CHAPTER 2

Key issues

2.1 All submissions received by the committee raised issues regarding the Bill. Submitters were particularly concerned with the amendments contained in Schedule 1, but also raised issues with Schedules 2, 4 and 6 of the Bill.

2.2 This chapter focuses on the issues raised in relation to those schedules.

Application for further visas (Schedule 1)

2.3 Submitters to the inquiry expressed concern regarding the provisions contained in Schedule 1.[1] These amendments seek to clarify that children and people with a mental impairment whom have had a protection visa application previously made on their behalf are prevented from making a further visa application, regardless of whether they knew about the previous application.

2.4 As discussed in chapter 1, these amendments stem from the Federal Court decision in *Kim v Minister for Immigration*. This was the view of Refugee and Casework Service (RACS) who stated that they were unaware of other cases where this issue has appeared before the court.[2]

2.5 The issue of who would actually be affected by the amendments set out in Schedule 1 was discussed in detail.[3] As noted by RACS in its written submission:

> As the Court in Kim makes clear, this is unlikely to be relevant for children of younger years. However for young people under 18 years of age with capacity, including capacity to providing consent and capacity to form an intention, it is unwise to legislate that such matters can never be considered in relation to future visa applications.
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> Visa applicants under 18 years of age are not a uniform group, and it seems prudent to allow for some consideration of factors such level of understanding, intelligence, competence, knowledge, family conflict and mental incapacity.[4]

2.6 During the public hearing, RACS provided further information on when a child was likely to be considered competent for the purposes of making their own

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1 Refugee Advice and Casework Service, *Submission 1*, pp 1-5; National Ethnic Disability Alliance and the Federation of Ethnic Communities' Councils of Australia, *Submission 2*, pp 1-4; Salvos Legal, *Submission 3*, pp 1-3; Human Rights Law Centre, *Submission 4*, pp 2-4; Refugee Council of Australia, *Submission 5*, pp 1-3.

2 Mr Ali Mojtahedi, Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 3.

3 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, pp 7-8; Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, 28 July 2014, p. 11.

4 *Submission 1*, p. 3.

decisions with regards to visa applications.[5] Ms Katie Wrigley, Principal Solicitor at RACS, noted that the older the child, the more likely it is they will be considered to have capacity.[6]

2.7 RACS also discussed the significance of where a child or a person with a mental incapacity was not aware of an application being made on their behalf.[7] RACS identified possible scenarios where these amendments could adversely impact young visa applicants:

> A 17 year old young man lives independently of his parents in a relationship not approved of by his parents. He is included on a non-meritorious protection visa application by his parents without his knowledge. This application is refused. He only learns of this visa application history when he makes his own visa application in the future, which is deemed invalid.
>
> A 16 year old girl remains in conflict with her father due to family violence and remains living in a refuge with her mother. She is included in a non-meritorious visa application without her knowledge by her father which is refused. When her mother includes her on a subsequent meritorious visa application as her dependent, she is informed that the application by the daughter is invalid due to the father's previous application.[8]

2.8 Ms Wrigley noted that while visa applicants should not be allowed to make repeated, non-meritorious applications, the amendments went too far and may result in unintended consequences for minors in situations similar to those discussed above.[9]

2.9 Submitters also raised concerns about how the amendments would interact with Australia's obligations under international law.[10] RACS referred to Australia's obligations under Article 12 of the Convention on the Rights of the Child:

> This right recognises that children should be given the opportunity to participate in all decisions that affect them. The changes proposed to the law by the Bill rule out consideration of a child's views in relation to

5 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, pp 7-8.

6 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 7.

7 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 8.

8 *Submission 1*, p. 3.

9 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 1.

10 Refugee Advice and Casework Service, *Submission 1*, p. 5; Salvos Legal, *Submission 3*, p. 2; Human Rights Law Centre, *Submission 4*, pp 2-3; Refugee Council of Australia, *Submission 5*, pp 2-3.

