

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 16 June 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Migration Amendment Bill 2013

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 12 November 2013

Purpose

2.1 The Migration Amendment Bill 2013 (the bill) amended the *Migration Act 1958* (Migration Act) to:

- specify that a review decision by the Refugee Review Tribunal 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);
- specify the operation of the statutory bar on making a further protection visa application (Schedule 2); and
- make it a criterion for the grant of a protection visa that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (Schedule 3).

Background

2.2 The committee reported on the bill in its *Second Report of the 44th Parliament* (11 February 2013) and *Fourth Report of the 44th Parliament* (18 March 2014).

2.3 The bill was subsequently passed by the Parliament and received Royal Assent on 27 May 2014.

2.4 The committee identified a number of issues arising from the amendments in each of the schedules. The committee concluded its examination of the issues in relation to schedules 1 and 2 based on the Minister for Immigration and Border Protection's (the minister) initial response,¹ but sought further information in relation to Schedule 3.

1 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), p. 125.

Committee view on compatibility

Prohibition against arbitrary detention

Security assessments (Schedule 3)

2.5 The committee identified a range of concerns arising from the potential for the amendments to result in the indefinite detention of a protection visa applicant found to be a refugee but deemed a security risk by ASIO.² Specifically, the committee requested that the minister provide advice as to:

- the arrangements for independent review of security assessments;
- whether the bar on refugees accessing merits review by the Administrative Appeals Tribunal (AAT) of adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR; and
- 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 and, if not, clarification as to how the absence of such individualised assessment and/or options may be considered to be a proportionate response.

Minister's response

Do 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.

Review of ASIO adverse security assessments (ASAs) falls within the portfolio responsibilities of the Attorney-General. The Attorney-General has provided me with the following information in response to the Committee's concerns.

2 Explanatory memorandum (EM), p. 9.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security. There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of the Independent Reviewer's findings are provided to the Attorney-General, the Minister for Immigration and Border Protection and the Inspector-General of intelligence and Security.

The Independent Reviewer provides independent periodic reviews of ASAs every 12 months. In addition, ASIO can and will issue a new security assessment in the event that new information of relevance comes to light.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report. Information can only be provided that does not prejudice the interests of security. For national security reasons, information that would reveal confidential sources and methodologies must remain protected.

Is the bar on refugees accessing merits review by the AAT of adverse security assessments consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

Article 26 allows for differential treatment where it is for a legitimate aim under the ICCPR and is reasonable, necessary and proportionate in the circumstances. Accordingly, if a distinction on the basis of a prohibited ground has arisen, differential treatment of a particular group will not constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.

Review of ASAs in the Administrative Appeals Tribunal is unavailable for non-citizens who are not the holder of a valid permanent, special category or special purpose visa. In 1977, the Hope Royal Commission on Intelligence and Security specifically considered and recommended against

extending review rights to non-Australian, non-resident visa applicants who receive prejudicial security assessments.

Whether steps have been put in place and what they are to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the Committee's views. It is the general practice of the Government not to publicly comment in detail while considering such views.³

Committee response

2.6 The committee thanks the minister for his response.⁴

2.7 However, while the committee acknowledges that security assessments are an important part of ensuring the safety of Australians, and that ASIO advice that an individual is a risk to security should be afforded appropriate weight when considering an individual's suitability for a visa, the committee does not consider that indefinite detention must automatically follow, or is the only legitimate option, for genuine refugees the subject of an adverse security assessment (ASA).

2.8 The committee notes that, while the minister's response re-emphasises the importance of the policy that individuals subject to an ASA be detained in immigration detention, the response provides no assessment of whether, in the minister's view, the non-availability of statutory individual review rights for individuals subject to indefinite detention is compatible with the prohibition against arbitrary detention.

2.9 Noting the findings of the UN Human Rights Committee (HRC),⁵ which found that the continued detention of 46 refugees subject to adverse ASIO security assessments was arbitrary, and amounted to cruel, inhuman or degrading

3 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 24 March 2014.

4 See also, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 2-9.

5 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 70-76.

treatment,⁶ the committee acknowledges the minister's advice that 'it is the general practice of the Government not to publicly comment in detail while considering such views'.⁷ While the committee notes that Australia's response to the HRC's communication is overdue (having been due within 180 days of their publication on 26 July 2013), the committee will consider that response, and any substantive steps that may be proposed, with reference to the committee's concerns outlined in relation to Schedule 3 of the bill.

2.10 The committee welcomes the Government's confirmation of its commitment to give due weight to the views of the HRC in good faith, which the committee expects will be reflected in the Government providing strong justification and detailed reasoning in the event that the HRC's interpretation of the ICCPR, or specific recommendations, are rejected.

2.11 The committee intends to write to the Attorney-General to request a copy of the Government's response to the views of the UN Human Rights Committee in this case once they have been submitted.

2.12 In light of the minister's advice and the views of the UN HRC, the committee notes its concern that the amendments in Schedule 3 are likely to be inconsistent with the ICCPR's prohibition on arbitrary detention and the prohibition on cruel, inhuman or degrading treatment.

6 Contrary to articles 9(1), 9(4) and 7 of the International Covenant on Civil and Political Rights.

7 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 24 March 2014, p. 3.