The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Protection and Other Measures) Bill 2014 [Provisions]

September 2014

ISBN 978-1-76010-088-9

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

MEMBERSHIP OF THE COMMITTEE

Members

Senator the Hon Ian Macdonald (LP, QLD) (Chair)

Senator the Hon Jacinta Collins (ALP, VIC) (from 1 July 2014) (Deputy Chair from 10 July 2014)

Senator Catryna Bilyk (ALP, TAS) (from 1 July 2014)

Senator Barry O'Sullivan (NATS, QLD) (from 1 July 2014)

Senator Linda Reynolds (LP, WA) (from 1 July 2014)

Senator Penny Wright (AG, SA)

Former Members

Senator the Hon Lisa Singh (ALP, TAS) (Deputy Chair until 30 June 2014)

Senator Sue Boyce (LP, QLD) (until 30 June 2014)

Senator Gavin Marshall (ALP, VIC) (until 30 June 2014)

Senator Zed Seselja (LP, ACT) (until 30 June 2014)

Substitute Member

Senator Sarah Hanson-Young (AG, SA)

to replace Senator Penny Wright (AG, SA) (from 26 June 2014)

Secretariat

Ms Julia Agostino, Secretary

Ms Jessica Strout, Senior Research Officer

Ms Elise Williamson, Research Officer

Ms Sarah Bainbridge, Administrative Officer (until 12 September 2014)

Ms Sophie Wolfer, Administrative Officer (from 15 September 2014)

Suite S1.61
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
Email: legcon.sen@aph.gov.au

TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 1

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

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

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

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

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 landscape[5] 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 applications[8] 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 appear[33] 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.

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]

---

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]

---

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:

---

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

---

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.

---

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:

---

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

---

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

---

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.

---

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

---

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

---

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.

---

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

---

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

---

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

---

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

---

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

---

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]

---

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

---

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

---

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]

---

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]

---

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

LABOR SENATORS' ADDITIONAL COMMENTS

Introduction

1.1 Labor senators are concerned with the widespread confusion about the intended meaning and application of the new complementary threshold and the proposed changes to the delivery of certain decisions by the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).

Meaning and application of the threshold for complementary protection

1.2 Schedule 2 of the bill makes significant changes to the way Australia will determine if it has protection obligations in relation to a certain non-citizen. Specifically, the bill inserts a new section 6A that provides that a non-citizen is not entitled to complementary protection unless that person can prove that it is 'more likely than not' he or she will suffer significant harm if removed from Australia.[1]

1.3 Labor Senators note that in evidence before the committee, the Department of Immigration and Border Protection (department) conceded that the meaning and application of 'more likely than not' was expressed inconsistently in the explanatory memorandum,[2] the Minister for the department's second reading speech,[3] and the department's submission to this inquiry.[4] As such, the department agreed that an amended explanatory memorandum ought to be published[5] 'in order to clarify the confusion around the "more likely than not" threshold and how it is intended to apply to decision makers.'[6]

1.4 The confusion surrounding the threshold for complementary protection centred on whether it would be interpreted by decision makers on the balance of probabilities or a quantifiable greater than 50 per cent chance style test. These issues are outlined below.

Balance of probabilities

1.5 The department's written submission to this inquiry explained the government's intention as follows:

> The 'more likely than not' test is considered to be a workable and meaningful test that is already understood in Australian law and by the

---

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

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

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

4 Department of Immigration and Border Protection *Submission 14*, p. 11.

5 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 61.

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

> Courts as it is the same as the 'balance of probabilities' standard in civil proceedings.[7]

1.6 Labor senators note that the balance of probabilities test is not applied on a crude mathematical 50/50 basis. Instead, it requires a decision maker to weigh up the facts and evidence before them, giving weight to or discounting relevant factors dependent on the circumstances, and drawing a conclusion as to whether the balance of probabilities is satisfied. For example, an administrative decision maker considering a complementary protection claim might give weight to the magnitude of the harm that an applicant may suffer if removed from Australia, such as female genital mutilation or honour killings, when determining where the balance of probabilities sits.

50/50 test (greater than fifty per cent chance)

1.7 An alternative interpretation of the 'more likely than not' complementary protection threshold is that it apply on a crude mathematical basis. i.e. a '50/50' test. This gives rise to concern for Labor senators that a non-citizen may be removed from Australia if there is only a 49 per cent chance that they will suffer significant harm.

