

Migration Legislation Amendment Bill (No.1) 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 27 March 2014

Purpose

1.118 The Migration Legislation Amendment Bill (No.1) 2014 (the bill) consists of six schedules of amendments to the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007*. Key changes include:

- amending the existing limitations on applying for a further visa under sections 48, 48A and 501E of the Migration Act to include situations where the first visa applications was made on behalf of a non-citizen, even if the non-citizen did not know of, or did not understand, the nature of the application due to a mental impairment or because they were a minor (Schedule 1);
- providing that a bridging visa application is not an impediment to removal under subsection 198(5) (Schedule 2);
- extending debt recovery provisions for detention costs to all convicted people smugglers and illegal foreign fishers (Schedule 3);
- amending the role of authorised recipients for visa applicants; and the Migration Review Tribunal and Refugee Review Tribunal's obligation to give documents to authorised recipients (Schedule 4);
- providing access to, and use of, material and information obtained under a search warrant in migration and citizenship decisions (Schedule 5); and
- amending the procedural fairness provisions that apply to visa applicants (Schedule 6).¹

Committee view on compatibility

Non-refoulement obligations

1.119 Australia has non-refoulement obligations under the Refugee Convention and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).² This means that Australia must not return an individual to a country where there is a real risk that they would face torture or other serious forms

1 Explanatory memorandum (EM), p. 2.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*.

of harm, such as arbitrary deprivation of life; the death penalty; or cruel, inhuman or degrading treatment or punishment.³

1.120 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.121 Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.⁴

1.122 Australia principally seeks to effect its non-refoulement obligations through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which include being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

Risk of refoulement – extension of statutory bar on further visa applications

1.123 Under the Migration Act, individuals in the migration zone at the time of making a protection visa application are allowed to make only one such application, and are barred from making a further application after being refused a visa (section 48) or protection visa (section 48A), or having a visa cancelled (section 501E). The EM for the bill notes that this bar is intended to prevent the making of repeat unmeritorious claims.⁵

1.124 Schedule 1 of the bill proposes to extend the bar on making a further visa application to an individual who has previously been refused a visa in relation to an application made on their behalf, even where they did not know of or did not understand the nature of the application due to mental impairment or because they were a minor.⁶

1.125 The statement of compatibility for the bill explains that the objective of the measure is to respond to a recent Full Federal Court case in which it was argued that section 48 would not operate to limit further applications by a minor, if the minor did not know about or understand the nature of an unsuccessful visa application made

3 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations in addition to those under the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2.

5 EM, p. 6.

6 EM, p. 8.

on their behalf by a parent.⁷ The statement of compatibility notes that such an outcome:⁸

...could create a potential loophole that undermines the integrity of Australia's visa program by undermining the objective of section 48 of the Act, which is to prevent non-citizens who do not otherwise have a right to remain in Australia from delaying their departure from Australia by making repeat unmeritorious applications.⁹

1.126 The statement of compatibility also states that such an interpretation would create a significant administrative burden, as the department, in determining whether section 48 applies, would be required to establish whether a visa applicant knew and understood the nature of a previous application.¹⁰

1.127 The committee notes that the amendments would prevent a minor or person who did not know of or understand the nature of the application because of an intellectual impairment from making a further protection visa application despite having a valid independent protection claim (for example, that if returned to a country they would face a real risk of torture or other serious harm). This will be the case where:

- the person has previously been included in a family member's protection application and there has been no independent assessment of that person's protection claims;
- the person has no knowledge of the previous application made on their behalf;
- the person has not had the opportunity to be substantively involved in the preparation of the protection claim in accordance with the capacity to contribute to the making of that protection claim nor make representations on their own behalf; and
- potentially, the person did not consent to the previous application being made on their behalf and the person had the legal capacity to provide such consent.

1.128 Any such failure to consider the independent protection claims of an individual, leading to the return of a person to a country where they face torture or other serious harm, would amount to a breach of Australia's non-refoulement obligations.

7 EM, p. 8.

8 EM, pp 8-9.

9 EM, p. 9.

10 EM, p. 9.

1.129 On this question, the statement of compatibility for the bill points to 'adequate protections' to ensure the non-refoulement of minors and or person's with a disability with otherwise valid independent protection claims. It states:

...a non-citizen who is being removed from Australia will be assessed for any possible risks that might arise under the CAT and the ICCPR as a consequence of their removal from Australia...

