CHAPTER 2

Key issues

2.1 The Migration (Protection and Other Measures) Bill 2014 (bill) seeks to reform Australia's onshore protection status determination system, clarify the risk threshold for Australia's non-refoulement obligations, streamline the statutory bars that preclude making valid visa applications and improve the processes and administration of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT).

2.2 Submissions to the inquiry broadly examined the bill's ability to improve the efficiency and fairness of the existing onshore protection status determination system and its interplay with Australia's obligations under international law. Some submitters also considered the bill's potential impact on unauthorised maritime arrivals (UMA) and transitory persons who have been issued a temporary safe haven visa, and weighed the necessity of the proposed amendments to the practices of the MRT and RRT.

2.3 The evidence provided to the committee reflected a wide range of views from concerns about the proposed measures, to acknowledgement of the need for reform as an effective response to the evolving challenges in the asylum seeker landscape.[1] These views will be discussed in this chapter.

Improved efficiency of onshore protection status determination processes

Specifying all particulars of a protection visa claim

2.4 Schedule 1 introduces measures that would make it a non-citizen's responsibility to set out all the details of their protection visa claim, including providing sufficient evidence to substantiate such a claim.[2] Further, schedule 1 expressly provides that:

- the Minister of Immigration and Border Protection (Minister) has no obligation or responsibility to assist a non-citizen with their protection visa claim;[3] and
- the 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.[4]

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1 Migration Review Tribunal – Refugee Review Tribunal, *Submission 5*; Department of Immigration and Border Protection, *Submission 14*.

2 Migration Amendment (Protection and Other Measures) Bill 2014, s. 5AAA.

3 Migration Amendment (Protection and Other Measures) Bill 2014, s. 5AAA(4).

4 Migration Amendment (Protection and Other Measures) Bill 2014, s. 423A.

2.5 A number of submitters contended that the refugee status determination process is inquisitorial in nature, and argued that the proposed measures would introduce an adversarial process.[5] Some submitters expressed concerns that these measures may not be consistent with international standards for the assessment for refugee protection claims.[6]

2.6 Some submitters argued that the proposed changes to the production of identification evidence creates a risk that Australia will breach its international obligations not to return people to persecution or other significant harm.[7] Some submitters opposed this provision on the basis that it would require asylum seekers to draft their protection claims as if they were drafting a legal pleading.[8]

2.7 Many submitters also took issue to the proposed requirement that the RRT draw an adverse inference on credibility where new claims or evidence are presented before the primary decision on a protection visa claim is made.[9] The ANU College of Law – Migration Law Program (ANU Law) submitted that the proposed measures would allow the decision maker to 'draw adverse inferences as to credibility *based on the timing* of when evidence is presented,'[10] and that this could 'unwittingly encourage applicants to submit false documents or evidence to support their claims for fear that later evidence may not be accepted.'[11]

2.8 Some submitters also raised concerns that the requirement to draw an adverse inference on credibility 'hinders both the independence and discretion' of the tribunal,[12] and argued that the discretionary Ministerial powers provided would not satisfy the standard of 'independent, effective and impartial' review required to meet Australia's international obligations.[13]

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5 The Andrew and Renata Kaldor Centre for International Refugee Law, *Submission 6*; Law Council of Australia, *Submission 9*, p. 4, pp. 9–10; Refugee Advice and Case Work Service, *Submission 10*, pp. 1–2; Refugee Council of Australia, *Submission 11*, p. 1; Ms Linda Kirk, *Submission 12*, p. 4; Human Rights Law Centre, *Submission 17*, p. 7.

6 Amnesty International, *Submission 1*, pp. 1–2; Canberra Refugee Action Committee, *Submission 3*, pp. 5–6; *Submission 6*; ANU College of Law – Migration Law Program, *Submission 8*, pp. 5–6; *Submission 9*, p. 3; *Submission 10*, p. 1; *Submission 11*, pp. 1–2; *Submission 12*, p. 3; *Submission 17*, p. 8; United Nations High Commissioner for Refugees, *Submission 18*, p. 4.

7 *Submission 6*, p. 22; *Submission 8*, pp. 5–6; *Submission 10*, p. 4; *Submission 11*, pp. 1–2 .

8 *Submission 9*, p. 12; The Law Society of New South Wales, *Submission 15*, p. 1.

9 *Submission 10*, p. 4; *Submission 11*, p. 3.

10 *Submission 8*, p. 6.

11 *Submission 8*, p. 8.

12 *Submission 11*, p. 3.

13 *Submission 6*, p. 22; *Submission 9*, p. 14.

2.9 Concerns focused on the impact of the bill on asylum seekers with vulnerabilities.[14] Refugee Council of Australia (RCOA) highlighted that if an adversarial process was adopted, legal representation and timely and appropriate immigration advice and assistance for visa applicants would be of even greater importance.[15]

2.10 The Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) opined that in most cases it would not only be challenging, but unrealistic to require 'asylum seekers [to] provide proof of the harm they fear.'[16] Amnesty International submitted that 'those fleeing persecution from conflict, or even threat of female genital mutilation or other forms of torture, may not have the capacity to prove their likely threat explicitly.'[17] The UNHCR submitted that:

> Given the particular reasons motivating refugee movements, a person fleeing from persecution is often compelled to leave with only the barest necessities and very frequently without personal documents.[18]

2.11 In contrast, the department and the government argued that the amendments are necessary to prevent exploitation by people who are not genuinely pursuing protection claims.

2.12 As explained in the explanatory memorandum to the bill, the proposed legislation seeks to address situations where asylum seekers 'have deliberately destroyed or discarded identity documents and… refuse to co-operate in efforts to establish their identity, nationality, or citizenship.'[19] In evidence before the committee, the department stated that:

> By legislating that it is an asylum seeker's responsibility to specify all particulars of their claim and to provide sufficient evidence to establish that claim, the government is formalising the legitimate expectation that someone who seeks Australia's protection will put forward their case for that protection.[20]

2.13 In his Second Reading Speech, the Minister explained that the proposed measures will not act to prevent an asylum seeker from raising late claims where there exists good reasons why they could not do so earlier, but will act to prevent:

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14 *Submission 6*; *Submission 8,* p. 7; *Submission 9*, p. 11; *Submission 10*, p. 2; *Submission 11*, pp. 3–4.

