and rationale for, each schedule is considered in this chapter separately.

Schedule 1 – When decisions are made and finally determined

1.4 Part 7 of the Act provides a process of merits review of particular visa decisions (including protection visas) made by the department in the Refugee Review Tribunal (RRT).

1.5 In accordance with section 430 of the Act, when the RRT makes its decision on review, it must prepare a written statement. In accordance with section 430A, the RRT must notify both the applicant and the secretary of the department of its decision on review by providing a copy of the written statement prepared under section 430.

1.6 Subsection 5(9) of the Act provides that an application under the Act is finally determined when either:

- a decision on an application is not (or no longer) subject to a form of review; or
- a decision that has been made on an application was subject to some form of review but the period within which a review may be instituted has ended.

1.7 Recent decisions by the Full Federal Court of Australia in *Minister for Immigration and Citizenship v SZQOY*[4] and *Minister for Immigration and Citizenship*

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[1] *Journals of the Senate* No. 11—12 December 2013, p. 361.

[2] *Votes and Proceedings* No 15—12 December 2013, p. 248.

[3] *Explanatory Memorandum* (EM), p.1-2.

[4] [2012] FCAFC 131.

v SZRNY[5] have interpreted when a decision on review by the RRT is finally determined. In *SZRNY*, the Full Federal Court found that an application within the meaning of subsection 5(9) of the Act, is not 'finally determined' unless the RRT has notified its decision to both the applicant and the department in accordance with section 430A.

1.8 These decisions of the court depart from the interpretation that has been applied by the department, that once a review decision was made, the application was finally determined. The department had taken the view that whether or not the RRT had correctly notified the review applicant and the secretary of the department did not affect when a decision was finally determined.

1.9 The department argued that the judgement in *SZRNY* is 'highly problematic' for the RRT and also has implications for decisions on review by the Migration Review Tribunal (MRT).[6] The department argued that as a result of the court's decision in *SZRNY*, if the MRT or the RRT makes an error in notifying either the review applicant or the secretary of the department of its decision, the application is not finally determined and continues to be subject to merits review. Understanding when a decision is finally determined is critical for administrative certainty. For example, ascertaining when an application is finally determined is crucial for the department to correctly remove individuals from Australia under section 198 of the Act.

1.10 The Bill seeks to provide administrative certainty by clarifying:

- that a visa refusal, cancellation or revocation decision by the minister or his delegate is taken to be made on the date on which the order is made and not when the decision is communicated to the applicant or former visa holder;
- the MRT and RRT's powers of review are exercised when a decision on review has been made, and once made it cannot be re-opened or varied; and
- that where review of a decision on an application has been sought, it will be considered to be finally determined when the MRT or the RRT has made its decision[7], and not when the decision is communicated to the applicant or the department.

Schedule 2 – Bar on further applications for protection visas

1.11 In March 2012, amendments to the Act introduced a statutory framework for considering complimentary protection claims for a protection visa. Complimentary protection refers to Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (the ICCPR), the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, and the Convention on the Rights of the Child (the CRC). The 2012 amendments provided for a combined protection visa assessment process of both

[5] [2013] FCAFC 104.

[6] EM, Attachment A, p. 3.

[7] An exception is provided where the MRT or RRT makes a decision to remit the application to the department for reconsideration.

Australia's obligations under the Refugees Convention and Australia's complimentary protection obligations.

1.12 As amended in March 2012, section 36(2) of the Act sets out the key criterion for the grant of a protection visa. The section provides that an applicant must be a person who:

- engages Australia's protection obligations under the Refugees Convention; or
- engages Australia's protection obligations on the basis that as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm ('complimentary protection'); or
- is a member of the family unit of a person who meets either of the above two criteria.

1.13 Section 48A of the Act prohibits repeat protection visa applications by persons in the migration zone. In *SZGIZ v Minister for Immigration and Citizenship*[8] the Full Federal Court found that these three separate criterion for a protection visa under section 36(2) could be used to initiate separate visa applications. Consequently, the court found that section 48A of the Act does not prohibit the making of further protection visa applications that rely on different criterion. Section 48A only prohibits repeated applications under the same criterion.

1.14 The EM states that as a result of this decision, a non-citizen who first applied for a protection visa prior to March 2012, and who has no meritorious protection claims, will potentially be able to make four alternative protection visa claims before being barred under section 48A.[9]

1.15 According to the EM:

> [t]he original policy intention in relation to section 48A was to prohibit the making of further visa applications by persons who have already applied for protection and had their application assessed and refused.[10]

1.16 The Bill seeks to amend the Act so that a person who was refused a protection visa under the Refugee Convention criterion would be unable to make a further protection visa application on the grounds of complimentary protection. This amendment would only affect applicants who applied for a protection visa prior to the 2012 amendments. Applicants since 24 March 2012 have had their complimentary protection claims assessed by the department at the same time as protection claims under the Refugee Convention.

Schedule 3 – Security assessments

1.17 The third schedule to the Bill seeks to address a recent High Court decision in *Plaintiff M47/2012 v Director-General of Security & Ors.*[11] In this case, the court

[8] [2013] FCAFC 71.

[9] EM, Attachment A, p.6.

[10] EM, Attachment A, p.6.

[11] [2012] HCA 46.

found that the use of the Public Interest Criterion 4002 (PIC 4002) in the *Migration Regulations 1994* were invalid for the purposes of assessing a protection visa application.

1.18 PIC 4002 states that an applicant for a protection visa must not be subject to an adverse security assessment from the Australian Security Intelligence Organisation (ASIO).[12] Following the decision of the court in M47, the department has been unable to rely on PIC 4002 and as a result has been required to individually assess whether each applicant does or does not pass the character test in section 501 of the Act. This has caused delays in processing protection visa applications.

1.19 The Bill would address this issue by amending section 36 of the Act to insert a specific criterion for a protection visa that the applicant does not have an adverse security assessment from ASIO. The Bill would also confirm that the MRT, RRT and AAT do not have the power to review a decision to refuse to grant (or to cancel) a protection visa on the basis of an adverse security assessment by ASIO. The Bill would also clarify that the RRT does not have the power to review a decision into a refusal to grant (or to cancel) a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention.

Conduct of the inquiry

1.20 In accordance with the usual practice, the committee advertised the inquiry on its website. The committee also wrote to relevant organisations inviting submissions by 13 January 2014. The committee received 12 submissions. A full list of submissions is provided at Appendix 1.