Furthermore, the Minister has a personal, non-compellable power under section 48B of the Act to allow the minor or the mentally impaired non-citizen to make a further protection visa application in the public interest...[as well as] personal, non-compellable powers under other relevant provisions in the Act to grant a visa to the minor or mentally impaired non-citizen in the public interest. In consideration of the public interest, the Minister may take into account Australia's protection obligations...¹¹

1.130 The statement of compatibility concludes that the measure is an administrative measure that is not inconsistent with Australia's non-refoulement obligations.¹²

1.131 The committee acknowledges the objectives of efficient and expeditious administration of protection claims, and that the ICCPR and CAT do not require Australia to grant particular forms of visa or follow particular processes in relation to persons to whom non-refoulement obligations are owed.

1.132 However, the committee notes that the obligation of non-refoulement requires the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations (along with the general obligation to provide effective remedies for human rights breaches under article 2 of the ICCPR).¹³

1.133 Given this, the committee notes that extending the statutory bar on visa applications effectively removes existing procedural and substantive safeguards against the potential refoulement of children and persons with a disability with valid protection claims (amounting to a limitation on their right to an effective remedy). The committee is therefore concerned as to the adequacy of administrative assessment and the minister's non-compellable and non-reviewable powers, which will be relied upon to avoid the removal of any minor or person with a disability with

11 EM, pp. 14-15.

12 EM, p. 15.

13 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

valid protection claims (and to whom Australia therefore owes non-refoulement obligations).¹⁴

1.134 The committee considers that the remaining administrative and discretionary safeguards are less stringent than the statutory protection visa application and review processes. Therefore, the amendments could increase the risk of Australia breaching its non-refoulement obligations.

1.135 The committee has previously commented that administrative consideration of protection visa claims is insufficient to satisfy the standards of 'independent, effective and impartial' review required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT.¹⁵ In particular, rigorous independent scrutiny of decisions involving non-refoulement obligations is required because of the irreversible nature of the harm that might occur.

1.136 The committee is concerned that the bill further entrenches a preference for non-reviewable executive decision making at the expense of the important protection provided by a system of robust and independent merits review.

1.137 The committee therefore recommends that the bill be amended to provide for independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability.

Risk of refoulement – amendments to prevent repeat bridging visa applications

1.138 Schedule 2 of the bill proposes amendments to section 198 of the Migration Act, which sets out the circumstances in which an unlawful non-citizen maybe removed from Australia. The amendments would provide that a bridging visa application is not an impediment to removal under subsection 198(5) of the Migration Act,¹⁶ and are intended to prevent an individual from making repeat unmeritorious applications for bridging visas in order to delay their removal from Australia.

1.139 In order to ensure that the amendments do not result in the removal of individuals from Australia where a separate protection visa application is on foot, the amendments include a new subsection 198(5A), which provides that an officer must not remove an unlawful non-citizen if the non-citizen made a valid application for a protection visa and either:

- the grant of the visa has not been refused; or

14 EM, p. 15.

15 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament*, paras 1.89 – 1.99. See also *Fourth Report of the 44th Parliament*, paras 3.55-3.66 (both relating to the Migration Amendment (regaining Control Over Australia's Protection Obligations) Bill 2013).

16 EM, p. 16.

- the application has not been finally determined.¹⁷

1.140 The statement of compatibility states that the amendments:

...do not engage [Australia's non-refoulement obligations under] Article 3(1) of the CAT and Article 6, and 7 of the ICCPR. Individuals would not be subject to removal unless and until their claims for protection had been assessed according to law.¹⁸

1.141 However, the committee notes that proposed subsection 98(5A) would apply only to individuals who have an existing protection visa application on foot. It is unclear whether the amendment may lead to the refoulement of individuals with valid protection claims who, for example, have not or have been unable to initiate a protection claim due to other provisions of the Migration Act. The committee understands that the only mechanism for ensuring non-refoulement of such persons would be the administrative pre-removal clearances procedures of the department.

1.142 As above, the committee is concerned that such procedures may not be stringent enough to provide a thorough assessment of protection claims, and are not subject to 'independent, effective and impartial' review as required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT.

1.143 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with Australia's non-refoulement obligations under the ICCPR and CAT.