15 *Submission 11*, pp. 2–3.

16 *Submission 6*, p. 10.

17 *Submission 1*, p. 1.

18 *Submission 18*, p. 4.

19 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 56.

20 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 56.

> … those non-genuine asylum seekers who attempt to exploit the independent merits review process by presenting new claims or evidence to bolster their original unsuccessful claims only after they learn why they were not found to be refugees by the department.[21]

2.14 With respect to the role of the decision maker under the amendments, the Minister emphasised that it is not the responsibility of the department or the RRT to make a case for protection on behalf of an asylum seeker.[22] The department further explained that the role of a decision maker is not to advocate for the asylum seeker but to render a decision as to whether or not Australia has an obligation to provide protection to the asylum seeker.

> This new provision does not negate the decision maker's duty to evaluate and ascertain all relevant facts, which is an obligation shared by the asylum seeker and the decision maker. The obligations of decision-makers are already codified. They must act in good faith to fully assess protection visa applications and afford procedural fairness to asylum seekers in accordance with the codes of procedure in the Migration Act. This amendment makes it clear that both parties have a role.[23]

2.15 The department also submitted that the proposed measures are '[c]onsistent with requirements in other resettlement countries, and guidelines from the United Nations High Commissioner for Refugees.'[24] Specifically, the Minster explained that the amendments included in schedule 1 would 'put Australia on par with like-minded countries including the United States, New Zealand and the United Kingdom.'[25]

2.16 With respect to concerns raised by submitters regarding the withdrawal of publicly funded assistance for asylum seekers and the need for more advice and assistance for protection visa applicants, the committee heard evidence from the department that steps had already been taken to provide support and assistance to the most vulnerable:

> [T]he minister recognised that there would be some clients who were more vulnerable than others and that in the interests of supporting those clients, including unaccompanied minors, and also for the efficiency of processes, in some circumstances… legal support should be available. There is a tender currently open at the moment for the provision of those services. The tender closes towards [the] end of this month. We have sought proposals for

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

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

23 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 56.

24 Statement of Compatibility with Human Rights, Migration Amendment (Protection and Other Measures) Bill 2014, Attachment A to the Explanatory Memorandum, p. 3.

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

> people to provide the assistance through the protection visa application processes for those clients who are more vulnerable. In the case of unaccompanied minors, where the minister has guardianship responsibilities, that support would also be available at the merits stage.[26]

2.17 The Kaldor Centre also provided evidence to the committee regarding the government's commitment to fund legal representation of vulnerable groups. Specifically, they submitted that the tender:

> … provides that the Department will select asylum seekers eligible for these services, being those with "demonstrated high levels of vulnerability (which may include unaccompanied minors, people with an intellectual disability, or cases in which resolution of protection claims would otherwise be in the best interest of the Government)."[27]

Bogus identity documents

2.18 A number of submitters opposed the amendments that require the Minister to refuse to grant an application for a protection visa where an applicant provides a 'bogus' identity document.[28] The opposition to this provision centred on the breadth of the definition of 'bogus' documents relevant to the proposed section,[29] which require that a decision maker 'reasonably suspects' the document to be false.[30]

2.19 The Asylum Seeker Resource Centre (ASRC) provided evidence that currently tribunals have considerable discretion in how they look at information brought before them, including false documents.[31]

2.20 Some submitters argued the bill should include a provision for review of decisions based upon a 'bogus' document.[32] The Law Council of Australia (Law Council) expressed concern that the amendments would:

> … require the Minister to refuse the protection visa applicant in circumstances where bogus documents are provided or where identity documents have been destroyed, rather than allow an adverse inference to be made.[33]

2.21 In response to these concerns the department explained in detail their 'expert capacity' to examine and determine whether or not documents are fraudulent.

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26 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 59.

27 The Andrew and Renata Kaldor Centre for International Refugee Law, answer to question on notice, 10 September 2014, p. 1.

28 *Submission 1*; *Submission 6*; *Submission 9*; *Submission 10*; *Submission 17.*

29 *Submission 6*, pp. 22–23; *Submission 9*, pp. 14–17; *Submission 10*, p. 11.

30 *Submission 6*, p. 23.

31 Ms Jessica Williamson, Human Rights Law Program Manager, Asylum Seeker Resource Centre, *Proof Committee Hansard*, 5 September 2014, p. 22.

32 *Submission 6*, p. 23.

33 *Submission 9*, p. 15.

> In the same way that [a] tribunal turns to… [an] expert [for] advice, so would our primary decision makers when they are dealing with documentation. We are certainly interested in making sure that all of our decision makers are aware of the issues around fraudulent documentation and know where to go to get further advice if they are uncertain at all… We would use our expertise in the unit in the department.[34]

2.22 The Migration Review Tribunal – Refugee Review Tribunal (MRT – RRT) also provided evidence before the committee that 'fraudulent documents in relation to identity are not all that common' and that these 'matters are generally picked up at the departmental level.'[35] Further, MRT – RRT emphasised that where a tribunal encounters documents that are suspected to be fraudulent '[t]he tribunal has the ability to use the document fraud unit within the department to examine documents,' and that 'from time to time [the tribunal will] refer documents to overseas posts for them to assess the likelihood of the document being genuine or not.'[36]

2.23 The government also highlighted that the purpose of this amendment is to discourage protection visa applicants from 'providing false identity documents, or destroying or discarding existing, genuine documents' and to ensure that 'wherever possible to do so' a protection visa applicant 'provides documentary evidence of their identity, nationality or citizenship.'[37]

Reasonable explanation safeguards

2.24 The amendments provide that where the Minister is satisfied that the applicant has a 'reasonable explanation' for non-compliance with the identification provisions outlined above, the applicant's protection visa may be granted.[38] The Law Council explained the application of the proposed measures, as follows:

> The current provisions allow the decision maker to exercise discretion to make an adverse finding against someone who relies on bogus documents. The proposed provisions would, if you like, introduce a two-step process where… the starting point would be to draw an adverse inference and then the next inquiry would be to find out if there is a reasonable explanation.[39]

2.25 ANU Law argued that the 'reasonable explanation' provision would not only create an additional burden on applicants and decision makers, but also a risk:

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34 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 60.

