Chapter 5

Key Issues – Schedule 3

5.1 This chapter discusses the key issues raised in submissions and evidence in respect of Schedule 3. The chapter concludes with the committee's view on Schedule 3 of the Bill.

Key issues identified by submitters and witnesses

5.2 All 12 submissions received by the committee provided substantive comment on Schedule 3 to the Bill. Many submitters expressed concerns about Schedule 3, including:

- the lack of appeal rights for refugees who receive an adverse security assessment (ASA) from ASIO,
- the reality of indefinite detention for refugees with ASAs, and
- the necessity of the proposed amendments given existing provisions in the *Migration Act 1958* (the Act).

5.3 These three issues are examined in this chapter separately. Finally, this chapter examines the current arrangements for independent reviews of ASAs for refugees.

5.4 Before considering these issues in detail, the committee notes that the amendments in Schedule 3 do not seek to directly legislate on the first two issues which were raised by submitters and are therefore not directly within the Terms of Reference for this Inquiry. The amendments in Schedule 3 would reinstate in legislation a regulation (*PIC 4002)* found by the High Court to be inconsistent with the Act. The Bill itself would not legislate for indefinite detention of refugees. Similarly, the rights to appeal ASAs are dealt with in the *Australian Security Intelligence Organisation Act* and not the *Migration Act.*

5.5 Nevertheless, the committee accepts that these issues may be relevant to an examination of the broad protection visa framework. This was explained by submitters to the inquiry:

> The amendment to s 36 (protection visas) virtually inscribes the former regulation into the Act without confronting any of the widely identified defects of the present system, and risks creating further defects of its own.[1]

Lack of appeal rights for non-citizens

5.6 Submissions from Amnesty International Australia and the Human Rights Law Centre[2] noted that Schedule 3 of the Bill expressly excludes decisions to refuse to grant (or cancel) protection visas on security grounds from review by the Refugee

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[1] *Submission 7*, p. 6.

[2] *Submission 1*, p. 1 and *Submission 5*, p. 5.

Review Tribunal (RRT). These submissions also noted that whilst Australian citizens and permanent and special purpose visa holders are able to seek merits review of ASAs by ASIO in the Administrative Appeals Tribunal (AAT), protection visa applicants are denied those rights of review.[3]

5.7 In its submission to the inquiry, the United Nations High Commissioner for Refugees (UNHCR) expressed views similar to many submitters when it noted:

> its concern that a refugee who has received an adverse assessment has very limited legal avenues to contest a negative assessment and is not afforded procedural fairness or natural justice.[4]

5.8 UNHCR confirmed that it is particularly concerned that existing processes around ASAs do not:

> provide a basis on which an affected person is able to assess and, if necessary, contest a negative assessment.[5]

5.9 A number of submitters including the Human Rights Law Centre and RACS suggested that refugees should have the same appeal rights with respect to ASAs as Australian citizens. In evidence before the committee, Mr Ali Mojtahedi suggested:

> ….it is certainly our position that the AAT is well placed to consider merits review. It has a security division. It can take steps to keep certain evidence confidential. It can close its doors to the public. There is no reason that the AAT should not have the opportunity to consider review of a decision.[6]

5.10 Similarly, Mr Daniel Webb from the Human Rights Law Centre suggested:

> …protecting national security is not compromised by allowing a refugee to appeal an adverse ASIO assessment…We say that just because ASIO says someone is a risk does not mean that that person should not be able to challenge that finding through an authoritative, independent process that safeguards confidential information and everything like that. Such a process already exists for everyone other than refugees.[7]

5.11 Whilst the UNHCR supported the AAT having jurisdiction to review the ASAs of refugees, in its submission to the committee, it noted that:

> …the use of classified information is a complex area of law where an appropriate balance between national security and international protection must be found. UNHCR understands that in matters of national security, the preservation of sources of information and methods of intelligence gathering may need to be protected from public scrutiny.[8]

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[3] *Submission 1*, p. 2, and *Submission 5*, p. 5.

[4] *Submission 9*, p.5

[5] *Submission 9*, p.4

[6] Mr Ali Mojtahedi, Senior Solicitor, RACS, *Proof Committee Hansard*, 4 February 2014, p. 22.

[7] Mr Daniel Webb, Director of Legal Advocacy, Human Right s Law Centre, *Proof Committee Hansard*, 4 February 2014, p. 18.