1.8 The department's written submission to this inquiry explained that it is not the government's intention that the 'more likely than not' threshold will be applied in this arbitrary fashion:

> It has been suggested that a refugee may be returned to a country where they have a 49 per cent chance of being subject to torture. **This is not the case** [emphasis added].[8]

The explanatory memorandum and second reading speech

1.9 The misunderstanding about the government's intended meaning and application of the 'more likely not' threshold arises from shortcomings in the explanatory memorandum and second reading speech.

1.10 The explanatory memorandum states:

> The risk threshold of "more likely than not" means that there would be a greater than fifty percent chance that a person would suffer significant harm in the receiving county.[9]

1.11 Similarly, the Hon Scott Morrison MP, Minister for the department stated in the his second reading speech that:

> 'More likely than not' means that there would be a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to.[10]

---

7 *Submission 14*, p. 11.

8 *Submission 14*, p. 11.

9 Explanatory Memorandum, p. 3.

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

1.12 In light of the department's evidence before the committee, the explanatory memorandum and the Minister's second reading speech represent a poorly-expressed attempt at explaining the meaning of 'more likely than not.' The department's evidence suggests that expressing the test on a 'greater than fifty percent' basis was an attempt to explain the balance of probabilities standard in plain English terms.

1.13 In response to a question on notice from Senator Jacinta Collins' regarding the clarity of the explanatory memorandum, the department agreed that:

> Further clarity could be provided in the explanatory memorandum to more closely reflect the further information provided to the Committee by the Department in its initial submission and during the course of the hearing.[11]

1.14 Labor Senators welcome the department's commitment to redraft the explanatory memorandum in order to clarify the confusion around the application of the 'more likely than not' test and its application by decision-makers.

1.15 Unfortunately, in expressing the balance of probabilities standard in such terms, the department and the Minister have caused a misunderstanding about the test that is intended. They have given the false impression that the 'more likely than not' test will be applied on a crude mathematical basis. Labor senators are unaware of any such test applying in any other field of Australian law.

Labor Senators' view

1.16 The department should deliver on its commitment to publish an amended explanatory memorandum to clarify that the government does not intend the 'more likely than not' test to be applied in an unsophisticated mathematical fashion. Pursuant to the evidence provided, Labor senators understand that the amended explanatory memorandum will clarify that the normal civil standard of balance of probabilities is intended to apply.

1.17 Similarly, the Minister ought to make a supplementary second reading speech to clarify the current misunderstanding. Both the explanatory memorandum and the Minister's second reading speech have interpretive effect. The confusion arising from the existing explanatory memorandum and Minister's second reading speech must not be allowed to persist.

1.18 Labor senators' view is that failure to take the above mentioned steps will lead the law into a state of confusion, and could also expose vulnerable persons, especially women and children, to risk of being removed from Australia and subjected to the most abhorrent of harms.

Changes to the delivery of decisions by tribunals

1.19 Schedule 4 of the bill makes significant changes to the processes and administration of the MRT and RRT. Specifically, items 12 and 27 seek to empower the tribunals to dismiss applications in the case of an applicant's failure to appear;[12]

---

11 Department of Immigration and Border Protection, answer to question on notice, 18 September 2014, p. 8.

12 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 362B; ss. 426A.

and items 17 and 32 seek to empower tribunals to provide an oral statement of reasons where it makes an oral decision.[13]

No written statement where oral decision made

1.20 Currently where the tribunal gives an oral statement of reasons, they must also provide a written statement. However, the proposed change will require the Tribunal to provide a written statement only at the request of the applicant where an oral decision is made.

Power to dismiss an application where an applicant fails to appear

1.21 Currently where an applicant fails to appear before a tribunal after being invited to do so, the tribunal has the power to determine the review without the applicant's further input. However, under the proposed change tribunals will be able dismiss an application where an applicant fails to appear after being invited, without considering the information before it.

1.22 Labor senators note that where an application is dismissed where an applicant fails to appear, the tribunals will have the power to reinstate the application if reinstatement is requested by the applicant within a specific period of time and it is considered appropriate to do so.[14]

Labor Senators' view

1.23 Labor Senators remain concerned that the broadening of the powers of the MRT and RRT is a watering down of current requirements.