35 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 53.

36 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 53.

37 Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, p. 12.

38 Migration Amendment (Protection and Other Measures) Bill 2014, s. 91W, s. 423A(2).

39 Ms Sarah Moulds, Co-Director, Criminal Law and Human Rights Division, Law Council of Australia, *Proof Committee Hansard*, 5 September 2014, p. 40.

> … that you might have an instance where someone would present what seems to be very strong evidence but that evidence is not considered in the context of their claims because they have not come up with a 'reasonable explanation'. The bill is silent on exactly what a 'reasonable explanation' may be.[40]

2.26 A number of submitters argued that this 'reasonable explanation' safeguard is vague and unsatisfactory[41] 'as the test is not whether the explanation is objectively reasonable, but whether the decision maker is satisfied the explanation is reasonable'[42] and the bill offers no guidance as to what may constitute a 'reasonable explanation' for the purposes of the proposed sections.[43] Some submitters raised specific concerns regarding the inability of the amendments to make allowances for child applicants.[44] UNICEF Australia argued that:

> Evidence may not be presented at first instance simply because applicants, particularly children, do not fully understand the process or the significance of the evidence. It is unclear whether a lack of understanding would be regarded as a reasonable explanation for not presenting claims or evidence at the earliest opportunity.[45]

2.27 In evidence before the committee, the department reiterated its view that the critical thing about the proposed changes is that they are not designed to facilitate the department to refuse a visa, but instead:

> … it is designed to really encourage people to come at the beginning of the process with as much information as possible that can help us in establishing their identity. It is a much more straightforward process to assess whether somebody is a refugee or not if we have all of the ideas the information that someone has at the beginning of a process.[46]

2.28 Moreover, the bill includes two additional safeguards on top of the 'reasonable explanation' safeguard to protect applicants. The first gives the Minister the power to grant a protection visa application where 'the applicant provides documentary evidence of their identity, nationality or citizenship when requested to do so, or has taken reasonable steps to do so.'[47] The second requires that an applicant be given a

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40 Mr Khanh Hoang, Associate Lecturer, Migration Law Program, ANU College of Law, *Proof Committee Hansard*, 5 September 2014, p. 27.

41 *Submission 6*, pp. 22–23; *Submission 8*, p. 6; *Submission 9*, p. 14; *Submission 10*, p. 9.

42 *Submission 6*, p. 23.

43 *Submission 6*, p. 23; *Submission 8*, p. 6; *Submission 9*, p. 14; *Submission 10*, p. 9.

44 UNICEF Australia, *Submission 7*, p. 2; *Submission 9*, p. 12.

45 *Submission 7*, p. 2.

46 Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 60.

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

warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant where the applicant refuses or fails to comply with the request; or produces a bogus document in response to the request.[48]

2.29 In response to concerns raised about the current form of the 'reasonable explanation' safeguard in the bill, the department explained that:

> A 'reasonable explanation', or 'reasonable steps' have not been codified in law as it is not necessary to do so and may unduly restrict their interpretation to the detriment of applicants. A reasonable explanation is one that is generally credible and does not run counter to known facts. Decision makers are obliged to act reasonably, lawfully and in good faith at all times.[49]

2.30 In the context of concerns raised by some submitters regarding the ability of the amendments to make allowances for protection visa applicants who are children, the committee notes that the Minister is the guardian of unaccompanied children in Australia,[50] and as such, would be fully cognisant of the requirement of presenting claims or evidence at the earliest opportunity.

Protection visa's for family members of a protection visa applicant

2.31 Under the proposed amendments, a family member of an existing protection visa holder, cannot be granted a protection visa simply on the basis of being a member of the same family. Some submitters argued that it would be more efficient to process and grant family protection as opposed to conducting individual status determinations of each family member.[51] Refugee Advice and Case Worker Service (RACS) submitted that 'the amendment discriminates against family members who did not arrive in Australia and apply for protection at the same time.'[52]

2.32 With reference to Articles 6 and 9 of the *Convention on the Rights of the Child* (CRC), Kaldor Centre submitted that 'a child shall not be involuntarily separated from his or her parents, except when such separation is in the child's best interests.'[53] As such, some submitters argued that the amendments could violate Australia's obligations under CRC.[54] In addition, ASRC submitted that the Refugee Convention specifically directs government with reference to family units 'to ensure the "unity of the refugee's family is maintained, particularly in cases where the head of the family

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48 Migration Amendment (Protection and Other Measures) Bill 2014, s. 91W(2)(d).

49 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 56.

50 Mr David Manne, Executive Director/Principal Solicitor, Refugee & Immigration Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 7.

51 *Submission 6*, p. 28; *Submission 8*, p. 10.

52 *Submission 10*, p. 12.

53 *Submission 6*, p. 8.

54 *Submission 6*; *Submission 7*, pp. 2–3; *Submission 8*, pp. 10–11; *Submission 9*, p. 31.

has fulfilled the necessary conditions for admission to a particular country".'[55] The Law Council was also concerned that this amendment would run counter to the spirit of the Refugee Convention to ensure family unification.[56]

2.33 The department submitted that the amendment is aimed to discourage family members of protection visa holders arriving in Australia, particularly illegally, with an expectation that on the basis of being a family member they will be granted a protection visa.[57]

> This measure does not stop a protection visa holder being with their family. A member of the same family unit is able to apply for a protection visa in their own right if they arrive in Australia after the protection visa holder has already been granted their visa or the protection visa holder may act as a sponsor for various family migration visas as appropriate.[58]

2.34 The committee notes that this amendment does not change the definition of a 'member of the same family unit', nor does it affect the existing ability of a member of the same family unit to apply together with, or have their application combined with, the eventual holder of a protection visa when they are present in Australia at the same time.