> matters significantly affecting them- namely their rights to bring future visa applications in Australia.[11]

2.10 The Human Rights Law Centre (HRLC) was particularly concerned with Australia's obligations under the Refugee Convention with respect to the principle of non-refoulement.[12] In her evidence to the committee, Ms Emily Howie, Director of Advocacy and Research at the HRLC, stated that:

> At the heart of our opposition to the proposed amendments to proposed section 48A is the fundamental principle that a person should not be returned to a country where they face persecution. This principle is at the core of Australia's international legal obligations under the Refugee Convention and other international treaties to which Australia has agreed to be legally bound. The proposed amendments, however, have the potential to undermine our obligations. They may result in a person being returned to a country in which they have genuine protection concerns, simply because Australia's migration system refuses to permit a further protection visa application from them on the basis that someone else may have already made an application for them on their behalf, despite the fact it may have been made without their knowledge or proper understanding and therefore may not have properly articulated their claims.[13]

2.11 Another concern raised by submitters was the lack of justification provided by the minister. In its submission, the Refugee Council of Australia (RCOA) stated that the 'rationale for these amendments has not been sufficiently explained or justified':

> While the Explanatory Memorandum accompanying this Bill claims that the amendments are necessary to preserve the integrity of Australia's visa systems, it presents no evidence demonstrating that the extant working of the *Migration Act 1958* has significantly undermined the integrity of these systems. Moreover, we do not accept that allowing asylum seekers to lodge a subsequent Protection Visa application if their first application was lodged without their knowledge or consent would in any way threaten the integrity of Australia's visa processes. On the contrary, ensuring that all asylum seekers are able to have a fair hearing of their claims would help to ensure the integrity of these processes.[14]

2.12 During the hearing, Ms Howie expressed a similar view on behalf of the HRLC:

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11 *Submission 1*, p. 5.

12 *Submission 4*, pp 2-3. Both the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights raised concerns with regards to Australia's human rights obligations: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 5/14*, 14 May 2014, p. 23; Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, June 2014, pp 30–46.

13 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, 28 July 2014, pp 10-11.

14 *Submission 5*, p. 2.

> …the proposed amendments cannot be justified under the rationale of administrative expediency. Permitting a person the opportunity to make a further protection visa application in limited circumstances in which the original application was made without the person's knowledge or instructions is unlikely to open the floodgates or to place an unreasonable administrative burden on the system. In any event, our system ought to be one which upholds the principle against non-refoulement, well above the issues of administrative inconvenience.[15]

2.13 Another point of discussion at the public hearing was whether section 48B, which provides an exception to the operation of 48A, is a sufficient safeguard against injustice. In her evidence to the committee, Ms Howie discussed the operation of section 48B:

> It empowers the minister to lift the bar imposed by section 48A and to determine that the section does not apply to an individual where the minister is of the opinion that it is in the public interest to permit that person to make a further protection visa application. This discretion is personal to the minister and non-compellable.[16]

2.14 Section 48B only operates with regards to protection visas. It was the view of submitters that section 48B is not an adequate safeguard when weighed up against the right of non-citizens to not be removed.[17]

2.15 The RCOA stated in its submission that it:

> …rejects the assertion that the Minister's personal, non-compellable powers under section 48B of the Migration Act 1958 provide adequate protection against refoulement for people subject to section 48A. A non-reviewable process which relies on the discretion of a single Minister, based on powers which the Minister is under no obligation to exercise, does not provide a sufficient safeguard against forcible return of refugees to situations of persecution and danger.[18]

2.16 Ultimately, both RACS and the HRLC were of the view that the current arrangements were robust enough to prevent the filing of repeat applications.[19] In her opening statement, Ms Wrigley from RACS noted that:

> In terms of cost-benefit analysis, the need to alter the current law on this point is simply not supported by the volume of legislation generated by the

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15 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, 28 July 2014, p. 11.

16 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, 28 July 2014, p. 10.

17 Salvos Legal, *Submission 3*, p. 2; Human Rights Law Centre, *Submission 4*, p. 3; Refugee Council of Australia, *Submission 5*, p. 2.

18 *Submission 5*, p. 2.

19 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 1; Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, 28 July 2014, p. 11.

> current ability at law for a person to seek scrutiny of this issue before the courts.[20].

