Migration Amendment Bill 2013

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 12 December 2013

Summary of committee concerns

1.246 The committee considers that the measures proposed by this bill potentially involve serious limitations on human rights. The committee seeks further information to determine whether the bill is compatible with human rights.

Overview

1.247 This bill proposes to make various amendments to the *Migration Act 1958* (Migration Act), including:

- specifying that a review decision by the Refugee Review Tribunal (RRT) or the Migration Review Tribunal (MRT) is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant (Schedule 1);
- specifying the operation of the statutory bar on making a further protection visa application (Schedule 2); and
- making it a criterion for the grant of a protection visa that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (Schedule 3).

1.248 The amendments seek to address various recent Federal and High Court decisions which are considered to 'significantly affect the operations of the Department of Immigration and Border Protection'.[1]

Compatibility with human rights

Statement of compatibility

1.249 The bill is accompanied by a statement of compatibility that contains a separate human rights assessment for each schedule to the bill.

1.250 For the amendments contained in Schedule 1, the statement states that the proposed changes do not raise any human rights issues,[2] including in relation to the right to a fair hearing.[3]

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1 Department of Immigration and Border Protection, *Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry on the Migration Amendment Bill 2013 [Provisions]*, 13 January 2014, p 3.

2 See statement of compatibility, pp 2-4.

3 Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

1.251 For the amendments contained in Schedule 2, the statement concludes that the proposed changes are compatible with Australia's non-refoulement obligations under the ICCPR and the Convention against Torture (CAT) 'as the amendments do not seek to remove the opportunity of persons to make claims for protection as against these rights or to have those claims assessed'.[4]

1.252 For the amendments contained in Schedule 3, the statement[5] argues that the proposed changes are consistent with a range of rights, including the right not to be arbitrarily detained;[6] non-refoulement obligations;[7] the right to a fair hearing;[8] the right not to be expelled without due process;[9] and the right to humane treatment in detention.[10]

1.253 The committee's comments on each schedule of the bill and the adequacy of the explanations provided in the statement of compatibility are set out below.

Committee view on compatibility

Schedule 1– When decisions are made and finally determined

1.254 The Migration Act provides a scheme for the review of certain protection visa decisions by the RRT.[11] The RRT must prepare a written statement of reasons for its decision, and that decision on review is taken to have been made on the date of the written statement.[12]

1.255 The RRT is required to notify the applicant and the Secretary of the Department of Immigration and Border Protection (Immigration Department) of its decision on review, by giving the applicant and the Secretary a copy of the written statement within 14 days after the day on which the decision is deemed to have been made.[13] However, a failure to comply with the notification requirements does not affect the validity of the decision.[14]

1.256 A visa application under the Migration Act is 'finally determined' when a decision is no longer subject to any form of merits review (that is, by either the RRT

4 See statement of compatibility, pp 5-7.

5 See statement of compatibility, pp 8-12.

6 Article 9 of the ICCPR.

7 Articles 6 and 7 of the ICCPR; and article 3 of the CAT.

8 Article 14(1) of the ICCPR.

9 Article 13 of the ICCPR.

10 Article 10 of the ICCPR.

11 *Migration Act 1958*, Part 7.

12 *Migration Act 1958*, section 430.

13 *Migration Act 1958*, sections 430A(1) and 430A(2).

14 *Migration Act 1958*, section 430A(3).

or the MRT).[15] The concept of a visa application being 'finally determined' is a relevant trigger for the operation of various other provisions under the Migration Act, including being one of the preconditions for exercising the power to remove an 'unlawful non-citizen' from Australia.[16]

1.257 A 2012 decision of the full Federal Court of Australia found that the RRT's decision-making power in respect of a review is not exercised or 'spent' until its review decision is notified 'irrevocably and externally'.[17] In 2013, the full Federal Court held that an application is 'finally determined' only when the review decision is notified to both the review applicant and the Secretary of the Immigration Department.[18] Until then, the decision on the relevant application remains subject to review and is not 'finally determined' (that is, no longer subject to merits review).

1.258 The statement of compatibility explains that, prior to these judicial decisions, the Immigration Department had considered an application to be 'finally determined' at the point when a review decision had been made.[19] To address 'the administrative uncertainty and put the original policy intention beyond doubt',[20] the amendments in this bill propose to specify that:

- the MRT or the RRT's powers of review are 'spent' when a decision on review has been made, and that once a decision is made, it cannot be re-opened or varied (*functus officio*); and
- a visa application will be considered to be finally determined (that is, no longer subject to merits review) when the MRT or the RRT has made its decision (other than a decision to remit the case back to the Department for reconsideration).