2.35 The department also emphasised that this amendment has no affect on the ability of a member of a family unit applying together for a protection visa or the ability of a member of a family unit once they have arrived in Australia to combine their application with the eventual protection visa holder.[59]

> [T]here is still the ability for people to lodge protection applications as a family group. It would also be possible for other family members to join the application while the application was still on foot—that is, before a decision had been made.[60]

Committee view

2.36 The committee is persuaded that the measures in schedule 1 clarify the responsibility of non-citizens who claim to be a person in respect of whom Australia has protection obligations and encourage complete information to be provided upfront. The committee is satisfied that appropriate safeguards exist to protect applicants who do not fully understand the process or the significance of producing identity evidence at the earliest opportunity.

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55 Asylum Seeker Resource Centre, *Submission 16*, p. 11.

56 *Submission 9*, p. 31.

57 *Submission 14*, p. 8.

58 *Submission 14*, p. 8.

59 *Submission 14*, p. 8.

60 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 59.

Clarifying the risk threshold for Australia's non-refoulement obligations

Background

2.37 In 1989 the High Court established the 'real chance' test to assess the objective element of a non-citizen's well-founded fear under the Refugee Convention.[61] In March 2013 the Full Federal Court applied this same 'real chance' test in the context of assessing Australia's complementary protection obligations 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).[62] As such, currently, Australia has protection obligations in respect of a non-citizen where there is a 'real chance' that the non-citizen will suffer significant harm if removed from Australia to a 'receiving country.'[63]

2.38 The judicial interpretation of the risk threshold in the context of complementary protection 'is inconsistent with the Government's intended interpretation.'[64]For this reason, schedule 2 introduces measures into the protection visa framework to provide clarity and to restore it to the threshold that was initially intended by the *Migration Amendment (Complementary Protection) Act 2011* that commenced in March 2012.[65] Specifically, it provides that Australia has complementary protection obligations where it is 'more likely than not' the non-citizen will suffer significant harm if removed from Australia to a receiving country.[66]

> The 'more likely than not' threshold is the same threshold that was applied when the complementary protection provisions were first introduced into the Migration Act in March 2012, and this bill seeks to restore this threshold by making it expressly clear on the face of the legislation rather than only in policy.[67]

International practice

2.39 The department acknowledged the threshold test for assessing non-refoulement obligations under ICCPR and CAT 'has been the subject of ongoing differences of opinion in international fora and amongst the various national implementations of these obligations.'[68] Further, it submitted that applying the

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61 *Chan Yee Kim v Minister for Immigration and Ethnic Affairs* [1989] HCA 62.

62 *Minister for Immigration and Citizenship v SZQRB* [2013] FAFC 33.

63 Receiving country, in relation to a non-citizen means: (a) A country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or (b) If the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country. See: Migration Amendment (Protection and Other Measures) Bill 2014, ss. 5(1).

64 *Submission 14*, p. 8.

65 See: *Migration Amendment (Complementary Protection) Act 2011*.

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

67 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 57.

68 *Submission 14*, p. 9.

threshold of 'more likely than not' will align Australia with like-minded countries such as the United States and Canada.[69] In evidence before the committee, the department explained that:

> … the government considers the 'more likely than not' threshold to be an acceptable position open to Australia under international law; that the amendments made to the overall language of the new test are reflective of Australia's interpretation of its non-refoulement obligations under both the convention against torture and the International Covenant on Civil and Political Rights; and that applying this threshold is consistent with the views of the UN Committee against Torture in its general comment 1 and the UN Human Rights Committee in its general comment 31 as to when a non-refoulement obligation will arise.[70]

2.40 Many submitters argued that changing the risk threshold from a 'real risk' of suffering significant harm to 'it is more likely than not' that a non-citizen will suffer significant harm, could bring Australia into conflict with international law, and specifically, in violation of its non-refoulement obligations.[71]

2.41 A number of submitters also raised concerns that as the proposed measures would only change the assessment of the complementary protection aspect of a claim, and not the assessment of whether a person meets the refugee definition,[72] this would create two inconsistent tests for refugee and complementary protection,[73] making it confusing for both applicants and decision makers.[74]

2.42 The department submitted it is necessary to amend the threshold test to ensure it is consistent with Australia's non-refoulement obligations under CAT.[75] The department explained that 'Article 3 of the CAT requires more than a mere possibility of torture but that it does not have to be highly likely to occur.'[76] As such, given the

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69 *Submission 14*, p. 9.

70 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 57.

71 *Submission 1*, p. 4; Castan Centre for Human Rights Law, *Submission 2*, p. 4; *Submission 3*, p. 15; Association for the Prevention of Torture and the Victorian Foundation for Survivors of Torture, Submission *4*, p. 2; *Submission 6*, p. 13; *Submission 7*, p. 3; *Submission 8*, p. 1; *Submission 9*, p. 5; *Submission 10*, pp. 16–17 ; *Submission 11*, p. 9; Ms Linda Kirk, *Submission 13*, p. 4; *Submission 15*, pp. 2–3; *Submission 16*, p. 3; *Submission 17*, p. 5; *Submission 18*, pp. 10–12; Refugee & Immigration Legal Centre, tabled document, 5 September 2014, p. 8.

72 *Submission 6*, p. 13.

73 *Submission 6*, p. 19; *Submission 3*, p. 14; *Submission 8*, pp. 2–3; *Submission 16*, p. 3.

74 *Submission 3*, p. 14; *Submission 8*, pp. 2–3; *Submission 16*, p. 3.

75 *Submission 14*, p. 10.

76 *Submission 14*, p. 10.