1.21 The committee held a public hearing in Melbourne on 4 February 2014.

1.22 A list of stakeholders who have evidence to the committee at the public hearing is provided at Appendix 2.

Structure of the report

1.23 This report considers the Bill as follows:

- chapter 2 provides a brief overview of the provisions contained in the bill;
- chapter 3 discusses the key issues raised in submissions and evidence in respect of Schedule 1;
- chapter 4 discusses the key issues raised in submissions and evidence in respect of Schedule 2; and
- chapter 5 discusses the key issues raised in submissions and evidence in respect of Schedule 3.

Acknowledgement

1.24 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

[12] ASIO undertakes an assessment of whether an application is directly or indirectly a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*

Note on references

1.25 References in this report to the committee Hansard are to the proof. Hansard and page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

Provisions

2.1 The Bill has three schedules that address distinct issues arising from recent court and administrative tribunal decisions. This chapter sets out the provisions in each schedule.

Schedule 1 – When decisions are made and finally determined

2.2 Item 1 of Schedule 1 would insert a new statutory definition of 'finally determined' into the *Migration Act 1958* (the Act). In conjunction with other amendments in this schedule, Item 1, together with Items 2 and 3, are intended to confirm exactly when an application becomes 'finally determined' under the Act.[1]

2.3 Item 4 would repeal section 67 and substitute a new section 67. The new section 67 would provide that a decision by the minister to grant a visa or refuse to grant a visa would be taken to be made when the minister records the decision. This would have the effect that a decision by the minister or delegate on a visa application becomes final on the day and at the time a record of the decision is made. The decision maker could not consider any submission made by the applicant or a third party after that time and the decision may not be varied or revoked. The only exception would be where there has been a legal error.[2]

2.4 Items 5 to 16 are largely consequential amendments which would confirm that under the Act a decision on an application (or a decision to cancel a visa) is made when a decision is recorded and not at the time the applicant (or visa holder) is taken to have been notified under the Act.

2.5 Item 17 would repeal subsection 368(2) and substitute new subsections 368(2) and 368(2A). The new subsection 368(2) would provide that decisions on review by the Migration Review Tribunal (MRT) (other than an oral decision) are taken to have been made by the making of the written statement on the date the written statement is made. The new subsection 368(2A) would provide that the MRT has no power to vary or revoke a decision after the date on which the written statement is made. Together, the new subsection 368(2) and 368(2A) would confirm that a written decision of the MRT is made on the date it is recorded and becomes final at that time. Item 19 would add a new subsection 368(4) to confirm that a decision of the MRT remains valid not withstanding any procedural irregularities such as a failure by the MRT to date the written statement or return required documents to the secretary of the department.

2.6 Item 26 would make the same amendments as Item 17 but in respect of decisions by the Refugee Review Tribunal (RRT) under subsection 430(2).

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[1] Item 3 also inserts a new subsection 5(9B) which provides an exception where the decision of the MRT or RRT is to remit the matter to the department for further consideration.

[2] EM, p.8.

2.7 As set out in Item 30, the amendments in this schedule would apply to a decision of the minister, the MRT or the RRT that is taken to have been made, as provided by the Act as amended on or after the commencement of the schedule.

Schedule 2 – Bar on further applications for protection visas

2.8 Item 2 of Schedule 2 would insert a new subsection 48A(1C) into the Act. This provision would clarify that subsection 48A(1) and (1B),[3] which prohibit the making of repeated applications for a protection visa whilst in the migration zone, apply regardless of the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy. The intent of the provision is to ensure that section 48A of the Act prohibits a non-citizen who has been refused a protection visa or had a protection visa cancelled from applying for a subsequent protection visa on different criteria whilst in the migration zone.

2.9 Item 3 would repeal and replace subsection 48A(2)(aa) to define protection visa in its broadest sense. Any visa created in the future which is in the class of protection visa would be covered by this section. The purpose of this provision is to further reinforce that section 48A is intended to prevent a non-citizen, while in the migration zone, from making repeated protection visa applications regardless of whether the further applications are based on different criterion to the previously unsuccessful applications.

2.10 Items 4 and 5 set out the timing of the application of these amendments to the Act in this schedule and the relationship with the timing of amendments set out in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

Schedule 3 – Security assessments

2.11 Item 1 of Schedule 3 would insert new subsections 36(1A) and 36(1B) in the Act. The effect of these amendments would be that a protection visa could only be granted where the applicant is not subject to an adverse security assessment from Australian Security Intelligence Organisation (ASIO).

2.12 Item 2 and Item 3 would repeal paragraph 411(1)(c) and substitute a new paragraph. This amendment would confirm that the RRT does not have jurisdiction to review a decision to reject a visa application based on an adverse security assessment from ASIO.[4]

2.13 Similarly, Item 4 and Item 5 would repeal paragraph 411(1)(d) and substitute a new paragraph. This amendment would confirm that the RRT does not have jurisdiction to review a decision to cancel a protection visa application based on an adverse security assessment from ASIO.[5]

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[3] EM, p.18.

[4] Whether it is item 2 or item 3 that comes into effect depends on the timing of the passage of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.*

[5] Whether it is item 4 or item 5 comes into effect depends on the timing of the passage of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.*

2.14 Item 6 would insert a new subsection 500(4A) in Part 9 of the Act. The new subsection 4A would provide that a decision to refuse to grant (or cancel) a protection visa on the basis of an adverse security assessment from ASIO under section 36(1B) (as inserted by Item 1) is not a decision reviewable by the Administrative Appeals Tribunal (AAT) under section 500, by the MRT under Part 5, or RRT under Part 7.

2.15 Item 7 would provide that the amendments to the Act contained in Schedule 3 would apply in relation to:

- an application for a protection visa made on or after the commencement of this item,
- an application for a protection visa made before the commencement of this item but not finally determined, and
- a decision to cancel a protection visa made on or after the commencement of this item, regardless of when the protection visa was granted.

Chapter 3

Key Issues – Schedule 1

3.1 This chapter discusses the key issues raised in submissions and evidence in respect of Schedule 1. The chapter concludes with the committee's view on Schedule 1 of the Bill.

Key issues identified by submitters and witnesses

3.2 The committee received relatively few submissions which addressed Schedule 1 of the Bill. Apart from the department's submission, which covered all three schedules, only three substantive submissions were received in relation to Schedule 1. These submissions opposed the amendments contained in Schedule 1. The Law Council also commented on Schedule 1 at the public hearing.