[8] *Submission 9*, p. 5.

5.12 The UNHCR expressed its preference for a process that would allow 'some meaningful opportunity to challenge the assessment in appropriately compelling cases'.[9]

5.13 The department explained the rationale for not extending appeal rights to refugees:

> The amendments further create certainty and promote efficiency by confirming that the MRT, RRT and Administrative Appeals Tribunal (AAT) will not have the power to review a decision to refuse to grant or to cancel a protection visa on the basis of an adverse security assessment by ASIO that the applicant for, or holder of, a protection visa is a risk to security.[10]

5.14 Moreover, the department expressed the essential national security imperative of the arrangements as:

> The amendments ensure that to meet community expectations, the government must not only have the ability to act decisively and effectively, wherever necessary, to protect the Australian community, but also to have the legislative basis to refuse or cancel a protection visa for those non-citizens who are a security risk.[11]

The reality of indefinite detention for refugees with adverse security assessments (ASAs)

5.15 The committee heard evidence from the President of the Australian Human Rights Commission, Professor Gillian Triggs on the numbers and circumstances of refugees currently subject to indefinite detention:

> There are currently about 50 refugees—that is, people who have been assessed as refugees—with adverse security assessments who face indefinite and, potentially at least, lifetime detention. There are also five young children of parents with adverse assessments who are detained.[12]

5.16 Professor Gillian Triggs further explained to the committee:

> For several years the commission has raised serious human rights obligations about the situation faced by this group, including the lack of review rights and indefinite detention.[13]

5.17 The Law Council, Human Rights Law Centre and Victorian Foundation for Survivors, amongst others, expressed similar concerns.[14]

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[9] *Submission 9,* p. 5.

[10] *Submission 3,* p. 6.

[11] *Submission 3,* p. 6.

[12] Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p 31.

[13] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 31.

[14] *Submission 2,* p. 2, *Submission 5,* pp 6-7, *Submission 8,* pp 3-4.

5.18 The committee also heard evidence from Dr Ida Kaplan, of the Victorian Foundation for Survivors of Torture, as to the effect of indefinite detention on refugees:

> We have very serious concerns about their mental health. They are in very poor mental health, and that is continuing to deteriorate with time. The most prominent mental health effects in that regard are depression, anxiety and trauma related symptoms.[15]

5.19 The department acknowledged the practical link between the amendments in Schedule 3 and the indefinite detention. However, the department suggested to the committee that indefinite detention 'is a separate policy issue of the government'[16] from the amendments proposed in Schedule 3. From the perspective of the department:

> They are separate policy decisions about whether a person who has an adverse security assessment should be in held detention or should be in community detention or should be on a temporary visa. All this legislation is about is the government's position that a person who is owed protection but who has an adverse security assessment should not be granted a permanent protection visa.[17]

5.20 The committee accepts this point.

The necessity of the amendments given existing provisions in the Migration Act 1958

5.21 A number of submitters to the inquiry, such as the Refugee Council of Australia (RCOA) questioned the necessity of the amendments in Schedule 3 of the Bill given existing provisions in the Act.

5.22 RCOA submitted that:

> In RCOA's view, the Minister's existing powers to refuse or cancel a visa under Section 501 of the *Migration Act 1958* are sufficient to allow for the refusal or cancellation of a visa for individuals who present a significant threat to national security or the safety of the Australian community.[18]

5.23 Noting the approximately 50 people currently in detention who have been found to be refugees but subject to ASAs, RCOA submitted that:

> Existing legislation has proved sufficient to deny visas to these individuals. RCOA therefore fails to see the need for any additional restrictions that put

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[15] Dr Ida Kaplan, Manager, Direct Services Program, Victorian Foundation for Survivors of Torture, *Proof Committee Hansard,* 4 February 2014, p.15.

[16] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard,* 4 February 2014, p. 38.

[17] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Affairs Committee Hansard,* 4 February 2014, p. 38.