'more likely than not' threshold is lower than a 'highly probable' threshold, the department consider it is compatible with Australia's obligations under CAT.[77]

2.43 With respect to Australia's non-refoulement obligations under the ICCPR, the department submitted that UNHCR has 'consistently emphasised the need for the risk to be "real and personal" to the individual' in order to engage non-refoulement obligations under Articles 6 and 7 of the ICCPR.[78]

> The 'more likely than not' risk threshold in this Bill is intended to both capture and allow assessment of all potential circumstances and situations which may engage Australia's non-refoulement obligations under the ICCPR and the CAT.[79]

Applying the new threshold

2.44 Concerns were raised at the hearing as to how the proposed new threshold would be applied by decision makers.[80] The core issue was whether the threshold would be interpreted on the balance of probabilities or a quantifiable greater than 50 per cent chance style test.

2.45 The department acknowledged that further clarity on this issue could be provided and has undertaken to amend the explanatory memorandum to the bill 'in order to clarify the confusion around the "more likely than not" threshold and how it is intended to apply to decision makers.'[81]

2.46 With respect to the amended definition of 'receiving country,'[82] this clarifies the reference point for assessing Australia's protection obligations in respect of non-citizens.[83] This proposed measure will ensure that:

> … there is always a country of reference for a person claiming protection, regardless of the fact that a non-citizen may be stateless or that their county of nationality or habitual residence may not in fact accept their return.[84]

Committee view

2.47 The committee notes that the approach taken in comparable jurisdictions varies and is satisfied that applying the complementary protection risk threshold of 'more likely than not' is an acceptable position open to Australia under CAT and ICCPR.

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77 *Submission 14*, pp. 9–10.

78 *Submission 14*, p. 10.

79 *Submission 14*, p. 10.

80 Senator the Hon. Jacinta Collins, *Proof Hansard*, 5 September 2014, p. 61.

81 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 3.

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

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

84 *Submission* 14, p. 12.

2.48 The committee considers this amendment is necessary to restore the risk threshold for protection to the higher threshold that was intended when the protection framework was inserted into the *Migration Act 1958* in 2011.

2.49 The committee view is that the explanatory memorandum should be amended to clarify how the 'more likely than not' threshold will be applied by decision makers.

Streamlining the statutory bars that preclude making visa applications

2.50 Under schedule 3, 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.[85] Additionally, UMAs and transitory persons holding a temporary safe haven visa, temporary humanitarian visa or a temporary protection visa, will be excluded from applying for another valid temporary safe haven visa application, unless the Minister determines to allow them to do so.[86]

Simplifying the legal framework

2.51 In his Second Reading Speech, the Minister said that it is administratively complex and inefficient for a person to be subject to different provisions at different times that prevent them from making a valid visa application when one would suffice.[87] The explanatory memorandum explains that the items in schedule 3:

> … make amendments 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 and supporting the orderly management of visa applications.[88]

2.52 RCOA agreed the current system for granting visas to UMAs was inefficient and administratively complex, but, maintained that the issues concerning the processing of asylum seekers who arrive by boat would be better resolved by:

> … returning to a single statutory system of status determination and protection for all asylum seekers, rather than maintaining parallel systems for different groups based on their mode of arrival and requiring personal Ministerial intervention in cases where standard processing procedures would suffice.[89]

2.53 Canberra Refugee Action Committee (CRAC) acknowledged that the proposed measures would provide the government increased flexibility in determining

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85 Explanatory Memorandum, p. 3.

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

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

88 Explanatory Memorandum, p. 30.

89 *Submission 11*, p. 11.

a UMA or transitory persons' visa application, however, they raised concerns about how this may develop in the context of implementing the:

> Government's original policy not to issue permanent protection visas to boat arrivals, and to limit the duration of … [temporary protection visas] on a case-by-case basis to no more than 3 years, requiring a completely new refugee assessment for any renewal.[90]

2.54 The Law Council emphasised the need for the potential impact of schedule 3 on asylum seekers who have been granted temporary safe haven visas to be considered.[91] Specifically, the Law Council expressed concerns about the supports, such as access to Medicare and education that are available under temporary safe haven visas, but are not included under temporary protection visas.[92]

Committee view

2.55 The committee notes that extending the application of the statutory bar on applying for a visa to UMAs and transitory persons who are in Australia and have already been granted a bridging or a prescribed temporary visa 'do[es] not affect the substantive current objective of the statutory bars which is to allow the Government to control access to Protection visas and other substantive visas.'[93] Further, the committee considers the Minister's ability to make a determination that it is in the public interest to allow UMAs and transitory persons to make a valid application,[94] to be an adequate safeguard to protect against submitters' concerns.

2.56 The committee is persuaded that the measures contained in schedule 3 will support the orderly management of visa applications from UMAs and transitory persons and in some cases, their release from detention.

Improving tribunal processes and administration

Practice directions

2.57 Schedule 4 seeks to implement measures to enable the Principal Member of the MRT and RRT to issue practice directions about procedures and processing practices that are to be complied with in respect of particular review or classes of cases before the tribunals.[95] The committee did not receive any substantive submissions opposing the amendments contained in schedule 4 concerning the practice directions measures.

2.58 MRT – RRT submitted that the proposed practice directions measures contained in the bill would 'strengthen and clarify the existing powers of the Principal

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90 *Submission 3*, p. 17.

91 *Submission 9*, p. 32.

92 *Submission 9*, p. 33.

93 *Submission 14*, p. 13.

94 Explanatory Memorandum, p. 3.

95 *Submission 14*, p. 13.