3.3 Witnesses noted key differences between the practices of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) when compared to the practices typical of court proceedings in Australia.[1] Whereas it is usual for judgements to be pronounced in open court, the committee heard that this is not the usual practice in the RRT and the MRT due to their significant caseload.[2] In these tribunals, whilst oral evidence is heard and witnesses are questioned as part of the tribunal process, tribunal members typically do not pronounce their decision orally in hearings.[3] Instead tribunal members prepare a written decision which is recorded by the tribunal member and then subsequently faxed or mailed by the registry office of the tribunal to both the applicant and the department.[4]

3.4 The Law Council noted the difference as:

> The judges actually announce the judgement; that is the difference. This [a tribunal decision] is only getting recorded onto a system.[5]

3.5 In the absence of a public pronouncement of a decision, correctly notifying the applicant and the department of a decision is critical, especially as the nature and timing of those decisions can have significant consequences for applicants including their legal status in Australia.

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[1] Mr Ali Mojtahedi, Senior Solicitor, Refugee Advice and Casework Service (RACS), *Proof Committee Hansard*, 4 February 2014, p. 3.

[2] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014 p. 28.

[3] Though the tribunal retains the option to deliver decisions verbally.

[4] Ms Carina Ford, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014 p. 28.

[5] Ms Carina Ford, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014 p. 28.

3.6 In the context of the practice of the RRT and MRT, submitters argued that the recent decisions by the Full Federal Court of Australia in *Minister for Immigration and Citizenship v SZQOY*[6] and *Minister for Immigration and Citizenship v SZRNY*[7] were correctly decided and should not be overturned by the proposed amendments in Schedule 1. The Refugee Advice and Casework Service (RACS) submitted that Schedule 1 may 'fetter decision makers by preventing reconsideration of a decision, [thus creating] situations where formality takes precedence over fairness'.[8]

3.7 The ACT Refugee Action Committee supported this view and suggested that:

> [I]t is desirable for the decision maker to be open to new material, new legal decisions, or new legal circumstances which may persuade the decision maker that his or her written decision needs to be changed in a significant way…up to the point where both the party (the applicant) and the Secretary have been notified of the terms of the decision.[9]

3.8 Mr Ali Mojtahedi of RACS suggested that Justice Barker's analysis at paragraph 58 of this honour's judgement in *SZQOY* best summed up his position:

> [T]here is no compelling reason in public policy why the RRT should not be able to recall the reasons recording a decision arising from the review process under the Act before it has been communicated to a party. While finality is important in any decision-making process, there is a much greater public policy to be served if, despite having written up the reasons for a decision and instructed they be despatched to the affected party and the Secretary, the RRT has the flexibility to correct any error made so as to avoid legal error or to take steps to avoid any possible injustice. After all, the whole point of the review process is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decision-making. [10]

3.9 Mr Mojtahedi added:

> To deny a decision-maker the ability to revisit their decision before it has left the tribunal in my submission would go against the idea of the process being fair and just.[11]

3.10 However, witnesses acknowledged that the flexibility afforded to tribunal members to revisit decisions until they are communicated externally as a result of the court decisions in *SZQOY*[12] and *SZRNY*[13] is limited to a matter of days and not weeks or months:

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[6] [2012] FCAFC 131.

[7] [2013] FCAFC 104.

[8] *Submission 4,* p. 3.

[9] *Submission 7,* p. 4.

[10] [2012] FCAFC 131, para 58.

[11] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard,* 4 February 2014, p. 2.

[12] [2012] FCAFC 131.

[13] [2013] FCAFC 104.

> …we are talking about a very short period of time in which they can revisit their decision. We are not talking about weeks.[14]

3.11 Whilst much evidence before the committee on Schedule 1 focused on its potential to reduce the flexibility of the decision making process in the RRT and MRT, the impact on applicants was identified as:

> [Schedule 1] reduces the tribunal's ability to consider additional information which could be detrimental to a review applicant.[15]

3.12 Witnesses to the inquiry accepted that there is a need for certainty in identifying when decisions are 'finally determined' in order to have an effective process for considering and resolving protection visa cases. However, submitters came to a view contrary to the department's as to whether a decision could be finally determined without considering whether that decision had also been notified to the applicant and the department.[16]

3.13 RACS argued that:

> …it is entirely appropriate that an application not be considered finally determined until such time that is lawfully sent to the applicant and the secretary.[17]

3.14 In response to this, the department stated that '…there is a need to make sure that the applicant is appropriately notified'.[18] However:

> …the reason for the amendments we have sought to put in place is that there is also a very definite reason to need to know when a decision has actually been made and when, therefore, it is finally determined, because a number of things flow from that.[19]

3.15 The department explained that it had sought, in the amendments proposed in Schedule 1, to balance competing public policy interests:

> I think there is an issue of weighing up the public interest in the possibility that someone may not be notified—according to the procedures set out in the act, as a result of an administrative error—against also the public interest in the need to have certainty, because some very serious consequences can flow from it.[20]

3.16 In evidence before the committee the department explained that one of the serious consequences that flow from a decision being 'finally determined' included

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[14] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard*, 4 February 2014, p. 3.

[15] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard*, 4 February 2014, p. 4.

[16] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard*, 4 February 2014, p. 7.

[17] Mr Ali Mojtahedi, RACS, *Proof Committee Hansard*, 4 February 2014, p. 7.

[18] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 35.

[19] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 35.

[20] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 35.

that 'a person can become an unlawful noncitizen 28 days after something has been finally determined'.[21]

3.17 Nevertheless, the Law Council raised concerns about the impact of the proposed amendments on the notification requirements under the Act. The Law Council argued that '[i]t is vital that the changes ensure the decisions are notified quickly upon being recorded'. [22]

3.18 Moreover the Law Council argued that it:

> would be concerned if the amendments proposed in schedule 1 had the effect of diluting or removing the requirement to notify applicants of the outcome of decisions…If these were the consequences of the amendments, it would raise serious rule-of-law concerns and seriously undermine visa applicants' rights of review and appeal.[23]

Committee view

3.19 The committee accepts that tribunals undertaking merits review, such as the RRT and the MRT, are fulfilling a different role to the courts. In the role being fulfilled by the RRT and MRT, a degree of flexibility is required to ensure a correct and just decision.