[18] *Submission 10,* para 2.1

> out of question any flexibility of approach to individuals with adverse ASIO assessments.[19]

5.24 The Human Right Law Centre suggested the amendments in Schedule 3 would in fact go beyond the requirements in section 501 of the *Migration Act 1958*:

> It broadens the test and it makes the process by which that test is conducted not subject to independent merits review.[20]

5.25 The Human Rights Law Centre further submitted that the Bill would expand the grounds for exclusion from the grant of a protection visa beyond those contained in the Refugee Convention.[21]

5.26 As explained in the Explanatory Memorandum to the Bill, the proposed legislation effectively seeks to restore regulation PIC 4002, by inserting provisions into the Act. The committee heard evidence from the department that PIC 4002 was a long standing requirement in order to obtain a protection visa under migration law:

> Not in its current form but, in substance, since 1994, and there were previous iterations of it even before that. So, it has been around for a long time. The way that operated, of course, was that if an adverse security assessment had been made in relation to a person, the criterion was not met and the visa had to be refused.[22]

5.27 The department also explained in detail why the existing character provisions were insufficient to protect national security and hence why the amendments in Schedule 3 were required:

> …where the minister is required to use the character provisions, they do not really meet the national security requirements. The character provisions, in the way they are drafted, largely look at the behaviour of a person in the past and therefore whether they are of bad character, as opposed to security assessments, which can often look at what might be the behaviour of the person in the future. So they do not necessarily marry exactly. Also, in relation to the character provisions and the way they work, even once the minister has made a determination that the person is a bad character such that the power is enlivened, the discretion is enlivened, there still is a discretion whereby the minister has to look at all the circumstances in the case and may even need to look behind the adverse security assessment and then make a decision about whether it is appropriate to grant a protection visa or not.[23]

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[19] *Submission 10*, para 2.3.

[20] Mr Daniel Webb, Human Rights Law Centre, *Legal and Constitutional Affairs Committee Hansard*, 4 February 2014, p 17.

[21] *Submission 5*, p. 8.

[22] Ms Vicki Parker, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 37.

[23] Ms Vicki Parker Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 37.

Independent Reviewer of Adverse Security Assessments

5.28 During the public hearing there was much discussion of the effectiveness of the Independent Reviewer for Adverse Security Assessments (IRASA).

5.29 The introduction of an IRASA is relatively recent. In October 2012, the previous government announced an independent review process for refugees who have been refused a permanent visa as a result of an ASIO ASA. A former federal court judge, the Hon Margaret Stone was appointed by the Attorney-General as the IRASA.[24] The IRASA's role is to review ASIO ASAs given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the department to: engage Australia's protection obligations under international law, but not be eligible for a permanent protection visa; or who have had their permanent protection visa cancelled. The reviewer also has a role to conduct a periodic review of ASAs for eligible persons every 12 months.[25]

5.30 Many submitters welcomed the appointment of the IRASA as a mechanism for reviewing ASAs and checking there have been no inadvertent errors.

5.31 Mr Webb from the HRLC expressed the views of many appearing before the committee with respect to the IRASA when he indicated that:

> It is an important step in opening a process that makes profoundly important decisions, up to some level of scrutiny.[26]

5.32 The Law Council also supported the introduction of the IRASA:

> [I]n the absence of any other model, the law council considers that it provides some opportunity for review—and, indeed, it has on two occasions led to reassessment which has resulted in two families [being] removed from detention. It also provides some opportunity to revisit ASIO security assessments at certain points in time.[27]

5.33 Professor Triggs also highlighted the critical role of the IRASA:

> I think it has been extremely helpful to have it. It has given a level of transparency and openness. To appoint a well regarded former Federal Court judge to this position gave it, if you like, the gravitas—the

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[24] AHRC, *Refugee and Adverse Security Assessments*, available from: http://www.humanrights.gov.au/sites/default/files/document/publication/tell-me-about-refugees-adverse-security.pdf (accessed: 6 February 2014).

[25] Attorney-General's Department, *Terms of Reference for the Independent Reviewer of Adverse Security Assessments*, available from: http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx (accessed: 6 February 2014).

[26] Mr Daniel Webb, Human Rights Law Centre, *Proof Committee Hansard*, 4 February 2014, p. 17.

[27] Ms Sarah Moulds, Acting Director, Criminal Law and Human Rights Division, Law Council of Australia, *Proof Committee Hansard*, 4 February 2014, p. 27.