1.259 The bill also proposes to specify that decisions by the Minister or his delegate to refuse, cancel or revoke a visa are taken to be made on the day and at the time when a record of the decision is made. As a result of these changes, finalisation will not be dependent on when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder.

Right to a fair hearing

1.260 The statement of compatibility notes that article 14(1) of the ICCPR provides the right to a fair hearing by a competent, independent and impartial tribunal established by law. The statement states that:

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15 *Migration Act 1958*, section 5(9).

16 *Migration Act 1958*, section 198.

17 *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131.

18 *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104.

19 Statement of compatibility, p 2.

20 Statement of compatibility, p 3.

> The amendments do not seek to remove, disturb or otherwise diminish a person's ability to seek merits review [by the RRT or MRT] in circumstances where the decision is merits reviewable. Rather, the amendments seek to restore administrative certainty over when the MRT or the RRT's decision making powers for the purpose of conducting review of a decision are exercised, as well as certainty over when an application is considered to be finally determined for the purpose of the Migration Act. As such, the amendments do not give rise to human rights implications.[21]

1.261 The committee considers that the proposed changes potentially give rise to access to justice issues, which is an aspect of the right to a fair hearing in article 14(1) of the ICCPR. For example, the committee notes that if a visa application can be 'finally determined' without the applicant being notified of it, the person might be removed from Australia without having an opportunity to commence judicial review proceedings in respect of the tribunal's decision.

1.262 The statement of compatibility does not explain the range of consequences that may arise from the proposed redefinition of the concept of 'finally determined' in the Migration Act or address whether the changes may restrict a person's right to access to justice. Further, the statement of compatibility makes no mention of the implications of extending these changes to decisions by the Minister or his delegate as well. Without this information, the committee is unable to assess whether the changes are compatible with human rights.

1.263 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the following issues:

- **whether these changes could adversely affect the ability of a person to seek judicial review of a decision by the RRT or the MRT;**
- **whether there are any consequences for failing to comply with the notification requirements in the Migration Act, including whether any time bar for exercising review rights may be lifted as a result; and**
- **the implications of deeming that a decision by the Minister or his delegate to refuse, cancel or revoke a visa is made on the day and time when a record of the decision is made (irrespective of whether that decision is notified to the person), and whether these changes may adversely affect the ability of a person to challenge the decision.**

Schedule 2 – bar on further applications for protection visa

1.264 The Migration Act prescribes the key criteria upon satisfaction of which an applicant may be eligible for the grant of a protection visa, namely, an applicant must be:

21 Statement of compatibility, p 3.

- a person who engages Australia's protection obligations under the 1951 Refugee Convention as amended by the 1967 Refugee Protocol (Refugee Convention); or
- a person who engages Australia's protection obligations on the basis of complementary protection grounds (this criterion was introduced on 24 March 2012);[22] or
- a person who is a member of the family unit of a person who meets either of the above criteria and who holds a protection visa.[23]

1.265 A person in the migration zone who has previously been refused a protection visa, or who has had their protection visa cancelled, is prohibited from making a further protection visa application,[24] unless the Minister chooses to exercise his personal, non-delegable and non-compellable power to lift the legislative bar in the public interest.[25]

1.266 In 2012, the Full Federal Court of Australia held that there were effectively different sets of criteria by which a protection visa can be applied for and granted. Accordingly, it concluded that the legislative bar on further applications did not prevent a person making a further protection visa application based on a criterion which did not form the basis of a previous unsuccessful protection visa application.[26] Therefore, if a person had applied for a protection visa prior to the insertion of the complementary protection criterion (that is, relying on claims under the Refugee Convention only) and that application was refused, they would not be prohibited from making a further protection visa application based on claims related to complementary protection.

1.267 The explanatory statement states that:

> This outcome is contrary to the policy intention of [the legislative bar on further applications], which is that a [person] should not be able to make a further protection visa application in the migration zone after a previous protection visa application has been refused or a protection visa held by the person has been cancelled, irrespective of the grounds on which their

22 The complementary protection provisions in the *Migration Act 1958* were introduced by the *Migration Amendment (Complementary Protection) Act 2011* to provide a statutory basis for implementing Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The term 'complementary protection' refers to protection against refoulement (removal), which is additional to that provided by the 1951 Refugee Convention as amended by the 1967 Protocol (Refugee Convention).