3.20 The committee notes, however, that the flexibility afforded to tribunal members, whilst important, is not the only or even primary means of addressing new evidence or changed circumstances of the applicant or the country of origin. These issues are dealt with by other review mechanisms under the Act.[24]

3.21 The committee accepts the department's need for certainty in ascertaining when decisions are 'finally determined'. This need for certainty is heightened given the seriousness of the consequences that flow from such decisions, extending to liability of the applicant for removal from Australia. Accordingly, the committee supports the amendments in Schedule 1.

3.22 The committee is also concerned that applicants are promptly informed of the outcome of their matters by the department and the relevant tribunals as appropriate in accordance with the *Migration Act 1958.* The committee suggests that in order for the department to uphold the public interest in notifying visa applicants of the outcome of decisions, it should ensure that appropriate administrative arrangements are in place to minimise errors in notification and to ensure that errors are quickly identified and addressed.

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[21] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 38.

[22] Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[23] Ms Carina Ford, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[24] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 39

3.23 The committee, whilst not making any recommendation directly on this point, queries why the RRT and MRT retreated from what the committee understands was the practice of announcing a decision at the end of the hearing or, where the decision was reserved, then at a specially convened hearing, to provide a more certain and open way of delivering the Tribunal's determination.

Recommendation 1

3.24 The committee recommends that the Department of Immigration and Border Protection put in place policies and procedures, consistent with the *Migration Act 1958*, which would support applicants to seek leave to apply out of time or apply for alternative forms of review in the rare situations where the department or a tribunal fails to correctly notify the applicant and the applicant has been directly disadvantaged as a result.

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.

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

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

> 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

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[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.

> 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 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

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[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.

[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.

> 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 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]

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

Chapter 5

Key Issues – Schedule 3

5.1 This chapter discusses the key issues raised in submissions and evidence in respect of Schedule 3. The chapter concludes with the committee's view on Schedule 3 of the Bill.

Key issues identified by submitters and witnesses

5.2 All 12 submissions received by the committee provided substantive comment on Schedule 3 to the Bill. Many submitters expressed concerns about Schedule 3, including:

- the lack of appeal rights for refugees who receive an adverse security assessment (ASA) from ASIO,
- the reality of indefinite detention for refugees with ASAs, and
- the necessity of the proposed amendments given existing provisions in the *Migration Act 1958* (the Act).

5.3 These three issues are examined in this chapter separately. Finally, this chapter examines the current arrangements for independent reviews of ASAs for refugees.

5.4 Before considering these issues in detail, the committee notes that the amendments in Schedule 3 do not seek to directly legislate on the first two issues which were raised by submitters and are therefore not directly within the Terms of Reference for this Inquiry. The amendments in Schedule 3 would reinstate in legislation a regulation (*PIC 4002)* found by the High Court to be inconsistent with the Act. The Bill itself would not legislate for indefinite detention of refugees. Similarly, the rights to appeal ASAs are dealt with in the *Australian Security Intelligence Organisation Act* and not the *Migration Act.*

5.5 Nevertheless, the committee accepts that these issues may be relevant to an examination of the broad protection visa framework. This was explained by submitters to the inquiry:

> The amendment to s 36 (protection visas) virtually inscribes the former regulation into the Act without confronting any of the widely identified defects of the present system, and risks creating further defects of its own.[1]

Lack of appeal rights for non-citizens

5.6 Submissions from Amnesty International Australia and the Human Rights Law Centre[2] noted that Schedule 3 of the Bill expressly excludes decisions to refuse to grant (or cancel) protection visas on security grounds from review by the Refugee

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[1] *Submission 7,* p. 6.

[2] *Submission 1,* p. 1 and *Submission 5,* p. 5.

Review Tribunal (RRT). These submissions also noted that whilst Australian citizens and permanent and special purpose visa holders are able to seek merits review of ASAs by ASIO in the Administrative Appeals Tribunal (AAT), protection visa applicants are denied those rights of review.[3]

5.7 In its submission to the inquiry, the United Nations High Commissioner for Refugees (UNHCR) expressed views similar to many submitters when it noted:

> its concern that a refugee who has received an adverse assessment has very limited legal avenues to contest a negative assessment and is not afforded procedural fairness or natural justice.[4]

5.8 UNHCR confirmed that it is particularly concerned that existing processes around ASAs do not:

> provide a basis on which an affected person is able to assess and, if necessary, contest a negative assessment.[5]

5.9 A number of submitters including the Human Rights Law Centre and RACS suggested that refugees should have the same appeal rights with respect to ASAs as Australian citizens. In evidence before the committee, Mr Ali Mojtahedi suggested:

> ….it is certainly our position that the AAT is well placed to consider merits review. It has a security division. It can take steps to keep certain evidence confidential. It can close its doors to the public. There is no reason that the AAT should not have the opportunity to consider review of a decision.[6]

5.10 Similarly, Mr Daniel Webb from the Human Rights Law Centre suggested:

> …protecting national security is not compromised by allowing a refugee to appeal an adverse ASIO assessment…We say that just because ASIO says someone is a risk does not mean that that person should not be able to challenge that finding through an authoritative, independent process that safeguards confidential information and everything like that. Such a process already exists for everyone other than refugees.[7]

5.11 Whilst the UNHCR supported the AAT having jurisdiction to review the ASAs of refugees, in its submission to the committee, it noted that:

> …the use of classified information is a complex area of law where an appropriate balance between national security and international protection must be found. UNHCR understands that in matters of national security, the preservation of sources of information and methods of intelligence gathering may need to be protected from public scrutiny.[8]

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[3] *Submission 1,* p. 2, and *Submission 5,* p. 5.

[4] *Submission 9,* p.5

[5] *Submission 9,* p.4

[6] Mr Ali Mojtahedi, Senior Solicitor, RACS, *Proof Committee Hansard,* 4 February 2014, p. 22.

[7] Mr Daniel Webb, Director of Legal Advocacy, Human Right s Law Centre, *Proof Committee Hansard,* 4 February 2014, p. 18.

[8] *Submission 9,* p. 5.