Obligation to consider the best interests of the child

1.144 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.¹⁹

1.145 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Extension of statutory bar on further visa applications

1.146 As noted above, Schedule 1 to the bill would prevent a child from making a further protection visa application even in circumstances 'where allowing the visa

17 Migration Legislation Amendment Bill (No.1) 2014, Item 2, Schedule 2.

18 EM, p. 18.

19 Article 3(1).

application would likely be in...[their] best interests' (such as where they had a valid independent protection claim).²⁰

1.147 While the statement of compatibility acknowledges that the measure therefore limits the rights of children to have their best interests be a primary consideration, it concludes:

...the preservation of the overall integrity of Australia's visa systems in accordance with Parliamentary intent (as reflected in the legislative framework) and public expectation should take precedence.²¹

1.148 Further, the statement of compatibility characterises the measure as promoting the rights of the child, specifically the right of children not to be separated from their parents against their will other than in exceptional circumstances.²² It states:

...the amendment will help to avoid situations where the parents are prevented from making further applications and may be subject to possible removal from Australia following a visa refusal, but the child is not liable for removal because they are able to make further applications and be granted bridging visas in association with those further visa applications. To the extent that the amendment ensures that members of the same family unit who applied for visas together will receive consistent immigration outcomes and be bound by the same consequences, the amendment will assist to preserve family unity and prevent the separation of the child from their parents.²³

1.149 In the committee's view, the assessment provided does not contain sufficient analysis to support the committee's assessment of the compatibility of the measure with human rights, particularly in relation to how the maintenance of the integrity of the migration system in accordance with 'public expectation' may be regarded as a legitimate objective. The committee considers that seeking to justify a limitation on human rights by reference to general matters such as national security, integrity of the system or public expectation is insufficient. The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide a detailed and context-specific assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.150 Further, the committee considers that the characterisation of the proposed measure as promoting the rights of the child not to be separated from their family and therefore offsetting any potential violation of the child's other rights, is not an appropriate assessment of the limitation on human rights proposed by the measure.

20 EM, p. 12.

21 EM, p. 12.

22 Article 9, CRC.

23 EM, p. 13.

For example, the statement does not adequately reflect that the separation of the child from its family in certain cases could be clearly outweighed by exceptional circumstances and the child's best interests (such as where the child had valid protection claims). The committee considers that seeking to justify a limitation on human rights by reference to more remote and possibly hypothetical impacts on other human rights, fails to effectively analyse the human rights implications as required by human rights law.

1.151 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right of the child to be heard in judicial and administrative proceedings

1.152 Article 12 of the CRC provides that States parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.153 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Failure to question the validity of prior visa application

1.154 The committee notes that the effect of the proposed amendments in Schedule 1 would be to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represents a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings.

1.155 The committee's usual expectation where a limitation on these rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.156 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the right of

the child to be heard in judicial and administrative proceedings and, particularly, whether the measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Right of persons with disabilities to recognised as persons before the law and to the equal enjoyment of legal capacity

1.157 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires States parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Requirement to support persons with a mental impairment to make an informed decision about lodging a visa application

1.158 The bill provides that the restrictions on submission of further applications will also apply in cases where a person did not know about or did not understand the nature of the application 'due to any mental impairment'. The committee notes that neither the *Migration Act 1958* nor the bill contains a definition or description of the term 'mental impairment'. It is not clear what impairments this term is meant to cover, or which have arisen in practice in the context of visa applications. The committee notes that the CRPD includes both 'mental' and 'intellectual' impairment in its description of disability.

1.159 The committee notes that persons with intellectual and mental impairment may be particularly at risk as asylum-seekers. While the committee emphasises that under the CRPD the legal capacity of persons with disabilities is a starting point of any discussion, the committee recognises that in some cases persons with intellectual and mental impairment may need support or assistance in exercising that capacity. Making decisions about the lodging of a visa application, given the potential consequences and technical nature of such an action, is likely to be one such circumstance.

1.160 The statement of compatibility provides no information about the number of cases in which persons with intellectual or mental impairment may have visa applications lodged on their behalf, the procedures for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making an decision in relation to a visa application, and the nature and extent of any support necessary or provided to such persons. Nor is any information provided about whether the government considers that there are cases in which a person with an intellectual or mental impairment may not, even with support, be in a position to make an informed decision about the lodging of a visa application and, if so, what approach is adopted in such cases and whether it is compatible with the CRPD.

1.161 The committee considers that it is likely to be incompatible with the provisions of the CRPD, in particular article 12, if a person with an intellectual or mental impairment were not provided with any support required to make an informed decision about lodging a visa application and was then barred from making a subsequent visa application because an application had been lodged 'on behalf' of the person but without the participation of the person in that decision-making process. The Committee on the Rights of Persons with Disabilities has emphasised the responsibility of States parties to move away from substitute decision-making and replace it with 'supported decision-making, which respects the person's autonomy, will and preferences'.²⁴

1.162 In order for the committee to assess the compatibility of the measure with human rights, the committee requires further information including:

- whether the term 'mental impairment' includes both 'mental' and 'intellectual' impairment as covered by the CRPD;
- how many cases involve visa applications made on behalf of persons with intellectual or mental impairment; and
- what procedures are in place for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making an decision in relation to a visa application, and the nature and extent of any support necessary or provided to such persons.