23 *Migration Act 1958*, section 36(2).

24 *Migration Act 1958*, section 48A.

25 *Migration Act 1958*, section 48B.

26 *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 (3 July 2013).

> earlier protection visa application was refused or the grounds on which the cancelled visa was originally granted, and whether or not the grounds or criteria existed earlier.[27]

1.268 The statement of compatibility further explains that:

> The Full Federal Court decision in *SZGIZ* has led to an increase in the number of repeat applications from failed protection visa applicants who were refused the grant of a protection visa on Refugees Convention ground prior to the introduction of the complementary protection provisions. Some applicants have made further applications for protection visa despite not having any legitimate complementary protection claims and despite the lack of any real prospects of engaging Australia's protection obligations.[28]

1.269 To address these concerns, the bill proposes to amend the Migration Act to clarify that the legislative bar in section 48A of the Migration Act prevents a person who has been refused a protection visa (or has had a protection visa cancelled) from applying for a further protection visa while in the migration zone.

1.270 The amendments will affect persons who have made an application for and were refused a protection visa before the commencement of the complementary protection criterion on 24 March 2012.[29] Persons who make protection visa applications on or after 24 March 2012 are not affected by the amendments in relation to any complementary protection claims they may make, because if they are determined not to engage Australia's protection obligations under the Refugee Convention, their claims are automatically assessed under the complementary protection provisions of the Migration Act.[30]

Non-refoulement obligations

1.271 The statement of compatibility states that the proposed changes are consistent with Australia's non-refoulement obligations under the ICCPR and the Convention against Torture (CAT) because they 'do not substantively alter the rights and interests of [affected] persons'.[31] The statement bases this claim on the following reasons:[32]

- Consistent with the Immigration Department's practice prior to the introduction of [the complementary protection legislation], a person who is being removed from Australia will be assessed for any possible risks that

27 Explanatory statement, p 2.

28 Statement of compatibility, p 6.

29 Statement of compatibility, p 5.

30 Statement of compatibility, p 5.

31 Statement of compatibility, p 7.

32 Statement of compatibility, p 7.

might arise under the CAT and ICCPR as a consequence of their removal from Australia. Therefore, a failed protection visa applicant who may have claims going to complementary protection would not be denied the opportunity to have their claims assessed simply by virtue of these amendments.

- The Minister has a personal, non-compellable power under section 48B of the Migration Act to intervene to allow a person in the migration zone who has been refused a protection visa application to make a further protection visa application, in circumstances where it is in the public interest to do so. The Minister also has personal, non-compellable powers under other relevant provisions in the Migration Act to grant visas to a non-citizen in the public interest. In consideration of the public interest, the Minister may take into account Australia's protection obligations (under the Refugee Convention and complementary protection provisions in the Migration Act) as they relate to the individual in question.

1.272 The committee notes that this bill was introduced after the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, which seeks to repeal the existing complementary protection provisions in the Migration Act. Neither the statement of compatibility nor the explanatory memorandum makes any mention of this earlier bill or explains the possible interaction of both these measures.

1.273 The committee has commented extensively on the human rights implications of the measures contained in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. Those comments are relevant to these amendments, in particular, whether resorting to a purely administrative process to test a person's protection claims is compatible with Australia's non-refoulement obligations.

1.274 The committee intends to write to the Minister for Immigration and Border Protection to draw his attention to the committee's comments in relation to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, and to seek clarification on the following issues:

- **the number of people who are likely to be affected by the proposed bar on further protection visa applications;**
- **whether the individuals in this cohort have been assessed by the Immigration Department for any complementary protection claims;**
- **whether anyone in this cohort has received an alternative visa to remain in Australia as a result of the Minister exercising his discretionary powers under the Migration Act; and**
- **the interaction between these measures and those proposed by the Migration Amendment (Regaining Control Over Australia's Protection**

Obligations) Bill 2013, and whether these measures are a consequence of the proposed repeal of the complementary protection legislation.

Schedule 3 – security assessments

1.275 A 2012 decision by the High Court of Australia declared invalid the prescription, by regulation, of a stand-alone, non-discretionary criterion for the grant of a protection visa which required that an applicant must not have received an adverse ASIO security assessment.[33] This regulation[34] was found to be contrary to the decision-making scheme in the Migration Act for refusing or cancelling protection visas on national security grounds, including circumventing certain merits review procedures for such decisions.