Senator the Hon Jacinta Collins
Deputy Chair

Senator Catryna Bilyk

13 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 368D; ss. 430D.

14 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 362B; ss. 426A.

DISSENTING REPORT BY AUSTRALIAN GREENS

Introduction

1.1 The Senate inquiry into the *Migration Amendment (Protection and Other Measures) Bill 2014* revealed a barrage of concern from the community, human rights advocates and legal experts. Whilst the bill at face value seems technical in nature it is everything but. This bill carries with it the very real likelihood of Australia deporting people back to danger, in turn breaching our obligations under international law. The bill seriously compromises the integrity of Australia's rigorous protection determination system, erodes procedural safeguards and puts Australia at risk of breaching its non-refoulement obligations.

1.2 Those who arrive on our shores seeking protection are extremely vulnerable and have often experienced persecution and suffered torture and trauma. The amendments proposed in this bill disregard the realities of fleeing persecution and dismiss the very real and complex nature of the needs of people seeking asylum and the support they require.

1.3 The bill is nothing more than another attempt by the Government to limit Australia's responsibilities to those seeking protection. The Australian Greens do not accept that there is any evidence to justify the amendments proposed in this bill and do not believe it does anything to 'enhance the integrity and fairness of Australia's onshore protection status determination process'. In fact, it does the opposite.

1.4 Evidence provided to the committee made it clear that the bill should not be passed by the Parliament as it breaches various international protocols and treaties, misunderstands the refugee status determination process, has significant adverse impacts on people in genuine need of protection, including the real risk of refoulement due to an unjustifiable increase in the risk threshold, and denies applicants a proper and fair assessment of their protection claims.

1.5 The Australian Greens acknowledge the great concern raised by members of the community and experts in the sector and for the reasons outlined below, do not support the passage of this bill.

Burden of Proof

1.6 The amendments proposed by this bill state that the burden of proof will rest solely on the applicant to prove that they are a person to whom Australia has protection obligations and that sufficient evidence must be provided in the first instance to establish that claim. The shifting of the burden of proof has been widely criticised by legal experts and human rights advocates.

1.7 As noted by many of the submitters and witnesses the amendment is in complete contradiction to the United Nations High Commissioner for Refugee's Guidelines for decision making, which states that:

> While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.
>
> It is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognised.[1]

1.8 As was raised by the Human Rights Law Centre in their evidence to the committee the amendments require asylum seekers to master, what the UN recognises as, the art of the 'hardly' possible.[2]

1.9 The bill dismisses the realities of fleeing persecution and the vulnerabilities of those who reach Australia seeking protection. This, combined with the Government's recent cuts to legal advice for asylum seekers who arrive in Australia irregularly, means that those in genuine need of protection will be automatically disadvantaged and at risk of being returned to danger should they be unable to prepare and defend their claims on their own.

1.10 As stated by Mr David Manne, CEO of the Refugee and Immigration Legal Centre:

> It is often very difficult for people in those circumstances to understand what is required and how to present it. That is why the conventional position in international law and under our system is that the duty of establishing claims, the duty of listing those claims and evaluating them is a shared duty between the applicant and the decision maker.[3]

1.11 Of particular concern is how these changes will affect vulnerable groups, including women and children. The Parliamentary Joint Committee on Human Rights clearly stated that the proposed changes "may have a disproportionate or unintended negative impact on women" owing to the increased likelihood of their claims being based on persecution occurring in the home or private sphere making if difficult for applicants to prove.[4]

---

1 UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

2 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 28.

3 Mr David Manne, Refugee and Immigration Legal Centre, P*roof Committee Hansard*, 5 September 2014, p. 6.

4 Parliamentary Joint Committee on Human Rights, Ninth Report of the 44th Parliament, p. 53.

1.12 Seeking to amend the Act to shift the burden of proof goes against international law and the reputable body responsible for the protection of refugees, the UNHCR, and should not be accepted.

Increasing the risk threshold to 'more likely than not'

1.13 Significantly increasing the risk threshold for people who are fleeing harm puts Australia at an increased risk of deporting those who are in genuine need of protection back to danger. Under the proposed amendments asylum seekers will have to prove that they have a greater than 50 per cent chance of being tortured or killed. Should a person have a 40 per cent chance of being returned to serious harm then they will be deported.

