SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

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Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 2014

The committee presents its *Fifteenth Report of 2014* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Introduced into the House of Representatives on 24 September 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 14 of 2014*. The Minister responded to the committee's comments in a letter dated 14 November 2014. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2014 - extract

Background

This bill seeks to amend the *Migration Act 1958* to enable a visa to be cancelled or refused for certain non-citizens by:

- broadening the power to refuse to grant or to cancel a visa on character grounds;
- allowing the minister to require a state or territory agency to disclose personal information relevant to the character test and providing for lower thresholds for cancelling temporary visas;
- amending ministerial decision making powers in relation to general visa cancellation provisions; and
- introducing mandatory visa cancellation for certain non-citizens who do not pass the character test.

Broad discretionary power
Item 10, proposed new paragraph 501(6)(b)

This item repeals existing paragraph 501(6)(b) which provides that a person does not pass the character test if the person has or has had 'an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'. The purpose of the replacement paragraph 501(6)(b) is 'to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation [such as a criminal motorcycle gang or terrorist organisation] does not pass the character test' (explanatory memorandum, p. 9). Under the new provision the character

test will not be passed if a person is a member of such a group or organisation or where there is a reasonable suspicion of membership.

The proposed provision provides that a person does not pass the character test if the Minister reasonably suspects:

- that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

- that the group, organisation or person has been or is involved in criminal conduct.

Although this approach requires the minister to form a reasonable suspicion, it is apparent that reasonable minds may differ about whether evidence before the Minister would justify the formation of the relevant state of mind. It is suggested that this approach gives the Minister a practical area of judgment and that this would not easily be subject to effective judicial review given the lack of objective criteria. Of particular concern may be the fact that a reasonable suspicion that a person has an association with a group or person reasonably suspected of being involved in criminal conduct may be grounded in familial or social connections.

The explanatory memorandum makes an argument for the new approach in relation to membership, but does not specifically argue for the appropriateness of lowering the threshold of evidence required to show an 'association' (see paragraph 41, p. 9). **As such the committee seeks the Minister's further explanation for lowering the threshold of evidence required in relation to establishing an association between groups or persons involved in criminal conduct.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

Minister's response - extract

Item 10 - proposed new paragraph 501(6)(b) - Broad Discretionary Power

The committee seeks the Minister's further explanation for lowering the threshold of evidence required in relation to establishing an association between groups or persons involved in criminal conduct.

The purpose of the amendment to paragraph 501(6)(b) of the *Migration Act 1958* (the Act) is to ensure that non-citizens who are members of a criminal group or organisation, such as an outlaw motorcycle gang or terrorist group, do not pass the character test. Under the amended ground a reasonable suspicion that the person has been or is a member of a group

or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct will be sufficient to enliven the discretion under section 501 to refuse to grant or to cancel a visa on the ground in paragraph 501(6)(b) of the Act. Where a non-citizen chooses to become, or is, a member of a group or organisation that is suspected of involvement in criminal activity, they should expect to have their visa considered for refusal or cancellation under section 501 of the Act, consistent with the expectations of the Australian community.

The intention of the existing association ground at paragraph 501(6)(b) of the Act was to provide the Minister or delegate with the discretion to consider the refusal or cancellation of a non-citizen's visa where there are real doubts about the criminal background or criminal associations of a visa applicant or visa holder, with the objective of protecting the Australian community taking precedence in immigration decision-making. However, the effect of case law on the interpretation of the ground is such that it is no longer possible to be certain that all non-citizens who pose a risk to the Australian community on the basis of their association with groups or organisations involved in criminal conduct are able to be considered for visa refusal or cancellation under subsection 501(1) or (2) of the Act on the ground in current paragraph 501(6)(b) of the Act.

The amended provision does not alleviate the need for the Minister or delegate to have a reasonable suspicion that a non-citizen is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct. In order for a suspicion to be reasonable it must be rational and open to be made on the basis of available evidence. In assessing such evidence the Minister or a delegate would still be required to consider the nature, degree, frequency and duration of the membership or association. Whilst familial or social connections may, to a degree, go to the formation of a reasonable suspicion, those connections would have to be of relevance to these considerations and be linked to involvement in criminal conduct.

Committee Response

The committee thanks the Minister for this response, **requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Rights, liberties or obligations unduly dependent on insufficiently defined administrative powers
Item 11, paragraph 501(6)(d)

This item makes an amendment to paragraph 501(6)(d), which currently provides that a person does not pass the character test if, in the event they were allowed to enter or remain in Australia, there is a significant risk they would engage in specified activities (for example, criminal conduct) or that they represent a danger to the Australian community or to a segment of that community. The amendment removes the word 'significant'. The explanatory memorandum explains that the:

> …purpose of this amendment is to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act.

It is further explained that the:

> …intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.

The lowering of the threshold of risk should be seen in the context of two matters of relevance to the application of paragraph 501(6)(d). First, it should be emphasised that the assessment of risk is to be made in relation to possible outcomes which are inherently contestable. Significantly, whether or not a person represents a danger to the Australian community or to a segment of that community is a matter about which reasonable minds may disagree in particular circumstances. Second, the Minister is empowered to apply the character test to refuse to grant or cancel visas on the basis of this aspect of the character test without affording a fair hearing in certain circumstances (i.e. where the Minister is satisfied that the refusal or cancellation is in the national interest, see paragraph 501(3)(d)). This lack of a hearing means that assessments of risk may be based on adverse information to which a visa holder or applicant has not been given an opportunity to respond. In light of these features of the legislative context, lowering of the threshold of risk may be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers. **The committee therefore seeks the Minister's detailed explanation as to why lowering the required degree of risk is necessary and appropriate.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Minister's response - extract

Item 11 - paragraph 501(6)(d) - Rights, liberties or obligations unduly dependent on insufficiently defined administrative powers

The committee therefore seeks the Minister's detailed explanation as to why lowering the required degree of risk is necessary and appropriate.

The purpose of this amendment is to clarify the threshold of risk that the Minister or a delegate can accept before making a finding that a non-citizen does not pass the character test because they may engage in specified conduct. The intention is that the level of risk required is more than a minimal or remote risk that the non-citizen would engage in any of the conduct specified in paragraph 501(6)(d) of the Act, without requiring the Minister or delegate to prove that it amounts to a significant risk.

This amendment gives primacy to the protection of the Australian community and is particularly important in the offshore visa context. In considering whether a non-citizen should be granted a visa to come to Australia, there is an expectation that the non-citizen will not cause or threaten harm to either individuals or the Australian community. Where there is information that suggests that a visa applicant presents more than a minimal or remote risk of causing harm to an individual or the broader Australian community, it is entirely appropriate that the non-citizen be considered for refusal under subsection 501(1) of the Act.

This amendment lowers the requisite threshold against which a non-citizen may be found to not pass the character test, thus enlivening the discretion to refuse to grant or cancel the non-citizen's visa. This amendment does not dictate that a non-citizen's visa must be refused or cancelled in all circumstances. For example, in circumstances where a non-citizen is in Australia and is being considered against the grounds in paragraph 501(6)(d) of the Act, issues such as the level of risk being posed by the non-citizen, and countervailing considerations such the type of visa they hold, their ties to the community and length of residence in Australia would be considered in the context of the exercise of the discretion.

The committee has raised concerns around the lack of a fair hearing in certain circumstances where a decision is made personally by the Minister against paragraph 501(6)(d) of the Act. Where a Minister intends to make a personal decision to cancel or

refuse a visa under paragraph 501(1) or (2) of the Act, natural justice requirements would apply.

Decisions by the Minister to cancel or refuse a visa under subsection 501(3) of the Act are not subject to the rules of natural justice. However, under this subsection, the Minister may only refuse to grant or cancel a visa where satisfied that it is in the national interest to do so. Where the Minister has made a decision to cancel or refuse to grant a non-citizen's visa in the national interest, non-citizens have the opportunity to seek revocation of the cancellation or refusal decision following notification of the decision.

Committee Response

The committee thanks the Minister for this response, **requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Review rights
Item 12, proposed paragraph 501(6)(g)

This proposed paragraph provides that a person does not pass the character test if they are the subject of an adverse ASIO assessment.

The committee seeks the Attorney-General's advice as to whether ASIO assessments on which these decisions are based will be reviewable in the AAT and, if so, what implications the exercise of merits review right will have for the validity or implementation of decisions based on this paragraph 501(6)(g) of the *Migration Act*.

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Committee comment

The committee notes that the Minister's response, although detailed, does not appear to address this matter and **restates its request for the Attorney-General's advice as to whether ASIO assessments on which these decisions are based will be reviewable in the AAT and, if so, what implications the exercise of merits review rights will have for the validity or implementation of decisions based on this paragraph 501(6)(g) of the *Migration Act*.**

Alert Digest No. 14 of 2014 - extract

Procedural fairness
Item 17, proposed section 501BA

This item provides that where the cancellation of the visa of a person in prison (see item 18, proposed section 501CA) has been revoked by a delegate of the Minister or the AAT (subsection 501BA(1)), the Minister may (subsection 501BA(2)) exercise a personal power to set aside that revocation decision and cancel the visa if satisfied that the person does not pass the character test and the cancellation of the visa is in the national interest. New section 501CA provides that the Minister may cancel a visa without notice if satisfied that the person does not pass the character test and is in prison.

Subsection 501BA(3) provides that natural justice does not apply to a decision made under subsection 501BA(2) and subsection 501BA(5) provides that merits review is not available for decisions made under subsection 501BA(2).

The justification provided for excluding natural justice is that 'natural justice will have already been provided to the non-citizen through the revocation process available under subsection 501CA' and that the:

> …intention is that this is a personal power of the Minister to ensure that, despite a decision of a delegate or tribunal to revoke a visa cancellation, the Minister retains the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community.

Two matters may be noted in response to this justification:

- First, if the Minister relies on different material or considerations to that before the decision-maker who decided to revoke the visa cancellation, the fact that a fair hearing was provided at that stage of the decision-making process will not guarantee that the person has a fair hearing in relation to the subsequent decision under subsection 501BA(2) to set aside the original decision and cancel the visa.

- Secondly, even if it is considered appropriate that the fair hearing rule of natural justice not apply to the Minister's decision under subsection 501BA(2) it is not clear why the rule against apparent and actual bias should not apply.

It is noted that the non-availability of merits review makes the exclusion of natural justice more concerning, as there are no procedural checks on the Minister's exercise of a power which depends on his or her view about the vague criterion of what is in the national interest. The explanatory memorandum indicates that the exclusion of merits review is

based on the 'recognition of the fact that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations' (at p.15). The committee is concerned that this argument underestimates the role merit review tribunals can play in reflecting community standards and expectations. As part of their obligation to make the correct and preferable decision merit review tribunals typically apply government policy. Government policy issued by a Minister will, except in exceptional and rare cases, be applied by merit review tribunals. Given this, it is not clear why merits review needs be excluded to ensure that decisions reflect community standards and expectations to an acceptable degree.

Where:

1. procedural fairness obligations do not apply;
2. merits review is not available; and
3. the criteria being applied relate to the application of standards such as what is 'in the national interest'

the result is that the exercise of power is not, as a practical matter, constrained by law. This is of particular concern when decisions single out particular individuals and, thus, necessarily raise questions of fairness in the application of general standards in addition to matters of public policy.

For all of these reasons the committee seeks a more detailed explanation from the Minister as to why it is considered necessary to exclude *all* aspects of the rules of natural justice.

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Item 17 - Proposed section 501BA- Procedural fairness

The committee seeks more detailed explanation from the Minister as to why it is considered necessary to exclude all aspects of the rules of natural justice.

Provisions allowing the Minister to set-aside non-adverse delegate or Administrative Appeal Tribunal (AAT) decisions both with and without natural justice already exist at subsections 501A(2) and (3) and section 501B of the Act. It would be inconsistent with these existing provisions for there to be no such power in relation to delegate or AAT decisions to revoke a mandatory cancellation under proposed new section 501CA.

Merits review tribunals are required to determine what is the correct or preferable decision based on the merits of the case before them. The provisions in the Act (both the existing powers and the new powers) recognise that the Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, even where those decisions have resulted from merits review. Therefore it is appropriate that merits review not be available in respect of decisions that are made by the Minister personally under the proposed new section 501BA.

As noted in the explanatory memorandum that accompanied this Bill, proposed new section 501BA will ensure that the Minister retains the ability in exceptional cases, where it is in the national interest, to cancel the visa of a non-citizen who does not pass the character test. The Minister's proposed powers are only enlivened after a non-citizen has had the opportunity to put their case for revocation to either a delegate, or to a delegate and a merits review tribunal. While the Minister may choose to consider this information, the issue for the Minister is whether it is in the national interest that the non-citizen have their visa cancelled. The Minister also needs to be satisfied that the person does not pass the character test because of the operation of paragraph 501(6)(a) on the basis of paragraph 501(7)(a), (b) or (c), or paragraph 501(6)(e).

Committee Response

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum.** However, the committee retains concerns about the proposed approach, as the committee:

(continued)

1. notes that the response does not specifically address why it is considered appropriate to exclude all aspects of the rules of natural justice;

2. notes that the response does not indicate why ensuring decisions reflect community standards and expectations to an acceptable degree cannot be pursued through the articulation of policy; and

3. questions whether the community holds the Minister personally responsible for decisions made by the AAT, which has a reputation for external, independent review of government decisions.

However, in the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Alert Digest No. 14 of 2014 - extract

Undue trespass on personal rights and liberties—privacy
Item 25, proposed section 501L

This section introduces a new power which will enable the Minister to require the head of an agency of a State or Territory to disclose to the Minister personal information about a person whose visa may be cancelled on character grounds under section 501 of the Migration Act, certain to specified (quite limited) exceptions.

The information which may be requested clearly includes highly sensitive information, such as 'prison lists, information on persons who have received suspended sentences, or any other information that can be considered relevant to a person's character' (explanatory memorandum, p. 19). The Statement of Compatibility notes the information may include 'bio-data of persons entering Australian correctional institutions' (at p. 12).

The Statement of Compatibility (at p. 12) explains that this item has been introduced to establish a formal basis for obtaining information considered 'necessary to support the identification and assessment of visa holders of character concern against the character requirements of the Act'. It is noted that 'without an explicit power…it is either not possible, or not without risk, to attempt to put in place formal arrangements to share information'.

A justification for the significant new power is briefly given in the Statement of Compatibility:

This amendment has been written to be precise for section 501 purposes only. This amendment is necessary as the new Australian Privacy Principles (the 'APPs'), the Act and the various State and Territory privacy legislations do not provide sufficient coverage for my department to identify and assess all liable non-citizens. This amendment is a reasonable response to providing my department with the ability to properly identify and assess the circumstances of persons who may present a risk to public order, public safety, and the protection of the rights and freedoms of others and therefore, it is not arbitrary. Detailed Memoranda of Understanding will be developed to form the terms of the information sharing agreements and will be in accordance with the APPs.

The committee therefore seeks information from the Minister about whether the Privacy Commissioner has been consulted in developing the amendment and whether consideration has been given to the appropriateness of providing for additional accountability arrangements in recognition of the highly sensitive nature of the information which may be disclosed and the fact that a great deal of information may be relevant to a person's character in the ordinary sense.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Item 25 - Proposed section 501L - Undue trespass on personal rights and liberties - privacy

The committee therefore seeks information from the Minister about whether the Privacy Commissioner has been consulted in developing the amendment and whether consideration has been given to the appropriateness of providing for additional accountability arrangements in recognition of the highly sensitive nature of the information which may be disclosed and the fact that a great deal of information may be relevant to a person's character in the ordina1y sense.

In the course of developing this amendment my department consulted both the Department of the Prime Minister and Cabinet and the Attorney General's department. It is intended that the legislation form the basis of an exchange of letters and the development of memorandums of understanding with relevant agencies, which would necessarily include accountability arrangements for the use and management of information obtained under proposed section 501L of the Act. Proposed section 501L allows for the provision of

personal information to the department, and does not allow for the subsequent disclosure of that personal information unless consistent with the provisions of the *Privacy Act 1988.*

Committee Response

The committee thanks the Minister for this response, **requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Merits review
Items 26 and 27

It appears that these items seek to operate to limit the availability of review by the AAT of some personal decisions made by the Minister under section 501 of the Act; in particular, decisions based on Articles 1F, 32 or 33 of the Convention for Refugees.

The statement of compatibility states (at p. 13) that the bill 'restores the intended position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT'. However, the reasons why it is considered inappropriate for merits review to be available where a decision to refuse to grant or cancel a visa is based on Articles 1F, 32 or 33 of the Convention for Refugees are not elaborated. **For this reason, the committee seeks the Minister's more detailed justification of the proposed approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Item 26 and 27 - Merits review

For this reason the committee seeks the Minister's more detailed justification of the proposed approach.

The effect of this amendment is to restore the position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT. This was the case prior to the decision in *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46, where the High Court of Australia found that some personal decisions made by the Minister under section 501 of the Act are reviewable by the AAT. The High Court interpreted paragraph 500(1)(c) of the Act to mean that any decision to refuse to grant or to cancel a visa that relied on Articles 1F, 32 or 33 of the Refugees Convention was subject to review, even where the decision was made personally by the Minister under section 501, provided that the Minister had not issued a certificate declaring the person to be an excluded person under section 502 of the Act.

This position is inconsistent with the original intent of the legislation, and incongruous with the broader framework of personal decision-making by the Minister under section 501 of the Act and will be redressed by this amendment.

A decision under section 65 of the Act to refuse to grant a protection visa because of Article 1F, 32 or 33(2) of the Refugees Convention will continue to be merits review able, irrespective of whether the decision was made by the Minister acting personally or by a delegate of the Minister, unless the Minister has issued a certificate under section 502 of the Act excluding the person affected from being entitled to seek merits review.

Committee Response

The committee thanks the Minister for this response. The committee notes that the reasons provided for the amendments are that the High Court's interpretation of the existing law is 'inconsistent with the original intent of the legislation, and incongruous with the broader framework of personal decision-making by the Minister under section 501 of the Act'. The committee does not consider that the fact a decision is made by the Minister personally is, of itself, sufficient justification for excluding merits review. Further, the committee does not accept that the existence of other provisions in the Migration Act which exempt decisions made by the Minister from merits review is a sufficient reason to exclude review in relation to other powers. **However, the committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Procedural fairness
Schedule 2, item 12, subsections 133A(4) and 133C(4)

This provision states that the 'rules of natural justice, and the procedure set out in subdivision C, do not apply' to decisions made by the Minister to cancel a visa under subsection 133A(3). The explanatory memorandum (p. 45) justifies this approach on the basis that 'in some circumstances the Minister needs to be able to cancel a visa quickly without notice' and that if this is considered necessary a person who has had their visa cancelled will be invited to make representations to the minister about revocation of the decision under new section 133F. Under section 133F, where a decision has been made under 133A(3) without prior notice to the visa holder, the Minister must give the person a written notice setting out the original decision and the particulars of relevant information. The Minister must also invite the person to make representations to the Minister about the revocation of the original decision. Pursuant to subsection 133F(4), the Minister 'may' revoke the original decision if the person makes representations and the 'person satisfies the Minister that the ground for cancelling the visa…does not exist'.

Two features of this regime for providing a fair hearing to an affected person may be noted:

> First, even if the person satisfies the Minister that the ground for cancelling the visa does not exist, the Minister need not revoke the decision; and
>
> Secondly, whereas the original cancellation decision depends upon the Minister being satisfied that a ground for cancellation exists, the decision can be revoked only in circumstances where the person satisfies the Minister that the ground does not exist. This means that an affected person must bear the practical burden of proving that a ground does not exist, which may be a higher burden than merely establishing that there was insufficient material for the Minister to be satisfied that a ground for cancellation does exist.

Finally, it may also be noted that although the explanatory memorandum appears to indicate that cancellation decisions need to be made quickly in some circumstances, the content required by the common law fair hearing rule is adjusted to the circumstances of particular cases which may include the need for urgency.

The same issue also arises under subsection 133C(4).

In light of these matters, the committee seeks the Minister's fuller explanation for the justification for the abrogation of the fundamental principles of natural justice, including the rule against bias.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

Schedule 2, item 12, subsections 133A(4) and 133C(4) - Procedural fairness

In light of these matters, the committee seeks the Minister's fuller explanation of the justification for the abrogation of the fundamental principles or natural justice, including the rule against bias.

The Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, even where those decisions have resulted from merits review. Therefore it is not appropriate that these decisions be subject to merits review. These amendments ensure that such decisions can be made where the Minister is satisfied grounds for cancelling the visa under section 109 or 116 of the Act exist and the Minister is satisfied that cancellation of a non-citizen's visa is in the public interest.

These amendments will also ensure that personal decision-making by the Minister across both the character and general visa cancellation frameworks is subject to consistent arrangements.

