

Migration Amendment Bill 2013 **[Provisions] (Cth)**

Submission to Senate Legal and Constitutional Affairs Committee Inquiry
into the *Migration Amendment Bill 2013* [Provisions] (Cth)

16 January 2013

CONTENTS

Introduction.....	3
Who we are	3
Our submissions.....	3
Intersection with other amendments	7

INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee in its inquiry into the *Migration Amendment Bill 2013 [Provisions]* (Cth) ('the Bill').

WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.¹

OUR SUBMISSIONS

We are concerned as the amendments proposed within the *Migration Amendment Bill 2013* (Cth) ('the Bill') appear to not value procedural fairness, the importance of review, and transparency in decision making.

SCHEDULE 1 – WHEN DECISIONS ARE MADE AND FINALLY DETERMINED

1. We raise concern particularly regarding amendments to s67 and s138, which ensures that 'the Minister has no power to vary or revoke the decision after the day and time the record (regarding refusal/grant of visa) is made (cl 4 and 9).
2. This may remove any discretionary power following the making of such a decision, even if other information were to become apparent.

SCHEDULE 2 - BAR ON FURTHER APPLICATIONS FOR PROTECTION VISAS

3. We raise concern at the barring of further applications for protection visas

after there has been a refusal or cancellation.

4. Such amendments reject the importance of due process and procedural fairness, especially if the refusal or cancellation of the visa is inappropriate in the circumstances.
5. In particular, we raise concern at the removal of the ability for non-citizens from applying for a protection visa (s48A(1C)) despite:
 - a. Otherwise being eligible for a protection visa;
 - b. Satisfying previous eligibility criteria;
 - c. Criteria which the non-citizen claimed to satisfy in an earlier application;
 - d. The grounds on which a protection visa had previously been granted, which was subsequently cancelled.

SCHEDULE 3 - ASIO ASSESSMENTS

6. We remain opposed to amendments regarding security assessments in Schedule 3 of the Bill on the grounds that all individuals attempting to gain asylum in Australia should have adequate access to appeal and review of decisions made.

Characterisation

7. The amendments in Schedule 3 essentially characterise persons that are assessed by ASIO to be a directly or indirect risk to security, as similar in category to persons to whom Articles 1F, 32 or 33(2) of the Refugee Convention apply.
8. These articles refer to:
 - a. **Persons that have committed war crimes or crimes against humanity** as defined in the international instruments drawn up to make provision in respect of such crimes; (Article 1F);
 - b. Eligible grounds for expulsion (Article 32); and
 - c. Non-refoulement provisions (Article 33).
9. Article 32 of the *Convention relating to the Status of Refugees* is pertinent to consider in this submission. Article 32 provides that:

1. The Contracting States shall not expel a refugee lawfully in their

territory save on grounds of national security or public order.

2. The **expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.**

Except where compelling reasons of national security otherwise require, **the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented** for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

The amendments appear to be undermining due process, including providing persons with the opportunity to submit evidence to clear their name and to appeal.

10. Notably, Article 33 provides that:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are **reasonable grounds** for regarding as a danger to the security of the country in which he is, or who, **having been convicted by a final judgement of a particularly serious crime**, constitutes a danger to the community of that country.

The importance of a final judgment of a particularly serious crime in the application of this provision must be noted. An assessment by a national security agency is not equivalent to the final judgement of an independent court.

Removing the right of appeal

11. The insertion of Paragraph 411(1)(c) as per clause 4 of Schedule 3, effectively removes the right of appeal on the merits of an ASIO assessment to the Refugee Review Tribunal.
12. The amendments to s500(4), as per clause 6 of Schedule 3, effectively removes the right of appeal of an ASIO assessment to the Administrative

Appeals Tribunal.

13. The amendments are also almost retrospective in application as they apply to persons who have applied for a protection visa:
- a. Before the commencement of these amendments (if not yet finally determined at the time of commencement);
 - b. That has been cancelled on or after the commencement of the amendment, *regardless of whether the visa was granted before, or or after the commencement of this item.*
14. The amendments will thus proscribe a situation in which individuals who are assessed by ASIO as being a 'direct' or 'indirect' risk to security will be effectively eliminated from being able to appeal such a finding.
15. We raise concern, as particularly combined with *Migration Amendment (Regaining Control of Australia's Protection Obligations) Bill*, the amendments constrict the criteria for a protection visa of persons seeking asylum, providing further hoops for individuals to step through, without effective review.

Individual consideration

16. We note that Mr Morrison stated in his second reading speech, introducing the Bill that:
- 'Public interest criterion 4002 states that the applicant is not to be assessed by the Australian Security Intelligence Organisation, ASIO, to be directly or indirectly a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act* 1979, known as the ASIO Act. In the absence of PIC 4002, the protection visa assessment process for persons with an adverse security assessment is **currently problematic as each case requires individual consideration** as to whether the person does or does not pass the character test in section 501 of the act.

The bill will amend section 36 of the Migration Act to insert a specific criterion for a protection visa that the applicant is not assessed by ASIO to be directly or indirectly a risk to security, within the meaning of section 4 of the ASIO Act. The new criterion in section 36 reflects the wording of PIC 4002.'

17. We also raise concern at the statement that '[it] is currently problematic as each case requires individual consideration'. This appears to imply that it is problematic (for economic, administrative, procedural or other reasons) for an individual to have access to effective review of decisions made against them that will inalterably, affect their life.

18. The rule of law is applicable to all persons in Australia, regardless of their citizenship status. To deem an individual unworthy of access to justice as a result of their maritime means of arrival, or their assessment by a government agency as a risk, does not accord with standards of natural justice.
19. Persons seeking asylum in Australia are not simple procedural problems that have failed to meet key performance indicators or conform with mid year fiscal outlook balance sheets. Persons seeking asylum in Australia are human beings that retain all of the inalienable rights conveyed to an individual, with the only qualification being that they are human.
20. While we appreciate that the procedural mechanisms in place require strong rules in order to operate, a crucial factor in their continuity is the availability of checks and balances to ensure that the legislature or executive does not engage in *ultra vires* acts.
21. If an issue is procedurally uncomfortable, it is more likely that it is an area that requires greater scrutiny.
22. As the case of *Plaintiff M76/2013 v Minister For Immigration, Multicultural Affairs and Citizenship & Ors* [2013] HCA 53 demonstrated, errors in decision making can be made by officers of the Commonwealth. In *Plaintiff M76*, 'the error of law was that an officer of the Commonwealth, in deciding not to refer the plaintiff's case to the Minister, acted upon an incorrect view of the law by considering an invalid regulation to be relevant to the decision.'
23. We note that a realistic outcome from these amendments will be:
 - a. Speedier deportation of individuals without appropriate review;
 - b. A removal of checks and balances upon ASIO's decision making power;
 - c. Miscarriages of justice for individuals and their families.
24. We note that the combined effect of these amendments with the *Migration Amendment (Regaining Control of Australia's Protection Obligations) Bill 2013* will serve to deprive the families of individuals who have received negative ASIO assessments from being able to seek protection in Australia.

INTERSECTION WITH OTHER AMENDMENTS

We note that while the Migration Amendment Bill has been introduced, so has the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (Cth), which will effectively remove the criteria regarding 'significant harm' from Australia's protection visa framework.

We note that the Committee is also conducting an inquiry into this Bill. We will be providing further comment to the Committee upon this issue.

REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>