Member to give directions about the conduct of reviews', thereby contributing to the efficiency, certainty and consistency in conducting and processing reviews.[96]

Guidance decisions

2.59 Schedule 4 also seeks to implement measures to enable the Principal Member of the MRT and RRT to issue guidance decisions with respect to the issues determined that will be regarded as authoritative, unless a Principal Member is satisfied that the facts or circumstances of the case under review are clearly distinguishable from those in the guidance decision.[97]

2.60 A number of submitters noted the potential value of guidance decisions in creating more consistent and efficient decision making, but expressed concerns that the proposed measures do not provide safeguards to ensure the quality and appropriateness of guidance decisions.[98] ANU Law argued that:

> Consideration could be given as to whether achieving more consistent decision making at the RRT could be done through policy guidance… encouraging consistent decision-making, without unnecessary restrictions on a Member's ability to decide each case on its merits.[99]

2.61 Some submitters also expressed concerns that the proposed measures could potentially diminish the independence of the MRT and RRT,[100] and highlighted the need for the tribunals to retain their discretion to have regard to an applicant's individual circumstances.[101] Specifically, ANU Law stated that the provisions to allow Principal Members to issues guidance decisions 'unnecessarily fetters the discretion and independence of tribunal members to consider the merits of a particular case.'[102] In response, MRT – RRT stated that:

> … five people do not have to reinvent the wheel on a daily basis. Obviously, these decisions have a limited shelf life because circumstances change. What the legislation also makes clear is that, if a particular person's circumstances are not within that framework, the guidance decision simply does not apply to them.[103]

2.62 MRT – RRT argued that guidance decisions will 'contribute to the public perceptions of fairness and justice in Tribunal decision-making' and 'increase Tribunal

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96 *Submission 5*, p. 3.

97 *Submission 14*, p. 13.

98 *Submission 6*, p. 34; *Submission 8*, pp. 8–9; *Submission 9*, pp. 20–21.

99 *Submission 8*, p. 9.

100 *Submission 1*, p. 4; *Submission 3*, p. 19; *Submission 8*, p. 8; *Submission 9*, p. 21; *Submission 12*, p. 19.

101 *Submission 9*, p. 21; *Submission 11*, pp. 12–13; *Submission 16*, p. 12.

102 Mr Khanh Hoang, Associate Lecturer, Migration Law Program, ANU College of Law, *Proof Committee Hansard*, 5 September 2014, p. 27.

103 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 55.

efficiency and certainty in dealing with common questions that arise frequently.'[104] They emphasised that the protections within the provision to depart from guidance decisions where cases have clearly distinguishable facts or circumstances allowed for flexibility and justice in individual cases, 'ensuring that each case is considered on its own merits.'[105]

2.63 The department explained that it had sought to create consistent outcomes for protection visa applicants through the guidance decisions provisions.

> [T]his bill seeks to address the… inconsistency in the application of the Migration Act by decision makers, including tribunal members, leading to inconsistent outcomes for protection visa applicants.[106]

2.64 MRT – RRT further explained that 'the guidance decisions are to aid consistency in decision making' where cases 'have like circumstances within a particular factual matrix'.[107] MRT – RRT emphasised that a guidance decision 'really is a factual precedent rather than a legal precedent' and highlighted that the MRT – RRT are 'anxious to avoid [situations where]… a person who has like circumstances can obtain a different outcome.'[108]

2.65 In response to concerns about the inability of the measures to maintain the independence of tribunal Members, MRT – RRT submitted that 'the preservation of the validity of Tribunal decisions even in cases of non-compliance with a guidance decision maintains the independence of Tribunal members.'[109]

> [T]he intention of such a system is to guide fact finding tribunal members who have busy hearing schedules and matters with very variable representation coming before them, sometimes with poor documentation. The intention is that a decision that is marked as a guidance decision is one where there has been a thorough and exhaustive examination of all the relevant material to give guidance on the circumstances and risks in a particular country in question on a particular date.[110]

Power to dismiss applications for non-appearance

2.66 The proposed measures to enable the Principal Member of a tribunal to dismiss applications where an asylum-seeker fails to appear at a hearing received a

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104 *Submission 5*, p. 3.

105 *Submission 5*, p. 3.

106 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 56.

107 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 54.

108 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 54.

109 *Submission 5*, p. 5.

110 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 49.

mixed response from submitters. CRAC raised concerns about the necessity of the provision.[111] The Kaldor Centre submitted that the measures 'enable the RRT [and MRT] to ignore evidence before it' and thus, 'create a real risk of refoulement for the asylum seeker concerned.'[112]The Refugee & Immigration Law Centre (RILC) provided evidence before the committee that the proposed measures:

> … could result in people who, for reasons or circumstances beyond their control, fail to either receive a notification or fail to understand the statutory requirements[113]

2.67 The committee heard evidence regarding the limitations of the introduction of the seven day limit on reinstatement of an application. RCOA submitted that the imposition of 'short, seven-day time frames to apply to the Tribunal for reinstatement after notice of the decision is received' fails to take into consideration the significant obstacles many asylum seekers face.[114] Similarly the Kaldor Centre argued that 'there is no provision for extending this time limit, even where there may be a good reason (for example, hospitalisation),'[115] and that the seven day limit on reinstatement could result in asylum seekers being denied protection because:

> … they failed to notify the RRT of a change of address or their address was wrongly recorded. They therefore did not receive notice of the hearing, and they did not become aware of this until the seven-day reinstatement period had passed.[116]

2.68 In his Second Reading Speech the Minister recognised the need for an avenue of reinstatement where an applicant had a genuine reason for not attending a hearing. Specifically, the Minister explained that a claim that had been dismissed for non-appearance would be reinstated:

> … where the tribunal considers it appropriate to do so, in circumstances where the applicant has applied to the tribunal for reinstatement of the application within seven days after receiving notice of the decision to dismiss the application.[117]

2.69 MRT – RRT submitted that the proposed measures would 'create efficiency gains by providing an additional mechanism for the Tribunals to use in cases that are no longer pursued by applicants' and result in applications being finalised more quickly with fewer resources, 'as the Tribunals will not need to prepare a full decision

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111 *Submission 3*, p. 18.

112 *Submission 6*, p. 30.

113 Mr David Manne, Executive Director/Principal Solicitor, Refugee & Immigration Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 5.

114 *Submission 11*, p. 12.

115 *Submission 6*, p. 31.

116 *Submission 6*, p. 31.