1.14 These changes are in contravention to international and human rights law, in particular the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment* (CAT) and the principle of non-refoulement to which Australia is party.

1.15 The amendments proposed refer to people who are seeking protection on complementary grounds, that is, people who are not captured by the Refugee Convention but are still deserving of protection as they are fleeing serious harm such as torture, honour killings or female genital mutilation. The proposed amendments will mean Australia's protection obligations will only be engaged when the Minister considers it 'more likely than not' that the person will suffer significant harm if returned.

1.16 As stated by Mr Manne:

> The proposed 'more likely than not' test would ultimately significantly increase the risk of Australia making the wrong decision on whether or not somebody should be protected from serious harm. The test raises the real prospect of returning people to persecution or other forms of life-threatening harm, in violation of our non-refoulement obligations. That is the bottom line here.[5]

1.17 Despite the government and Department's attempts to downplay the quantitative measurement of the risk threshold throughout the inquiry, it is clear from the evidence provided to the committee that the 'more likely than not' threshold will result in a significantly higher test than the current 'real risk' or 'substantial grounds' threshold.

1.18 As stated by Mr Webb:

> [the] 'more likely than not' test is a higher test than real risk or substantial grounds and, to put that beyond doubt, the UN Committee Against Torture has specifically said that the 'more likely than not' standard is a higher test

5 Mr David Manne, Refugee and Immigration Legal Centre, P*roof Committee Hansard*, 5 September 2014, p. 2.

> than the substantial grounds test that the committee has advocated in its interpretation of the convention against torture.[6]

1.19 This unacceptably high threshold is at odds with Australia's international obligations, the lower threshold test which has been well established and applies in comparable countries like the UK and New Zealand, and significantly increases Australia's chances of violating its non-refoulement obligations.

Bogus Documentation

1.20 Should an applicant provide fraudulent documentation or is unable to prove their identity, under this bill, their application for protection will be denied. This amendment ignores the realities of seeking asylum and goes against the basic principles of the Refugee Convention.

1.21 As highlight by many of the submitters there are many reasons that people are unable to obtain identity documents or may not have the correct documentation when they arrive in Australia, such as their home government refusing to issue documentation to persecuted groups, being too afraid to request documentation from the government they are fleeing, and having no time to obtain documentation due to fleeing persecution.[7] To propose such an amendment dismisses the experiences of those fleeing persecution.

1.22 Further to this, the amendments contravene article 31 of the Refugee Convention which prohibits governments from penalising refugees who arrive without authorisation. As raised by Mr Webb:

> The Refugee Convention recognises what these reforms ignore – that is, the basic legal and moral duty to protect a person is not diminished just because a person arrives without certain paperwork or with fake documents.[8]

1.23 Amendments of this nature will result in genuine refugees being denied protection purely on the basis that they were unable to provide the 'right' documentation. This will put Australia at risk of returning refugees back to their persecutors.

Family Reunion

1.24 Family reunification is a fundamental human right under international law and a requirement of the Refugee Convention. The amendments proposed in Item 11,

---

6 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 31.

7 The Refugee Council of Australia, Submission 11, p. 4.

8 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 27.

subsection 91W,compromise this right and will mean that the family members of a protection visa holder will be unable to apply for a protection visa on the basis that they are a 'member of the same family unit'.

1.25 It is well known that the spouses and children of those found to be in genuine need of protection in Australia are highly likely to face similar threats or harm. As stated by Refugee Advice and Case Works Service (RACS) '(t)his is because harm to a person's family is one of the most common threats a person can receive by those perpetrators of serious harm'.[9]

1.26 The amendments also raise serious concerns for unaccompanied minors who will be unable to be reunited with their families under these amendments. The only option minors and other persons will have to be reunited with their loved ones will be through the humanitarian program which has significantly long wait times (up to five years for children who are separated from their families). In their evidence to the inquiry the Law Council of Australia stated these changes will be further exacerbated by the government's recent changes to family reunion for protection visa holders which includes:

> Removing 4,000 additional Family Stream places for people found to be owed protection in Australia to reunite with immediate family members announced as a measure in the 2014-15 budget; the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth) that removes parent visa subclass 103, the aged parent visa subclass 804, the aged dependent relative visas subclasses 114 and 838, the remaining relative visas subclasses 115 and 835, and the carer visas subclasses 116 and 836, and the fact that, as noted by the NSW Bar, since July 2013, fees for sponsors have increased up to 500%.[10]

1.27 Removing pathways for family reunion for vulnerable refugees compromises Australia's international obligations relating to family unification and puts unaccompanied minors at risk of being separated from family members for excessively long periods of time.