The fact that the Minister must be satisfied that cancellation without notice is in the public interest reflects the expectation that this is a power that would only be used from time to time where the Minister considers it necessary to do so. It is entirely appropriate that the Minister have the ability to cancel the visa of a non-citizen quickly and without notice in order to protect the health or safety of the Australian community.

Committee Response

The committee thanks the Minister for this response, however, it appears that the response does not engage with the committee's concerns or answer the specific question posed, which **relates to the apparent abrogation of the fundamental principles of natural justice, including the rule against bias. The committee therefore restates its request for the Minister's fuller explanation of these points.**

Alert Digest No. 14 of 2014 - extract

Merits review
Schedule 2, items 18-21

These items all have the purpose of ensuring that MRT review is not available where a decision is made to cancel a visa personally by the Minister in relation to cancellations related to the grounds set out in section 109 and section 116. The explanatory memorandum argues in each case that these cancellation grounds include 'those relating to national security, foreign interests, the health, safety and good order of the Australian community and the integrity of the Migration programme' (at p. 35). It is suggested that decisions made personally by the Minister under section 501 (which relate to the character test) are not reviewable and that it is therefore 'incongruous' for a 'cancellation decision taken by the Minister personally [applying the grounds under section 109 and section 116] to be subject to full merits based administrative review'. It is thus suggested that in each of these cases merits review should not be available because 'the government is ultimately responsible for ensuring that decisions reflect community standards and expectations' (at p. 35).

It appears to the committee that the difficulty with this approach to justifying the exclusion of merits review is that it is over broad. At least some of the grounds for cancellation in question do not appear to be unsuitable for merits review. For example, paragraph 116(1)(a) provides for cancellation if the Minister is satisfied that 'any circumstances which permitted the grant of the visa no longer exist'. Paragraph 116(1)(b) provides for cancellation if the Minister is satisfied that; 'its holder has not complied with a condition of the visa'. It is also the case that paragraph 116(1)(g) enables the prescription, in the regulations, of further grounds for cancellation. For this reason, the committee is concerned that not all of these grounds are suitable for the Minister to determine alone, without any facility for merits review, on the basis that 'the government is ultimately responsible for ensuring that decisions reflect community standards and expectations'. **The committee therefore seeks the Minister's detailed explanation as to why each of the grounds for cancellation under sections 109 and 116 should not be subject to merits review.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Schedule 2, Item 18-21 - Merits Review

The committee therefore seeks the Minister's detailed explanation as to why each of the grounds for cancellation under sections 109 and 116 should not be subject to merits review.

The Bill makes amendments which limit access to merits review for personal decisions by the Minister under the existing cancellation grounds in section 109 and section 116 of the Act, and proposed sections l33A and 133C of the Act. For a decision to be made under proposed new section 133A or section 133C, the Minister must be satisfied that a ground for cancelling the visa under section 109 or section 116 exists, and it would be in the public interest to cancel the visa. As discussed above, the public interest test is reflective of the threshold at which it is appropriate that a visa cancellation decision may be made without notice.

Circumstances can and do arise where a non-citizen is of sufficient concern to the Minister that he or she considers the case personally. In such circumstances, it would not be prudent to limit the available grounds for the Minister to make a personal decision to cancel a visa that is not merits reviewable. These decisions can relate to grounds for cancellation in section 116 of the Act including security, foreign interests, health and safety of the Australian community, and the integrity of the migration programme. Given the expectations of the Australian community in relation to the Minister being the final decision-maker in this area (apart from where judicial review of a cancellation decision is sought) it is appropriate that such decisions not be subject to merits review, irrespective of the ground for cancellation in section 116 of the Act on which they are based.

These amendments do not affect a non-citizen's capacity to seek judicial review of a decision to cancel their visa.

Thank you for considering this advice.

Committee Response

The committee thanks the Minister for this response, **but notes that its request sought the Minister's detailed explanation as to why each of the grounds for cancellation under sections 109 and 116 should not be subject to merits review. As it appears that the response does not directly address these issues, the committee restates its request for this information from the Minister.**

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Introduced into the House of Representatives on 25 September 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 14 of 2014*. The Minister responded to the committee's comments in a letter dated 14 November 2014. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2014 - extract

Background

This bill seeks to amend the *Maritime Powers Act 2013* to:

- provide clarity and consistency in relation to powers to detain and move vessels and people;
- clarify the relationship between the Act and other laws; and
- provide for the minister to give directions about the exercise of maritime powers.

The bill also seeks to amend the *Migration Act 1958* to:

- introduce temporary protection for those who engage Australia's non-refoulement obligations and who arrive in Australia illegally;
- create the authority to make deeming regulations;
- create the Safe Haven Enterprise Visa class;
- introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT);
- establish the Immigration Assessment Authority within the RRT to consider fast track reviewable decisions; clarify the availability of removal powers independent of assessments of Australia's non-refoulement obligations;

- codify Australia's interpretation of its protection obligations under the Convention for Refugees and clarify the legal status of children of unauthorised maritime arrivals and transitory persons; and

- enable the minister to place a statutory limit on the number of protection visas granted.

Consequential amendments are also made to the Maritime Powers Act 2013, Migration Act 1958, Administrative Decisions (Judicial Review) Act 1997, Immigration (Guardianship of Children) Act 1946 and Migration Regulations 1994.

Possible undue trespass on personal rights and liberties—procedural fairness Schedule 1, item 6, proposed section 22B

Proposed subsection 22B(1) provides that the rules of natural justice do not apply to the exercise of a power to give an authorisation under a provision of Division 2 of Part 2 of the Maritime Powers Act. Subsection 22B(2) provides that subsection 22B(1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.

The explanatory memorandum asserts that the 'purpose of subsection 22B(1) is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation under Division 2 of Part 2 of the Maritime Powers Act'. Further, it is said that this result aligns with the original intention of the Maritime Powers Act, which 'was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives'. In justification of this claim, the explanatory memorandum quotes from the *Replacement Explanatory Memorandum* to the Maritime Powers Bill 2012 (p. 62) as follows:

> Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.
>
> Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the "unique circumstances…in a maritime environment" render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.

The rules of natural justice are considered to be fundamental principles of the common law. The *Maritime Powers Act* contains a number of significant and coercive 'maritime powers' and the explanatory memorandum does not provide sufficient justification for the

exclusion of natural justice for all of the powers in the *Maritime Powers Act*. Not all the powers are the same or require the same considerations in relation to their exercise. For example, different considerations may arise in relation to powers which enable a person or vessel to be detained than in relation to powers which enable a person or vessel to be transported to a destination (which may be outside of Australia). Without further details and analysis, the claim that application of the rules of natural justice is not consistent with the 'unique circumstances…in a maritime environment' does not enable the committee to properly consider the appropriateness of the proposed exclusion of natural justice. **The committee therefore seeks the Minister's advice detailing each maritime power to which this exclusion will apply, accompanied by a justification in each instance as to why the exclusion of natural justice is considered reasonable.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Possible undue trespass on personal rights and liberties—procedural fairness
Schedule 1, item 19, proposed section 75B

Similar to item 6 in relation to proposed section 22B, this item states that the rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H. **The committee therefore repeats its request in the comment on item 6 seeking the Minister detailed advice as to the justification for the exclusion of the rules of natural justice in each instance in which this occurs.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Possible undue trespass on personal rights and liberties - procedural fairness
Schedule 1, item 6, proposed section 22B

The committee therefore seek the Minister's advice detailing each maritime power to which this exclusion will apply, accompanied by a justification in each instance as to why the exclusion of natural justice is considered reasonable.

Possible undue trespass on personal rights and liberties - procedural fairness
Schedule 1, item 19, proposed section 75B

The committee therefore repeats its request in the comment on item 6 seeking the Minister's detailed advice as to the justification for the exclusion of the rules of natural justice in each instance in which this occurs.

The powers conferred by the *Maritime Powers Act 2013* (Maritime Powers Act) are deliberately coercive and may involve force. These powers and the statutory framework as a whole have been expressed to aid maximum flexibility for maritime officers and safeguard operational integrity, in light of the many and varying contexts in which the powers might be used. However, as noted in the original and preceding explanatory memorandum, Parliament has, through various express terms and limitations on the powers, drawn a careful balance between various competing needs in this unique environment. For this reason, the Bill only excludes natural justice with respect to particular decisions made under the Act; this reflects Parliament's intention that, in the operational context in which these powers are to be exercised, any formal requirement for natural justice would not be practicable. As noted in the explanatory memorandum to this Bill, the explanatory memorandum to the Maritime Powers Bill reflected this understanding on its introduction.

The exclusion in proposed section 22B applies only to the making of authorisations, which would normally take place before contact with a vessel takes place. In these circumstances no meaningful opportunity for natural justice can be afforded. To do so would effectively nullify the object and purpose of the statutory framework, which is principally set up to provide for efficient and effective border and maritime security enforcement activities. Thus, the purpose of proposed section 22B is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation.

The broader exclusion of natural justice in proposed section 75B covers sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G and 75H. It is important to note that in respect of each of these sections natural justice is not prohibited *per se,* it is simply excluded as the basis upon which a court may seek to invalidate a decision or an exercise of power under the Act.

Taking each section in tum:

- 69: The power to move a vessel is a coercive power to be used as part of a maritime enforcement operation. For example, the power may be used to bring a vessel into a port to enable it to be searched for contraband, or to take a vessel to a place outside Australian waters to prevent a possible contravention of an Australian law from occurring. It is not appropriate in these circumstances to provide a legislative opportunity for natural justice, as Australia's maritime personnel and commanders need flexibility to conduct operations safely, efficiently and effectively to protect Australia's borders from serious criminal activity and its consequences.

- 69A: Section 69A makes clear the period during which a vessel may be detained while dealing with it under section 69 and making decisions about how to do so. This clarifies the intention of the provision and ensures the period is premised on that which is reasonably required, taking into account a number of realistic operational and policy considerations, as set out by proposed section 69A. A similar justification applies as to section 69.

- 71: Section 71 provides a power for maritime officers to place or keep a person in a particular place on a vessel (or an installation, aircraft or land) while exercising powers in respect of the vessel. This power supports the power in section 69, and as such a similar justification applies as to section 69.

- 72: The power to detain and move people is a coercive power to be used as part of a maritime enforcement operation. As with the current Maritime Powers Act, this power may be used to bring persons ashore to face criminal investigations and/or charges, or to take persons to a place or places outside Australia (particularly in the case where such persons are suspected of or have attempted illegal entry into Australia by maritime means). It should be noted the provision is not intended to undermine compliance with Australia's international obligations but that, as always intended, it is not appropriate nor practicable to provide a legislative opportunity for natural justice in the course of these maritime operations. Australia's maritime personnel and commanders require certainty and flexibility to conduct operations safely, efficiently and effectively to give effect to Government policy within the object and purpose of the statutory framework.

- 72A: Proposed section 72A puts it beyond doubt that the Maritime Powers Act is intended to account for the real time it takes to deal with a person under 72(4) safely and in an operationally realistic way. Proposed section 72A supports section 72 and a similar justification applies.

- 74: Section 74 provides that persons must not be placed or kept in places unless the responsible maritime officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. It would not be appropriate to require Australian maritime personnel to enter into negotiations about what is or is not a safe place. This is a matter for the judgement of professional mariners.

- 75D: Section 75D creates a personal power for the Minister to authorise an exception to some of the general geographical limits on the exercise of powers. As noted in the Explanatory Memorandum, the purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict. This is both appropriate and consistent with decision-making generally relating to Australia's sovereignty, and overarching national security and national interests. Natural justice in respect of a personal Ministerial power for use in restricted operational circumstances would not be appropriate.

- 75F: This provision puts it beyond doubt that the Minister can provide policy advice and directions to officers on the exercise or performance of certain powers and functions under the Act. While the provision of advice and direction by the executive government to officers performing functions on behalf of or for the Commonwealth is generally an uncontroversial part of Australia's system of government, this amendment puts it beyond doubt that the Minister has the power, on behalf of the executive, to provide directions to those exercising such powers. This is both appropriate and consistent with decision-making generally relating to Australia's sovereignty, and overarching national security and national interests. Requiring natural justice in respect of a personal Ministerial power would not be appropriate, particularly when the decision may have been made on national security grounds or in the national interest.
- 75G: Proposed section 75G provides that directions made under section 75F must be complied with. As with section 75F, natural justice is inappropriate in these circumstances.
- 75H: Proposed section 75H explicitly clarifies that, owing to the dynamic nature of the maritime enforcement environment, certain maritime laws do not apply to certain vessels used in the exercise of powers under the Maritime Powers Act. The purpose of 75H is to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, intended to apply to vessels with a requisite connection to Australia, do not inappropriately restrict the operational freedom of maritime officers. The application of natural justice has been excluded because requiring natural justice would not be appropriate in respect of a personal Ministerial decision primarily made on technical and operational grounds.

Committee Response

The committee thanks the Minister for this detailed response and requests that key information above be included in the explanatory memorandum. **The committee leaves the general question of whether the proposed approach in relation to natural justice is appropriate to the consideration of the Senate as a whole.**

However, the proposed exclusion of natural justice in relation to sections 72 and 72A continues to be of particular scrutiny concern. Where these powers are exercised to bring a person into the migration zone, then some sort of hearing of an affected person's claims will follow. However, the power may also be exercised to take persons outside Australia. The Minister justified this approach on the basis that it:

…is not intended to undermine compliance with Australia's international obligations but that, as always intended, it is not appropriate nor practicable to provide a legislative opportunity for natural justice in the course of these maritime operations. Australia's maritime personnel and commanders require certainty and flexibility to conduct operations safely, efficiently and effectively to give effect to Government policy within the object and purpose of the statutory framework.

(continued)

Although it may be accepted that providing natural justice in the course of a maritime operation raises questions of practicality, the result is that a person may be removed from the jurisdiction of the Australian legal system without being given any opportunity to be heard in relation to the exercise of this power or to raise any claims concerning Australia's international obligations. Even if the statement that it is not 'intended to undermine compliance with Australia's international obligations' is accepted, whether or not affected persons are given a hearing about their removal to a place outside of Australia or how Australia's international obligations relate to their personal circumstances is left entirely to executive discretion. For this reason there is a clear risk that the provision will unduly trespass on personal rights or liberties.

The committee therefore remains concerned about the exclusion of natural justice in these circumstances and draws proposed section 75B (particularly in relation to its operation in respect of sections 72 and 72A) to the attention of the Senate.

Alert Digest No. 14 of 2014 - extract

Undue trespass on personal rights and liberties—exercise of coercive powers Schedule 1, item 7, paragraph 31(a)

The purpose of this amendment is 'to put it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of the law' (explanatory memorandum at p. 21). Regrettably the explanatory memorandum does not explain the reasons why this extension of purposes for which maritime powers may be exercised is considered appropriate. Nor does the explanatory memorandum give examples of the sorts of situations that this extension of the application of the coercive powers under the *Maritime Powers Act* is intended to cover. **The committee therefore seeks the Minister's advice as to the justification for the extension of coercive powers.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Undue trespass on personal rights and liberties - exercise of coercive powers Schedule 1, item 7, paragraph 31(a)

The committee therefore seeks the Minister's advice as to the justification for the extension of coercive powers.

Maritime powers are used to respond to a range of threats to Australia's national interest, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal ecosystems from environmental damage and countering people smuggling. The insertion of "or prevent" after the word "investigate" simply puts it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of Australian law. This is consistent with the overarching object and purpose of the Act. The prevention of contraventions of the law is an uncontroversial part of many pieces of legislation. For example, to administer and ensure compliance with a monitoring law, one may be required to prevent a contravention from occurring as part of those initial investigations, such as in the case of intercepting a people smuggling venture attempting to illegally enter Australia.

Committee Response

The committee thanks the Minister for this response and requests that key information above be included in the explanatory memorandum. **The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Undue trespass on personal rights and liberties
Schedule 1, item 11, subsection 69(3) and subsection 69(3A)

Proposed new subsection 69(2) provides that an officer may take a detained vessel or aircraft to a ‘destination’ and remain in control or direct the person in charge of the vessel or aircraft to remain in control at the destination until either the vessel or aircraft is

returned to a person (referred to in subsection 87(1)) or action is taken as mentioned in subsection 87(3).

New subsection 69(3) provides that the destination to which a vessel or aircraft may be taken may be in the migration zone or outside the migration zone (including outside Australia). The destination to which a vessel or aircraft may be taken is clarified by proposed new section 75C (item 19). That provision states that the destination does not have to be in a country, may be just outside a country; and may be a vessel. It also provides that a vessel or aircraft may be taken (or caused to be taken) to a destination under section 69 whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it) and irrespective of the international obligations or domestic law of any other country.

The explanatory memorandum (at p. 29) states:

> The effect of new section 75C is to put it beyond doubt that a destination does not need to be inside a country and that a vessel, aircraft or person may be taken to a destination that is not inside a country whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country. While this amendment simply gives explicit voice to Parliament's intent in the original Maritime Powers Act, as demonstrated particularly by the fact that section 40 provides for the agreement of another country only for the exercise of maritime powers inside another country, this amendment puts the matter beyond doubt.

There is a risk that allowing the powers under section 69 to be exercised by taking vessels and aircraft to places outside of Australia, in circumstances where the executive is not subject to legal obligations that may be enforced by affected persons, may leave the manner in which the vessels and aircraft are dealt with is inadequately regulated by law. **In these circumstances the committee requests that the Minister detail the legal constraints and accountability mechanisms (if any) which are in place in relation to these powers and to address the question of whether personal rights and liberties of persons affected are adequately protected from undue trespass.**

New subsection 69(3A) provides that a maritime officer may change the destination to which a vessel or aircraft is being taken pursuant to subsection 69(2). A note to the subsection indicates that the destination can be changed more than once. This provision introduces the possibility that the powers to take a vessel to a place may be exercised in way that is not temporally limited.

It may be noted that although proposed section 69A (see item 12) imposes a reasonableness requirement related to the time a vessel or aircraft may be detained under subsection 69(1) for the purposes of making decisions about which place should be the destination and considering whether the destination should be changed, it is not clear that this deals with the reasonableness of multiple destination changes. The general rule (see section 87), that detained vessel or aircraft must be returned within 28 days, does not

resolve the difficulty as the ‘holding period should not commence until after the vessel or aircraft reaches its destination’ (explanatory memorandum at pp 23-24, referring to proposed subsection 69A(3)).

The committee seeks the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

> *Pending the Minister's reply, the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.*

Minister's response - extract

Undue trespass on personal rights and liberties
Schedule 1, item 11, subsection 69(3) and subsection 69(3A)

In these circumstances the committee requests that the Minister detail the legal constraints and accountability mechanisms (if any) which are in place in relation to these powers and to address the question of whether personal rights and liberties of persons affected are adequately protected from undue trespass.

The Government has instituted a robust whole-of-government response to illegal people smuggling, which has arrested the flow of illegal immigration and stopped deaths at sea. As with all operations undertaken in accordance with the Act, there exist clear protocols and guidelines on the use of coercive powers in enforcement operations. However, as has been articulated previously, particularly in the counter-people smuggling environment, disclosing the details of sensitive operational information could reveal the location, capacity, patrol and tactical routines relevant to Australian vessels and aviation assets, enable exploitation by organised criminals (particularly people smuggling syndicates) of confidential methodology and processes, and potentially impact upon relations with foreign states. However, in the interests of accountability and transparency, where appropriate, information is and will be released as circumstances permit.

The committee seeks the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

The Government does not agree with the premise of the question. The amendments in this Bill adequately ensure that any detention or other temporary deprivation of liberty is tied to an expectation that the period or periods for which a power is exercised is that period which is reasonably necessary for the legitimate exercise of powers under the Maritime

Powers Act; but is not intended to be arbitrary, indefinite nor to unreasonably prolong the exercise of those powers.

Committee Response

The committee thanks the Minister for this response, but notes that the further information does not indicate that adequate legal constraints or accountability mechanisms attach to the exercise of these coercive powers. **The committee draws these provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

In relation to timeframe for the exercise of the powers, the committee notes the Minister's advice and requests that the key information about powers only being used for the period that is reasonably necessary for their legitimate exercise be included in the explanatory memorandum.

Alert Digest No. 14 of 2014 - extract

Rights, liberties and obligations unduly dependent on insufficiently defined legislative power
Schedule 1, item 15, proposed subsections 72(3) and (4)

The explanatory memorandum (at p. 25) states that the 'effect of these amendments is to clarify the places to which a [detained] person may be taken and to harmonise the language between sections 69 and 72. As such, the same issues arise in item 15 as in item 11. **The committee therefore repeats its request in the previous comment seeking the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.**

Further, the combined effect of these subsections is that a maritime officer may detain and move a person, including to a place outside of Australia. The Statement of Compatibility (at p. 7) states that, although this provision (along with sections 69, 69A, 72A, and 75F) is capable of authorising actions which are not consistent with Australia's non-refoulement obligations, 'the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of law'. It is further stated that it 'is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government' (p. 7).