1.276 As noted above, the Migration Act sets out the key criteria upon satisfaction of which an applicant may be eligible for the grant of a protection visa.[35] To address this decision, the bill proposes to amend the Migration Act to include an additional criterion for a protection visa, namely, that the applicant is not assessed by ASIO to be directly or indirectly a risk to security.[36] The amendments mean that a person will be refused a protection visa if they receive an adverse security assessment by ASIO.

1.277 The bill also proposes to amend the Migration Act to provide that the RRT, the MRT and the Administrative Appeals Tribunal (AAT) will not have the power to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

Prohibition against arbitrary detention

1.278 Article 9 of the ICCPR provides that no one may be subjected to arbitrary arrest or detention; the guarantee applies to all deprivations of liberty and is not limited to criminal cases. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability. In order for detention not to be arbitrary, it must be:

- necessary in the individual case (rather than the result of a mandatory, blanket policy);
- subject to initial and periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified;
- proportionate to the reason for the restriction; and

33 *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46.

34 Public Interest Criterion 4002 of Part 1 of Schedule 4 to the *Migration Regulations 1994*.

35 *Migration Act 1958*, section 36(2).

36 Within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.

- for the shortest time possible.[37]

1.279 These requirements were recently reaffirmed in a decision by the UN Human Rights Committee (HRC) specifically relating to refugees who were being held in detention in Australia because of adverse ASIO security assessments. The HRC stated:

> The Committee recalls that the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[38] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.[39]

1.280 In a submission to the Senate Legal and Constitutional Affairs Legislation Committee, which is conducting an inquiry into the bill, the Law Council of Australia expressed its concern that:

> [b]y seeking to circumvent [the High Court] decision, the amendments proposed in the bill could place men, women and children who have been found to be owed protection by Australia at risk of prolonged or indefinite immigration detention as a result of the issue of an adverse assessment by ASIO. If enacted, the Bill would leave these refugees unable to obtain a

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37 Where the detention involves children, article 37(b) of the CRC requires that children are detained only as a measure of last resort, and for the shortest appropriate period of time. Article 3(1) of the CRC also requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'

38 See ccommunications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para 5.1; and No. 305/1988, *van Alphen v. Netherlands*, Views adopted on 23 July 1990, para 5.8.

39 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013), para 9.3. See also *M.M.M. et al. v Australia*, CCPR/C/108/D/2136/2012 (2013).

> protection visa in Australia and unable to return to their country of origin due to a genuine fear of persecution. Under current policy settings, such refugees are also ineligible for release into community detention arrangements or other forms of conditional release.[40]

1.281 The statement of compatibility acknowledges that a consequence of the amendments may be the indefinite detention of a protection visa applicant found to be a refugee but deemed a security risk by ASIO.[41] However, it argues that:

> It has been the long standing, clear and well publicised position of the Australian Government that persons who pose an unacceptable risk to the Australian community will remain in an immigration detention facility. …
>
> Detaining a person who unlawfully enters Australia or who becomes unlawful once in Australia is possible while that person's status is being resolved if there are particular reasons specific to the individual, such as a likelihood of absconding, a danger of crimes against others or a risk of acts against national security. In these circumstances, taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security … are considered reasonable, necessary and proportionate to the security risk that they are found to pose.[42]

1.282 The statement claims that such detention is consistent with article 9 of the ICCPR for the following reasons:[43]

- Where a person is detained as a result of their protection visa application being refused, or their protection visa being cancelled, because they have received an adverse security assessment from ASIO, their detention would not lack predictability.
- In some situations, persons who are not able to be removed can be managed in less intrusive forms of immigration detention; however, there may be a cohort of persons for whom, given health, security or character concerns, the less intrusive measures available under the Migration Act may not be appropriate.
- Arrangements are in place for independent review of the initial issue of and continuing need for an adverse security assessment. To the extent that the adverse security assessment is the basis for visa refusal and consequent detention, review of that basis may be available in individual cases.

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40 Law Council of Australia, *Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry on the Migration Amendment Bill 2013 [Provisions]*, 9 January 2014, p 1.

41 Statement of compatibility, p 9.

42 Statement of compatibility, pp 9-10.

43 See statement of compatibility, pp 9-10.

1.283 The committee notes that the proposed amendments will essentially entrench the existing approach for dealing with people to whom Australia owes protection obligations but who are the subjects of adverse security assessments by ASIO. In this regard, the committee notes the recent HRC decision concerning the continued detention of 46 refugees subject to adverse ASIO security assessments. The HRC found that their indefinite detention on security grounds was arbitrary and amounted to cruel, inhuman or degrading treatment, contrary to articles 9(1), 9(4) and 7 of the ICCPR. The HRC considered the detention of the refugees to be in violation of article 9 of the ICCPR because the government:[44]

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.