5.12 The UNHCR expressed its preference for a process that would allow 'some meaningful opportunity to challenge the assessment in appropriately compelling cases'.[9]

5.13 The department explained the rationale for not extending appeal rights to refugees:

> The amendments further create certainty and promote efficiency by confirming that the MRT, RRT and Administrative Appeals Tribunal (AAT) will not have the power to review a decision to refuse to grant or to cancel a protection visa on the basis of an adverse security assessment by ASIO that the applicant for, or holder of, a protection visa is a risk to security.[10]

5.14 Moreover, the department expressed the essential national security imperative of the arrangements as:

> The amendments ensure that to meet community expectations, the government must not only have the ability to act decisively and effectively, wherever necessary, to protect the Australian community, but also to have the legislative basis to refuse or cancel a protection visa for those non-citizens who are a security risk.[11]

The reality of indefinite detention for refugees with adverse security assessments (ASAs)

5.15 The committee heard evidence from the President of the Australian Human Rights Commission, Professor Gillian Triggs on the numbers and circumstances of refugees currently subject to indefinite detention:

> There are currently about 50 refugees—that is, people who have been assessed as refugees—with adverse security assessments who face indefinite and, potentially at least, lifetime detention. There are also five young children of parents with adverse assessments who are detained.[12]

5.16 Professor Gillian Triggs further explained to the committee:

> For several years the commission has raised serious human rights obligations about the situation faced by this group, including the lack of review rights and indefinite detention.[13]

5.17 The Law Council, Human Rights Law Centre and Victorian Foundation for Survivors, amongst others, expressed similar concerns.[14]

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[9] *Submission 9,* p. 5.

[10] *Submission 3,* p. 6.

[11] *Submission 3,* p. 6.

[12] Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p 31.

[13] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 31.

[14] *Submission 2,* p. 2, *Submission 5,* pp 6-7, *Submission 8,* pp 3-4.

5.18 The committee also heard evidence from Dr Ida Kaplan, of the Victorian Foundation for Survivors of Torture, as to the effect of indefinite detention on refugees:

> We have very serious concerns about their mental health. They are in very poor mental health, and that is continuing to deteriorate with time. The most prominent mental health effects in that regard are depression, anxiety and trauma related symptoms.[15]

5.19 The department acknowledged the practical link between the amendments in Schedule 3 and the indefinite detention. However, the department suggested to the committee that indefinite detention 'is a separate policy issue of the government'[16] from the amendments proposed in Schedule 3. From the perspective of the department:

> They are separate policy decisions about whether a person who has an adverse security assessment should be in held detention or should be in community detention or should be on a temporary visa. All this legislation is about is the government's position that a person who is owed protection but who has an adverse security assessment should not be granted a permanent protection visa.[17]

5.20 The committee accepts this point.

The necessity of the amendments given existing provisions in the Migration Act 1958

5.21 A number of submitters to the inquiry, such as the Refugee Council of Australia (RCOA) questioned the necessity of the amendments in Schedule 3 of the Bill given existing provisions in the Act.

5.22 RCOA submitted that:

> In RCOA's view, the Minister's existing powers to refuse or cancel a visa under Section 501 of the *Migration Act 1958* are sufficient to allow for the refusal or cancellation of a visa for individuals who present a significant threat to national security or the safety of the Australian community.[18]

5.23 Noting the approximately 50 people currently in detention who have been found to be refugees but subject to ASAs, RCOA submitted that:

> Existing legislation has proved sufficient to deny visas to these individuals. RCOA therefore fails to see the need for any additional restrictions that put

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[15] Dr Ida Kaplan, Manager, Direct Services Program, Victorian Foundation for Survivors of Torture, *Proof Committee Hansard,* 4 February 2014, p.15.

[16] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 38.

[17] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Affairs Committee Hansard,* 4 February 2014, p. 38.

[18] *Submission 10,* para 2.1

> out of question any flexibility of approach to individuals with adverse ASIO assessments.[19]

5.24 The Human Right Law Centre suggested the amendments in Schedule 3 would in fact go beyond the requirements in section 501 of the *Migration Act 1958*:

> It broadens the test and it makes the process by which that test is conducted not subject to independent merits review.[20]

5.25 The Human Rights Law Centre further submitted that the Bill would expand the grounds for exclusion from the grant of a protection visa beyond those contained in the Refugee Convention.[21]

5.26 As explained in the Explanatory Memorandum to the Bill, the proposed legislation effectively seeks to restore regulation PIC 4002, by inserting provisions into the Act. The committee heard evidence from the department that PIC 4002 was a long standing requirement in order to obtain a protection visa under migration law:

> Not in its current form but, in substance, since 1994, and there were previous iterations of it even before that. So, it has been around for a long time. The way that operated, of course, was that if an adverse security assessment had been made in relation to a person, the criterion was not met and the visa had to be refused.[22]

5.27 The department also explained in detail why the existing character provisions were insufficient to protect national security and hence why the amendments in Schedule 3 were required:

> …where the minister is required to use the character provisions, they do not really meet the national security requirements. The character provisions, in the way they are drafted, largely look at the behaviour of a person in the past and therefore whether they are of bad character, as opposed to security assessments, which can often look at what might be the behaviour of the person in the future. So they do not necessarily marry exactly. Also, in relation to the character provisions and the way they work, even once the minister has made a determination that the person is a bad character such that the power is enlivened, the discretion is enlivened, there still is a discretion whereby the minister has to look at all the circumstances in the case and may even need to look behind the adverse security assessment and then make a decision about whether it is appropriate to grant a protection visa or not.[23]

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[19] *Submission 10*, para 2.3.

[20] Mr Daniel Webb, Human Rights Law Centre, *Legal and Constitutional Affairs Committee Hansard*, 4 February 2014, p 17.

[21] *Submission 5*, p. 8.

[22] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 37.

[23] Ms Vicki Parker Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 37.

Independent Reviewer of Adverse Security Assessments

5.28 During the public hearing there was much discussion of the effectiveness of the Independent Reviewer for Adverse Security Assessments (IRASA).

5.29 The introduction of an IRASA is relatively recent. In October 2012, the previous government announced an independent review process for refugees who have been refused a permanent visa as a result of an ASIO ASA. A former federal court judge, the Hon Margaret Stone was appointed by the Attorney-General as the IRASA.[24] The IRASA's role is to review ASIO ASAs given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the department to: engage Australia's protection obligations under international law, but not be eligible for a permanent protection visa; or who have had their permanent protection visa cancelled. The reviewer also has a role to conduct a periodic review of ASAs for eligible persons every 12 months.[25]

5.30 Many submitters welcomed the appointment of the IRASA as a mechanism for reviewing ASAs and checking there have been no inadvertent errors.