This approach can be characterised as making rights which are protected at international law and Australia's obligations to protect those rights unduly dependent on insufficiently defined legislative power. **The committee therefore seeks the Minister's advice as to the justification for this approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference and may also be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

Minister's response - extract

Rights, liberties and obligations unduly dependent on insufficiently defined legislative power
Schedule 1, item 15, proposed subsections 72(3) and (4)

The committee therefore repeats its request in the previous comment seeking the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

The committee therefore seeks the Minister's advice as to the justification for this approach.

Please see response in relation to previous question.

Committee Response

The committee thanks the Minister for this response and repeats its request that the key information about powers only being used for the period that is reasonably necessary for their legitimate exercise be included in the explanatory memorandum.

Alert Digest No. 14 of 2014 - extract

Adequacy of Parliamentary oversight; broad discretionary power
Schedule 1, item 19, proposed sections 75D, 75F, 75H

Section 75D allows for the section 41 statutory limits on the exercise of maritime powers in relation to foreign vessels between countries to be dispensed with in the exercise of power under section 69, 69A, 71, 72, 72A or 74 relating to the detention and movement of vessels, aircraft and persons. The mechanism for dispensing with these statutory limits is a Ministerial determination that is expressed to cover the exercise, in a specified circumstance, of one or more of the listed powers.

From a scrutiny perspective there are two issues of concern. The first is the breadth of the discretion to make a determination. The 'only condition' for the exercise of the Minister's power to make a determination is whether 'the Minister thinks that it is in the national interest to make or vary the determination' (subsection 75D(4)).

The second concern is that a determination is not a legislative instrument (subsection 75D(7)). The explanatory memorandum accepts that this is a substantive exemption from the Legislative Instruments Act, which it justifies as follows:

> Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information dangerous and unique maritime operational environment. *[sic]*

The result, however, is that the exercise of this power is not subject to effective legal or political forms of accountability. The overall purpose of section 75D is 'to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict' (explanatory memorandum, p. 30).

A similar issue arises in relation to section 75F, which empowers the Minister to issue written directions that determine how the powers under section 69, 69A, 71, 72, and 72A must be exercised. The only condition for the exercise of the power to give such a direction is that the Minister thinks that it is in the national interest to do so. Subsection 75F(10) provides that directions are exempt for the LIA, for the same essential reasons as those relating to determinations under section 75E. Similar powers are also available to the Minister under subsection 75H(4) with the only condition again being that the Minister thinks that it is in the national interest (75H(6)).

Unfortunately the explanatory memorandum does not further elaborate the reasons why such a broad discretionary power to dispense with normal statutory requirements is required. Given that the power may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or to insufficiently subject the exercise of legislative power to parliamentary scrutiny, **the committee seeks the Minister's advice as to whether a more detailed justification could be provided for the introduction of the powers.**

Further, if the breadth of the discretionary power is considered necessary**, the committee seeks the Minister's advice as to whether consideration has been given to introducing accountability checks, alternative to the LIA requirements, which would not require the disclosure of sensitive operational matters. For example, a requirement for the Minister to report on the exercise of his power to make determinations could be considered.**

> *Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference, and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Minister's response - extract

Adequacy of Parliamentary oversight
Broad discretionary power
Schedule 1, item 19, proposed sections 75D, 75F, 75H

The committee seeks the Minister's advice as to whether a more detailed justification could be provided for the introduction of the powers.

- Section 75D creates a personal power for the Minister to authorise an exception to some of the general geographical limits on the exercise of powers. As noted in the Explanatory Memorandum, the purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict.

- Section 75F has been introduced to address the incorrect assertion that the executive, and particularly the Minister administering the Maritime Powers Act, does not have the power to provide direction or policy guidance to maritime officers.

As noted above, the provision of advice and direction by the executive government to officers of the Commonwealth is generally an uncontroversial part of Australia's system of government. This amendment is simply designed to put this principle beyond doubt in the circumstances of this legislative scheme.

- As noted above, section 75H is intended to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, which are intended to apply to vessels with a requisite connection to Australia, do not apply inappropriately. For example, there are circumstances, depending on the offence, in which foreign fishing vessels can become automatically forfeited to the Commonwealth. This· can trigger the registration rules applying to Commonwealth-owned vessels, which is clearly inappropriate in the circumstances.

The committee seeks the Minister's advice as to whether consideration has been given to introducing accountability checks, alternative to the LIA requirements, which would not require the disclosure of sensitive operational matters. For example, a requirement for the Minister to report on the exercise of his power to make determinations could be considered.

Consideration was given to introducing accountability checks in the course of drafting the Bill. Issues of national and operational security weighed against a legislative requirement to report, as well as informing the exclusion of the application of the Legislative Instruments Act. While it is the Government's intent that Parliament be provided with information at an appropriate time, this needs to be done with consideration given to the individual circumstances rather than subject to an inflexible legislative requirement.

Committee Response

The committee thanks the Minister for the reply and **requests that the key information above be included in the explanatory memorandum**. The committee notes that it remains concerned about the breadth of the discretionary powers to dispense with legal requirements in the absence of any accountability mechanisms. **The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Exclusion of review under the *Administrative Decisions (Judicial Review) Act 1977*
Item 31

This item has the effect of excluding review under the *Administrative Decisions (Judicial Review) Act 1977* of decisions made under section 75D, 75F of 75H of the *Maritime Powers Act 2013*. There is no justification provided for excluding review. If the rationale for exclusion relates to the requirement under the ADJR Act to give reasons, the committee considers this in itself is insufficient to justify listing the decisions in Schedule 1 (which excludes review) because the reason-giving requirement could be excluded by listing the decisions in Schedule 2 to the Act.

In the absence of any explanation or justification in the explanatory memorandum, **the committee seeks the Minister's advice as to why the decisions made under these sections are not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Exclusion of review under the Administrative Decisions (Judicial Review Act 1977)
Item 31

The committee seeks the Minister's advice as to why the decisions made under these sections are not reviewable under the Administrative Decisions (Judicial Review) Act 1977.

The Government's position is that a ministerial direction made in the national interest is likely to relate to highly sensitive operational decisions and would be likely to raise complex and novel issues. Accordingly, it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the Administrative Decisions (Judicial Review) Act 1977.

Committee Response

The committee thanks the Minister for this response, but is unclear why 'it is more appropriate that judicial review be undertaken using a constitutional remedy'. **In order to properly assess this assertion, the committee seeks the Minister's detailed advice as to the rationale for this conclusion.**

Alert Digest No. 14 of 2014 - extract

Delegation of legislative power
Schedule 2, item 5, proposed subsection 35A(4)

Proposed subsection 35A(4) provides that the regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas. The explanatory memorandum (at p. 47) explains that the purpose of this provision is to provide for the flexibility to introduce additional classes of protection visas in the Migration Regulations. **The committee seeks the Minister's advice as to why this flexibility is needed and why the recognition of new classes of protection visas should not be considered an important question of policy that is more appropriately determined directly by Parliament than through regulations.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

Minister's response - extract

Delegation of legislative power
Schedule 2, item 5, proposed subsection 35A(4)

The committee seeks the Minister's advice as to why this flexibility is needed and why the recognition of new classes of protection visas should not be considered an important question of policy that is more appropriately determined directly by Parliament than through regulations.

The new subsection 35A(4) provides the process for creating new protection visas consistent with the majority of other visa classes that are created by regulations. Having the flexibility to create new classes of protection visas provides the government with an ability to manage the onshore protection programme by responding quickly and effectively to any policy challenges that may arise in the future.

Any such Regulations creating new classes of visa would be subject to disallowance and therefore open to Parliamentary scrutiny and consideration as are all other types of visa classes created in Regulations.

Committee Response

The committee thanks the Minister for this response and notes the comment in relation to disallowance, but remains concerned about the use of delegated legislation for important matters of policy. **The committee seeks the Minister's further advice in relation to the need for flexibility and the ability to respond quickly, including examples of the types of circumstances in which the use of regulations, rather than primary legislation, are considered necessary. The committee also seeks the Minister's advice as to whether, if the use of regulations is retained, an amended disallowance process (such as providing that any regulations would commence after a disallowance process) would be appropriate.**

Alert Digest No. 14 of 2014 - extract

Undue trespass on personal rights and liabilities—accrued rights
Schedule 2, item 20, proposed subsection 45AA(8)

This subsection provides that neither subsection 12(2) of the *Legislative Instruments Act 2003* nor subsection 7(2) of the *Acts Interpretation Act 1901* apply to the making of a 'conversion regulation'. Proposed subsection 45AA(3) provides for the making of conversion regulations, and the purpose of such regulation is to provide, in circumstances specified in subsection 45AA(1), for an application made for a particular class of visa to be converted into an application for a visa of a different class.

The explanatory memorandum (at p. 61) clarifies that the purpose of this provision is to ensure that a conversion regulation may affect the accrued rights of an applicant. Subsection 12(2) of the *Legislative Instruments Act 2003* provides that a legislative instrument has no effect if, apart from subsection 12(2), it would take effect prior to the date it is registered (i.e. retrospectively) and as a result would impose liabilities or adversely affect the rights of a person. Subsection 7(2) of the *Acts Interpretation Act 1901*

provides that if an Act or instrument under an Act repeals or amends an Act, then the repeal or amendment does not, among other things, affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act.

Regrettably, the explanatory memorandum does not elaborate the nature of any accrued rights that may be adversely affected by these provisions. Nor is the question of the fairness of any detriment that may be suffered by visa applicants addressed. **The committee therefore seeks the Minister's advice as to how the proposed subsection will operate and a justification for its inclusion.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Undue trespass on personal rights and liabilities—accrued rights
Schedule 2, item 20, proposed subsection 45AA(8)

The committee therefore seeks the Minister's advice as to how the proposed subsection will operate and a justification for its inclusion.

Proposed subsection 45AA(8) is one part of the fulfilment of a pre-election commitment of not granting permanent protection visas to anyone who arrives in Australia illegally. This is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

This policy denies permanent residency, citizenship and therefore a product for people smugglers to sell. However, anyone who engages Australia's protection obligations will receive temporary protection and is not at risk of refoulement. The Government notes the committee's concerns but maintains that this approach is fair and justified.

Subsection 45AA(8) deals with subsection 12(2) of the *Legislative Instruments Act 2003* ("LI Act") and subsection 7(2) of the *Acts Interpretation Act 2001* ("AI Act"). Broadly speaking, those provisions preserve the accrued rights and accrued liabilities of a person who is affected by a legislative amendment.

The accrued rights in this instance are the rights of a non-citizen to have their pre-conversion application assessed against the time-of application criteria for the pre-conversion visa that existed at the time the pre-conversion application was made. A conversion regulation would affect those rights because the non-citizen's pre-conversion application would be taken not to be, and never to have been, a valid application for that

pre-conversion visa. Instead, it would be taken to be, and always to have been, a valid application for a different class of visa.

The intention of the Bill is to put beyond doubt that an applicant for a pre-conversion visa does not have any accrued rights to have their pre-conversion application dealt with in accordance with the law as at the time of the making of the application. It is the intention of the Bill to ensure that an applicant for a pre-conversion visa will be only entitled to have their converted visa application dealt with according to law. This is the effect of proposed subsection 45AA(8). The AI Act and the LI Act have provisions which mean that, as a starting point, in certain circumstances persons who have "accrued rights" (and also "accrued liabilities") have those preserved. However, this is always subject to a contrary intention, and subsection 45AA(8) provides that contrary intention to the extent that it may be necessary to do so.

What paragraph 45AA(8)(a) does

Paragraph 45AA(8)(a) mentions subsection 12(2) of the LI Act. The effect of subsection 12(2) is that if a regulation "takes effect" before the date it is registered on the Federal Register of Legislative Instruments, it will have no effect if it affects the rights of the visa applicant so as to disadvantage him or her. This means that subsection 12(2) could prevent the operation of a conversion regulation if the conversion regulation takes effect before it is registered and disadvantages visa applicants. However, the preservation of the accrued rights by subsection 12(2) can be removed. Subsection 12(3) of the LI Act makes it clear that subsection 12(2) will not prevent the operation of such a conversion regulation if there is an express statement in the enabling legislation (in this case, the Migration Act) displacing the effect of subsection 12(2).

The Government's view is that proposed subsection 45AA(3) displaces the effect of subsection 12(2) of the LI Act. Proposed subsection 45AA(3) relevantly authorises the making of a conversion regulation that can deem a pre-conversion application to be, and always to have been, a valid application for a different class of visa. This means that proposed subsection 45AA(3) authorises the making of a conversion regulation that affects the accrued rights of a non-citizen who made a pre-conversion application. By doing so it creates the contrary intention referenced in subsection 12(3) of the LI Act.

However, if a court were to question that argument, proposed subsection 45AA(8) is included to put it beyond doubt that a conversion regulation can be made (including a conversion regulation enacted by the Parliament) that adversely affects the accrued rights of visa applicants.

There might be some doubt as to whether subsection 12(2) of the LI Act would apply to proposed conversion regulation 2.08F. This is because subsection 12(2) only applies to "legislative instruments", namely, an instrument in writing that is of a legislative character and made in the exercise of a power delegated by the Parliament (see section 5 LI Act). Proposed conversion regulation 2.08F will not be a legislative instrument in this sense, as it will be made by the Parliament rather than the Governor-General.

To avoid any such doubt, and to remove questions about the operation of subsection 12(2) of the LI Act with respect to the conversion regulation - which would be made by way of an Act passed by Parliament yet given the status of delegated legislation - paragraph 45AA(8)(a) makes it clear that subsection 12(2) has no operation in relation to accrued rights in such circumstances. There is no preservation of accrued rights in relation to the operation of conversion regulation 2.08F or any other conversion regulation made, including a conversion regulation enacted by the Parliament.

What paragraph 45AA(8)(b) does

Paragraph 45AA(8)(b) mentions section 13 of the LI Act. The effect of paragraph 13(l)(a) of the LI Act is that, subject to any contrary intention, the AI Act applies to any legislative instrument made as if the legislative instrument were an Act, and as if each provision of the legislative instrument were a section of an Act.

This means paragraph 13(l)(a) of the LI Act applies subsection 7(2) of the Al Act to legislative instruments such as a conversion regulation made under the Migration Act.

Like subsection 12(2) of the LI Act, paragraph 7(2)(c) of the AI Act preserves the accrued rights and accrued liabilities of a person who is affected by a legislative amendment. Because of section 13 of the LI Act, each reference to "Act" in paragraph 7(2)(c) can be read to mean "regulation" (i.e. conversion regulation). This means that because of paragraph 7(2)(c), a conversion regulation that amends the Migration Regulations cannot affect any right that a visa applicant has accrued under the Migration Regulations.

However, because of subsection 2(2) of the Al Act, the application of the AI Act or a provision of it (for example, subsection 7(2)) to an Act or a provision of an Act is subject to a contrary intention. This means that the preservation of a visa applicant's accrued rights by subsection 7(2) can be removed if there is a provision in the Bill that evinces an intention for that to occur.

Proposed subsection 45AA(3) is a provision that evinces such an intention. As mentioned above, subsection 45AA(3) relevantly authorises the making of a conversion regulation that can deem a pre-conversion application to be, and always to have been, a valid application for a different class of visa. In the Government's view, this means that proposed subsection 45AA(3) authorises the making of a conversion regulation which affects the accrued rights of non-citizens who made a pre-conversion application.

However, if a court were to question that argument, paragraph 45AA(8)(b) puts it beyond doubt that a conversion regulation can be made (including a conversion regulation enacted by the Parliament) that adversely affects the accrued rights of visa applicants. It also puts it beyond doubt that subsection 7(2) of the AI Act does not apply to the enactment of section 45AA. This means that both section 45AA and a conversion regulation made under section 45AA can adversely affect a visa applicant's accrued rights.

Proposed conversion regulation 2.08F is given the status of a regulation yet it is enacted by the Parliament. In light of this, there may be some uncertainty as to whether it would fall within the scope of paragraph 7(2)(c) of the Al Act as an enactment, albeit given the status of a regulation. Subsection 45AA(8) removes any such doubt, and makes it clear that there is no preservation of accrued rights in relation to the operation of proposed conversion regulation 2.08F or any other conversion regulation, including a conversion regulation enacted by the Parliament.

Committee Response

The committee thanks the Minister for this detailed response and **requests that the key information above be included in the explanatory memorandum**. The committee notes that the proposed approach to implementation of the policy does raise a question of fairness by applying a legislative change to persons who have already lodged applications. The committee also notes that applying the new legislative policy in relation applicants who have applied on the basis of 'time of application criteria' cannot act to discourage the voyages undertaken by this class of applicants as they relate to past events. **The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Make rights or obligations unduly dependent on insufficiently defined administrative powers—broad discretionary power
Schedule 2, item 31, proposed clause 785.227 of the Migration Regulations 1994

This proposed clause provides that the Minister must be satisfied that the grant of a visa is in the national interest. This enables a visa not to be granted on the basis of a criterion that reposes in the Minister what, in practical terms, is a broad discretionary judgment about what is or is not in the national interest. Given that the criteria also include public interest criteria (see clause 75.226, which is a mechanism by which the character test of the Migration Act can be considered) and a number of criteria related to health and medical examinations, it is unclear why this national interest criterion is necessary and appropriate. **The committee therefore seeks the Minister's advice as to why this criterion should not be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers.**

Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations

unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

Make rights or obligations unduly dependent on insufficiently defined administrative powers - broad discretionary power
Schedule 2, item 31, proposed clause 785.227 of the Migration Regulations 1994

The committee therefore seeks the Minister's advice as to why this criterion should not be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers.

Including the national interest criterion in the Temporary Protection visa regulations is consistent with the long standing policy of applying this criterion to all protection visa classes. It was introduced on 1 September 1994, at the same time that the basic scheme of the current Migration Act was introduced, and also existed in the criteria for a 'domestic protection (temporary) entry permit' which was in effect from 1991-1994. A 'national interest' criterion in domestic legislation is not inconsistent with the Refugees Convention, which does not deny nation states the right to make decisions about the admission of non-citizens by reference to their national interest. It is a necessary and appropriate measure that allows Australia's national interest to be taken into account in the administration of protection visas. It is a rarely used power that has to date been exercised only personally by the Minister.

The Government notes the committee's concerns but does not consider this criterion makes rights or obligations unduly dependent on insufficiently defined administrative powers.

Committee Response

The committee thanks the Minister for this response, **requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Commencement of regulation
Schedule 2, item 38, proposed subregulation 2.08F(3) of the Migration Regulations 1994

This item provides for a 'conversion regulation', which means that certain applications for Protection (Class XA) visas will be taken to be applications for Temporary Protection (Class XD) visas.

Subregulation 2.08F(3) provides that, in a case in which the Minister has made a decision in relation to a pre-conversion application, the new conversion regulation starts to apply to a pre-conversion application immediately after a tribunal (the RRT or AAT) remits the pre-conversion application for re-decision or a court quashes a decision of the Minister in relation to a pre-conversion application and orders the Minister to reconsider the application in accordance with the law.

The effect of this subregulation is that a visa applicant may succeed in their application to a court or tribunal but that when the matter is re-determined after that proceeding, the law applicable at the time of the court or tribunal application will no longer be applied. Thus even though an applicant may have established in tribunal or court proceedings that the Minister's original decision in relation to their pre-conversion application was in error, they will no longer be entitled to have their application for a Protection (Class XA) visa determined as their application will, by virtue of regulation 2.08F, have been converted into an application for a Temporary Protection (Class XD) visa.

The explanatory memorandum describes the effect of subregulation 7.08F(3). Although the subregulation may not, technically speaking, be considered retrospective, an applicant who has successfully challenged in court or a tribunal the Minister's original decision is then denied having their application decided on the basis of the law that should have been properly applied at the time of that original decision. There is arguably an element of unfairness about this approach and **in the circumstances the committee seeks the Minister's advice as to the justification for the proposed approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Commencement of regulation
Schedule 2, item 38, proposed subregulation 2.08F(3) of the Migration Regulations 1994

In the circumstances the committee seeks the Minister's advice as to the justification for the proposed approach.

Subregulation 2.08F(3) is discussed in some detail above.

This proposed approach is the fulfilment of a pre-election commitment to not grant permanent protection visas to anyone who arrives in Australia illegally. This is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia. This policy denies permanent residency, citizenship and therefore a product for people smugglers to sell. Any exception would only serve to weaken the effectiveness of this policy. The Government notes the committee's concerns but maintains that this approach is justified.

Committee Response

The committee thanks the Minister for this response, **requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole. The committee notes that it will not be possible for the approach to discourage the voyages of those directly affected by this amendment as they have already been undertaken.**

Alert Digest No. 14 of 2014 - extract

Merits review and procedural fairness
Schedule 4, item 1, subsection 5(1) and item 21, Part 7AA generally

Item 1 inserts a new defined term, namely, 'fast track applicant' in subsection 5(1) of the Act. In general terms, a fast track applicant means an unauthorised maritime applicant (UMA) who entered Australia on or after 13 August 2012, for whom the Minister has lifted the bar preventing the UMA from making a valid visa application under subsection 46A(1) and who has subsequently made a valid application for a protection visa.