2.17 The Department of Immigration and Border Protection (DIBP or the department) responded generally to concerns raised about whether the amendments proposed in the Bill would breach Australia's obligations under the Refugee Convention:

> We would start by saying that the government certainly remains committed to adhering to all of our non-refoulement obligations under all the conventions to which we are signatories. And processes are in place to ensure that anyone who is found to engage our non-refoulement obligations under the treaties will not be removed from Australia in breach of the obligations.[21]

2.18 The department also emphasised that there are a number of processes in place to ensure that non-citizens with legitimate grounds are not removed:

> The way we look at any other protection obligations that arise perhaps outside the refugees convention is through pre-removal clearance processes. At every stage before a removal there are processes that the department undertakes to ensure that a person is not returned if there is a likelihood of refoulement occurring, and that is an opportunity for people to raise those issues with the department before any removal takes place.[22]

2.19 With regards to the amendments set out in Schedule 1 of the Bill, DIBP noted that these are not aimed at changing the law, but rather returning 'the [A]ct to the situation as it stood since 1994', before the decision in *Kim v Minister for Immigration*.[23] The department stated that the rationale for the amendments was to remove the need for departmental officers to consider each situation subjectively:

> I think it related to the requirement that would be imposed on the department to go to more subjective consideration of whether or not a child was aware of or had knowledge of the application that was made on their behalf. As we had understood the operation of those sections on the act, there was a very clear and objective requirement for departmental decision makers to view, which was around whether or not a visa had been refused in the past. Where this decision took us was to then, in certain

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20 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 1.

21 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 15.

22 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 15.

23 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 14.

> circumstances, have to go behind that to see whether or not the minor in those particular circumstances was aware.[24]

2.20 The department argued that the court's decision would place 'our decision makers in an impossible situation where they have to work out what the child's knowledge and state of mind were maybe five, six or seven years ago'. [25] It also highlighted the difficulty in drafting exceptions with regards to the Migration Act and maintained that ministerial intervention under section 48B of the Act is a better avenue.[26]

2.21 The department noted that children still retained the right to be heard in a judicial or administrative proceeding:

> In the case of a child who has personal protection claims, the Minister is able to intervene under section 48B of the Migration Act to enable the person acting on the child's behalf to make a further Protection visa application so that the child's personal protection claims may be assessed and their best interests would be the primary consideration. In other cases where ministerial intervention is not available, the child may seek judicial review of the decision that the purported further application is invalid, if the child, or their parent or guardian, believes that decision is wrongly decided.[27]

2.22 The department stated that it was not possible to reframe the Bill to allow for those non-citizens who have meritorious claims, as this would require the decision maker to make a subjective assessment of the person's claims.[28] In its response to questions on notice, the department stated:

> It is a long standing and fundamental principle of the migration legal framework that the validity of an application must be determined by reference to objective criteria. In addition to administrative certainty, this objectivity is important so that prospective applicants know exactly the requirements they have to meet for their application to be accepted as valid, instead of having that acceptance decided based on a subjective assessment with its attendant uncertainty and variability of outcomes. It also means that

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24 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 16.

25 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 16.

26 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 17.

27 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.

28 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, p. 3.

> officers processing/receipting applications do not need to make subjective assessments that go to the validity of the application.[29]

2.23 The other issue that the department clarified in its response to questions taken on notice was with regards to the number of visa applicants who would be affected by the proposed amendments.[30]

2.24 While the department stated that it was only aware of one other person affected by the decision in *Kim v Minister for Immigration* (other than Ms Kim), it highlighted the potential for there to be numerous claims:

> Based on the Department's interrogation of its systems with a data range from 1 July 2000 to COB 5 May 2014, as at 6 May 2014 there are a total of 3,317 non-citizens who are affected by the KIM decision. That is, as at 6 May 2014 there are 3,317 non-citizens in Australia who were minors aged 15 years or less at the time they were included as dependent applicants in their parents' visa application that was refused and who, following the decision in KIM, would not be barred by section 48 (or if relevant, section 48A) and would now be able to make a further application for the grant of a visa (whether for the same subclass of visa as the one that was refused, or for a different subclass of visa).[31]