New claims or evidence before the Refugee Review Tribunal (RRT)

1.28 Amendments proposed in section 423A will require the RRT to refuse protection if new evidence or claims are provided that were not previously raised with the Department. This amendment fails to take into consideration the vulnerabilities of those who come to Australia seeking protection and the reasons why some people may not or were unable to provide all necessary evidence in the first instance.

---

9 RACS, http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-The-Migration-Amendment-Protection-and-Other-Measures-Bill-2014-25-June-2014.pdf

10 Law Council of Australia, Submission 9, pp. 31– 32.

1.29 As noted by the ANU College of Law, Migration Law Program in their submission:

> A failure to disclose earlier claims or evidence would be particularly common in relation to family violence or gendered-violence claims. Applicants may be reluctant to disclose evidence due to the traumatic nature of such claims and a fear and mistrust of authorities.[11]

1.30 The amendments ignore the lived experiences of asylum seekers and refugees who come to Australia seeking protection.

Tribunal processes

Guidance decisions, oral decisions and statements of reason and power to dismiss for non-attendance

1.31 The proposed amendments in Schedule 4 of the bill will undermine the independence of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) and deny applicants procedural fairness.

1.32 Many submitters raised concerns about the amendments that would enable the Principal Member to issue guidance decisions. Mr Hoang from the ANU College of Law stated in his evidence to the committee:

> This unnecessarily fetters the discretion and independence of tribunal members to consider the merits of a particular case. The bill is completely silent on the circumstances on which a guidance decision would be issued by the principal member of the RRT and exactly what parts of a decision would be binding on tribunal members.[12]

1.33 Similarly, concerns were raised about amendments that would see only oral decisions handed down by the RRT and MRT. Written decisions would only be available if specifically requested. In their experience Refugee Immigration and Legal Centre stated that:

> Applicants often struggle to understand key elements of their decision, even after a detailed explanation…and may also not understand the need to request written reasons within the limited time period. The consequence of failing to obtain a written statement of reasons could seriously compromise a person's capacity to seek judicial review.[13]

1.34 The proposed power to dismiss a person's case on the basis of non-attendance denies a person the ability to receive a fair hearing and could potentially breach Australia's international obligations. The committee heard clear evidence from experts

---

11 ANU College of Law, Migration Law Program, Submission 8, p. 7.

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

13 Mr David Manne, Refugee and Immigration Legal Centre, additional documents, p. 9.

in the sector that there are a number of reasons that people may be unable to attend a hearing and that a seven day timeframe for reinstatement fails to take into consideration the obstacles that many asylum seekers face.

Retrospectivity

1.35 It is important to note that the provisions in this bill are drafted to apply retrospectively. Should this bill be passed people who have applications on foot will be disadvantaged despite at all times meeting the criteria for a visa grant prior to the change. Evidence provided to the committee by the RRT and MRT states that there are currently 4,400 cases that will be affected should this bill pass.[14]

1.36 As stated by Amnesty International these amendments will:

> Adversely impact a large cohort of individuals who have always complied with the criteria for their protection applications. The changes will mean that they are found to no longer meet these requirements, simply because the goalposts have moved around them. This is plainly unfair and must not be allowed to come into effect.[15]

1.37 The retrospective nature of this bill is unnecessary and will result in thousands of people being disadvantaged due to the goal posts shifting.

Conclusion

1.38 The bill is nothing more than another attempt by the Government to limit Australia's responsibilities to those seeking protection. The Australian Greens do not accept that there is any evidence to justify the amendments proposed in this bill and do not believe this bill does anything to 'enhance the integrity and fairness of Australia's onshore protection status determination process'. In fact, it does the opposite.

1.39 This bill carries with it the very real likelihood of breaching Australia's non- refoulement obligations and deporting people back to danger due to the increase in the risk threshold to over a 50 per cent chance of experiencing significant harm. The bill is inconsistent with international standards, it misunderstands the refugee status determination process, has significant adverse impacts on people in genuine need of protection and denies applicants a proper and fair assessment of their protection claims.