Apart from cases involving an 'excluded fast track review applicant', fast track applicants will be subject to a new Fast Track assessment process. Rather than having access to existing merits review mechanisms, most decisions to refuse a visa (other than decisions relying on a number of specified provisions in the Migration Act) will only be reviewable by reference to a new merits review body—the Immigration Assessment Authority (IAA). Fast track review applicants would not be entitled to apply to the RRT in respect of their fast track reviewable decisions.

The IAA will conduct an automatic and limited form of review for all fast track reviewable decisions (proposed section 473CC). Proposed section 473CA (see item 21) requires the Minister to refer a fast track reviewable decision to the IAA as soon as is reasonably practicable. There are associated obligations on the Secretary of the Department to provide 'review material' on which the review is to be based (proposed section 473CB). This material must include:

- a statement that sets out the findings of fact, refers to the evidence on which these findings are based, and gives the reasons for the decision;
- material provided by the applicant; and
- any other material in the Secretary's possession or control which the Secretary considers relevant to the review.

Proposed subsection 473CC(1) requires the IAA to review a fast track reviewable decision referred to the Authority under section 473CA; subsection 473CC(2) provides that the IAA may either (1) affirm the decision or (2) 'remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by the regulations'.

Adequacy of merits review

The form of review provided by the IAA can be considered 'limited' in two significant ways. First, the remedial powers of the IAA do not, as is the case with the powers of the RRT, MRT and AAT, enable the review body to vary the decision or set the decision aside and substitute a new decision. Although it may be correct to say that there is no canonical form of merits review, one of the key features of merits review tribunals such as the AAT, MRT and RRT (when compared to judicial review) is the remedial power to substitute a new decision if it is considered that the decision under review is not correct or preferable. In this respect, review by the IAA involves a significant departure from the form of review available in existing migration review tribunals.

It is unfortunate that the explanatory memorandum says relatively little about this limited nature of the IAA's remedial power. What it stated is that:

> …the power to remit a fast track decision with directions or recommendations will permit the IAA to review the substantive matters which must be satisfied before the visa application can be approved and, if these are decided in favour of the applicant,

to then remit the case back to the Department to consider the more procedural criteria, which would not be appropriate for the IAA to deal with.

This explanation of the provision does not elaborate the sort of directions or recommendations which may be permitted by the regulations. Further, there is nothing to suggest that the Minister would be bound to comply with any directions or recommendations which are given when a decision is remitted for reconsideration. Indeed, the language of reconsideration indicates that the ultimate decision would be left with the Minister (or his or her delegate). Nor does the explanatory memorandum identify the 'more procedural criteria' which it is claimed would not be appropriate for the IAA to deal with. Without further information about these issues, **the committee is not well placed to assess the justification for the departure from what may be considered to be the full set of remedial powers which are associated with merits review of decisions which directly affect individual rights or interests. The committee therefore seeks the Minister's more detailed explanation and justification for the limited remedial powers of the IAA.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

Merits review and procedural fairness
Schedule 4, item 1, subsection 5(1) and item 21, Part 7AA generally

The committee is not well placed to assess the justification for the departure from what may be considered to be the full set of remedial powers which are associated with merits review of decisions which directly affect individual rights or interests. The committee therefore seeks the Minister's more detailed explanation and justification for the limited remedial powers of the IAA.

In short, the more limited remedial powers of the IAA reflect the actual practice of the RRT, notwithstanding the much broader range of powers the RRT ostensibly can exercise.

Currently, section 415 of the Migration Act provides the powers of the Refugee Review Tribunal (RRT) to affirm, vary, set a departmental decision aside and substitute it with a new decision or if the decision relates to a prescribed matter - remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations.

However, while the RRT has these powers within its legal framework, it generally only uses two of its powers - to affirm a departmental refusal or set a departmental refusal aside and remit the matter back to the department with a direction that the RRT has found the applicant to be owed protection.

Regulation 4.33 of the Migration Regulations provides the prescribed directions that the RRT may make in relation to an application for a Protection visa. The permissible directions allow the RRT to establish whether a review applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention). In addition, the permissible directions also allow it to establish whether there are substantial grounds' for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

However, it is not a permissible direction for the RRT to determine issues of character or security. Specifically, it is not a permissible direction for the RRT to consider issues that may invoke Article 1F, 32, 33(2) of the Refugees Convention and which are also outlined as grounds for ineligibility for the grant of a Protection visa under subsection 36(2C) of the Migration Act. To this extent, the RRT's review jurisdiction extends only to determining whether a review applicant is owed protection under one of Australia's *non-refoulement* obligations.

In addition to satisfying the primary criteria for a protection visa (that is, being found to be owed protection under one of Australia's *non-refoulement* obligations), an applicant must also satisfy the requirements outlined in the public interest criteria. Broadly speaking, the public interest criteria ensure an applicant's suitability to reside in Australia without posing a risk to the public and require completion of a number of checks regarding health, character and security.

As such, while it is within the scope of the RRT to determine whether a review applicant should be owed protection under one of Australia's *non-refoulement* obligations, it is not within the RRT's review jurisdiction to determine an applicant's suitability against character, security or the public interest criteria necessary to be granted a protection visa. As a result, the RRT does not commonly use its power to set aside and substitute a departmental refusal decision, in favour of its own decision to find that an applicant should be granted a protection visa.

The practical approach currently followed by the RRT is the approach which has been modelled for the IAA's review jurisdiction as outlined in the Bill. Specifically section 473CC of the Legacy Bill provides for the IAA to have the powers to affirm or remit the decision for reconsideration in accordance with directions or recommendations of the IAA as are permitted by regulation, as these are the most common powers used by the RRT under section 415 of the Migration Act.

In addition, the government is proposing the introduction of a regulation, similar to current regulation 4.33, to outline the powers of the IAA and the types of prescribed directions it will be able to make in relation to reviews of fast track applicants' cases. It is proposed that the prescribed directions for the IAA be identical to those provided to the RRT and include allowing the IAA to determine whether a referred applicant will be a person to whom Australia owes a non-refoulement obligation either under the Refugees Convention or under one of the complementary protection grounds, but will not allow it to consider character, security or public interest criteria. On that basis, the powers provided to the IAA to affirm or set aside are appropriate and intended to establish consistency with the RRT's current approach to reviews.

Currently, certain refusal decisions of the grant of a protection visa on character· or security grounds can be reviewed, in accordance with section 500 of the Migration Act. If such decisions are made in respect of fast track applicants and is currently the case, those decisions may be reviewable by the AAT.

Committee Response

The committee thanks the Minister for this detailed response and **requests that the key information above be included in the explanatory memorandum**. The committee remains concerned that the remedial powers of the IAA do not clearly enable it to make determinations on the question of whether a review applicant is owed protection under one of Australia's non-refoulement obligations which must be accepted by the Minister. Given the Minister indicates that it is intended that the IAA should have this power, **the committee seeks advice as to whether the legislation can be amended to provide for this (regardless of whether any regulations are made)**.

Alert Digest No. 14 of 2014 - extract

Merits review
Schedule 4, item 1, subsection 5(1)

Item 1 inserts a number of new defined terms, including 'excluded fast track review applicant'.

If a person falls within the definition of 'excluded fast track review applicant', the consequence is that their applications cannot be determined by the (new) Immigration Assessment Authority. Further, they would not be entitled to apply for review to the Migration Review Tribunal and the Refugee Review Tribunal. In short, excluded fast track review applicants would not be able to seek *any* form of merits review. Given the limitations of judicial review (which, for example, is in principle unable to correct for serious factual errors), this inability for an applicant for a protection visa to seek any form

of merits review is of considerable practical significance. Where a decision has serious effects on individual rights or interests and relates to a particular individual, the committee's expectation is that the opportunity to seek merits review should generally be made available.

The explanatory memorandum (at pp 107-108) indicates that the general rationale for excluding some applicants from any facility of merits review is that they 'are determined to have put forward disingenuous information in support of their application or have access to protection elsewhere'. Further, it is stated that the 'measure is also aimed at discouraging the making of non-genuine, unmeritorious claims for protection as a means of delaying an applicant's departure from Australia'.

Subparagraph (a)(ii) of the definition excludes applicants who, in the opinion of the Minister, have previously entered Australia and who, while in Australia, made a claim for protection (on the basis of seeking asylum as a refugee) in an application that was refused or withdrawn. The justification given for denying such applicants access to merits review is that 'such persons have already accessed and been refused protection under Australia's framework and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases' (explanatory memorandum at p. 108).

Two issues are of concern about this rationale for the exclusion of merits review in relation to this category of fast track review applicants. First, it may be that the basis for the claim for asylum has changed and that as such the previous refusal related to different or changed personal or political circumstances from those that form the basis of the present application. Second, the exclusion of review applies not only to previous applications that have been refused but also to withdrawn applications. It is not obvious that withdrawal of an application necessarily indicates it is without substance; nor is it the case that it such a withdrawn application can be said to have been 'already assessed'. **In these circumstances the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Merits review
Schedule 4, item 1, subsection 5(1)

In these circumstances (Subparagraph (a)(ii)) the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.

Paragraph 5(1)(a)(ii) of the definition of 'excluded fast track review applicant' requires that fast track applicants to be excluded from merits review if, after being found not to be owed protection under the new primary decision element of the fast track assessment process, the Minister is of the opinion that they have made a previous claim for protection as a refugee under paragraph 36(2)(a) of the Migration Act or under one of the complementary protection grounds under paragraph 36(2)(aa) of that Act and that previous application was refused or withdrawn.

Australia's protection framework affords all asylum seekers one opportunity to request protection and to have their asylum claims assessed in an open and transparent process. If the applicant has either been refused as a result of that process or has made the choice to withdraw their application (which would indicate the applicant no longer seeks Australia's protection), the Government considers it appropriate to ensure this subsequent examination of protection claims that same applicant makes is not unduly extended.

All protection visa applicants, including fast track applicants, will receive a full assessment of their protection claims, including any new claims that may relate to different or changed personal or political circumstances since their previous protection visa applications. A visa may be granted to them.

However, should they be found not be owed protection because they do not engage Australia's *non-refoulement* obligations, the fast track assessment process identifies the application to be unmeritorious because of the applicant's repeated and unsuccessful attempts to seek Australia's protection. Providing such an applicant access to merits review in these circumstances would continue to delay finalisation of a case that, in the Government's view, had already had numerous opportunities to demonstrate its claims under Australia's protection framework and has not done so.

This expedited process strikes an appropriate balance between undertaking consideration of any new claims an applicant may make while not unduly delaying finalisation of a refusal decision. The alternative of not considering further claims at all, in these circumstances, was not considered to provide the necessary balance.

Prior to finalising a case involving a possible excluded fast track review applicant and in addition to the department's ordinary quality control checks, such cases will undergo a further legal check of the process within the department. In addition, decisions which have identified an excluded fast track review applicant will continue to have access to judicial review.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum. The committee retains concerns in relation to instances where claims relate to changed circumstances and withdrawn applications as it is not clear that such claims will be unmeritorious. However, the committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Subparagraph (a)(iii) of the definition excludes applicants who, in the opinion of the Minister, have made a claim for protection in a country other than Australia that was refused by that country. This provision is justified on the basis that 'those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework' should 'be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases'.

The same justification is also provided in relation **subparagraph (a)(iv)** which excludes applicants who, in the opinion of the Minister, have made a claim for protection outside Australia that was refused by the Office of the United Nations High Commissioner for Refugees'.

A number of issues arise in relation to the justification for excluding merits review for these applicants. First, there is no requirement that the claim be based on the same circumstances. The application of these exclusions may mean that an applicant who had a claim refused outside of Australia many years ago would be disabled from access to merits review—a form of review which is an important part of the Australian administrative justice system for decisions which are based on the individual circumstances of affected persons. Second, there is a question about the extent to which it is appropriate to exclude important parts of Australia's administrative justice system on the basis that applications have already been determined in other countries under administrative procedures that may

not reflect standards of administrative decision-making applied in Australia. **In these circumstances the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

In these circumstances (Subparagraphs (a)(iii), (a)(iv)) the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.

As stated earlier, Australia's protection framework affords all asylum seekers one opportunity to request protection and to have their asylum claims assessed in an open and transparent process. If a fast track applicant has not been found to engage Australia's *non-refoulement* obligations during the primary decision element of that process and has previously been refused protection by another country (including under the mandate of the UNHCR), the Government considers it appropriate to ensure subsequent examination of protection claims that same applicant makes is not unduly extended.

All Protection visa applicants, including fast track applicants whom the department may have identified as having already sought protection overseas or under the mandate of the UNHCR, will receive a full assessment of their protection claims including any new claims that may relate to different or changed personal or political circumstances from their previous protection visa applications. A visa may be granted. However, should they then be found not be owed protection because they do not engage Australia's *non-refoulement* obligations, the fast track assessment process identifies the application to be unmeritorious because of the applicant's repeated and unsuccessful attempts to seek protection both in Australia and overseas.

While it is open to all States who are signatories to the key human rights treaties (including the Refugees Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture) to adopt the most appropriate administrative arrangements to complement their legal frameworks in determining who should be granted asylum, they all fundamentally recognise and adopt the core tenets of these treaties including the principle of *non-refoulement.* In addition, most States develop their assessment processes in broad accordance with the UNHCR's procedures for determining refugee status.

Accordingly, other State signatories share common aspects and approaches with Australia's protection framework, regarding the standards applied in recognising refugees or asylum seekers owed complementary protection and the administrative decision-making processes that are applied to arrive to those determinations (including working without bias and taking relevant information into consideration when coming to a reasonable decision).

Given this commonality of approach internationally, providing such an applicant access to merits review in these circumstances would continue to delay finalisation of a case that in the Government's view, had already had numerous opportunities to demonstrate its claims under protection determination procedures both overseas and under Australia's protection framework and has not done so.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum.** The committee notes that the approach is based on the assumption that differences in administrative processes for determinations of asylum claims should not give rise to concern about the applicable principles given there is a 'commonality of approach internationally'. However, the committee retains concerns in relation to instances in which claims relate to changed circumstances as it is not clear that such claims will be unmeritorious. **The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Subparagraph (a)(v) of the definition excludes applicants who, in the opinion of the Minister, have made 'a manifestly unfounded claim for protection' in his or her application. The explanatory memorandum states that '[t]his provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia's asylum process in an attempt to avoid removal'. In these cases, it is concluded:

> …that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.

As a general principle, it is suggested that merits review should not be excluded on the basis that the original decision-maker is of the opinion that an application is clearly or

manifestly unfounded. Not only is the question of whether an application is manifestly unfounded one about which reasonable minds may disagree, the original decision-maker is arguably not in a position to impartially consider it. Given that whether a claim is 'manifestly unfounded' is a matter to be determined by reference to the 'opinion' of the Minister, **the committee seeks the Minister's advice as to whether consideration has been given to giving greater guidance for the application of this standard, which is capable of varying interpretations or whether merits tribunals could adopt procedures to eliminate cases from their lists which are genuinely without foundation.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

The committee seeks the Minister's advice as to whether consideration has been given to giving greater guidance for the application of this standard (subparagraph (a)(v)), which is capable of varying interpretations or whether merits tribunals could adopt procedures to eliminate cases from their lists which are genuinely without foundation.

'Manifestly unfounded claims' arise persistently and universally across the system of international protection and are recognised as a category of claims by commentators such as the United Kingdom and Canada. While the specific definition of the term may differ slightly, it is common to assess these types of claims with an alternative protection assessment and/or review process. For example, the United Kingdom is able to issue a certificate which denies an asylum seeker merits review if they find the asylum seeker to have claims which they consider clearly unfounded.

The concept of 'manifestly unfounded claims' for protection has been introduced into Australia's protection framework as a mechanism for identifying and channelling those cases where claims for asylum have been found to have:

- no substance - such as having no fear of mistreatment;
- no plausible basis - including where there is no objective evidence supporting the claimed mistreatment; or
- are based on a deliberate attempt to mislead or abuse Australia's asylum process to avoid removal.

It is the Government's view that while these examples have been discussed in the explanatory memorandum and will be further elucidated in policy documents, the concept

should not be explicitly defined in the legislation but rather, should be developed through a flexible, policy-based approach.

This will allow decision makers to take into account individual circumstances of a case, while still being bound by the parameters of the broader legal framework supporting how Australia's international obligations should be interpreted and applied - stemming from both the Migration Act as well as administrative case law.

As such, it is anticipated that while policy guidance will acknowledge the possibility that decision makers may find differing circumstances to fall within the category of 'manifestly unfounded', cases should share similar attributes such as:

- whether a claim was found to be completely inconsistent or unsupported by reliable and factual information publicly available regarding the issue;

- whether a claim was presented with such insufficient detail and specificity as to render it impossible to consider or accept as credible in any way;

- whether the entirety of a fast track applicant's claims were found to have been manufactured for the sole purpose of making a successful protection visa application in Australia; and

- whether the claims raised human rights' issues beyond Australia's *non-refoulement* obligations under the Refugees Convention and other human rights treaties. An example may include, protection claims based on a general lack of employment or education opportunities or general health care in their home country.

As a public servant bound by the Australian Public Service (APS) Code of Conduct, the Government considers the primary decision maker to be in the best position to impartially determine the nature of an applicant's claims and whether a case might be reasonably considered to be 'manifestly unfounded'. As the original decision maker, they have access to all material provided by the fast track applicant to the department during the processing of their Protection visa application, including from the time of the fast track applicant's arrival in Australia until a decision is made on the application.

The Government did not consider enacting the alternative approach suggested by the committee – that of allowing merits review tribunal the ability to automatically dismiss applications with unfounded claims. Rather the Government is of the view that such an approach would be more resource intensive, costly and contrary to the objective of establishing a merits review system, which is determining whether the decision under review is the correct or preferable one.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum. The committee retains concerns about excluding merits review on the basis that the primary decision-makers deems the application to rest on 'manifestly unfounded claims'. However, in light of the detailed explanation, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Delegation of legislative power
Schedule 4, item 1, subsection 5(1), paragraph (b); item 2, schedule 4, subparagraph 5(1)(1AA)(a) and subsection 5(1)(1AB)

Paragraph (b) of the definition provides that an excluded fast track review applicant is a person who is, or is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a). The explanatory memorandum (at p.114) states that:

> The intention is to exclude from merits review other fast track applicants who do not fall within the definition of paragraph 5(1)(a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to protection elsewhere.

It can be noted, however, that paragraph 5(1AA)(a), inserted by item 2 of schedule 4, does not expressly limit the categories of persons who may be specified in a legislative instrument for the purposes of paragraph (b) of the definition of excluded fast track review applicant. More generally, it is a matter of concern that the exclusion from categories of applicants seeking asylum from the merits review system is a matter of substantive significance and, thus, that it should be dealt with in primary legislation. This concern is heightened given that the instrument would not be disallowable by operation of item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003* (see explanatory memorandum at p.114). The explanatory memorandum does not address the appropriateness of providing for further categories through legislative instrument (other than a reference to providing the Minister with flexibility (explanatory memorandum p. 113)). **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers*

inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

Delegation of legislative power
Schedule 4, item 1, subsection 5(1), paragraph (b); item 2, schedule 4, subparagraph 5(1)(1AA)(a) and subsection 5(1)(1AB)

The committee therefore seeks the Minister's advice as to the justification for the proposed approach

The Government's purpose in establishing the fast track assessment process is to provide a framework for addressing and processing the backlog of Unauthorised Maritime Arrivals (UMAs) who entered Australia on or after 13 August 2012.

However, the Government also wants the fast track assessment process to have the flexibility to be able to respond to other unforeseen cohorts of irregular arrivals that might seek Australia's protection in the future.

The power to make a legislative instrument to expand both the definition of a 'fast track applicant' and an 'excluded fast track applicant' provides this speed and flexibility. For example, it is proposed to use the legislative instrument under subsection 5(1AA) to define unauthorised air arrivals as a fast track applicant, as they are a known, albeit currently small, additional group of persons who enter Australia unlawfully. The capacity to make further legislative instruments ensures the fast track process is not unnecessarily limited to being a response to a single group of arrival. This in turn, will assist the Government to uphold the integrity of Australia's onshore protection programme and encourage the well-managed entry of people to Australia.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum.** The committee's view is that the operation of the fast track assessment process, and in particular the categories of persons to whom it applies, appears to raise significant policy questions. This gives rise to a scrutiny concern relating to the use of delegated legislation, rather than primary legislation, for important matters as the categories of persons to whom its key provisions may apply can be altered by legislative instrument. **The committee draws this matter (including the fact that the relevant instruments would not be subject to disallowance) to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

(continued)

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 14 of 2014 - extract

Broad discretionary power
Schedule 4, item 21, proposed section 473BD

This section provides that the Minister may issue a conclusive certificate in relation to a fast track decision if the Minister believes that it would be contrary to the national interest to change the decision or for the decision to be reviewed. The effect of a conclusive certificate is that the fast track decision is not a fast track reviewable decision and thus no form of merits review is available in relation to the decision.