2.25 These calculations did not include applicants aged between 16–18 who are required to sign visa application forms.[32] The department further noted that the calculations discussed above do not take into account applicants yet to apply:

> …there is an unknown and potentially large number of non-citizens that are minors who, following the refusal of their application (whether in their own right or as dependent applicants in their parents' applications), will in future not be barred by section 48 or section 48A, as the case may be, from having application/s made repeatedly on their behalf until such time that they either reach 18 or their competence can be established, whatever occurs earlier.[33]

2.26 The department also provided reassurance that there were processes in place to ensure that applications were not made on behalf of children where the person making the application lacked proper authority:

> Where doubt exists about whether the person making the application on behalf of the child is indeed the parent or the legal guardian of the child, the department's practice is to request evidence of the person's authority to

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29 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, p. 2.

30 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, pp 1-2.

31 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, p. 1.

32 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, p. 1.

33 Department of Immigration and Border Protection, answer to a question on notice, received 11 August 2014, p. 1.

> make such an application; [the] department does not simply accept the application made on behalf of the child as valid without query when there is such a doubt.[34]

Committee comment

2.27 The committee notes the department's concern that there are a significant number of individuals who may be eligible to make further visa applications as a result of the *Minister for Border Protection v Kim* case and its claim that the amendments proposed in Schedule 1 would merely change the legislation to reflect the department's understanding of the Migration Act prior to this court case. The committee also acknowledges the difficulties associated with considering visa applications subjectively and the need for administrative certainty for visa applicants.

2.28 However, the committee remains concerned about the potential impact on children and people with a mental impairment seeking to make a subsequent visa application in circumstances where these individuals are unaware of a previous application having been made on their behalf. In the committee's view, it would be unfair to prevent these individuals from making a subsequent visa application. The committee appreciates that addressing this issue would likely require the Department of Immigration and Border Protection to make certain inquiries and decisions of a complex nature; irrespective, the committee is eager to ensure that children and people with a mental impairment are not unfairly treated as a result of the proposed amendments.

2.29 The committee therefore recommends that the Commonwealth government consider additional safeguards to ensure children and people with a mental impairment are not unfairly prevented from making a subsequent visa application where they were unaware of a previous application having been made on their behalf.

Recommendation 1

2.30 The committee recommends that the Commonwealth government consider additional safeguards to ensure that children and people with a mental impairment are not unfairly prevented from making a subsequent visa application in circumstances where they are unaware of a previous application having been made on their behalf.

Removal of people on bridging visas (Schedule 2)

2.31 As discussed in chapter 1, Schedule 2 amends section 198 of the Migration Act which sets out the minister's power to remove non-citizens in certain circumstances.

2.32 RACS understood the rationale behind the amendments is to prevent a person from making repeat applications for bridging visas.[35] Ms Wrigley argued that the

34 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.

35 *Submission 1*, p. 6.

amendments are therefore unnecessary due to the operation of section 74 of the Migration Act:

> The stated aim of this legislative amendment can already be achieved, we say, by recourse to section 74 of the Migration Act, which would facilitate removal of an unlawful non-citizen during the 30-day period within which a further application for a bridging visa may not be made.[36]

2.33 At the public hearing , Ms Wrigley stated that the amendments proposed in Schedule 2 go further than the provisions currently set out under section 74:

> I think…what would be new about this is that there would be no initial right to a bridging visa application to be considered in that it could be someone's first application for a bridging visa which was not going to be considered during the period that they are removed, whereas under this section 74 there is to some extent a safeguard in that a person would at least have an opportunity to make one application for a bridging visa and then, if that is refused, they may not make one for another 30 days, and during that time they could be removed.[37]

2.34 Salvos Legal noted that the amendments appeared to be aimed at removing applicants that may otherwise remain in indefinite detention due to not having substantive visa options.[38] It opposed the idea of applicants being removed while still having their bridging visa application considered:

> Removal may adversely impact on unlawful non-citizens who have made a bridging visa application with the intention of lodging a subsequent visa application, or who are in the process of preparing a request for Ministerial intervention (including if on grounds never previously raised).[39]

2.35 RACS argued that there is a need to maintain strict safeguards with regards to the removal of non-citizens:

> A robust process for determining asylum claims will always involve a degree of administrative burden, but given the fundamental rights at stake the overriding concern must be to ensure that we have proper processes in place to make sure that no individual is returned to risk of serious harm and that there are safeguards in place to ensure that we are correctly and properly following those processes. Streamlining removal to prevent consideration of an application for a bridging visa currently on foot will remove one of these important safeguards.[40]

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36 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 2.