1.40 The Australian Greens acknowledge the community concerns regarding the implications of this bill and for the reasons stated, do not support the passage of this bill.

---

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

15 Ms Sophie Nicolle, Amnesty International Australia, *Proof Committee Hansard*, 5 September 2014, p.11.

Recommendation 1:

1.41 The Australian Greens recommend that the Australian Government at all times act within the law and abide by Australia's international and human rights obligations.

Recommendation 2:

1.42 The Australian Greens recommend that the Australian Government reaffirm its commitment to the Refugee Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment.

Recommendation 3:

1.43 The Australian Greens recommend that the Senate reject the bill.

Senator Sarah Hanson-Young
Australian Greens

APPENDIX 1

Submissions received

1. Amnesty International
2. Castan Centre for Human Rights Law
3. Canberra Refugee Action
4. Association for the Prevention of Torture and the Victorian Foundation for Survivors of Torture Inc.
5. Migration Review Tribunal - Refugee Review Tribunal
6. The Andrew and Renata Kaldor Centre for International Refugee Law
7. UNICEF Australia
8. ANU College of Law - Migration Law Program
9. Law Council of Australia
10. Refugee Advice and Casework Service (RACS)
11. Refugee Council of Australia (RCOA)
12. Ms Linda Kirk, Lecturer - Migration Law Program, Australian National University, College of Law
13. Immigration Advice and Rights Centre (IARC)
14. Department of Immigration and Border Protection
15. The Law Society of New South Wales
16. Asylum Seeker Resource Centre
17. Human Rights Law Centre
18. United Nations High Commissioner for Refugees

Additional information

1. Document tabled by Mr David Manne, Refugee and Immigration Legal Centre, on 5 September 2014.
2. Additional information received by Andrew and Renata Kaldor Centre for International Refugee Law on 10 September 2014

Correspondence

1. Correction of evidence from Mr Scott Cosgriff - Refugee Advice and Casework Service, received 8 September 2014.

Response to questions on notice

1. Response to question on notice from the Migration Review Tribunal and Refugee Review Tribunal, received 10 September 2014.

2. Response to questions on notice from the ANU College of Law - Migration Law Program, received 10 September 2014.

3. Response to question on notice from the Law Council of Australia, received 10 September 2014.

4. Response to question on notice from the Department of Immigration and Border Protection, received 12 September 2014.

5. Response to question on notice from the Department of Immigration and Border Protection, received 19 September 2014.

APPENDIX 2

Public Hearing

Canberra, Friday, 5 September 2014.

CHIA, Dr Joyce, Senior Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law

COSGRIFF, Mr Scott, Senior Solicitor, Refugee Advice & Casework Service

ECKARD, Ms Rebecca, Research Coordinator, Refugee Council of Australia

FORD, Ms Carina, Steering Group, Migration Law Committee, Law Council of Australia

HOANG, Mr Khanh, Associate Lecturer, Migration Law Program, ANU College of Law

KNACKSTREDT, Ms Nicola, Policy Lawyer, Criminal Law and Human Rights Division, Law Council of Australia

LARKINS, Ms Alison, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Border Protection

MANNE, Mr David, Executive Director/Principal Solicitor, Refugee & Immigration Legal Centre Inc.

MOULDS, Ms Sarah, Co-Director, Criminal Law and Human Rights Division, Law Council of Australia

NICOLLE, Ms Sophie, Government Relations Adviser, Amnesty International Australia

PARKER, Ms Vicki, General Counsel, Department of Immigration and Border Protection

PENOVIC, Dr Tania, Deputy Director, Castan Centre for Human Rights Law

RANSOME, Ms Kay, Principal Member, Migration Review Tribunal and Refugee Review Tribunal

SOUTHERN, Dr Wendy, Deputy Secretary, Department of Immigration and Border Protection

WANG, Ms Er-kai, Associate Lecturer, ANU Migration Law, ANU College of Law

WEBB, Mr Daniel, Director of Legal Advocacy, Human Rights Law Centre

WILLIAMSON, Ms Jessica, Human Rights Law Program Manager, Asylum Seeker Resource Centre