The explanatory memorandum notes that this section 'aligns with current subsection 411(3) which provides the Minister with the ability to issue a conclusive certificate in relation to a decision which would normally be reviewable by the RRT'. It is suggested that the Minister would:

> …generally only issue a conclusive certificate on the grounds that changing the decision or reviewing the decision could result in a prejudice to Australia's security, defence, international relations or where a review would require the IAA to consider Cabinet or Cabinet committee documents (explanatory memorandum, p. 127).

It may be acknowledged that a discretion similar to that in proposed s.473D already applies in relation to decisions which would be otherwise reviewable by the RRT. Nevertheless, given the consequence of the exercise of the power to issue a conclusive certificate is to deny a fast track applicant any form of merits review, it is not clear that the exercise of this discretionary power to issue conclusive certificates could not be more narrowly targeted. Notably, the explanatory memorandum indicates that the Minister would 'generally' only exercise the power in the circumstances listed above, which suggests that the power may be exercised in an even broader range of circumstances.

Given the potential significance of the exercise of this power the committee seeks the Minister's advice as to whether consideration has been given to narrowing the scope of this broad discretionary power. The committee also seeks an explanation for excluding merits review of a decision with respect to the examples given in the explanatory memorandum which are given in justification for the power.

Further the committee seeks the Minster's advice as to whether:

1. **It is possible that prejudice to Australia's security, defence or international relations could be protected through other powers reposed in the Minister for refusing or cancelling a visa; and**
2. **Why such matters are not adequately dealt with by the definition of non-disclosable information in subsection 5(1) of the Migration Act or proposed section 473GA (to be inserted by item 21) which restricts the disclosure to the IAA of information which would prejudice the security, defence or international relations of Australia or would disclose deliberations or decisions of the Cabinet or a committee of the Cabinet.**

Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

Broad discretionary power
Schedule 4, item 21, proposed section 473BD

Given the potential significance of the exercise of this power the committee seeks the Minister's advice as to whether consideration has been given to narrowing the scope of this broad discretionary power. The committee also seeks an explanation for excluding merits review of a decision with respect to the examples given in the explanatory memorandum which are given in justification for the power.

Further the committee seeks the Minister's advice as to whether:

1. ***It is possible that prejudice to Australia's security, defence or international relations could be protected through other powers reposed in the Minister for refusing or cancelling a visa.***
2. ***Why such matters are not adequately dealt with by the definition of non-disclosable information in subsection 5(1) of the Migration Act or proposed section 473GA (to be inserted by item 21) which restricts the disclosure to the IAA of information which would prejudice the security, defence or international relations of Australia or would disclose deliberations or decisions of the Cabinet or a committee of the Cabinet.***

Under section 339 of the Migration Act, the Minister for Immigration and Border Protection has the power to issue a conclusive certificate in relation to a general migration visa decision if they believe it would be contrary to the national interest to have the decision changed or reviewed by the Migration Review Tribunal (MRT). Under subsection 411 (3), the Minister for Immigration and Border Protection has the same power with respect to issuing a conclusive certificate regarding a protection visa decision if they believe it would be contrary to the national interest to have the decision changed or reviewed by the RRT.

In turn, under subsections 338(1) and 411(2) of the Migration Act respectively, decisions where the Minister for Immigration and Border Protection has issued a conclusive certificate on national interest grounds are excluded from the scope of the MRT and RRT's review jurisdiction. These current powers have the effect of ensuring a decision is upheld in the national interest and not subject to being overturned if reviewed.

Consistent with this approach, the fast track assessment process will provide the Minister for Immigration and Border Protection with a similar power to issue a conclusive certificate in relation to a fast track decision where the Minister believes it would be contrary to the national interest to have the fast track decision changed or reviewed by the newly established Immigration Assessment Authority. Again, where a conclusive certificate is issued, such decisions would be excluded from the scope of the IAA's review jurisdiction as currently occurs with the MRT and RRT.

The concept of 'national interest' is a broad one which generally speaking, is regarded as being similar in breadth and scope to the phrase 'the public interest' and imports an understanding that a discretionary value judgment is required to be exercised, as it is normally in response to undefined factual matters that go to Australia's interests as a whole.

These provisions preserve the status quo. If fast track decisions were being reviewed by the RRT rather than the IAA, the Minister would have the same power to issue conclusive certificates available to him. Given the consistency of the new provisions with the existing provisions no consideration was given to narrowing the scope of the power.

There is no overlap between this provision and section 473GA regarding the restriction on disclosure of certain information or the definition of 'non-disclosable information' under subsection 5(1) of the Migration Act. This conclusive certificate power works in a different manner and fulfils a different policy objective for the Government, namely it prevents review in a case which could see a decision being set aside and which the Minister has determined, would be contrary to the national interest. The other provisions seek to ensure that information held by the Secretary or disclosed under certain conditions to the IAA and which go to issues of the security, defence or international relations of Australia or the deliberations of Cabinet, is not disclosed either to a referred applicant or publicly, as such actions could cause Australia's national interests to be jeopardised.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum.** The committee notes that the provision is consistent with those providing essentially the same powers in relation to review by the MRT and RRT. Nevertheless, the power is a broad one and the committee remains concerned about merits review being excluded on the basis of such broad discretionary judgments. The committee remains unclear about the nature of potential threats to the national interest posed by review to the IAA, other than concerns about the disclosure of information in the course of a review. The committee further notes that it is possible that concerns about the disclosure of information in the course of a review may be addressed in ways which limit the disclosure of information in that process. **However, in light of the explanation provided, the committee draws these matters to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 14 of 2014 - extract

Exclusion of procedural fairness
Schedule 4, Division 3, item 21, proposed section 473DA

Subsection 473DA(1) provides that Division 3 and sections 473GA and 473GB, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. Sections 473GA and 473GB deal with the disclosure of confidential information to and by the IAA.

Subsection 473DA(2) provides that nothing in this Part requires the IAA to give a referred applicant any material that was before the Minister when the Minister made the decision under section 65. The explanatory memorandum explains that the purpose of this subsection is to put beyond doubt that the IAA 'is not required to give a referred applicant any material that was before the Minister for comment'. It is said that this is appropriate because 'under subsection 57(2) of the Migration Act and in relation to their fast track decision, an applicant would have already been provided an opportunity to comment on relevant information that the Minister considered was the reasons, or part of the reason for refusing to grant a visa' (at p. 130).

It is possible, however, that the IAA could affirm a decision under review on the basis of information that was not considered to be information that must be disclosed by the Minister. In these circumstances, procedural fairness (i.e. the natural justice hearing) would be likely to require the review body to disclose the information upon which it proposed to rely in affirming the decision. **The committee therefore seeks the Minister's advice as**

to whether consideration has been given to amending the bill to ensure that this risk of procedural unfairness does not materialise.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Exclusion of procedural fairness
Schedule 4, Division 3, item 21, proposed section 473DA

The committee therefore seeks the Minister's advice as to whether consideration has been given to amending the bill to ensure that this risk of procedural unfairness does not materialise.

Under section 473CB, the Secretary is required to give the IAA all review material in relation to each fast track reviewable decision. This includes a statement outlining the findings of fact made in relation to the referred applicant, the evidence on which those findings were based and the reasons for the decision. In addition, the Secretary must also provide all material provided by the referred applicant to the decision maker before the decision was made as well as any other material that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review.

As such, the 'review material' likely to be provided by the Secretary to the IAA in most cases will comprise of information provided by the applicant to the department during their entry interview; copies of the applicant's protection visa application/s (including statements of asylum claims); information provided by the applicant during their protection visa interview and any additional submissions provided by the applicant, including in response to a request by the department to comment on adverse information being considered by the department. In addition and if considered necessary, the department's decision-making processes, the review material might also include the policy guidance taken into account by the decision maker in determining key concepts within the Migration Act (such as the department's Procedural Advice Manual (PAM) or any relevant section 499 Ministerial directions).

While section 473GA provides that the Secretary must not give the IAA a document or information which the Minister has certified because its disclosure would be contrary to the public interest (because it would prejudice the security, defence or international relations of Australia or would disclose of deliberations or decisions of the Cabinet), section 473GB provides that the Secretary can give such information or documents to the IAA if in doing so, he complies with the Act and provides the IAA with written advice

that the Secretary thinks is relevant regarding the significance of the document or information.

As the Explanatory Memorandum to this provision explains in exercising its own discretion to disclose, the IAA is to consider the advice of the Secretary regarding the significance of the information or document prior to deciding whether to release the document or information to a referred applicant. It is intended that this provision allow the IAA to rely on such documents or information in making its decision in the review of a case without breaching the rules of natural justice if the IAA decides not to advise the referred applicant of that document or information. However, this provision also enables the IAA, at its discretion, to rely on certain information or documents and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure.

On this basis, the Government is of the view that this set of provisions provide appropriate safeguards in both ensuring that the IAA has all the necessary 'review material' it requires when considering a case while allowing it the necessary scope to fulfil its natural justice requirements outlined in section 473DA.

Committee Response

The committee thanks the Minister for this information, but notes that the focus of the objection was not s 473GA, but section 473DA. The scrutiny problem with s 473DA(2) appears to the committee to be that it states there is no obligation in any circumstances to disclose material that was before the Minister. Given that the Minister is not under an obligation to disclose everything in the file (only the matters specified in the code of procedure under the Migration Act), it may be that the IAA relies on material which forms the reason or part of the reason for refusing to grant a visa even in circumstances in which the Minister was under no obligation to disclose that material (under section 57 of the MA, the Minister must only disclose relevant information if he or she considers the information 'would be the reason, or part of the reason, for refusing to grant a visa). It is therefore possible that the IAA could refuse a visa for different reasons to those given by the Minister and that the relevant information has never been disclosed to the applicant. **The committee's initial inquiry was directed to this situation and the committee restates its request for the Minister's advice about this matter.**

Alert Digest No. 14 of 2014 - extract

Procedural fairness; delegation of legislative power
Schedule 4, item 21, proposed paragraph 473DE(c)

This item provides that the regulations may prescribe certain types of new information that will not be subject to the requirements under new subsection 473DE(1) to give particulars of any new information, if the new information has been considered by the IAA and would be a reason or part of the reason for affirming the fast track reviewable decision. Paragraph 473DE(1)(c) provides that a referred applicant must be invited to give comments on the new information in writing or at an interview, whether conducted in person, by telephone or in any other way.

Providing particulars of new information relied upon by the IAA is the only mechanism in the statutory procedural scheme which guarantees any form of participation for the referred applicant in the process of review. Given that the scheme is taken to be an exhaustive statement of the rules of the natural justice hearing rule, enabling these guarantees to be whittled away by regulations is a matter of concern. Regrettably, the explanatory memorandum does not explain why further exceptions to the obligation to disclose new information may be required. Nor is there an explanation of why it is appropriate that further circumstances in which new information which would be the reason, or part of the reason, for affirming a decision should be disclosed be dealt with by legislative instrument. **The committee therefore seeks the Minister's advice as to the justification for the inclusion of this paragraph and the reasons why it should not be considered to deal with important matters that should be determined in the primary legislation.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

Minister's response - extract

Procedural fairness
Delegation of legislative power
Schedule 4, item 21, proposed paragraph 473DE(c)

The committee therefore seeks the Minister's advice as to the justification for the inclusion of this paragraph and the reasons why it should not be considered to deal with important matters that should be determined in the primary legislation.

Section 473DE, in conjunction with section 473DA, will provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. It will require the IAA to give fast track applicants, the particulars of any new information it has or will consider in a review and which would be the reason or part of the reason for affirming the department's refusal.

'New information' is defined in section 473DC as documents or information that was not before the Minister when the Minister made the decision under section 65 and 'review material' is defined in section 473CB as including all the material that was before the department before it made its decision under section 65.

Because the IAA is a new model of review, the Government is concerned to ensure outcomes in review cases cannot be delayed unduly by different types of information that may emerge that have not been foreseen and which fall outside of the current definitions of 'new information' or 'review material'.

To provide the Government with flexibility to respond to any such occurrences or trends, subsection 473DE(3) provides the Government with the ability to further prescribe, in regulations, what new information should not be subject to the IAA's natural justice obligations and Code of Procedure requirements. Any such regulations would be subject to disallowance and therefore will remain open to Parliamentary scrutiny.

Committee Response

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum**. However, given the very limited extent to which affected persons can participate in IAA reviews the committee remains concerned about further limits to the scope of disclosable information being established by legislative instrument. The scheme of review is already designed with significant limits on natural justice and any further limits on disclosures of new information which would be the reason, or part of the reason, for affirming a decision should be established in the primary legislation. Given the importance of the principle of natural justice, the policy of providing flexibility to further limit its application in the context of a new statutory scheme of merits review is not a sufficient justification for the use of delegated legislation for enabling changes to be made to the operation of that scheme rather than including them in primary legislation. **The committee draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 14 of 2014 - extract

Procedural fairness
Schedule 4, item 21, proposed section 473GA and 473GB

Natural justice is excluded in relation to these provisions (see 473DA(1)), which provides that other provisions along with sections 473GA and 473GB provide an exhaustive statement of the natural justice hearing rule. However, there is a risk that the application of these provisions will mean that fast track applicants are not afforded a fair hearing.

Section 473GA provides that the Minister may issue a conclusive certificate that prevents the Secretary from giving the IAA certain documents or information if the disclosure would be contrary to the public interest. The explanatory memorandum provides little in the way of justification for the proposed power. **The committee therefore seeks the Minister's advice as to whether the exercise of this power may deny a fast track applicant a fair opportunity to be heard in relation to adverse information.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

According to the explanatory memorandum, proposed section 473GB:

> ...deals with a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest ... or the document [or information] was given in confidence. Where the Secretary gives information or a document to the IAA, the Secretary shall notify the IAA in writing that the section applies and may give the IAA written advice that the Secretary thinks relevant about the significance of the document or information.
>
> In exercising the discretion to disclose [this information], the IAA should consider the advice of the Secretary about the significance of the information or document. It is intended that the IAA may rely on such documents or information in making its decision without breaching the rules of natural justice if the referred applicant is not advised of that document or information. It is also intended that if the IAA chooses to release the document or information in full knowledge of the Secretary's advice, it should be responsible for the release. (p. 145)

The committee is concerned that this may result in adverse information not being disclosed. This may replace common law requirements with no enforceable fairness based requirements at all. In these circumstances, **the committee seeks the Minister's advice firstly as to why disclosure should be left entirely to the discretion of the IAA, and secondly, why it is considered appropriate to have no requirements directed to ensuring a fair hearing in relation to information covered by this section.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

Procedural fairness
Schedule 4, item 21, proposed section 473GA and 473GB

The committee therefore seeks the Minister's advice as to whether the exercise of this power may deny a fast track applicant a fair opportunity to be heard in relation to adverse information.

As discussed earlier, while section 473GA provides that the Secretary must not give the IAA a document or information which the Minister has certified because its disclosure would be contrary to the public interest (because it would prejudice the security, defence or international relations of Australia or would disclose of deliberations or decisions of the Cabinet), section 473GB provides that the Secretary can give such information or documents to the IAA if in doing so, he complies with the Migration Act and provides the IAA with written advice that the Secretary thinks is relevant regarding the significance of the document or information.

As the Explanatory Memorandum to this provision explains, in exercising its own discretion to disclose, the IAA is to consider the advice of the Secretary regarding the significance of the information or document prior to deciding whether to release the document or information to a referred applicant. It is intended that this provision allow the IAA to rely on such documents or information in making its decision in the review of a case without breaching the rules of natural justice if the IAA decides not to advise the referred applicant of that document or information. However, this provision also enables the IAA, at its discretion to rely on certain information or documents and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure.

On this basis, the Government is of the view that this set of provisions provide appropriate safeguards in both ensuring that the IAA has all necessary 'review material' it requires when considering a case while allowing it the necessary scope to fulfil its natural justice requirements outlined in section 473DA.

The committee seeks the Minister's advice firstly as to why disclosure should be left entirely to the discretion of the IAA, and secondly, why it is considered

appropriate to have no requirements directed to ensuring a fair hearing in relation to information covered by this section.

Please see the comments in Schedule 4, item 21, proposed sections 473GA and 473GB above.

In addition, the Government considers that it is of utmost importance for the IAA to afford natural justice concerning any new information it may be relying upon to affirm a refusal by the department. The Government also considers that the IAA must also have sufficient powers to ensure that information disclosed under certain conditions to the IAA and which go to issues of the security, defence or international relations of Australia or the deliberations of Cabinet, is not disclosed if such action could cause Australia's national interests to be jeopardised.

These are not new issues arising only in the context of the IAA but are reflections of the difficult balance that must be maintained in all instances where the public interest must be weighed with the interests of an individual. The same dilemmas are already worked through in a similar way in the MRT, RRT and AAT and it would be inconsistent to treat the IAA differently.

As stated above, it will be open to the IAA to exercise its discretion and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure. With the availability of this power and discretion, the Government considers that referred applicants will receive a fair hearing in relation to such information, where the IAA considers it appropriate.

Committee Response

The committee thanks the Minister for this response and **requests the key information be included in the explanatory memorandum.** The committee notes the advice that it will be open to the IAA to exercise its discretion to disclose information and that similar approaches to the disclosure of information thought to be contrary to the public interest is taken in the context of MRT, RRT and AAT reviews. **The committee seeks the Minister's further advice about the extent of any differences between these provisions and those applicable in the MRT, RRT and AAT.**

Alert Digest No. 14 of 2014 - extract

In this respect the committee also notes that although the IAA is described as providing independent and impartial review (e.g. Statement of Compatibility, p. 27) the bill does not appear to include (in division 8) any of the typical measures designed to promote independence in tribunal decision-making (such as fixed term appointments). **The committee therefore seeks the Minister's advice as to whether consideration has been given to prescribing measures to ensure that the IAA acts, and is seen to act, in an independent and impartial manner.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

The committee therefore seeks the Minister's advice as to whether consideration has been given to prescribing measures to ensure that the IAA acts, and is seen to act, in an independent and impartial manner.

The independent and impartial operation of the IAA will be supported by many different aspects of its establishment. Consistent with the Government's National Commission of Audit, the IAA will be established as a separate office of the RRT. As such, the IAA will be independent of the Department of Immigration and Border Protection and its decision-makers who will be undertaking the primary assessments of fast track applicants' protection claims.

Section 473JA proposes that the Principal Member of the MRT-RRT (Principal Member) will be the head of the IAA for the purposes of the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999* (Public Service Act). In establishing these governance arrangements, the Government intends for both the RRT and IAA to have the same Principal Member as their respective agency head and to share staff and other administrative arrangements in order to achieve budgetary and administrative efficiencies.

Section 473JC provides for the Principal Member to appoint a Senior Reviewer to oversee the functions and quality of reviews produced by the IAA. To fulfil their role, powers and

functions will be delegated to the Senior Reviewer by the Principal Member as outlined under section 473JF of the Bill.

The role of the Senior Reviewer will be to manage the review caseload, including the allocation of work, supervise reviewers and conduct activities in accordance with the IAA's functions and purposes. Reporting to the Senior Reviewer and as outlined at section 473JA, will be a team of reviewers (IAA reviewers) who are to exercise the powers and perform the review function of the IAA as provided for at section 473DB.

Section 473JE further outlines that both the Senior Reviewer and the IAA reviewers are to be persons engaged as public servants under the Public Service Act. As public servants therefore, the Government considers that the selection and engagement of the Senior Reviewer and IAA reviewers will be based on merit and take place in accordance with broader Australian Public Service (APS) requirements. Being engaged as public servants will further allow the Senior Reviewer and IAA reviewers to exercise their powers of review in an impartial and independent manner, while working within the IAA's limited review function as provided for in the fast track assessment framework.

On that basis, the Government is confident that the IAA will act and will be seen to act in an independent and impartial manner appropriate to a merits review body.

Committee Response

The committee thanks the Minister for this response and **requests the key information above be included in the explanatory memorandum.** Without in any way doubting the integrity and professionalism of persons engaged as public servants, it is considered desirable that the independence of external merit review tribunals be secured by more robust mechanisms than drawing the members of the tribunal from the Australian Public Service. The committee therefore remains concerned about the absence of statutory provisions directed towards strengthening the independence and impartiality of the IAA. **The committee draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Retrospective application
Schedule 6

The purpose of this schedule is to establish the legal status of children of unauthorised maritime arrivals and transitory persons. As explained by the explanatory memorandum (p. 13):

> Section 5AA of the Migration Act will be amended to include the children of UMAs, who are born in Australia or in a regional processing country, within the definition of UMA in this section. Such children are not currently explicitly included in the definition of UMA in the Migration Act. This means that the policy intent, which is that such children are prevented from applying for a Permanent Protection visa while in Australia by virtue of being a UMA, is not explicit on the face of the legislation.