37 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 4.

38 *Submission 3*, p. 2.

39 *Submission 3*, pp 2-3.

40 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 2.

2.36 As noted in chapter 1, the government's rationale for these provisions is to enable the removal of non-citizens who have made only a bridging visa application and not a substantive visa application.[41] The department stated that these amendments would:

> …prevent the possibility of those individuals remaining in detention indefinitely where they have no further immigration claims or avenues of appeal, but refuse voluntary removal and cannot currently be involuntarily removed due to an ongoing Bridging visa application.[42]

2.37 The EM acknowledged that it is not the government's intention that non-citizens who have applied for bridging visas to remain in 'a state of indefinite immigration detention'.[43]

2.38 The department noted that these amendments are not about preventing repeat bridging visa applications (which section 74 of the Act already provides for) but rather the situation where an individual applies only for a bridging visa and fails to apply for a substantive visa:

> At present the language of section 198(5) does not cover the situation where a person has applied only for a bridging visa and not for a substantive visa. A submission to the committee from the Refugee Advice and Casework Service suggested that these amendments were unnecessary as multiple bridging visa applications were already prevented through the operation of section 74 of the act. The problem being dealt with here though is not with multiple applications for bridging visas but, rather, to deal with the situation where a detainee applies only for a bridging visa in accordance with section 195 and not for a substantive visa. Our advice is that the current wording of section 198(5) takes the removal power out of play if there is an application for a bridging visa even if that application is refused.[44]

2.39 The department again stated that where certain risk factors are present a pre-removal clearance process is undertaken.[45]

Committee comment

2.40 The committee acknowledges the concerns raised by submitters about the removal of non-citizens who have applied for bridging visas.

2.41 However, the committee is of the view that the department has adequately addressed these concerns. In its evidence at the public hearing, the department stated

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41 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 13.

42 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.

43 EM, p. 13.

44 Dr Wendy Southern, Deputy Secretary of the Policy and Program Management Group, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 13.

45 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.

that the rationale for these amendments is to allow for non-citizens in detention who are unable to apply for substantive visas to be removed from Australia. The department argued that section 74 of the Migration Act, which prevents applicants from making repeat applications, does not allow for the removal of non-citizens who have only applied for bridging visas.

2.42 The committee considers that the department has proper processes in place for ensuring that non-citizens with legitimate grounds are not returned in breach of Australia's international obligations.

2.43 The committee supports the department's view that people should not remain in indefinite detention.

Other issues

Role of authorised recipients (Schedule 4)

2.44 RACS raised a number of issues with regards to changes to the role of the authorised recipient:

> The proposed amendment removes the current, rational, position that a client applicant is free to instruct an agent and tell that agent what the agent is empowered to do. It reduces the agent to an address. Migration agents are professionals. Agents are bound by a Code of Conduct, and subject to regulation by the Migration Agents Registration Authority (MARA). Agents have a codified role as representatives and advocates of their clients. It is inappropriate to provide, by law, that they are prevented from acting in this role including acting as agents for their clients. It was never the intention of section 494 that migration agents be excluded from their role as their client's representatives.[46]

2.45 RACS also argued that these amendments would mean that they would no longer be able to ensure they are notified when their clients are contacted by the department:

> …the Bill significantly dilutes the scope of agents' ability to act on behalf of their clients in the course of visa applications. The Bill and the explanatory memorandum are silent as to how any more wide-reaching authorisation from a client to agent would be notified to or observed by the Department. RACS' clients represent an incredibly vulnerable client base. It is vital that they retain access to agents who can speak and act on their behalf and ensure their claims are expressed clearly to decision makers considering their cases.[47]

2.46 As discussed in chapter 1, the purpose of the amendments to subsection 379G(1) of the Act are to clarify that an authorised recipient can only accept documents on an applicant's behalf.[48] As stated in the EM,[49] this is to ensure

46 *Submission 1*, p. 8.

