

CHAPTER 1

Introduction

The referral

1.1 The Migration Amendment (Protection and Other Measures) Bill 2014 (bill) was introduced in the House of Representatives on 25 June 2014 by the Hon Scott Morrison MP, Minister for Immigration and Border Protection.¹ On 26 June 2014 the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 22 September 2014.²

Rationale for the bill

1.2 The bill seeks to amend the *Migration Act 1958* (the Act) to enhance the integrity of the onshore protection status determination process.³ Aimed at increasing the efficiency of Australia's protection system,⁴ the bill responds to current challenges in the domestic asylum seeker landscape⁵ and seeks to ensure public confidence in the government's capacity to assess asylum seeker claims in the interests of Australia, and against the interests of those who show bad faith.⁶

1.3 The bill clarifies the responsibility of asylum seekers who claim to be a person in respect of whom Australia has protection obligations and encourages complete information to be provided upfront.⁷ The bill also streamlines the statutory bars that preclude certain persons from making visa applications⁸ and improves the merits review system.⁹

1 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, pp. 8–10.

2 *Journals of the Senate*, No. 37—26 June 2014, p. 1013.

3 Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, p. 1.

4 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, p. 8.

5 Explanatory Memorandum, p. 1.

6 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, p. 10.

7 Explanatory Memorandum, p. 2.

8 Explanatory Memorandum, p. 3.

9 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, p. 8.

The bill has four schedules that address distinct issues. Accordingly, each schedule is considered in this chapter separately.

Schedule 1: Protection visas

1.4 Schedule 1 of the bill sets out amendments aimed at improving the integrity of the onshore protection status determination process. It clarifies that the responsibility for making a claim for protection and providing sufficient evidence to establish such a claim sits with the individual who is seeking protection.¹⁰ Its purpose is to discourage applicants from providing false identity documents or destroying or discarding genuine identity documents.

1.5 In order to encourage asylum seekers to provide all claims and supporting evidence as soon as possible, schedule 1 provides that:

- the Refugee Review Tribunal (RRT) is required to draw an inference unfavourable to the credibility of new claims or evidence when claims were not raised or evidence was not presented before the primary decision was made by the Department of Immigration and Border Protection (department) on their protection visa claim.¹¹ However, this provision will not apply where the RRT is satisfied that the applicant has a 'reasonable explanation' for refusing or failing to comply with the request and either produces documentary evidence of their identity, nationality or citizenship or has taken reasonable steps to produce such evidence;¹² and
- the Minister for the department (Minister) must refuse to grant a protection visa when an applicant provides a bogus identity document, or the Minister is satisfied that the applicant has disposed, destroyed or caused to be destroyed identity documents.¹³

1.6 Schedule 1 also contains an amendment relevant to applications for protection visas by members of an applicant's family.¹⁴ Under this amendment a family member of a protection visa holder will be required to apply independently for their own individual protection visa.¹⁵ This change is aimed at discouraging family members of protection visa holders from arriving in Australia illegally, with the expectation of being granted a protection visa on the basis of being a family member.¹⁶

10 Department of Immigration and Border Protection, *Submission 14*, p. 4.

11 Explanatory Memorandum, p. 2.

12 Migration Amendment (Protection and Other Measures) Bill 2014, s. 91W.

13 Migration Amendment (Protection and Other Measures) Bill 2014, s. 91W, s. 91WA.

14 Parliamentary Library, *Bills Digest*, Migration Amendment (Protection and Other Measures) Bill 2014, pp. 7–8.

15 Migration Amendment (Protection and Other Measures) Bill 2014, s. 91WB.

16 Parliamentary Library, *Bills Digest*, Migration Amendment (Protection and Other Measures) Bill 2014, p. 7.

Schedule 2: Australia's protection obligations under certain international instruments

1.7 Schedule 2 introduces a higher risk threshold for assessing Australia's protection obligations in respect of non-citizens under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (CAT).¹⁷ The purpose of this amendment is to restore the risk threshold for complementary protection to the higher threshold that was intended when the complementary protection framework was inserted into the Act in 2012.¹⁸

1.8 Currently, Australia has protection obligations in respect of a non-citizen where the Minister believes there is a 'real risk' the non-citizen will suffer significant harm if removed from Australia to a receiving country.¹⁹ Under the proposed amendment the threshold for return is raised, such that Australia would only have protection obligations in respect of a non-citizen where the Minister is satisfied that 'it is more likely than not that the non-citizen will suffer significant harm' if removed from Australia to a receiving country.²⁰

1.9 Schedule 2 also amends the definition of 'receiving country'²¹ to clarify the reference point for assessing Australia's protection obligations in respect of non-citizens.²² The purpose of this change is to ensure that there is always a country of reference where a person is claiming protection, regardless of whether 'they may be stateless or that their county of nationality or habitual residence may not in fact accept their return.'²³

Schedule 3: Unauthorised maritime arrivals and transitory persons

1.10 Schedule 3 seeks to broaden the operations of the statutory bars to allow unauthorised maritime arrivals (UMAs) and transitory persons to be granted bridging visas (or other temporary visas) while their asylum claims are being assessed. The amendments seek to 'ensure there will be only one provision that prevents an unauthorised maritime arrival or a transitory person from making a valid application for a visa, simplifying the legal framework,²⁴ and 'will support the orderly

17 Parliamentary Library, *Bills Digest*, Migration Amendment (Protection and Other Measures) Bill 2014, pp. 13–14.

18 Explanatory Memorandum, p. 19.

19 *Migration Act 1958*, s. 36(2)(aa).