The amendments in this schedule also make it clear that children of UMA's who arrived post-13 August 2012 are subject to transfer to a regional processing country. This means that children will be in a position consistent with their parents. The schedule also contains a number of consequential amendments to account for the new definition of UMA.

As made clear in the explanatory material, these measures will apply with retrospective effect (subject to limited exceptions). The justification for the retrospective application of the amendments appears to be that this will 'ensure, as far as possible that all members of a family are treated in the same way and will limit the possibility of separation of the child and parent due only to the operation of the Migration Act' (explanatory memorandum, p. 197). In short, the justification is that consistent treatment of children and their parents is desirable.

Although as a general proposition it may be accepted (recognising that there may be exceptions) that the status of children under the Migration Act should be consistent with that of their parents, acceptance of this principle does not of itself justify its retrospective application. **The committee therefore seeks a detailed justification from the Minister for the retrospective application of the amendments in Schedule 6.**

Further, the committee seeks the Minister's advice on the extent of any adverse impact on children affected by these amendments being given retrospective effect and whether the amendments may affect any litigation or tribunal matters concerning the inclusion of children born to an unauthorised maritime arrival parent within the definition of 'unauthorised maritime arrival'.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

Retrospective application
Schedule 6

The committee therefore seeks a detailed justification from the Minister for the retrospective application of the amendments in Schedule 6.

The reason for giving these measures retrospective application is to clarify the government's existing position and the intention of the legislation, which is that children of UMAs, born in Australia, are already included within the existing definition of UMA in the Migration Act.

Although the amendments operate retrospectively, they do so to explicitly capture those persons the legislation is already intended to capture.

Upon commencement of the amendments, it will be clear that children born in Australia or in a Regional Processing Country (RPC) to at least one UMA parent are UMAs and have always been UMAs. It is also necessary to ensure that all UMAs, regardless of the date of their arrival, have a migration status consistent with their children, as far as possible. This will mean that, if a UMA is to be removed from Australia, the UMA's removal will not be frustrated because a non-UMA child family member makes a valid application for a visa.

Delivering consistency of migration status between a parent and a new born child is a long standing approach taken in many circumstances within the Migration legislation. Any prior visa application made by such a person is taken to have been made invalidly, where the Minister did not expressly allow it. Ensuring that such applications will be taken to have been made invalidly upon the commencement of the amendments will also remove the incentive for applications to be lodged on behalf of the Australian-born children of UMAs prior to the commencement of the amendments.

If children of UMAs are able to make a valid application for a permanent protection visa, it renders ineffective the application bars in the Act, central to achieving a variety of desired policy outcomes including regional processing. This will likely lead to a difference in treatment within the family unit if the application bar, preventing the relevant UMA parents from applying for a permanent protection visa, is not lifted. Alternatively, if the application bar is lifted to allow all other members within that family unit to apply for a permanent protection visa, the government's policy positions on UMAs would be contradicted to the detriment of current, successful, anti-people smuggling strategies.

Similarly, the retrospective application of the measures also clarifies that children of UMAs arriving on or after 13 August 2012 are subject to transfer to a RPC. This means the

Government will not have to consider the risk of separating a newborn baby from their UMA parents who are subject to transfer, or alternatively the consequences of keeping the family unit together in Australia contrary to the government's policy position that such UMAs will not be processed or resettled in Australia. The deterrent effect of that policy would be reduced if UMAs who have children in Australia were not able to be transferred for offshore processing.

The retrospective effect of the amendments will not however effect applications in respect of which the Minister has previously intervened to allow a valid application to be made. Accordingly, on-hand applications that the Minister has already allowed to proceed can continue to be assessed.

Further, the committee seeks the Minister's advice on the extent of any adverse impact on children affected by these amendments being given retrospective effect and whether the amendments may affect any litigation or tribunal matters concerning the inclusion of children born to an unauthorised maritime arrival parent within the definition of 'unauthorised maritime arrival'.

If a protection visa application lodged by a child affected by the proposed amendments was finally determined prior to the commencement of this Bill, it would, like all *other finally determined* applications, be unaffected by this Bill. This is because the amendments will not apply to applications that have been finally determined.

If the child in the case currently before the Federal Court of Australia and known as *Plaintiff B9/2014* has not lodged a valid visa application or if any such application has not been finally determined by the time these measures commence, the measures will apply to the child, such that the child will be taken to have always been a UMA.

A significant consequence of having the status of UMA is being subject to offshore processing and resettlement. The amendments also ensure that a number of children retrospectively made UMAs by this Bill (all those born to parents who arrived before 13 August 2012), are not subject to offshore processing, despite the Bill confirming their status as UMA. Ensuring children of a UMA have the status of UMA ensures, as far as is possible, that their status is consistent with that of their parents, so if it is necessary to remove their parents, an inconsistent status cannot be used to frustrate this removal.

Another consequence of being made a UMA is that the Minister has made directions under section 499 of the Act, mandating the order of priority for processing visa applications. UMAs are currently last in the order of priority. However, the Government takes the view, recently confirmed by the Federal Circuit Court in *Plaintiff B9/2014*, that these children and already UMAs are therefore already subject to that direction. The relevant directions are Direction No. 62 - Order for considering and disposing of Family Stream visa applications; and Direction No 57 - Order of consideration of Protection visas. Accordingly, no adverse impact of this type occurs as a result of the retrospective application of these amendments.

Committee Response

The committee thanks the Minister for this response and **requests the key information above be included in the explanatory memorandum**.

The committee does not consider the fact that the amendments bring the law into conformity with the operation originally intended when the law was first enacted by the Parliament is a sufficient justification for retrospective application of amending legislation. Legislative intention is to be ascertained by the intention manifested in the terms of the statute, as interpreted by the courts. The committee remains concerned that retrospectively enacting these amendments risks unfairness in individual cases and, also, may be considered to undermine the integrity of the principle (part of the rule of law) that courts are the arbiters of the requirements of the law. **The committee draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator Helen Polley
Chair

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Canberra ACT 2600

Dear Senator Polley

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Thank you for your letter dated 30 October 2014 in relation to comments made in the Committee's Alert Digest No. 14 of 2014 concerning the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the Bill). I would like to provide the following advice to the committee as a result of the comments in the Alert Digest.

Item 10 - proposed new paragraph 501(6)(b) - Broad Discretionary Power
The committee seeks the Minister's further explanation for lowering the threshold of evidence required in relation to establishing an association between groups or persons involved in criminal conduct.

The purpose of the amendment to paragraph 501(6)(b) of the *Migration Act 1958* (the Act) is to ensure that non-citizens who are members of a criminal group or organisation, such as an outlaw motor cycle gang or terrorist group, do not pass the character test. Under the amended ground a reasonable suspicion that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct will be sufficient to enliven the discretion under section 501 to refuse to grant or to cancel a visa on the ground in paragraph 501(6)(b) of the Act. Where a non-citizen chooses to become, or is, a member of a group or organisation that is suspected of involvement in criminal activity, they should expect to have their visa considered for refusal or cancellation under section 501 of the Act, consistent with the expectations of the Australian community.

The intention of the existing association ground at paragraph 501(6)(b) of the Act was to provide the Minister or delegate with the discretion to consider the refusal or cancellation of a non-citizen's visa where there are real doubts about the criminal background or criminal associations of a visa applicant or visa holder, with the objective of protecting the Australian community taking precedence in immigration decision-making. However, the effect of case law on the interpretation of the ground is such that it is no longer possible to be certain that all non-citizens who pose a risk to the Australian community on the basis of their association with groups or organisations involved in criminal conduct are able to be considered for visa refusal or cancellation under subsection 501(1) or (2) of the Act on the ground in current paragraph 501(6)(b) of the Act.

The amended provision does not alleviate the need for the Minister or delegate to have a reasonable suspicion that a non-citizen is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct. In order for a suspicion to be reasonable it must be rational and open to be made on the basis of available evidence. In assessing such evidence the Minister or a delegate would still be required to consider the nature, degree, frequency and duration of the membership or association. Whilst familial or social connections may, to a degree, go to the formation of a reasonable suspicion, those connections would have to be of relevance to these considerations and be linked to involvement in criminal conduct.

Item 11 - paragraph 501(6)(d) - Rights, liberties or obligations unduly dependent on insufficiently defined administrative powers

The committee therefore seeks the Minister's detailed explanation as to why lowering the required degree of risk is necessary and appropriate.

The purpose of this amendment is to clarify the threshold of risk that the Minister or a delegate can accept before making a finding that a non-citizen does not pass the character test because they may engage in specified conduct. The intention is that the level of risk required is more than a minimal or remote risk that the non-citizen would engage in any of the conduct specified in paragraph 501(6)(d) of the Act, without requiring the Minister or delegate to prove that it amounts to a significant risk.

This amendment gives primacy to the protection of the Australian community and is particularly important in the offshore visa context. In considering whether a non-citizen should be granted a visa to come to Australia, there is an expectation that the non-citizen will not cause or threaten harm to either individuals or the Australian community. Where there is information that suggests that a visa applicant presents more than a minimal or remote risk of causing harm to an individual or the broader Australian community, it is entirely appropriate that the non-citizen be considered for refusal under subsection 501(1) of the Act.

This amendment lowers the requisite threshold against which a non-citizen may be found to not pass the character test, thus enlivening the discretion to refuse to grant or cancel the non-citizen's visa. This amendment does not dictate that a non-citizen's visa must be refused or cancelled in all circumstances. For example, in circumstances where a non-citizen is in Australia and is being considered against the grounds in paragraph 501(6)(d) of the Act, issues such as the level of risk being posed by the non-citizen, and countervailing considerations such the type of visa they hold, their ties to the community and length of residence in Australia would be considered in the context of the exercise of the discretion.

The committee has raised concerns around the lack of a fair hearing in certain circumstances where a decision is made personally by the Minister against paragraph 501(6)(d) of the Act. Where a Minister intends to make a personal decision to cancel or refuse a visa under paragraph 501(1) or (2) of the Act, natural justice requirements would apply.

Decisions by the Minister to cancel or refuse a visa under subsection 501(3) of the Act are not subject to the rules of natural justice. However, under this subsection, the Minister may only refuse to grant or cancel a visa where satisfied that it is in the national interest to do so. Where the Minister has made a decision to cancel or refuse to grant a non-citizen's visa in the national interest, non-citizens have the opportunity to seek revocation of the cancellation or refusal decision following notification of the decision.

Item 17 - Proposed section 501BA - Procedural fairness
The committee seeks more detailed explanation from the Minister as to why it is considered necessary to exclude all aspects of the rules of natural justice.

Provisions allowing the Minister to set-aside non-adverse delegate or Administrative Appeal Tribunal (AAT) decisions both with and without natural justice already exist at subsections 501A(2) and (3) and section 501B of the Act. It would be inconsistent with these existing provisions for there to be no such power in relation to delegate or AAT decisions to revoke a mandatory cancellation under proposed new section 501CA.

Merits review tribunals are required to determine what is the correct or preferable decision based on the merits of the case before them. The provisions in the Act (both the existing powers and the new powers) recognise that the Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, even where those decisions have resulted from merits review. Therefore it is appropriate that merits review not be available in respect of decisions that are made by the Minister personally under the proposed new section 501BA.

As noted in the explanatory memorandum that accompanied this Bill, proposed new section 501BA will ensure that the Minister retains the ability in exceptional cases, where it is in the national interest, to cancel the visa of a non-citizen who does not pass the character test. The Minister's proposed powers are only enlivened after a non-citizen has had the opportunity to put their case for revocation to either a delegate, or to a delegate and a merits review tribunal. While the Minister may choose to consider this information, the issue for the Minister is whether it is in the national interest that the non-citizen have their visa cancelled. The Minister also needs to be satisfied that the person does not pass the character test because of the operation of paragraph 501(6)(a) on the basis of paragraph 501(7)(a), (b) or (c), or paragraph 501(6)(e).

Item 25 – Proposed section 501L - Undue trespass on personal rights and liberties - privacy
The committee therefore seeks information from the Minister about whether the Privacy Commissioner has been consulted in developing the amendment and whether consideration has been given to the appropriateness of providing for additional accountability arrangements in recognition of the highly sensitive nature of the information which may be disclosed and the fact that a great deal of information may be relevant to a person's character in the ordinary sense.

In the course of developing this amendment my department consulted both the Department of the Prime Minister and Cabinet and the Attorney General's department. It is intended that the legislation form the basis of an exchange of letters and the development of memorandums of understanding with relevant agencies, which would necessarily include accountability arrangements for the use and management of information obtained under proposed section 501L of the Act. Proposed section 501L allows for the provision of personal information to the department, and does not allow for the subsequent disclosure of that personal information unless consistent with the provisions of the *Privacy Act 1988*.

Item 26 and 27 – Merits review
For this reason the committee seeks the Minister's more detailed justification of the proposed approach.

The effect of this amendment is to restore the position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT. This was the case prior to the decision in *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46, where the High Court of Australia found that some personal decisions made by the Minister under section 501 of the Act are

reviewable by the AAT. The High Court interpreted paragraph 500(1)(c) of the Act to mean that any decision to refuse to grant or to cancel a visa that relied on Articles 1F, 32 or 33 of the Refugees Convention was subject to review, even where the decision was made personally by the Minister under section 501, provided that the Minister had not issued a certificate declaring the person to be an excluded person under section 502 of the Act.

This position is inconsistent with the original intent of the legislation, and incongruous with the broader framework of personal decision-making by the Minister under section 501 of the Act and will be redressed by this amendment.

A decision under section 65 of the Act to refuse to grant a protection visa because of Article 1F, 32 or 33(2) of the Refugees Convention will continue to be merits reviewable, irrespective of whether the decision was made by the Minister acting personally or by a delegate of the Minister, unless the Minister has issued a certificate under section 502 of the Act excluding the person affected from being entitled to seek merits review.

Schedule 2, Item 12, subsections 133A(4) and 133C(4) - Procedural fairness
In light of these matters, the committee seeks the Minister's fuller explanation of the justification for the abrogation of the fundamental principles or natural justice, including the rule against bias.

The Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, even where those decisions have resulted from merits review. Therefore it is not appropriate that these decisions be subject to merits review. These amendments ensure that such decisions can be made where the Minister is satisfied grounds for cancelling the visa under section 109 or 116 of the Act exist and the Minister is satisfied that cancellation of a non-citizen's visa is in the public interest.

These amendments will also ensure that personal decision-making by the Minister across both the character and general visa cancellation frameworks is subject to consistent arrangements.

The fact that the Minister must be satisfied that cancellation without notice is in the public interest reflects the expectation that this is a power that would only be used from time to time where the Minister considers it necessary to do so. It is entirely appropriate that the Minister have the ability to cancel the visa of a non-citizen quickly and without notice in order to protect the health or safety of the Australian community.

Schedule 23, Item 18-21 – Merits Review
The committee therefore seeks the Minister's detailed explanation as to why each of the grounds for cancellation under sections 109 and 116 should not be subject to merits review.

The Bill makes amendments which limit access to merits review for personal decisions by the Minister under the existing cancellation grounds in section 109 and section 116 of the Act, and proposed sections 133A and 133C of the Act. For a decision to be made under proposed new section 133A or section 133C, the Minister must be satisfied that a ground for cancelling the visa under section 109 or section 116 exists, and it would be in the public interest to cancel the visa. As discussed above, the public interest test is reflective of the threshold at which it is appropriate that a visa cancellation decision may be made without notice.

Circumstances can and do arise where a non-citizen is of sufficient concern to the Minister that he or she considers the case personally. In such circumstances, it would not be prudent to limit the available grounds for the Minister to make a personal decision to cancel a visa that is not merits reviewable. These decisions can relate to grounds for cancellation in section 116 of the Act including

security, foreign interests, health and safety of the Australian community, and the integrity of the migration programme. Given the expectations of the Australian community in relation to the Minister being the final decision-maker in this area (apart from where judicial review of a cancellation decision is sought) it is appropriate that such decisions not be subject to merits review, irrespective of the ground for cancellation in section 116 of the Act on which they are based.

These amendments do not affect a non-citizen's capacity to seek judicial review of a decision to cancel their visa.

Thank you for considering this advice. The contact officer in my department is Greg Phillipson, Assistant Secretary, Legal Framework Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
18 / 9 /2014

Senator the Hon Scott Morrison
Assistant Minister for Immigration and Border Protection

Senator the Hon Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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CANBERRA ACT 2600

Dear Senator Polley

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Thank you for your letter dated 30 October 2014 in relation to comments made in the Committee's Alert Digest No. 14 of 2014 concerning the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

I would like to provide the advice contained in the attachment to this letter to the Committee in response to the comments in the Alert Digest.

Thank you for considering this advice. The contact officer in my Department is Karen Visser, Director, Protection and Humanitarian Policy Section on (02) 6264 4124.

Yours sincerely

The Honourable Scott Morrison
Minister for Immigration and Border Protection
14 / 4 /2014

Possible undue trespass on personal rights and liberties – procedural fairness
Schedule 1, item 6, proposed section 22B

The committee therefore seeks the Minister's advice detailing each maritime power to which this exclusion will apply, accompanied by a justification in each instance as to why the exclusion of natural justice is considered reasonable.

Possible undue trespass on personal rights and liberties – procedural fairness
Schedule 1, item 19, proposed section 75B

The committee therefore repeats its request in the comment on item 6 seeking the Minister's detailed advice as to the justification for the exclusion of the rules of natural justice in each instance in which this occurs.

The powers conferred by the Maritime Powers Act 2013 (Maritime Powers Act) are deliberately coercive and may involve force. These powers and the statutory framework as a whole have been expressed to aid maximum flexibility for maritime officers and safeguard operational integrity, in light of the many and varying contexts in which the powers might be used. However, as noted in the original and preceding explanatory memorandum, Parliament has, through various express terms and limitations on the powers, drawn a careful balance between various competing needs in this unique environment. For this reason, the Bill only excludes natural justice with respect to particular decisions made under the Act; this reflects Parliament's intention that, in the operational context in which these powers are to be exercised, any formal requirement for natural justice would not be practicable. As noted in the explanatory memorandum to this Bill, the explanatory memorandum to the Maritime Powers Bill reflected this understanding on its introduction.

The exclusion in proposed section 22B applies only to the making of authorisations, which would normally take place before contact with a vessel takes place. In these circumstances no meaningful opportunity for natural justice can be afforded. To do so would effectively nullify the object and purpose of the statutory framework, which is principally set up to provide for efficient and effective border and maritime security enforcement activities. Thus, the purpose of proposed section 22B is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation.

The broader exclusion of natural justice in proposed section 75B covers sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G and 75H. It is important to note that in respect of each of these sections natural justice is not prohibited *per se*, it is simply excluded as the basis upon which a court may seek to invalidate a decision or an exercise of power under the Act.

Taking each section in turn:

- 69: The power to move a vessel is a coercive power to be used as part of a maritime enforcement operation. For example, the power may be used to bring a vessel into a port to enable it to be searched for contraband, or to take a vessel to a place outside Australian waters to prevent a possible contravention of an Australian law from occurring. It is not appropriate in these circumstances to provide a legislative opportunity for natural justice, as Australia's maritime personnel and commanders need flexibility to conduct operations safely, efficiently and effectively to protect Australia's borders from serious criminal activity and its consequences.

- 69A: Section 69A makes clear the period during which a vessel may be detained while dealing with it under section 69 and making decisions about how to do so. This clarifies the intention of the provision and ensures the period is premised on that which is reasonably required, taking into account a number of realistic operational and policy considerations, as set out by proposed section 69A. A similar justification applies as to section 69.

- 71: Section 71 provides a power for maritime officers to place or keep a person in a particular place on a vessel (or an installation, aircraft or land) while exercising powers in respect of the vessel. This power supports the power in section 69, and as such a similar justification applies as to section 69.

- 72: The power to detain and move people is a coercive power to be used as part of a maritime enforcement operation. As with the current Maritime Powers Act, this power may be used to bring persons ashore to face criminal investigations and/or charges, or to take persons to a place or places outside Australia (particularly in the case where such persons are suspected of or have attempted illegal entry into Australia by maritime means). It should be noted the provision is not intended to undermine compliance with Australia's international obligations but that, as always intended, it is not appropriate nor practicable to provide a legislative opportunity for natural justice in the course of these maritime operations. Australia's maritime personnel and commanders require certainty and flexibility to conduct operations safely, efficiently and effectively to give effect to Government policy within the object and purpose of the statutory framework.

- 72A: Proposed section 72A puts it beyond doubt that the Maritime Powers Act is intended to account for the real time it takes to deal with a person under 72(4) safely and in an operationally realistic way. Proposed section 72A supports section 72 and a similar justification applies.