5.31 Mr Webb from the HRLC expressed the views of many appearing before the committee with respect to the IRASA when he indicated that:

> It is an important step in opening a process that makes profoundly important decisions, up to some level of scrutiny.[26]

5.32 The Law Council also supported the introduction of the IRASA:

> [I]n the absence of any other model, the law council considers that it provides some opportunity for review—and, indeed, it has on two occasions led to reassessment which has resulted in two families [being] removed from detention. It also provides some opportunity to revisit ASIO security assessments at certain points in time.[27]

5.33 Professor Triggs also highlighted the critical role of the IRASA:

> I think it has been extremely helpful to have it. It has given a level of transparency and openness. To appoint a well regarded former Federal Court judge to this position gave it, if you like, the gravitas—the

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[24] AHRC, *Refugee and Adverse Security Assessments*, available from: http://www.humanrights.gov.au/sites/default/files/document/publication/tell-me-about-refugees-adverse-security.pdf (accessed: 6 February 2014).

[25] Attorney-General's Department, *Terms of Reference for the Independent Reviewer of Adverse Security Assessments*, available from: http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx (accessed: 6 February 2014).

[26] Mr Daniel Webb, Human Rights Law Centre, *Proof Committee Hansard*, 4 February 2014, p. 17.

[27] Ms Sarah Moulds, Acting Director, Criminal Law and Human Rights Division, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 27.

> authority—for a review that we found very encouraging. We were very pleased indeed when this position was appointed.[28]

5.34 A representatives from ASIO, also gave evidence before the committee. They suggested that whilst ASIO had concerns about the effect of the review processes on agency resources, that the IRASA process was working well:

> …I have personally, as Director - General of Security, confidence that the process that is currently in operation…is providing me with an effective, independent review of decisions that we [ASIO] have taken. It does not force me to change that decision, but in almost every case I have respected the reviewer's advice.

5.35 Whilst welcoming the establishment of the IRASA, a number of witnesses, including the Law Council, also highlighted a number of weaknesses in the IRASA process and suggested it ought be strengthened.

5.36 Mr Webb argued that the appointment of the IRASA does not completely remedy the inability of refugees to review an ASA from ASIO. Mr Webb suggested:

> [The IRASA] does not cure the system of its defects. That is for a few reasons. One is that the outcome of that independent reviewer process is an opinion, not a decision—it is a recommendation, it is not binding.… Second, it exists as a creature of policy; it is not legislated. In theory—although I hope this doesn't happen—it could be dispensed with on a whim.[29]

5.37 In similar evidence before the committee, Mr Josef Szwarc from the Victorian Foundation for Survivors of Torture, suggested:

> …that appointment is under an administrative arrangement. She has no powers other than the power to request material. Her recommendations, insofar as we know them, do not have any power.[30]

5.38 This view was supported by the AHRC:

> [T]he non-statutory review mechanism with non-binding recommendations does not in our view adequately reflect the gravity of the consequences of an adverse security assessment that I have discussed.[31]

5.39 A number of submitters suggested that the IRASA could be strengthened. The Law Council was indicative when it argued:

> provid[ing] a statutory basis to the existing administrative appointment of the independent reviewer of adverse security assessments for refugees—so

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[28] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 34.

[29] Mr Daniel Webb, Human Rights Law Centre, *Proof Committee Hansard,* 4 February 2014, p. 17.

[30] Mr Josef Szwarc, Manager, Research, Victorian Foundation for Survivors of Torture, *Proof Committee Hansard,* 4 February 2014, p.15.

[31] Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 31.

to codify in legislation the powers of that reviewer and the procedure that would apply.[32]

Committee view

5.40 The committee acknowledges concerns about the prolonged detention of refugees with ASAs and their children.

5.41 As mentioned in paragraph 5.20, the committee agrees with the department that the policy of indefinite detention, however, is a separate policy issue to the matters currently before the committee. The Bill simply seeks to restore the effect of the regulation *PIC 4002* by inserting a specific criterion into the *Migration Act 1958*. This distinction was also accepted by the AHRC.[33]

5.42 The committee is of the view that most Australians would expect that under Australian law it is a criterion for the grant of a protection visa that an individual does not have an ASA from ASIO.

5.43 The committee supports the government's efforts generally and the work of the department and ASIO, specifically in upholding community safety and protecting national security. The committee accepts that it is a decision for government whether to open up ASA's issued by ASIO to non-citizens, including refugees, to further formal review or appeal mechanisms.

5.44 The committee also supports the excellent work undertaken by the Hon Margaret Stone in her role of IRASA. The committee believes IRASA has played a crucial role in ensuring there is an appropriate review of ASAs issued by ASIO. The committee also notes the evidence that the work undertaken by the current IRASA has been effective because of her close and productive relationship with ASIO. The committee accepts the evidence that the IRASA is a critical safety mechanism given the serious consequences that flow from ASAs for those found to be refugees.

5.45 The committee notes, however, that the role of the IRASA exists simply as an instrument of policy. The committee suggests that the government should consider how the role of the IRASA could be strengthened by having a regulatory underpinning. This would give the role certainty and credibility befitting the seriousness of the task.

Recommendation 2

5.46 The committee recommends that the Australian Government consider putting in place a regulatory framework to underpin the powers, authority and role of the Independent Reviewer of Adverse Security Assessments.

5.47 On balance, the committee believes that the Bill should be passed—subject to Recommendations 1 and 2—so as to give the Department of Immigration and Border Protection administrative certainty regarding the interpretation and application of the *Migration Act 1958*.

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[32] Ms Sarah Moulds, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[33] AHRC, *answers to question on notice*, 4 February 2014, (received 6 February 2014), p. 1.

Recommendation 3

5.48 The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendations.

Senator the Hon Ian Macdonald

Chair

Dissenting Report

Senator Sarah Hanson-Young

Migration Amendment Bill 2013 [Provisions]

Introduction

1.1 The Migration Amendment Bill 2013 [Provisions] seeks to amend Australia's rigorous refugee determination process by overturning a number of High and Full Federal Court decisions. The amendments proposed are inconsistent with Australia's international obligations, do not afford procedural fairness and further entrench the current practice of indefinitely detaining men, women and children who have been found to be genuine refugees, but deemed a security threat by the Australian Security Intelligence Organisation (ASIO).

1.2 Overwhelmingly the majority of submissions made to the committee on this Bill were not supportive of the proposed changes and concluded that the Bill should not proceed.