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

and statement of reasons with findings and evidence'[118] in cases where an applicant fails to appear.

2.70 MRT – RRT also emphasised that these measures would bring the powers of the MRT and RRT into alignment with other commonwealth merits review tribunals, such as the Social Security Appeals Tribunal and the Administrative Tribunal, where such powers are exercised fairly and effectively.[119]

2.71 The committee also notes that the proposed amendment to allow tribunals to dismiss applications where an applicant fails to appear is consistent with the recommendations of Professor Michael Lavarch who conducted a recent inquiry into the increased workload of the MRT and RRT.[120]

Oral statement of reasons

2.72 Schedule 4 also seeks to change the delivery of oral decisions for the MRT and RRT, such that where a tribunal makes a decision on review orally, then it will no longer need to reduce the statement of reasons to writing, unless the applicant makes a request for it to be provided.

2.73 RCOA emphasised that for some applicants, oral decisions fail to adequately address the cultural and linguistic barriers faced by asylum seekers.[121] They argued that:

> … this is especially compounded by the applicant's likely lack of understanding of Australia's legal system and lack of familiarity with such processes. Given the memory and retention issues that torture and trauma survivors often experience, there is a compelling need for applicants to receive a written record of the decision.[122]

2.74 The Law Council also expressed concerns about the need for a written statement of an oral decision to be provided by the MRT and RRT:

> Receiving written reasons for a decision is important for an applicant to understand a finding, particularly in the case of an adverse finding where the applicant must decide whether to challenge the decision in an appeal. Written reasons are also very important for self-represented applicants who are not necessarily able to assess reasons at the time they are given orally and would benefit from having more time to consider and understand the decision. There is also a risk that self-represented litigants will not be aware of the requirement to make the request.[123]

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118 *Submission 5*, p. 2.

119 *Submission 5*, p. 2.

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

121 *Submission 11*, p. 12.

122 *Submission 11*, p. 12.

123 *Submission 9*, p. 22.

2.75 In evidence before the committee, RACS highlighted that:

> One of the issues with the oral decisions provision is that it is going to be very difficult for applicants who are unsuccessful and receive their decision orally to then get advice from someone who can tell them whether or not the tribunal made the decision according to law.[124]

2.76 In contrast, MRT – RRT and the department submitted that the oral statement of reasons provisions will result in improved access to the tribunal's reasons for a decision for applicants in a hearing.[125] MRT – RRT argued that enabling the tribunals to provide an oral statement of reasons where it makes an oral decision in the context of a tribunal hearing 'will also have advantages for applicants who speak languages other than English.'[126] As arrangements are already made by the tribunals for interpreters to enable the proceedings to be translated for the applicant in their own language, this provision would permit the applicant to immediately hear the reasons for the tribunal's decision in their own language.[127] MRT – RRT argued that:

> We use interpreters in a lot of our matters. One of the advantages of delivering oral reasons is that they are delivered in the presence of the interpreter and interpreted at the time rather than written in English and provided to the applicant at a later date. We record all of our proceedings. So if oral reasons were delivered an applicant could obtain a copy of the recording and again listen to the interpreted reasons for the decision.[128]

2.77 MRT – RRT highlighted the safeguard contained in the proposed measures that '[a]pplicants will still be entitled to receive a written statement of reasons if they wish, simply by requesting it within the specified timeframe.'[129] MRT – RRT summed up its position at the hearing as follows:

> From an administrative point of view, it is very time consuming to have to turn around in every case and write detailed written reasons... the tribunals are a very busy jurisdiction. We need to give everybody an opportunity to have their matter dealt with expeditiously. So we are looking at ways that will add efficiency to our processes but not take away anything from people's rights or fairness. The delivery of oral reasons is an immediate response to a decision. It would not be something that is done in every case. In a very complex refugee case, I cannot imagine that a member would be delivering oral reasons. But, in a lot of the more routine matters, particularly in the Migration Review Tribunal context rather than the Refugee Review Tribunal context, oral reasons would be eminently

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124 Mr Scott Cosgriff, Senior Solicitor, Refugee Advice & Casework Service, *Proof Committee Hansard*, 5 September 2014, p. 22.

125 *Submission 5*, pp. 2–3.

126 *Submission 5*, p. 2.

127 *Submission 5*, p. 3.

128 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 51.

129 *Submission 5*, p. 3.

> suitable. Other tribunals and courts have the ability to deliver oral reasons as long as you can get a copy in writing if you so request.[130]

Safeguards

2.78 Under the proposed measures applicants who receive an oral decision and an oral statements of reasons are entitled to receive a written statement of reasons if they wish, by requesting for an oral statement to be provided in writing within 14 days after the decision is made.[131]

2.79 Further, the Law Council explained in their submission that:

> Outside of this merits review process, the applicant can also request that the Minister exercise his or her non-compellable, discretionary powers to intervene to reconsider a negative decision relating to a protection visa. Judicial review may also be available, for example on the grounds of a failure by the primary decision maker to make the decision in accordance with law.[132]

2.80 The department also provided evidence that after tribunal consideration:

> The other options are always judicial review… or a request for ministerial intervention—for the minister to intervene if he believes it is in the national interest to do so—to allow someone to make a further application or to grant a visa.[133]

Pending amalgamation of commonwealth tribunals

2.81 The Law Council did not support the proposed changes to the operation of the MRT and RRT whilst review of the amalgamation of the commonwealth tribunals is pending.[134]

2.82 MRT – RRT and the department foreshadowed an amalgamation of various commonwealth tribunals in the future, and submitted that more continuity between the tribunals was therefore appropriate.[135] MRT – RRT also provided evidence before the committee that:

> … in terms of our current member numbers, we do not anticipate that the amalgamation of tribunals would affect the number of members who are

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130 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, pp. 51–52.

131 *Submission 5*, p. 3; Migration Amendment (Protection and Other Measures) Bill 2014, ss. 368(d).

132 *Submission 9*, p. 38.

133 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 64.

134 *Submission 9*, p. 23.