- 74: Section 74 provides that persons must not be placed or kept in places unless the responsible maritime officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. It would not be appropriate to require Australian maritime personnel to enter into negotiations about what is or is not a safe place. This is a matter for the judgement of professional mariners.

- 75D: Section 75D creates a personal power for the Minister to authorise an exception to some of the general geographical limits on the exercise of powers. As noted in the Explanatory Memorandum, the purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict. This is both appropriate and consistent with decision-making generally relating to Australia's sovereignty, and overarching national security and national interests. Natural justice in respect of a personal Ministerial power for use in restricted operational circumstances would not be appropriate.

- 75F: This provision puts it beyond doubt that the Minister can provide policy advice and directions to officers on the exercise or performance of certain powers and functions under the Act. While the provision of advice and direction by the executive government to officers performing functions on behalf of or for the Commonwealth is generally an uncontroversial part of Australia's system of government, this amendment puts it beyond doubt that the Minister has the power, on behalf of the executive, to provide directions to those exercising such powers. This is both appropriate and consistent with decision-making generally relating to Australia's sovereignty, and overarching national security and national interests. Requiring natural justice in respect of a personal Ministerial power would not be appropriate, particularly when the decision may have been made on national security grounds or in the national interest.

- 75G: Proposed section 75G provides that directions made under section 75F must be complied with. As with section 75F, natural justice is inappropriate in these circumstances.

- 75H: Proposed section 75H explicitly clarifies that, owing to the dynamic nature of the maritime enforcement environment, certain maritime laws do not apply to certain vessels used in the exercise of powers under the Maritime Powers Act. The purpose of 75H is to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, intended to apply to vessels with a requisite connection to Australia, do not inappropriately restrict the operational freedom of maritime officers. The application of natural justice has been excluded because requiring natural justice would not be appropriate in respect of a personal Ministerial decision primarily made on technical and operational grounds.

Undue trespass on personal rights and liberties – exercise of coercive powers
Schedule 1, item 7, paragraph 31(a)

The committee therefore seeks the Minister's advice as to the justification for the extension of coercive powers.

Maritime powers are used to respond to a range of threats to Australia's national interest, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal ecosystems from environmental damage and countering people smuggling. The insertion of "or prevent" after the word "investigate" simply puts it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of Australian law. This is consistent with the overarching object and purpose of the Act. The prevention of contraventions of the law is an uncontroversial part of many pieces of legislation. For example, to administer and ensure compliance with a monitoring law, one may be required to prevent a contravention from occurring as part of those initial investigations, such as in the case of intercepting a people smuggling venture attempting to illegally enter Australia.

Undue trespass on personal rights and liberties
Schedule 1, item 11, subsection 69(3) and subsection 69(3A)

In these circumstances the committee requests that the Minister detail the legal constraints and accountability mechanisms (if any) which are in place in relation to these powers and to address the question of whether personal rights and liberties of persons affected are adequately protected from undue trespass.

The Government has instituted a robust whole-of-government response to illegal people smuggling, which has arrested the flow of illegal immigration and stopped deaths at sea. As with all operations undertaken in accordance with the Act, there exist clear protocols and guidelines on the use of coercive powers in enforcement operations. However, as has been articulated previously, particularly in the counter-people smuggling environment, disclosing the details of sensitive operational information could reveal the location, capacity, patrol and tactical routines relevant to Australian vessels and aviation assets, enable exploitation by organised criminals (particularly people smuggling syndicates) of confidential methodology and processes, and potentially impact upon relations with foreign states. However, in the interests of accountability and transparency, where appropriate, information is and will be released as circumstances permit.

The committee seeks the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

The Government does not agree with the premise of the question. The amendments in this Bill adequately ensure that any detention or other temporary deprivation of liberty is tied to an expectation that the period or periods for which a power is exercised is that period which is reasonably necessary for the legitimate exercise of powers under the Maritime Powers Act; but is not intended to be arbitrary, indefinite nor to unreasonably prolong the exercise of those powers.

Rights, liberties and obligations unduly dependent on insufficiently defined legislative power
Schedule 1, item 15, proposed subsections 72(3) and (4)

The committee therefore repeats its request in the previous comment seeking the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

The committee therefore seeks the Minister's advice as to the justification for this approach.

Please see response in relation to previous question.

Adequacy of Parliamentary oversight; broad discretionary power
Schedule 1, item 19, proposed sections 75D, 75F, 75H

The committee seeks the Minister's advice as to whether a more detailed justification could be provided for the introduction of the powers.

- Section 75D creates a personal power for the Minister to authorise an exception to some of the general geographical limits on the exercise of powers. As noted in the Explanatory Memorandum, the purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict.

- Section 75F has been introduced to address the incorrect assertion that the executive, and particularly the Minister administering the Maritime Powers Act, does not have the power to provide direction or policy guidance to maritime officers.

As noted above, the provision of advice and direction by the executive government to officers of the Commonwealth is generally an uncontroversial part of Australia's system of government. This amendment is simply designed to put this principle beyond doubt in the circumstances of this legislative scheme.

- As noted above, section 75H is intended to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, which are intended to apply to vessels with a requisite connection to Australia, do not apply inappropriately. For example, there are circumstances, depending on the offence, in which foreign fishing vessels can become automatically forfeited to the Commonwealth. This can trigger the registration rules applying to Commonwealth-owned vessels, which is clearly inappropriate in the circumstances.

The committee seeks the Minister's advice as to whether consideration has been given to introducing accountability checks, alternative to the LIA requirements, which would not require the disclosure of sensitive operational matters. For example, a requirement for the Minister to report on the exercise of his power to make determinations could be considered.

Consideration was given to introducing accountability checks in the course of drafting the Bill. Issues of national and operational security weighed against a legislative requirement to report, as well as informing the exclusion of the application of the Legislative Instruments Act. While it is the Government's intent that Parliament be provided with information at an appropriate time, this needs to be done with consideration given to the individual circumstances rather than subject to an inflexible legislative requirement.

Exclusion of review under the *Administrative Decisions (Judicial Review Act 1977)*
Item 31

The committee seeks the Minister's advice as to why the decisions made under these sections are not reviewable under the Administrative Decisions (Judicial Review) Act 1977.

The Government's position is that a ministerial direction made in the national interest is likely to relate to highly sensitive operational decisions and would be likely to raise complex and novel issues. Accordingly, it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the *Administrative Decisions (Judicial Review) Act 1977*.

Delegation of legislative power
Schedule 2, item 5, proposed subsection 35A(4)

The committee seeks the Minister's advice as to why this flexibility is needed and why the recognition of new classes of protection visas should not be considered an important question of policy that is more appropriately determined directly by Parliament than through regulations.

The new subsection 35A(4) provides the process for creating new protection visas consistent with the majority of other visas classes that are created by regulations. Having the flexibility to create new classes of protection visas provides the government with an ability to manage the onshore protection programme by responding quickly and effectively to any policy challenges that may arise in the future.

Any such Regulations creating new classes of visa would be subject to disallowance and therefore open to Parliamentary scrutiny and consideration as are all other types of visa classes created in Regulations.

Undue trespass on personal rights and liabilities – accrued rights
Schedule 2, item 20, proposed subsection 45AA(8)

The committee therefore seeks the Minister's advice as to how the proposed subsection will operate and a justification for its inclusion.

Proposed subsection 45AA(8) is one part of the fulfilment of a pre-election commitment of not granting permanent protection visas to anyone who arrives in Australia illegally. This is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

This policy denies permanent residency, citizenship and therefore a product for people smugglers to sell. However, anyone who engages Australia's protection obligations will receive temporary protection and is not at risk of refoulement. The Government notes the committee's concerns but maintains that this approach is fair and justified.

Subsection 45AA(8) deals with subsection 12(2) of the *Legislative Instruments Act 2003* ("LI Act") and subsection 7(2) of the *Acts Interpretation Act 2001* ("AI Act"). Broadly speaking, those provisions preserve the accrued rights and accrued liabilities of a person who is affected by a legislative amendment.

The accrued rights in this instance are the rights of a non-citizen to have their pre-conversion application assessed against the time-of application criteria for the pre-conversion visa that existed at the time the pre-conversion application was made. A conversion regulation would affect those rights because the non-citizen's pre-conversion application would be taken not to be, and never to have been, a valid application for that pre-conversion visa. Instead, it would be taken to be, and always to have been, a valid application for a different class of visa.

The intention of the Bill is to put beyond doubt that an applicant for a pre-conversion visa does not have any accrued rights to have their pre-conversion application dealt with in accordance with the law as at the time of the making of the application. It is the intention of the Bill to ensure that an applicant for a pre-conversion visa will be only entitled to have their converted visa application dealt with according to law. This is the effect of proposed subsection 45AA(8). The AI Act and the LI Act have provisions which mean that, as a starting point, in certain circumstances persons who have "accrued rights" (and also "accrued liabilities") have those preserved. However, this is always subject to a contrary intention, and subsection 45AA(8) provides that contrary intention to the extent that it may be necessary to do so.

What paragraph 45AA(8)(a) does

Paragraph 45AA(8)(a) mentions subsection 12(2) of the LI Act. The effect of subsection 12(2) is that if a regulation "takes effect" before the date it is registered on the Federal Register of Legislative Instruments, it will have no effect if it affects the rights of the visa applicant so as to disadvantage him or her. This means that subsection 12(2) could prevent the operation of a conversion regulation if the conversion regulation takes effect before it is registered and disadvantages visa applicants. However, the preservation of the accrued rights by subsection 12(2) can be removed. Subsection 12(3) of the LI Act makes it clear that subsection 12(2) will not prevent the operation of such a conversion regulation if there is an express statement in the enabling legislation (in this case, the Migration Act) displacing the effect of subsection 12(2).

The Government's view is that proposed subsection 45AA(3) displaces the effect of subsection 12(2) of the LI Act. Proposed subsection 45AA(3) relevantly authorises the making of a conversion regulation that can deem a pre-conversion application to be, and always to have been, a valid application for a different class of visa. This means that proposed subsection 45AA(3) authorises the making of a conversion regulation that affects the accrued rights of a non-citizen who made a pre-conversion application. By doing so it creates the contrary intention referenced in subsection 12(3) of the LI Act.

However, if a court were to question that argument, proposed subsection 45AA(8) is included to put it beyond doubt that a conversion regulation can be made (including a conversion regulation enacted by the Parliament) that adversely affects the accrued rights of visa applicants.

There might be some doubt as to whether subsection 12(2) of the LI Act would apply to proposed conversion regulation 2.08F. This is because subsection 12(2) only applies to "legislative instruments", namely, an instrument in writing that is of a legislative character and made in the exercise of a power delegated by the Parliament (see section 5 LI Act). Proposed conversion regulation 2.08F will not be a legislative instrument in this sense, as it will be made by the Parliament rather than the Governor-General.

To avoid any such doubt, and to remove questions about the operation of subsection 12(2) of the LI Act with respect to the conversion regulation — which would be made by way of an Act passed by Parliament yet given the status of delegated legislation— paragraph 45AA(8)(a) makes it clear that subsection 12(2) has no operation in relation to accrued rights in such circumstances. There is no preservation of accrued rights in relation to the operation of conversion regulation 2.08F or any other conversion regulation made, including a conversion regulation enacted by the Parliament.

What paragraph 45AA(8)(b) does

Paragraph 45AA(8)(b) mentions section 13 of the LI Act. The effect of paragraph 13(1)(a) of the LI Act is that, subject to any contrary intention, the AI Act applies to any legislative instrument made as if the legislative instrument were an Act, and as if each provision of the legislative instrument were a section of an Act.

This means paragraph 13(1)(a) of the LI Act applies subsection 7(2) of the AI Act to legislative instruments such as a conversion regulation made under the Migration Act.

Like subsection 12(2) of the LI Act, paragraph 7(2)(c) of the AI Act preserves the accrued rights and accrued liabilities of a person who is affected by a legislative amendment. Because of section 13 of the LI Act, each reference to "Act" in paragraph 7(2)(c) can be read to mean "regulation" (i.e. conversion regulation). This means that because of paragraph 7(2)(c), a conversion regulation that amends the Migration Regulations cannot affect any right that a visa applicant has accrued under the Migration Regulations.

However, because of subsection 2(2) of the AI Act, the application of the AI Act or a provision of it (for example, subsection 7(2)) to an Act or a provision of an Act is subject to a contrary intention. This means that the preservation of a visa applicant's accrued rights by subsection 7(2) can be removed if there is a provision in the Bill that evinces an intention for that to occur.

Proposed subsection 45AA(3) is a provision that evinces such an intention. As mentioned above, subsection 45AA(3) relevantly authorises the making of a conversion regulation that can deem a pre-conversion application to be, and always to have been, a valid application for a different class of visa. In the Government's view, this means that proposed subsection 45AA(3) authorises the making of a conversion regulation which affects the accrued rights of non-citizens who made a pre-conversion application.

However, if a court were to question that argument, paragraph 45AA(8)(b) puts it beyond doubt that a conversion regulation can be made (including a conversion regulation enacted by the Parliament) that adversely affects the accrued rights of visa applicants. It also puts it beyond doubt that subsection 7(2) of the AI Act does not apply to the enactment of section 45AA. This means that both section 45AA and a conversion regulation made under section 45AA can adversely affect a visa applicant's accrued rights.

Proposed conversion regulation 2.08F is given the status of a regulation yet it is enacted by the Parliament. In light of this, there may be some uncertainty as to whether it would fall within the scope of paragraph 7(2)(c) of the AI Act as an enactment, albeit given the status of a regulation. Subsection 45AA(8) removes any such doubt, and makes it clear that there is no preservation of accrued rights in relation to the operation of proposed conversion regulation 2.08F or any other conversion regulation, including a conversion regulation enacted by the Parliament.

Make rights or obligations unduly dependent on insufficiently defined administrative powers – broad discretionary power
Schedule 2, item 31, proposed clause 785.227 of the Migration Regulations 1994

The committee therefore seeks the Minister's advice as to why this criterion should not be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers.

Including the national interest criterion in the Temporary Protection visa regulations is consistent with the long standing policy of applying this criterion to all protection visa classes. It was introduced on 1 September 1994, at the same time that the basic scheme of the current Migration Act was introduced, and also existed in the criteria for a 'domestic protection (temporary) entry permit' which was in effect from 1991-1994. A 'national interest' criterion in domestic legislation is not inconsistent with the Refugees Convention, which does not deny nation states the right to make decisions about the admission of non-citizens by reference to their national interest. It is a necessary and appropriate measure that allows Australia's national interest to be taken into account in the administrations of protection visas. It is a rarely used power that has to date been exercised only personally by the Minister.

The Government notes the committee's concerns but does not consider this criterion makes rights or obligations unduly dependent on insufficiently defined administrative powers.

Commencement of regulation
Schedule 2, item 38, proposed subregulation 2.08F(3) of the Migration Regulations 1994

In the circumstances the committee seeks the Minister's advice as to the justification for the proposed approach.

Subregulation 2.08F(3) is discussed in some detail above.

This proposed approach is the fulfilment of a pre-election commitment to not grant permanent protection visas to anyone who arrives in Australia illegally. This is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia. This policy denies permanent residency, citizenship and therefore a product for people smugglers to sell. Any exception would only serve to weaken the effectiveness of this policy. The Government notes the committee's concerns but maintains that this approach is justified.

Merits review and procedural fairness
Schedule 4, item 1, subsection 5(1) and item 21, Part 7AA generally

The committee is not well placed to assess the justification for the departure from what may be considered to be the full set of remedial powers which are associated with merits review of decisions which directly affect individual rights or interests. The committee therefore seeks the Minister's more detailed explanation and justification for the limited remedial powers of the IAA.

In short, the more limited remedial powers of the IAA reflect the actual practice of the RRT, notwithstanding the much broader range of powers the RRT ostensibly can exercise.

Currently, section 415 of the Migration Act provides the powers of the Refugee Review Tribunal (RRT) to affirm, vary, set a departmental decision aside and substitute it with a new decision or if the decision relates to a prescribed matter – remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations.

However, while the RRT has these powers within its legal framework, it generally only uses two of its powers - to affirm a departmental refusal or set a departmental refusal aside and remit the matter back to the department with a direction that the RRT has found the applicant to be owed protection.

Regulation 4.33 of the Migration Regulations provides the prescribed directions that the RRT may make in relation to an application for a Protection visa. The permissible directions allow the RRT to establish whether a review applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention). In addition, the permissible directions also allow it to establish whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

However, it is not a permissible direction for the RRT to determine issues of character or security. Specifically, it is not a permissible direction for the RRT to consider issues that may invoke Article 1F, 32, 33(2) of the Refugees Convention and which are also outlined as grounds for ineligibility for the grant of a Protection visa under subsection 36(2C) of the Migration Act. To this extent, the RRT's review jurisdiction extends only to determining whether a review applicant is owed protection under one of Australia's *non-refoulement* obligations.

In addition to satisfying the primary criteria for a protection visa (that is, being found to be owed protection under one of Australia's *non-refoulement* obligations), an applicant must also satisfy the requirements outlined in the public interest criteria. Broadly speaking, the public interest criteria ensure an applicant's suitability to reside in Australia without posing a risk to the public and require completion of a number of checks regarding health, character and security.

As such, while it is within the scope of the RRT to determine whether a review applicant should be owed protection under one of Australia's *non-refoulement* obligations, it is not within the RRT's review jurisdiction to determine an applicant's suitability against character, security or the public interest criteria necessary to be granted a protection visa. As a result, the RRT does not commonly use its power to set aside and substitute a departmental refusal decision, in favour of its own decision to find that an applicant should be granted a protection visa.

The practical approach currently followed by the RRT is the approach which has been modelled for the IAA's review jurisdiction as outlined in the Bill. Specifically section 473CC of the Legacy Bill provides for the IAA to have the powers to affirm or remit the decision for reconsideration in accordance with directions or recommendations of the IAA as are permitted by regulation, as these are the most common powers used by the RRT under section 415 of the Migration Act.

In addition, the government is proposing the introduction of a regulation, similar to current regulation 4.33, to outline the powers of the IAA and the types of prescribed directions it will be able to make in relation to reviews of fast track applicants' cases. It is proposed that the prescribed directions for the IAA be identical to those provided to the RRT and include allowing the IAA to determine whether a referred applicant will be a person to whom Australia owes a non-refoulement obligation either under the Refugees Convention or under one of the complementary protection grounds, but will not allow it to consider character, security or public interest criteria. On that basis, the powers provided to the IAA to affirm or set aside are appropriate and intended to establish consistency with the RRT's current approach to reviews.

Currently, certain refusal decisions of the grant of a protection visa on character or security grounds can be reviewed, in accordance with section 500 of the Migration Act. If such decisions are made in respect of fast track applicants and is currently the case, those decisions may be reviewable by the AAT.

Merits review
Schedule 4, item 1, subsection 5(1)

In these circumstances (Subparagraph (a)(ii)) the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.

Paragraph 5(1)(a) (ii) of the definition of 'excluded fast track review applicant' requires that fast track applicants to be excluded from merits review if, after being found not to be owed protection under the new primary decision element of the fast track assessment process, the Minister is of the opinion that they have made a previous claim for protection as a refugee under paragraph 36(2)(a) of the Migration Act or under one of the complementary protection grounds under paragraph 36(2)(aa) of that Act and that previous application was refused or withdrawn.

Australia's protection framework affords all asylum seekers one opportunity to request protection and to have their asylum claims assessed in an open and transparent process. If the applicant has either been refused as a result of that process or has made the choice to withdraw their application (which would indicate the applicant no longer seeks Australia's protection), the Government considers it appropriate to ensure this subsequent examination of protection claims that same applicant makes is not unduly extended.

All protection visa applicants, including fast track applicants, will receive a full assessment of their protection claims, including any new claims that may relate to different or changed personal or political circumstances since their previous protection visa applications. A visa may be granted to them.

However, should they be found not be owed protection because they do not engage Australia's *non-refoulement* obligations, the fast track assessment process identifies the application to be unmeritorious because of the applicant's repeated and unsuccessful attempts to seek Australia's protection. Providing such an applicant access to merits review in these circumstances would continue to delay finalisation of a case that, in the Government's view, had already had numerous opportunities to demonstrate its claims under Australia's protection framework and has not done so.

This expedited process strikes an appropriate balance between undertaking consideration of any new claims an applicant may make while not unduly delaying finalisation of a refusal decision. The alternative of not considering further claims at all, in these circumstances, was not considered to provide the necessary balance.

Prior to finalising a case involving a possible excluded fast track review applicant and in addition to the department's ordinary quality control checks, such cases will undergo a further legal check of the process within the department. In addition, decisions which have identified an excluded fast track review applicant will continue to have access to judicial review.

In these circumstances (Subparagraphs (a)(iii), (a(iv)) the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.