47 *Submission 1*, p. 8.

48 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3329.

that the provisions reflect the intended policy position in light of the decision of *MZZDJ v Minister for Immigration and Border Protection*.[50]

2.47 The EM noted that 'these amendments do not prevent a person from acting as the agent of the applicant for review due to some other authorisation'.[51] They do prevent an person acting on an applicant's behalf without the proper authorisation:

> For example, the authorised recipient cannot unilaterally withdraw their authorisation to receive documents on behalf of the applicant for review. It is the applicant for review who must make arrangements for this to occur. This clarification is important to avoid administrative uncertainty for the Tribunal in relation to its communications with applicants for review.[52]

2.48 The department clarified that where an authorised recipient is also an applicant's solicitor or migration agent, they would continue to receive all written and oral communications on the applicant's behalf.[53]

Procedural fairness requirements (Schedule 6)

2.49 During the public hearing, Mr Motjtahedi from RACS was asked to explain how the amendments set out in Schedule 6 of the Bill would operate:

> The effect of the High Court decision in *Saeed* is that offshore applications and onshore applications require different forms of procedural fairness. Onshore applications are dealt with under a code of procedure, which requires a decision maker to provide certain forms of procedural fairness, whereas in the absence of that codified procedure the High Court found offshore applications were entitled to common-law procedural fairness. I understand the purpose of this part of the bill to be to bring them in line.[54]

2.50 RACS noted in their submission that there would still be differences with regards to the procedural requirements for onshore and offshore applicants, as the common-law rules for procedural fairness only apply to onshore applicants.[55] The test for common law procedural fairness is broader than the test set out under section 57 of the Migration Act and requires information to be put to the applicant if it is 'relevant, credible and significant'.[56]

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49 EM, p. 18.

50 [2013] FCAFC 156.

51 EM, p. 18.

52 EM, p. 18.

53 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.

54 Mr Ali Mojtahedi, Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 7.

55 *Submission 1*, pp 9-10.

56 *Submission 1*, pp 9-10.

2.51 RACS argued that the common-law test should apply to both onshore and offshore applicants:

> RACS supports a refugee status determination process which is procedurally fair for all applicants and we say that the best way to achieve this end would be to require all information which is relevant, credible and significant to be put to all applicants.[57]

2.52 In response to this concern, the department stated that the common law test is confusing for delegates to apply and creates an administrative burden:

> …under section 57 it is clear that adverse information needs to be put to the applicant for comment only if, inter alia, it would be the reason, or part of the reason, for refusing to grant the visa, and most delegates instinctively understand whether or not they would be relying on the adverse information as the reason or part of the reason for refusing the visa application. Under the common law, however, a delegate is obliged to put any adverse information that is 'relevant, credible and significant' to the applicant, even in circumstances where my delegate does not intend to rely on that information as the basis for making a decision to refuse.[58]

Committee comment

2.53 The committee accepts that the amendments set out in Schedule 4 of the Bill are merely aimed at returning interpretation of the Act to that prior to the decision of *MZZDJ v Minister for Immigration and Border Protection*. While the committee acknowledges the concerns raised by RACS with regards to the important role undertaken by agents on behalf of their clients, it also notes that these amendments do not prevent a person acting as an agent for an applicant.

2.54 The committee supports the changes to section 57 of the Act which would ensure that the procedural fairness requirements set out under this section apply to both onshore and offshore applicants. The committee also accepts that it is the government's position that the common-law test for procedural fairness should not be extended to offshore applicants.

Recommendation 2

2.55 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

Senator the Hon Ian Macdonald
Chair

57 Ms Katie Wrigley, Principal Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 July 2014, p. 2.

58 Department of Immigration and Border Protection, *Additional information*, received 15 August 2014.