1.3 The Australian Greens do not support the Bill as it is just another step by the government to limit the protection avenues for refugees who are in genuine need of Australia's assistance. The amendments fail to address the long standing criticisms held regarding the processing of asylum seeker claims in Australia and are contrary to Australia's international obligations.

Schedule 1: When decisions are made and finally determined

1.4 The amendments proposed in the Bill seek to overturn a decision of the Full Federal Court which determined that the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT) ought to have the ability to revisit their own decision up to the point where the applicant and the secretary have been notified of the terms of the decision.

1.5 As argued by the Refugee Advice and Casework Service (RACS) in its submission, the amendments:

> …fetter decision makers by preventing the reconsideration of a decision, [which] could create situations where formality takes precedence over fairness.[1]

1.6 Evidence heard by the committee outlined circumstances where new information or claims may come before the committee in the later stage of the decision making process. These documents or developments are necessary for the Tribunal to consider in order for them to make a correct and preferable decision.

In the view of Justice Barker:

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[1] *Submission 1*, p. 3.

> there is no compelling reason in public policy why the RRT should not have the ability to recall the reasons for recording a decision arising from the review process under the Act before it has been communicated to a party….after all, the whole point of the review process is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decision making.[2]

1.7 When procedural fairness is afforded the RRT and MRT have the ability to consider this information and revise their decision if necessary. The Australian Greens believe that any amendments to the contrary would be inconsistent with the aims of the Tribunal to provide a review process which is fair, just, economical, informal and quick.

Schedule 2: Bar on further applications for protection visas

1.8 The amendments outlined in Schedule 2 seek to circumvent a decision by the Full Federal Court which determined that a person could make a subsequent claim for protection on the basis that the application relied on a different criterion.

1.9 The amendments proposed reject the importance of procedural fairness and due process by precluding a number of people from having their claims processed on complementary protection grounds, as now contained in section 36 of the Migration Act.

1.10 In the view of the UNHCR:

> ….the practical effect of the statutory bar is to prevent further applications for protection visas in circumstances where the complementary protection criteria did not exist at the time when the earlier application was refused or cancelled.[3]

1.11 Australia is party to the International Covenant on Civil and Political Rights, the Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child and must fulfil its obligations by protecting those people who may not qualify as a refugee under the 1951 Convention but are in need of protection based on non-refoulement obligations.

1.12 Whilst the Department stated that it was 'not that these people did not get any consideration of their complementary protection claims; they got them considered just in a different way'[4], it is important to note, as outline by many of the submitters to the inquiry, this was not an adequate process for determining complementary protection claims as the decision resided with the Minister and the determinations were non-reviewable and non-compellable.

1.13 As stated by the UNHCR 'it is preferable to provide a legislative basis for ensuring that a person will not be returned to a place where he or she may suffer

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[2] [2012] FCAFC 131, para 58.

[3] *Submission 9*, p. 2.

[4] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 40.

'significant harm'' and 'it is important to afford procedural fairness to the person concerned who is unable to appeal the Minister's decision.'[5]

1.14 The Australian Greens believe that the proposed statutory bar on further applications for protection is just another step by the government to limit the protection avenues for refugees who are in genuine need of Australia's assistance. Those who have not fulfilled the requirements under the Refugee Convention however may have substantiated claims for protection under the aforementioned international human rights instruments, should be given the ability to apply on complementary grounds.

Schedule 3: Security Assessments

1.15 The amendments proposed by Schedule 3 of the Bill fail to address the longstanding criticisms of the ASIO security assessment process and instead further entrench a process that has led to the indefinite detention of approximately 50 refugees, including 5 children.

1.16 These amendments are unnecessary, fail to provide adequate appeal rights, entrench the practice of indefinite detention, and breach Australia's international obligations.

The amendments are unnecessary

1.17 As highlighted by a number of submitters to the inquiry, including the RACS and the Refugee Council of Australia (RCOA), Section 501 of the Migration Act already sets out broad provisions relating to the Minister's power to refuse to grant, or cancel an individual's visa based on character. The RCOA submitted that 'existing legislation has proved sufficient to deny visas to these individuals.'[6]

1.18 Further, the UNHCR highlights that:

> ….the 1951 Convention contains specific provisions which allow states to protect their right to safeguard national security, while at the same time protecting the rights of refugees.[7]

The amendments fail to provide adequate appeal rights which leads to the indefinite detention of genuine refugees

1.19 The changes fail to provide a person with adequate review avenues should they receive an Adverse Security Assessment (ASA) which results in the indefinite detention of approximately 50 men, women and children.

1.20 Many of the submitters, including the UNHCR and Amnesty International Australia, were very concerned about the limited abilities to contest a negative ASIO assessment and therefore be afforded procedural fairness or natural justice.[8]

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[5] *Submission 9,* p. 3.

[6] *Submission 10,* para 2.4.

[7] *Submission 9,* p. 3.

[8] *Submission 1* and *Submission 9.*

1.21 As submitted by the Australian Lawyers Alliance:

> The rule of law is applicable to all persons in Australia, regardless of their citizenship status. To deem an individual unworthy of access to justice as a result of their maritime means of arrival…..does not accord with the standards of natural justice.[9]

1.22 As it currently stands, Australian citizens and permanent visa holders are able to seek merits review of adverse ASIO assessments, but protection visa applicants are not afforded these same rights.[10]

1.23 The Joint Select Committee on Australia's Immigration Detention Network, Chaired by Mr Daryl Melham MP and Senator Sarah Hanson-Young, stated in its report that 'there is no compelling reason to deny non-residents the same access to procedural fairness' as Australian residents.[11]

1.24 In its final report the Committee made a number of recommendations to afford refugees with ASAs an opportunity to appeal the grounds of their assessment and therefore their indefinite detention. The committee resolutely rejected the indefinite detention of people without any right of appeal.[12]

1.25 The Committee recommended that the Australian Government and ASIO should establish and implement periodic reviews of adverse refugee security assessments to ensure that genuine refugees were not subject to indefinite detention.[13]

1.26 The Committee went on to recommend that the A*ustralian Security Intelligence Organisation Act* should be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review ASIO security assessments of refugees and asylum seekers.[14]

1.27 It is the view of the Australian Greens that these recommendations should be adopted by the government to ensure procedural fairness is afforded and the practice of indefinite detention is ended.