20 Migration Amendment (Protection and Other Measures) Bill 2014, s. 6A(2).

21 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 5(1).

22 Explanatory Memorandum, p. 3; Parliamentary Library, *Bills Digest*, Migration Amendment (Protection and Other Measures) Bill 2014, p. 14.

23 *Submission 14*, p. 12.

24 Explanatory Memorandum, p. 30.

management of visa applications from unauthorised maritime arrivals [and transitory persons] and in some cases, their release from detention.²⁵

1.11 Under the amendments, UMAs and transitory persons who are unlawful non-citizens, bridging visa holders or temporary visa holders, will be prevented from making a valid visa application unless the Minister determines it is in the public interest to permit them to do so.²⁶ Additionally, the measure seeks to exclude UMAs and transitory persons holding a temporary safe haven visa, temporary humanitarian visa or a temporary protection visa, from applying for another valid temporary safe haven visa, unless the Minister determines to allow them to do so.²⁷

1.12 The amendments in schedule 3 provide the Minister and the department with more flexibility to address the specific issues relevant to individuals and cohorts, including the majority of UMAs who are present in Australia but have not been permitted to make a valid application for a protection visa.²⁸

Schedule 4: Migration Review Tribunal and Refugee Review Tribunal

1.13 Schedule 4 introduces amendments that strengthen the powers of the Principal Member of the Migration Review Tribunal (MRT) and the RRT. The bill proposes to enable the Principal Member of the MRT and RRT to:

- issue 'practice directions'²⁹ about procedures to be followed in relation to proceedings before the tribunals;³⁰ and
- issue 'guidance decisions' relating to the issues of a case that must be complied with by the tribunals in making a decision, unless the tribunals are satisfied that the facts or circumstances of the case are clearly distinguishable from those in the guidance decision.³¹

1.14 The purpose of the measure to issue 'guidance decisions' is to promote consistency in the decision making between different Members of the tribunals in relation to common issues and/or the same or similar facts or circumstances.³²

25 Explanatory Memorandum, p. 24

26 Explanatory Memorandum, p. 3.

27 Migration Amendment (Protection and Other Measures) Bill 2014, s. 15, s. 16; Explanatory Memorandum, p. 32.

28 Explanatory Memorandum, p. 25.

29 Explanatory Memorandum, p. 3.

30 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 353A(2).

31 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 353B; Explanatory Memorandum, p. 3.

32 Explanatory Memorandum, p. 36.

1.15 Schedule 4 gives the tribunals increased flexibility in handling cases where an applicant fails to appear³³ and the ability to provide an oral statement of reasons where it makes an oral decision.³⁴

1.16 These amendments have the potential to significantly reduce the administrative burden of the tribunals, and implement some of the recommendations of Professor Michael Lavarch who conducted an inquiry into the increased workload of the MRT and RRT.³⁵

Conduct of the inquiry

1.17 Details of the inquiry were made available on the committee's website.³⁶ The committee also contacted a number of relevant organisations inviting submissions by 4 August 2014. The committee received 18 submissions. A full list of submissions is provided at Appendix 1.

1.18 The committee held a public hearing in Canberra on 5 September 2014. The witness list for the hearing is available at Appendix 2.

Consideration of the bill by other committees

1.19 The bill has been considered by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny committee)³⁷ and the Parliamentary Joint Committee on Human Rights (Human Rights committee).³⁸

Scrutiny committee

1.20 The Scrutiny Committee examined the bill in Alert Digest No. 8 of 2014, tabled in the Senate on 9 July 2014.³⁹

33 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 362B(1).

34 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 368D.

35 Parliamentary Library, *Bills Digest*, Migration Amendment (Protection and Other Measures) Bill 2014, p. 17.

36 Parliament of Australia, Senate Standing Committee on Legal And Constitutional Affairs, Migration Amendment (Protection and Other Measures) Bill 2014, (accessed 19 September 2014).

37 *Journals of the Senate*, No. 40, 9 July 2014, p. 1110; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2014*, 9 July 2014, pp. 15–23.

38 *Journals of the Senate*, No. 43, 15 July 2014, p. 1178; Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, June 2014, pp. 35–55.

39 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2014*, 9 July 2014, pp. 15–23.

Human Rights committee

1.21 The Human Rights committee examined the bill in its Ninth Report of the 44th Parliament, tabled in the Senate on 15 July 2014.⁴⁰

Financial Impact Statement

1.22 The explanatory memorandum submits that the financial impact of the bill is low and that existing resources of the department will be used to cover any associated costs.⁴¹

Acknowledgement

1.23 The committee thanks the individuals and organisations who made submissions and gave evidence at the public hearing.

Notes on references

1.24 Reference to the committee *Hansard* is to the proof. Page numbers may vary between the proof and the official *Hansard* transcript.

40 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, June 2014, pp. 35–55.

41 Explanatory Memorandum, p. 4.