As stated earlier, Australia's protection framework affords all asylum seekers one opportunity to request protection and to have their asylum claims assessed in an open and transparent process. If a fast track applicant has not been found to engage Australia's *non-refoulement* obligations during the primary decision element of that process and has previously been refused protection by another country (including under the mandate of the UNHCR), the Government considers it appropriate to ensure subsequent examination of protection claims that same applicant makes is not unduly extended.

All Protection visa applicants, including fast track applicants whom the department may have identified as having already sought protection overseas or under the mandate of the UNHCR, will receive a full assessment of their protection claims including any new claims that may relate to different or changed personal or political circumstances from their previous protection visa applications. A visa may be granted. However, should they then be found not be owed protection because they do not engage Australia's *non-refoulement* obligations, the fast track assessment process identifies the application to be unmeritorious because of the applicant's repeated and unsuccessful attempts to seek protection both in Australia and overseas.

While it is open to all States who are signatories to the key human rights treaties (including the Refugees Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture) to adopt the most appropriate administrative arrangements to complement their legal frameworks in determining who should be granted asylum, they all fundamentally recognise and adopt the core tenets of these treaties including the principle of *non-refoulement.* In addition, most States develop their assessment processes in broad accordance with the UNHCR's procedures for determining refugee status.

Accordingly, other State signatories share common aspects and approaches with Australia's protection framework, regarding the standards applied in recognising refugees or asylum seekers owed complementary protection and the administrative decision-making processes that are applied to arrive to those determinations (including working without bias and taking relevant information into consideration when coming to a reasonable decision).

Given this commonality of approach internationally, providing such an applicant access to merits review in these circumstances would continue to delay finalisation of a case that in the Government's view, had already had numerous opportunities to demonstrate its claims under protection determination procedures both overseas and under Australia's protection framework and has not done so.

The committee seeks the Minister's advice as to whether consideration has been given to giving greater guidance for the application of this standard (subparagraph (a)(v), which is capable of varying interpretations or whether merits tribunals could adopt procedures to eliminate cases from their lists which are genuinely without foundation.

'Manifestly unfounded claims' arise persistently and universally across the system of international protection and are recognised as a category of claims by commentators such as the United Kingdom and Canada. While the specific definition of the term may differ slightly, it is common to assess these types of claims with an alternative protection assessment and/or review process. For example, the United Kingdom is able to issue a certificate which denies an asylum seeker merits review if they find the asylum seeker to have claims which they consider clearly unfounded.

The concept of 'manifestly unfounded claims' for protection has been introduced into Australia's protection framework as a mechanism for identifying and channelling those cases where claims for asylum have been found to have:

- no substance – such as having no fear of mistreatment;
- no plausible basis – including where there is no objective evidence supporting the claimed mistreatment; or
- are based on a deliberate attempt to mislead or abuse Australia's asylum process to avoid removal.

It is the Government's view that while these examples have been discussed in the explanatory memorandum and will be further elucidated in policy documents, the concept should not be explicitly defined in the legislation but rather, should be developed through a flexible, policy-based approach.

This will allow decision makers to take into account individual circumstances of a case, while still being bound by the parameters of the broader legal framework supporting how Australia's international obligations should be interpreted and applied – stemming from both the Migration Act as well as administrative case law.

As such, it is anticipated that while policy guidance will acknowledge the possibility that decision makers may find differing circumstances to fall within the category of 'manifestly unfounded', cases should share similar attributes such as:

- whether a claim was found to be completely inconsistent or unsupported by reliable and factual information publicly available regarding the issue;
- whether a claim was presented with such insufficient detail and specificity as to render it impossible to consider or accept as credible in any way;
- whether the entirety of a fast track applicant's claims were found to have been manufactured for the sole purpose of making a successful protection visa application in Australia; and
- whether the claims raised human rights' issues beyond Australia's *non-refoulement* obligations under the Refugees Convention and other human rights treaties. An example may include, protection claims based on a general lack of employment or education opportunities or general health care in their home country.

As a public servant bound by the Australian Public Service (APS) Code of Conduct, the Government considers the primary decision maker to be in the best position to impartially determine the nature of an applicant's claims and whether a case might be reasonably considered to be 'manifestly unfounded'. As the original decision maker, they have access to all material provided by the fast track applicant to the department during the processing of their Protection visa application, including from the time of the fast track applicant's arrival in Australia until a decision is made on the application.

The Government did not consider enacting the alternative approach suggested by the committee - that of allowing merits review tribunal the ability to automatically dismiss applications with unfounded claims. Rather the Government is of the view that such an approach would be more resource intensive, costly and contrary to the objective of establishing a merits review system, which is determining whether the decision under review is the correct or preferable one.

Delegation of legislative power
Schedule 4, item 1, subsection 5(1), paragraph (b); item 2, schedule 4, subparagraph 5(1)(1AA)(a) and subsection 5(1)(1AB)

The committee therefore seeks the Minister's advice as to the justification for the proposed approach

The Government's purpose in establishing the fast track assessment process is to provide a framework for addressing and processing the backlog of Unauthorised Maritime Arrivals (UMAs) who entered Australia on or after 13 August 2012.

However, the Government also wants the fast track assessment process to have the flexibility to be able to respond to other unforeseen cohorts of irregular arrivals that might seek Australia's protection in the future.

The power to make a legislative instrument to expand both the definition of a 'fast track applicant' and an 'excluded fast track applicant' provides this speed and flexibility. For example, it is proposed to use the legislative instrument under subsection 5(1AA) to define unauthorised air arrivals as a fast track applicant, as they are a known, albeit currently small, additional group of persons who enter Australia unlawfully. The capacity to make further legislative instruments ensures the fast track process is not unnecessarily limited to being a response to a single group of arrival. This in turn, will assist the Government to uphold the integrity of Australia's onshore protection programme and encourage the well-managed entry of people to Australia.

Broad discretionary power
Schedule 4, item 21, proposed section 473BD

Given the potential significance of the exercise of this power the committee seeks the Minister's advice as to whether consideration has been given to narrowing the scope of this broad discretionary power. The committee also seeks an explanation for excluding merits review of a decision with respect to the examples given in the explanatory memorandum which are given in justification for the power.

Further the committee seeks the Minister's advice as to whether:

1. ***It is possible that prejudice to Australia's security, defence or international relations could be protected through other powers reposed in the Minister for refusing or cancelling a visa.***

2. ***Why such matters are not adequately dealt with by the definition of non-disclosable information in subsection 5(1) of the Migration Act or proposed section 473GA (to be inserted by item 21) which restricts the disclosure to the IAA of information which would prejudice the security, defence or international relations of Australia or would disclose deliberations or decisions of the Cabinet or a committee of the Cabinet.***

Under section 339 of the Migration Act, the Minister for Immigration and Border Protection has the power to issue a conclusive certificate in relation to a general migration visa decision if they believe it would be contrary to the national interest to have the decision changed or reviewed by the Migration Review Tribunal (MRT). Under subsection 411(3), the Minister for Immigration and Border Protection has the same power with respect to issuing a conclusive certificate regarding a protection visa decision if they believe it would be contrary to the national interest to have the decision changed or reviewed by the RRT.

In turn, under subsections 338(1) and 411(2) of the Migration Act respectively, decisions where the Minister for Immigration and Border Protection has issued a conclusive certificate on national interest grounds are excluded from the scope of the MRT and RRT's review jurisdiction. These current powers have the effect of ensuring a decision is upheld in the national interest and not subject to being overturned if reviewed.

Consistent with this approach, the fast track assessment process will provide the Minister for Immigration and Border Protection with a similar power to issue a conclusive certificate in relation to a fast track decision where the Minister believes it would be contrary to the national interest to have the fast track decision changed or reviewed by the newly established Immigration Assessment Authority. Again, where a conclusive certificate is issued, such decisions would be excluded from the scope of the IAA's review jurisdiction as currently occurs with the MRT and RRT.

The concept of 'national interest' is a broad one which generally speaking, is regarded as being similar in breadth and scope to the phrase 'the public interest' and imports an understanding that a discretionary value judgment is required to be exercised, as it is normally in response to undefined factual matters that go to Australia's interests as a whole.

These provisions preserve the status quo. If fast track decisions were being reviewed by the RRT rather than the IAA, the Minister would have the same power to issue conclusive certificates available to him. Given the consistency of the new provisions with the existing provisions no consideration was given to narrowing the scope of the power.

There is no overlap between this provision and section 473GA regarding the restriction on disclosure

of certain information or the definition of 'non-disclosable information' under subsection 5(1) of the Migration Act. This conclusive certificate power works in a different manner and fulfils a different policy objective for the Government, namely it prevents review in a case which could see a decision being set aside and which the Minister has determined, would be contrary to the national interest. The other provisions seek to ensure that information held by the Secretary or disclosed under certain conditions to the IAA and which go to issues of the security, defence or international relations of Australia or the deliberations of Cabinet, is not disclosed either to a referred applicant or publicly, as such actions could cause Australia's national interests to be jeopardised.

Exclusion of procedure fairness
Schedule 4, Division 3, item 21, proposed section 473DA

The committee therefore seeks the Minister's advice as to whether consideration has been given to amending the bill to ensure that this risk of procedural unfairness does not materialise.

Under section 473CB, the Secretary is required to give the IAA all review material in relation to each fast track reviewable decision. This includes a statement outlining the findings of fact made in relation to the referred applicant, the evidence on which those findings were based and the reasons for the decision. In addition, the Secretary must also provide all material provided by the referred applicant to the decision maker before the decision was made as well as any other material that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review.

As such, the 'review material' likely to be provided by the Secretary to the IAA in most cases will comprise of information provided by the applicant to the department during their entry interview; copies of the applicant's protection visa application/s (including statements of asylum claims); information provided by the applicant during their protection visa interview and any additional submissions provided by the applicant, including in response to a request by the department to comment on adverse information being considered by the department. In addition and if considered necessary, the department's decision-making processes, the review material might also include the policy guidance taken into account by the decision maker in determining key concepts within the Migration Act (such as the department's Procedural Advice Manual (PAM) or any relevant section 499 Ministerial directions).

While section 473GA provides that the Secretary must not give the IAA a document or information which the Minister has certified because its disclosure would be contrary to the public interest (because it would prejudice the security, defence or international relations of Australia or would disclose of deliberations or decisions of the Cabinet), section 473GB provides that the Secretary can give such information or documents to the IAA if in doing so, he complies with the Act and, provides the IAA with written advice that the Secretary thinks is relevant regarding the significance of the document or information.

As the Explanatory Memorandum to this provision explains in exercising its own discretion to disclose, the IAA is to consider the advice of the Secretary regarding the significance of the information or document prior to deciding whether to release the document or information to a referred applicant. It is intended that this provision allow the IAA to rely on such documents or information in making its decision in the review of a case without breaching the rules of natural justice if the IAA decides not to advise the referred applicant of that document or information. However, this provision also enables the IAA, at its discretion, to rely on certain information or documents and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure.

On this basis, the Government is of the view that this set of provisions provide appropriate safeguards in both ensuring that the IAA has all the necessary 'review material' it requires when considering a case while allowing it the necessary scope to fulfil its natural justice requirements outlined in section 473DA.

Procedural fairness; delegation of legislative power
Schedule 4, item 21, proposed paragraph 473DE(c)

The committee therefore seeks the Minister's advice as to the justification for the inclusion of this paragraph and the reasons why it should not be considered to deal with important matters that should be determined in the primary legislation.

Section 473DE, in conjunction with section 473DA, will provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. It will require the IAA to give fast track applicants, the particulars of any new information it has or will consider in a review and which would be the reason or part of the reason for affirming the department's refusal.

'New information' is defined in section 473DC as documents or information that was not before the Minister when the Minister made the decision under section 65 and 'review material' is defined in section 473CB as including all the material that was before the department before it made its decision under section 65.

Because the IAA is a new model of review, the Government is concerned to ensure outcomes in review cases cannot be delayed unduly by different types of information that may emerge that have not been foreseen and which fall outside of the current definitions of 'new information' or 'review material'.

To provide the Government with flexibility to respond to any such occurrences or trends, subsection 473DE(3) provides the Government with the ability to further prescribe in regulations, what new information should not be subject to the IAA's natural justice obligations and Code of Procedure requirements. Any such regulations would be subject to disallowance and therefore will remain open to Parliamentary scrutiny.

Procedural fairness
Schedule 4, item 21, proposed section 473GA and 473GB

The committee therefore seeks the Minister's advice as to whether the exercise of this power may deny a fast track applicant a fair opportunity to be heard in relation to adverse information.

As discussed earlier, while section 473GA provides that the Secretary must not give the IAA a document or information which the Minister has certified because its disclosure would be contrary to the public interest (because it would prejudice the security, defence or international relations of Australia or would disclose of deliberations or decisions of the Cabinet), section 473GB provides that the Secretary can give such information or documents to the IAA if in doing so, he complies with the Migration Act and provides the IAA with written advice that the Secretary thinks is relevant regarding the significance of the document or information.

As the Explanatory Memorandum to this provision explains, in exercising its own discretion to disclose, the IAA is to consider the advice of the Secretary regarding the significance of the information or document prior to deciding whether to release the document or information to a referred applicant. It is intended that this provision allow the IAA to rely on such documents or information in making its decision in the review of a case without breaching the rules of natural justice if the IAA decides not to advise the referred applicant of that document or information. However, this provision also enables the IAA, at its discretion to rely on certain information or documents and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure.

On this basis, the Government is of the view that this set of provisions provide appropriate safeguards in both ensuring that the IAA has all necessary 'review material' it requires when considering a case while allowing it the necessary scope to fulfil its natural justice requirements outlined in section 473DA.

The committee seeks the Minister's advice firstly as to why disclosure should be left entirely to the discretion of the IAA, and secondly, why it is considered appropriate to have no requirements directed to ensuring a fair hearing in relation to information covered by this section.

Please see the comments in Schedule 4, item 21, proposed sections 473GA and 473GB above.

In addition, the Government considers that it is of utmost importance for the IAA to afford natural justice concerning any new information it may be relying upon to affirm a refusal by the department. The Government also considers that the IAA must also have sufficient powers to ensure that information disclosed under certain conditions to the IAA and which go to issues of the security, defence or international relations of Australia or the deliberations of Cabinet, is not disclosed if such action could cause Australia's national interests to be jeopardised.

These are not new issues arising only in the context of the IAA but are reflections of the difficult balance that must be maintained in all instances where the public interest must be weighed with the interests of an individual. The same dilemmas are already worked through in a similar way in the MRT, RRT and AAT and it would be inconsistent to treat the IAA differently.

As stated above, it will be open to the IAA to exercise its discretion and to disclose certain information to a referred applicant, on the condition that the referred applicant does not contravene the conditions attached to its disclosure. With the availability of this power and discretion, the Government considers that referred applicants will receive a fair hearing in relation to such information, where the IAA considers it appropriate.

The committee therefore seeks the Minister's advice as to whether consideration has been given to prescribing measures to ensure that the IAA acts, and is seen to act, in an independent and impartial manner.

The independent and impartial operation of the IAA will be supported by many different aspects of its establishment. Consistent with the Government's National Commission of Audit, the IAA will be established as a separate office of the RRT. As such, the IAA will be independent of the Department of Immigration and Border Protection and its decision-makers who will be undertaking the primary assessments of fast track applicants' protection claims.

Section 473JA proposes that the Principal Member of the MRT-RRT (Principal Member) will be the head of the IAA for the purposes of the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999* (Public Service Act). In establishing these governance arrangements, the Government intends for both the RRT and IAA to have the same Principal Member as their respective agency head and to share staff and other administrative arrangements in order to achieve budgetary and administrative efficiencies.

Section 473JC provides for the Principal Member to appoint a Senior Reviewer to oversee the functions and quality of reviews produced by the IAA. To fulfil their role, powers and functions will be delegated to the Senior Reviewer by the Principal Member as outlined under section 473JF of the Bill.

The role of the Senior Reviewer will be to manage the review caseload, including the allocation of work, supervise reviewers and conduct activities in accordance with the IAA's functions and purposes. Reporting to the Senior Reviewer and as outlined at section 473JA, will be a team of reviewers (IAA reviewers) who are to exercise the powers and perform the review function of the IAA as provided for at section 473DB.

Section 473JE further outlines that both the Senior Reviewer and the IAA reviewers are to be persons engaged as public servants under the Public Service Act. As public servants therefore, the Government considers that the selection and engagement of the Senior Reviewer and IAA reviewers will be based on merit and take place in accordance with broader Australian Public Service (APS) requirements. Being engaged as public servants will further allow the Senior Reviewer and IAA reviewers to exercise their powers of review in an impartial and independent manner, while working within the IAA's limited review function as provided for in the fast track assessment framework.

On that basis, the Government is confident that the IAA will act and will be seen to act in an independent and impartial manner appropriate to a merits review body.

Retrospective application
Schedule 6

The committee therefore seeks a detailed justification from the Minister for the retrospective application of the amendments in Schedule 6.

The reason for giving these measures retrospective application is to clarify the government's existing position and the intention of the legislation, which is that children of UMAs, born in Australia, are already included within the existing definition of UMA in the Migration Act.

Although the amendments operate retrospectively, they do so to explicitly capture those persons the legislation is already intended to capture.

Upon commencement of the amendments, it will be clear that children born in Australia or in a Regional Processing Country (RPC) to at least one UMA parent are UMAs and have always been UMAs. It is also necessary to ensure that all UMAs, regardless of the date of their arrival, have a migration status consistent with their children, as far as possible. This will mean that, if a UMA is to be removed from Australia, the UMA's removal will not be frustrated because a non-UMA child family member makes a valid application for a visa.

Delivering consistency of migration status between a parent and a new born child is a long standing approach taken in many circumstances within the Migration legislation. Any prior visa application made by such a person is taken to have been made invalidly, where the Minister did not expressly allow it. Ensuring that such applications will be taken to have been made invalidly upon the commencement of the amendments will also remove the incentive for applications to be lodged on behalf of the Australian-born children of UMAs prior to the commencement of the amendments.

If children of UMAs are able to make a valid application for a permanent protection visa, it renders ineffective the application bars in the Act, central to achieving a variety of desired policy outcomes including regional processing. This will likely lead to a difference in treatment within the family unit if the application bar, preventing the relevant UMA parents from applying for a permanent protection visa, is not lifted. Alternatively, if the application bar is lifted to allow all other members within that family unit to apply for a permanent protection visa, the government's policy positions on UMAs would be contradicted to the detriment of current, successful, anti-people smuggling strategies.

Similarly, the retrospective application of the measures also clarifies that children of UMAs arriving on or after 13 August 2012 are subject to transfer to a RPC. This means the Government will not have to consider the risk of separating a newborn baby from their UMA parents who are subject to transfer, or alternatively the consequences of keeping the family unit together in Australia contrary to the government's policy position that such UMAs will not be processed or resettled in Australia. The deterrent effect of that policy would be reduced if UMAs who have children in Australia were not able to be transferred for offshore processing.

The retrospective effect of the amendments will not however effect applications in respect of which the Minister has previously intervened to allow a valid application to be made. Accordingly, on-hand applications that the Minister has already allowed to proceed can continue to be assessed.

Further, the committee seeks the Minister's advice on the extent of any adverse impact on children affected by these amendments being given retrospective effect and whether the amendments may affect any litigation or tribunal matters concerning the inclusion of children born to an unauthorised maritime arrival parent within the definition of 'unauthorised maritime arrival'.

If a protection visa application lodged by a child affected by the proposed amendments was finally determined prior to the commencement of this Bill, it would, like all other *finally determined* applications, be unaffected by this Bill. This is because the amendments will not apply to applications that have been finally determined.

If the child in the case currently before the Federal Court of Australia and known as Plaintiff B9/2014 has not lodged a valid visa application or if any such application has not been finally determined by the time these measures commence, the measures will apply to the child, such that the child will be taken to have always been a UMA.

A significant consequence of having the status of UMA is being subject to offshore processing and resettlement. The amendments also ensure that a number of children retrospectively made UMAs by this Bill (all those born to parents who arrived before 13 August 2012), are not subject to offshore processing, despite the Bill confirming their status as UMA. Ensuring children of a UMA have the status of UMA ensures, as far as is possible, that their status is consistent with that of their parents, so if it is necessary to remove their parents, an inconsistent status cannot be used to frustrate this removal.

Another consequence of being made a UMA is that the Minister has made directions under section 499 of the Act, mandating the order of priority for processing visa applications. UMAs are currently last in the order of priority. However, the Government takes the view, recently confirmed by the Federal Circuit Court in *Plaintiff B9/2014*, that these children and already UMAs are therefore already subject to that direction. The relevant directions are Direction No. 62 – Order for considering and disposing of Family Stream visa applications; and Direction No 57 – Order of consideration of Protection visas. Accordingly, no adverse impact of this type occurs as a result of the retrospective application of these amendments.