1.28 The Greens welcomed the announcement in late 2012 of the Independent Reviewer as an important acknowledgement that, under current Australian law, there is no fair legal process for refugees to find out the reasons of their ASA or challenge the merits of the ASA. The Australian Greens acknowledge the work of the Hon Margaret Stone in reviewing a number of ASIO ASAs, however, the Greens share the unanimous concerns of the witnesses that appeared before the inquiry that the

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[9] *Submission 6*, p. 7.

[10] Human Rights Law Centre, *Submission 5*, p. 5.

[11] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, para 6.150.

[12] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, para 6.148.

[13] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, para 6.151.

[14] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, para 6.152.

Independent Reviewer has no binding powers to amend an ASA, or indeed any mandate over deciding whether refugees who are subject to an ASA must reside.

1.29 While the Greens accept that Recommendation 2 of the majority report is a step in the right direction it is important that there are legislative changes to ensure that the powers of the Independent Reviewer are binding and enforceable.

1.30 To address the recommendations the Australian Greens introduced the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill* in 2012 to put in place a fair legal process for the 50 refugees and their children who are currently stranded in indefinite immigration detention due to an ASA.

1.31 An inquiry into the Bill exposed wide support from witnesses including Civil Liberties Australia, the Australian Human Rights Commission, Victoria Legal Aid and the Asylum Seeker Resource Centre. A number of expert bodies supported the passage of the Bill as a starting point but remarked that the Bill could be amended to go even further in giving rights and fair process to refugees in this predicament, including Professor Ben Saul, the Law Council of Australia, the Refugee Council of Australia and Humanitarian Research Partners. These groups attested that the Bill was imperative as a first step to reform.

1.32 Despite overwhelming support for the Bill it has yet to be supported in the Parliament.

The amendments breach international obligations

1.33 In August last year, the UN Human Rights Committee found that Australia was in breach of its international obligations and had committed 143 human rights violations, including articles 7 and 9(1) of the ICCPR, by indefinitely detaining 46 refugees, including children, due to ASAs.[15]

1.34 The Human Rights Law Centre further highlights that the:

> ….detention of a refugee following an adverse assessment risks violating article 9 of the ICCPR as there are insufficient effective judicial oversight and review mechanisms.[16]

1.35 Amnesty International Australia also highlights possible breaches of articles 3 and 37B of the Convention on the Rights of the Child as a result of 5 children currently being indefinitely detained due to their parents receiving ASAs.[17]

Conclusion

1.36 The Migration Amendment (Provisions) Bill 2013 seeks to amend Australia's rigorous refugee determination process by overturning a number of High and Full Federal Court decisions.

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[15] United Nations Office of the High Commissioner for Human Rights, '*Australia's detention of 46 refugees 'cruel and degrading', UN rights experts find*'. 22 August 2013,

[16] *Submission 5, p. 7.*

[17] Submission 1, p. 2.

1.37 It is clear that this Bill will further distance Australia from our obligations to provide protection to those in desperate need. The amendments proposed are inconsistent with Australia's international obligations, do not afford procedural fairness and further entrench the current practice of indefinitely detaining men, women and children who have been found to be genuine refugees.

1.38 The Australian Greens depart from the recommendation of the majority report and conclude that the Bill should not proceed on basis of the arguments outlined above.

Recommendation 1:

The Australian Greens recommend that this Bill not proceed.

Recommendation 2:

The Australian Greens recommend that the government put in place a legislative framework to underpin the power, authority and role of the Independent Reviewer of Adverse Security Assessments.

Recommendation 3:

The Australian Greens recommend that the government urgently adopted the recommendations made by the Joint Select Committee on Australia's Immigration Detention Network, in particular;

> ***Recommendation 27***
>
> **That the Australian Government and the Australian Security Intelligence Organisation establish and implement periodic, internal reviews of adverse Australian Security Intelligence Organisation refugee security assessments commencing as soon as possible.**
>
> ***Recommendation 28***
>
> **That the Australian Security Intelligence Organisation Act be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review the Australian Security Intelligence Organisation security assessments of refugees and asylum seekers.**

Senator Sarah Hanson-Young

Australian Greens, SA

Appendix 1

Public submissions

Submissions

1 Amnesty International Australia
2 Law Council of Australia
3 Department of Immigration and Border Protection
4 Refugee Advice and Casework Service (RACS)
5 Human Rights Law Centre
6 Australian Lawyers Alliance
7 ACT Refugee Action Committee
8 The Victorian Foundation for Survivors of Torture
9 United Nations High Commissioner for Refugees
10 Refugee Council of Australia
11 Professor Ben Saul
12 Immigration Advice and Rights Centre (IARC)

Appendix 2

Witnesses who appeared before the committee

Tuesday 4 February 2014—Melbourne

BROWN, Ms Louise, Secondee Lawyer, Human Rights Law Centre

ECKARD, Ms Rebecca, Research Coordinator, Refugee Council of Australia

JACKSON-VAUGHAN, Ms Tanya, Executive Director, Refugee Advice & Casework Service (Aust) Inc.

KAPLAN, Dr Ida, Manager, Direct Services, Victorian Foundation for Survivors of Torture

MOJTAHEDI, Mr Ali, Senior Solicitor, Refugee Advice & Casework Service (Aust) Inc.

SZWARC, Mr Josef, Manager, Research, Victorian Foundation for Survivors of Torture

WEBB, Mr Daniel John, Director of Legal Advocacy, Human Rights Law Centre

FORD, Ms Carina, Steering Group, Migration Law Committee, Law Council of Australia

MOULDS, Ms Sarah Petronella, Acting Director, Criminal Law and Human Rights Division, Law Council of Australia

RODAN, Mr Erskine, OAM, Chair, Migration Law Committee, Law Council of Australia

TRIGGS, Professor Gillian Doreen, President, Australian Human Rights Commission

PARKER, Ms Vicki, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection

Appendix 3

Tabled documents, answers to questions on notice and additional information

Additional information and tabled documents

1 Additional Information - Security Law and Capability Branch, Attorney-General's Department, received 7 February 2014

Answers to questions on notice

Tuesday 4 February 2014

1 Australian Human Rights Commission - Answers to a question taken on notice (from public hearing, 4 February 2014)

2 Refugee Advice and Casework Service - Answers to a question taken on notice (from public hearing, 4 February 2014)

3 Department of Immigration and Border Protection - Answers to a question taken on notice (from public hearing, 4 February 2014)