1.284 The committee notes that the statement of compatibility makes no express reference to this HRC decision, which is surprising given its direct relevance to the proposals contained in this bill. While the committee understands that the HRC's views are not binding on Australia as a matter of international law, they are nonetheless highly authoritative interpretations of binding obligations and should be given considerable weight by the government in its interpretation of Australia's obligations under the ICCPR. The committee expects the government to provide a reasoned and compelling justification where it proposes not to accept an interpretation of the ICCPR adopted by the HRC, particularly where the HRC has reached a view in a case involving Australia or made recommendations specific to Australia.

1.285 The committee considers that protecting the public from security risks is a legitimate objective for limiting a person's right to liberty. However, it is also necessary to show that the measures authorising a person's detention are reasonable, necessary and proportionate to that objective.

1.286 As the committee has previously noted, the provision of substantive review rights is an important safeguard that goes towards ensuring the necessity and proportionality of detaining the person. The committee is therefore concerned that the amendments will specifically exclude RRT, MRT or AAT review of a decision to refuse or cancel a protection visa on the grounds of an adverse ASIO security

44 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

assessment. Further, the committee notes that the AAT currently has the power to review adverse security assessments for Australian citizens and permanent residents only.

1.287 The committee notes that judicial review remains available for such decisions but considers that such review will only be adequate in accordance with the requirements of article 9 of the ICCPR if it includes the power to release a person from detention if the detention cannot be objectively justified. The statement of compatibility suggests that 'arrangements are in place for independent review of the initial issue of and continuing need for an adverse security assessment', but does not provide further elaboration.

1.288 It is also not apparent to the committee whether and what steps have been taken to consider and apply alternatives to continuing detention while durable solutions are explored for refugees with adverse ASIO security assessments. The statement of compatibility makes the assertion that 'in some situations, persons who are not able to be removed can be managed in less intrusive forms of immigration detention' but provides no information as to what this might entail.

1.289 The committee considers that without these key features and information, the amendments proposed in this bill have the potential to breach individuals' rights under article 9 of the ICCPR in similar ways to those identified by the HRC in its recent decision.

1.290 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **Whether the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:**
  - **Meet the 'quality of law' test;**
  - **Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;**
  - **Result in binding outcomes, including the power to order release if the detention is not justified;**
  - **Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and**
  - **Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.**
- **Whether the bar on refugees accessing merits review by the AAT for their adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR.**

- **Whether refugees with adverse security assessments receive an individualised assessment as to whether less restrictive alternatives to closed detention are available and appropriate for their specific circumstances (including, for example, community detention or conditional release with requirements such as to reside at a specified location, curfews, travel restrictions, regular reporting or possibly even electronic monitoring),[45] and, if not, clarification as to how the absence of such individualised assessment and/or options may be considered to be a proportionate response.**

Prohibition against torture, cruel, inhuman or degrading treatment

1.291 Article 7 of the ICCPR provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. As mentioned above, in addition to violations of article 9 of the ICCPR, the HRC also found that the indefinite detention of refugees with adverse security assessments was contrary to article 7 of the ICCPR. The HRC considered that:

> The force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of, can have on the mental health of detainees.
>
> The combination of the arbitrary character of the [detention], its protracted and/or indefinite duration, the refusal to provide information and procedural rights … and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.[46]

1.292 The HRC noted that Australia was under an obligation to take steps to prevent similar violations in the future and recommended that the government should review the migration legislation to ensure its conformity with the requirements of articles 7 and 9 of the ICCPR.[47]

1.293 The statement of compatibility does not address the issue of whether the proposed amendments are consistent with article 7 of the ICCPR.

1.294 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to:

- **whether the amendments in Schedule 3 to the bill are compatible with the prohibition against torture, cruel, inhuman or degrading treatment,**

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45 See, for example, the Australian Human Rights Commission, *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments (* 2012) AusHRC 56, available at: http://www.humanrights.gov.au/publications/aushrc-56-sri-lankan-refugees-v-commonwealth-australia-department-immigration.

46 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

47 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

given that they may result in the indefinite detention of a refugee who is deemed a security risk by ASIO; and

- **whether and what steps have been put in place to ensure that the circumstances that were the subject of consideration by the HRC will not arise again.**