1.163 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the requirement to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Right to equality and non-discrimination

1.164 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).²⁵

1.165 These are fundamental human rights that essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the

24 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014); Article 12: Equal recognition before the law (CRPD/C/GC/1, adopted 11 April 2014)* p. 6.

25 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.166 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.²⁶

1.167 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.168 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.169 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

Extension of statutory bar on further visa applications

1.170 As noted above, Schedule 1 to the bill would extend the bar on making a further visa application to an individual who has previously been refused a visa in relation to an application made on their behalf, even where they did not know of or did not understand the nature of the application due to mental impairment or because they were a minor.

1.171 The statement of compatibility states that the amendments are consistent with Australia's obligations to ensure equality before the law under the CRPD. It concludes:

...the amendment simply seeks to ensure that the limitation or prohibition on the making of further applications will apply objectively and consistently to all non-citizens who have been refused a visa while they are in the migration zone.

Therefore, amendment 6 [Schedule 1] is not discriminatory on the basis of a non-citizen's mental impairment. If there is indeed any perceived discrimination, it is not inconsistent with Article 5(1) of the CRPD.²⁷

1.172 However, in the committee's view, the extension of the statutory bar on further visa applications to persons with a mental impairment may operate in such a

26 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

27 EM, p. 14.

way as to indirectly discriminate against such persons. This is because persons with disabilities may be disproportionately affected by this measure given that the measure specifically addresses visa applications made on their behalf. Along with minors, people with a mental impairment are the only group that will be denied the right to make a visa application if an application was made on their behalf, even if they did not authorise, contribute to or consent to the application.

1.173 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Extension of liability for detention and removal costs

1.174 Schedule 3 of the bill would amend the Migration Act to extend existing debt recovery provisions to apply to all convicted people smugglers and illegal foreign fishers. Currently, convicted people smugglers and illegal foreign fishers detained under section 250 of the Act are liable for the cost of their detention and removal from Australia.²⁸ The amendments would extend such liability to convicted people smugglers and illegal foreign fishers who:

- are, or have been detained under section 189 of the Act;
- are, or have been, detained under section 189 because of subsection 250(2); or
- have been granted a Criminal Justice Stay visa or any other class of visa.²⁹

1.175 The method of calculating the amount of detention, transportation and removal costs that convicted people smugglers and illegal foreign fishers will be liable for will remain unchanged.

1.176 The statement of compatibility for the bill concludes that Schedule 3 of the bill is compatible with human rights, as it does not raise any human rights issues.³⁰

1.177 However, the committee notes that it has previously identified the imposition of liability for detention and removal costs on convicted people smugglers

28 Subsection 250(2) of the Migration Act provides that a non-citizen may be detained in immigration detention if they are a non-citizen who has travelled or was brought to the migration zone, and is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against a law in the whole or any part of Australia.

29 EM, p. 19.

30 EM, p. 20.

and illegal foreign fishers as a limitation on the right of such persons to equality and non-discrimination. This is because they are the only individuals liable for their detention costs, which amounts to differential treatment requiring a reasonable and objective basis if it is not to be incompatible with the right to equality and non-discrimination.

1.178 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.179 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

1.180 Further, the committee notes its previous comments that the differential treatment of persons in detention (whether or not on a reasonable or objective basis), may amount to a limitation on the right to humane treatment in detention.³¹

1.181 The committee therefore requests the Minister's advice as to the whether Schedule 3 of the bill is compatible with the right to humane treatment in detention.

Right to a fair trial and fair hearing rights

1.182 The right to a fair trial and fair hearing are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.183 Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

Amendments affecting authorised recipients for visa applicants

1.184 Schedule 4 to the bill proposes amendments intended to clarify the role of individuals appointed by visa applicants as their authorised recipients for

31 The right to humane treatment in detention is guaranteed under article 7 of ICCPR and article 16 of CAT, which provides that all people deprived of their liberty must be treated with humanity and dignity. This right is linked to the prohibition against torture, cruel, inhuman or degrading treatment.

communication and documents from the department or a tribunal.³² The amendments also seek to confirm that a tribunal's obligation to give documents to an authorised recipient extends to circumstances where a review application is found not to be properly made.³³

1.185 The statement of compatibility states that the amendments in schedule 4 do not engage 'any rights stated in the seven core human rights treaties'.³⁴

1.186 However, the committee notes that the amendments would appear to allow the department to contact a visa applicant directly, even if they were represented by a solicitor or migration agent (being the applicant's authorised recipient). It is unclear to the committee whether the amendments could diminish the ability of authorised agents, such as solicitors and migration agents, to act on behalf of their clients (thereby representing a limitation on the right to a fair trial and fair hearing). For example, it is unclear whether the proposal may undermine existing legal practice protocols, which prohibit a solicitor contacting the client of another solicitor without their consent; or whether it could result in authorised agents failing to receive information relevant to their client's cases, or clients having unrepresented interactions with the department).