> authority—for a review that we found very encouraging. We were very pleased indeed when this position was appointed.[28]

5.34 A representatives from ASIO, also gave evidence before the committee. They suggested that whilst ASIO had concerns about the effect of the review processes on agency resources, that the IRASA process was working well:

> …I have personally, as Director - General of Security, confidence that the process that is currently in operation…is providing me with an effective, independent review of decisions that we [ASIO] have taken. It does not force me to change that decision, but in almost every case I have respected the reviewer's advice.

5.35 Whilst welcoming the establishment of the IRASA, a number of witnesses, including the Law Council, also highlighted a number of weaknesses in the IRASA process and suggested it ought be strengthened.

5.36 Mr Webb argued that the appointment of the IRASA does not completely remedy the inability of refugees to review an ASA from ASIO. Mr Webb suggested:

> [The IRASA] does not cure the system of its defects. That is for a few reasons. One is that the outcome of that independent reviewer process is an opinion, not a decision—it is a recommendation, it is not binding.… Second, it exists as a creature of policy; it is not legislated. In theory—although I hope this doesn't happen—it could be dispensed with on a whim.[29]

5.37 In similar evidence before the committee, Mr Josef Szwarc from the Victorian Foundation for Survivors of Torture, suggested:

> …that appointment is under an administrative arrangement. She has no powers other than the power to request material. Her recommendations, insofar as we know them, do not have any power.[30]

5.38 This view was supported by the AHRC:

> [T]he non-statutory review mechanism with non-binding recommendations does not in our view adequately reflect the gravity of the consequences of an adverse security assessment that I have discussed.[31]

5.39 A number of submitters suggested that the IRASA could be strengthened. The Law Council was indicative when it argued:

> provid[ing] a statutory basis to the existing administrative appointment of the independent reviewer of adverse security assessments for refugees—so

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[28] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 34.

[29] Mr Daniel Webb, Human Rights Law Centre, *Proof Committee Hansard,* 4 February 2014, p. 17.

[30] Mr Josef Szwarc, Manager, Research, Victorian Foundation for Survivors of Torture, *Proof Committee Hansard,* 4 February 2014, p.15.

[31] Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Committee Hansard,* 4 February 2014, p. 31.

to codify in legislation the powers of that reviewer and the procedure that would apply.[32]

Committee view

5.40 The committee acknowledges concerns about the prolonged detention of refugees with ASAs and their children.

5.41 As mentioned in paragraph 5.20, the committee agrees with the department that the policy of indefinite detention, however, is a separate policy issue to the matters currently before the committee. The Bill simply seeks to restore the effect of the regulation *PIC 4002* by inserting a specific criterion into the *Migration Act 1958*. This distinction was also accepted by the AHRC.[33]

5.42 The committee is of the view that most Australians would expect that under Australian law it is a criterion for the grant of a protection visa that an individual does not have an ASA from ASIO.

5.43 The committee supports the government's efforts generally and the work of the department and ASIO, specifically in upholding community safety and protecting national security. The committee accepts that it is a decision for government whether to open up ASA's issued by ASIO to non-citizens, including refugees, to further formal review or appeal mechanisms.

5.44 The committee also supports the excellent work undertaken by the Hon Margaret Stone in her role of IRASA. The committee believes IRASA has played a crucial role in ensuring there is an appropriate review of ASAs issued by ASIO. The committee also notes the evidence that the work undertaken by the current IRASA has been effective because of her close and productive relationship with ASIO. The committee accepts the evidence that the IRASA is a critical safety mechanism given the serious consequences that flow from ASAs for those found to be refugees.

5.45 The committee notes, however, that the role of the IRASA exists simply as an instrument of policy. The committee suggests that the government should consider how the role of the IRASA could be strengthened by having a regulatory underpinning. This would give the role certainty and credibility befitting the seriousness of the task.

Recommendation 2

5.46 The committee recommends that the Australian Government consider putting in place a regulatory framework to underpin the powers, authority and role of the Independent Reviewer of Adverse Security Assessments.

5.47 On balance, the committee believes that the Bill should be passed—subject to Recommendations 1 and 2—so as to give the Department of Immigration and Border Protection administrative certainty regarding the interpretation and application of the *Migration Act 1958*.

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[32] Ms Sarah Moulds, Law Council of Australia, *Proof Committee Hansard,* 4 February 2014, p. 25.

[33] AHRC, *answers to question on notice*, 4 February 2014, (received 6 February 2014), p. 1.

Recommendation 3

5.48 The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendations.

Senator the Hon Ian Macdonald

Chair