135 *Submission 5*.

> allocated to do the work that the MRT and the RRT are currently doing within a new body.[136]

Committee view

2.83 The committee considers that it is important to improve the processing and administration practices of the MRT and RRT, and is persuaded that these amendments will stop applicants from using the merits review process to delay their departure from Australia, as well as to align and reduce inconsistencies through the harmonisation of decisions.

2.84 However, the committee is persuaded by evidence that the 7 day time limit to apply to the tribunal for reinstatement after notice of a decision is received with respect to an applicant's non-appearance is inadequate. For this reason, the committee recommends that the 7 day limit on reinstatement of an application where an applicant fails to appear be increased to 14 days.

Application of the bill

2.85 Some submitters expressed concerns about the bill's retrospective application.[137] Highlighting the reality that protection visa applications are not instantaneous assessments, RACS submitted that:

> The retrospective application of the Bill… undermines the legal processes that have applied to existing but unfinalised applications… The Bill creates a legal situation in which a person who applied for a protection visa several years ago and who has always met all existing criteria for the grant of the visa can or must be refused the visa due to the amendments proposed in the Bill.[138]

2.86 The Kaldor Centre submitted that 'there is no compelling justification for the retrospective effect of these provisions.' They argued that the retrospective application of the proposed measures on applicants 'part way' through the process could not possibly achieve the 'intended effect of '"encouraging" such people to put their claims forward earlier and more fully (as suggested in the Explanatory Memorandum).'[139]

2.87 The Law Council also strongly opposed the retrospective application of the changes proposed by the bill. It argued that the proposed measures should apply only to applications lodged after the day of Royal Assent because:

> This will be easier to implement, more cost effective and efficient and far fairer to applicants… It is difficult to imagine any other approach to the application of these proposed changes that would not… be consistent with *Acts Interpretation Act 1901*(Cth).[140]

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136 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 54.

137 *Submission 6*, p. 12; *Submission 9*; *Submission 10*.

138 *Submission 10*, p. 3.

139 *Submission 6*, p. 12.

140 Law Council of Australia, answer to question on notice, 10 September 2014, p. 3.

2.88 In contrast, the department submitted that the bill would 'not take effect prior to its commencement date (ie. retrospectively)', but would operate prospectively, 'albeit in respect of already existing Protection visa applications and administrative assessments.'[141]

2.89 In response to criticisms about the application of the new threshold for complementary protection to 'on hand' protection visa applications, the department emphasised that this approach:

> … will ensure that all protection visa applicants regardless of which stage in the process they are up to, will be assessed under the same law and the same thresholds that the [g]overnment considers to be reflective of Australia's obligations under the CAT and the ICCPR.[142]

2.90 The department argued that because 'decision makers are required to accord procedural fairness to applicants in all circumstances' the application of the new threshold to 'on hand' applications is appropriate.[143] MRT – RRT also provided evidence before the committee that if the bill is passed, in handling 'on foot' cases, the applicant would be afforded the opportunity to come back before the tribunal to argue their case under the new threshold.[144]

> In all fairness to an applicant who has already had a hearing but where no decision has yet been made, it would be incumbent on the tribunal to go back to those applicants and say, 'There's been a change in the law; you need to address this'—prior to making any decision.[145]

2.91 MRT – RRT also submitted that when complementary protection was first introduced, it was applied in the same manner as the proposed legislation.

> It applied to all matters that the tribunal had undetermined at the time it was introduced. Obviously, a process had to be gone through with those existing matters so that those people then had an opportunity to make a submission on that basis. That would be the same… those people would need to be given an opportunity to make submissions in relation to issues that affected them if there was a change in the law.[146]

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141 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 2.

142 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 2.

143 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 4.

144 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, pp. 50–51.

145 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, pp. 50–51.

146 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 53.

2.92 In considering the impact of the application provisions, the committee notes that:

- the MRT – RRT provided evidence to the committee that there are currently approximately 4 400 active cases before the RRT.[147] Further, they explained that as at 5 September 2014, of these 4 400 cases, approximately 3 988 are yet to have a hearing, and approximately 412 have received a hearing but not had a decision finalised;[148] and
- the department provided evidence to the committee that currently there are approximately 9 000 protection visa applications awaiting decision at the primary departmental stage; approximately 5 650 protection visa applications before the RRT; and approximately 1 850 protection visa applications remitted by the RRT awaiting reconsideration by the department.[149]

Committee view

2.93 The committee notes the government's intention to ensure that the maximum number of complementary protection assessments apply the threshold considered by the government to be reflective of Australia's non-refoulement obligations under CAT and ICCPR.

2.94 However, the committee is persuaded by evidence that the application of the proposed measures to 'on hand' applications is not necessary to achieve the government's intended outcomes, including that an applicant provide all information upfront. Therefore the committee recommends that the bill apply only to applications made on or after the commencement of the bill.

2.95 In passing, the committee notes that the task of applying 'procedural fairness' to 16 450 applications already made would be burdensome on the departmental resources, in many cases requiring a re-hearing/reassessment of the application. In a practical sense as well, the committee believes it is preferable to have the new threshold test apply onto to the applications made after the date the bill is introduced into parliament.

147 Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, *Proof Committee Hansard*, 5 September 2014, p. 49.

148 Migration Review Tribunal – Refugee Review Tribunal, answer to question on notice, 10 September 2014, p. 1.

149 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 2.

Recommendation 1

2.96 The committee recommends that the government only apply the amendments to applications made on or after the commencement of the bill or the date on which the bill was first introduced to parliament.

Recommendation 2

2.97 The committee recommends that the government consider increasing the 7 day limit on reinstatement of an application where an applicant fails to appear to 14 days.

Recommendation 3

2.98 The committee recommends that the government amend the explanatory memorandum to the bill to clarify how the 'more likely than not' threshold will be applied by decision makers.

Recommendation 4

2.98 The committee recommends that the bill be passed subject to the preceding recommendations.

Senator the Hon Ian Macdonald
Chair