1.187 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.188 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 4 of the bill with the to a fair trial and fair hearing rights and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Removal of common law procedural fairness requirements

1.189 Schedule 6 to the bill proposes the removal of the current requirement to provide common law procedural fairness standards to offshore visa applicants. The result will be that both offshore and onshore applications will be subject to the narrower statutory Code of Procedure procedural fairness standard. Specifically, it will provide that the 'hearing rule' as prescribed by section 57 of the Migration Act

32 EM, p. 5.

33 EM, p. 8.

34 EM, p. 10.

will apply to offshore applications, rather than the broader common law hearing rule.³⁵

1.190 The statement of compatibility for the bill, while noting that the hearing rule standard to be applied by Schedule 6 is narrower than the common law standard being displaced (and therefore amounting to a limitation of the right to a fair trial and fair hearing), characterises the measure as (essentially) promoting the right of non-citizens to be expelled from a territory only in accordance with law, based on the reasoning that decision makers will be less prone to 'confusion' and therefore to make errors through the application of the wrong hearing rule standard in respect of offshore applicants.

1.191 The committee considers that the characterisation of the proposed measure as promoting the right of non-citizens to be expelled from a territory only in accordance with law is questionable, given that it reduces the level of procedural protection available to one group of non-citizens.

1.192 The statement of compatibility explains that the common law test has led to some confusion and that decision-makers have had difficulty determining whether adverse information is 'relevant, credible and significant' and therefore to be put to the applicant. The application of the different standards would not appear onerous or difficult, compared with the standards set out in section 57 of the *Migration Act 1958*. The committee considers that the statement of compatibility does not provide sufficient information to explain the necessity of these amendments.

1.193 The committee notes that human rights are to be interpreted generously and permissible restrictions narrowly. In order to justify a limitation, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.194 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 6 to the bill with the right to a fair trial and fair hearing rights and, in particular, whether the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right to privacy

1.195 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

35 The hearing rule relates to the right of an applicant to comment on certain adverse information. See EM, p. 3.

1.196 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that disclosure of information.

Disclosure of information obtained under search warrants

1.197 Schedule 5 to the bill would allow for material obtained under a search warrant issued under the *Crimes Act 1914* to be used in administrative decisions relating to visas and citizenship. The amendments would not further widen coercive law enforcement powers under Commonwealth law, but would extend the disclosure of information gained through existing coercive powers to officials within the Department of Immigration and Border Protection.

1.198 The statement of compatibility for the bill states that the objective of the bill is:

...to provide further information to administrative officers for more effective decision making...[to] enhance decision-making and as a result...enhance the integrity of the migration and citizenship programs...³⁶

1.199 The statement of compatibility concludes that the measure is compatible with the right to privacy 'because to the extent that it may limit...[the right], those limitations are reasonable, necessary and proportionate'.³⁷

1.200 However, the committee considers that, while the proposal appears to be directed to a legitimate objective, the statement of compatibility does not provide sufficient information to support the committee's assessment whether the measure is a reasonable and proportionate means of achieving that that objective. For example, it is unclear how decision making will be enhanced by the disclosure of information obtained under coercive powers.

1.201 Further, it is unclear what protections and safeguards will apply to such information as is disclosed to and used by departmental officials. This is a question of particular relevance, given that the existing regime provides that information obtained through coercive information-gathering powers may be disclosed only to those involved in the administration of the law or for the purposes of related legislation. Specifically, Part 1AA of the *Crimes Act 1914* (*Crimes Act*) prescribes specific criteria for when a search warrant can be sought, who can authorise the use of such a warrant, what use can be made of that information, how that information is to be stored and under what circumstances it can be shared and with whom.

1.202 While the *Crimes Act* makes provision for permitting Commonwealth officers to access information otherwise obtained under a search warrant, the committee notes that the amendments will allow such information to be made available to

36 EM, p. 21.

37 EM, p. 23.

administrative decision-makers for purposes apparently extending well beyond preventing, investigating or prosecuting a criminal offence.

1.203 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 5 of the bill with the right to privacy and in particular whether the measures in Schedule 5 are reasonable and proportionate.