



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

THIRD REPORT
OF
2014

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Terms of Reference

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2014

The committee presents its *Third Report of 2014* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Marriage Equality Amendment Bill 2013

Introduced into the Senate on 12 December 2013

By: Senator Hanson-Young

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2014*. The Senator responded to the committee's comments in a letter dated 11 March 2014. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2014 - extract

This bill is substantially similar to a bill introduced in the previous Parliament.

Background

This bill amends the *Marriage Act 1961* to remove all discrimination to ensure that two people, regardless of their sex, sexual orientation or gender identity have the opportunity to marry.

Inappropriate delegation of legislative power Schedule 1, subitem 10(1)

Subitem 9(1) of Schedule 1 enables regulations to be made which amend 'Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act'. This enables regulations to amend Acts of the Parliament. **The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum and the committee therefore seeks the Senator's rationale for the proposed approach.**

Pending the Senator's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Senator's response - extract

The Committee has indicated that it has concerns with Schedule 1, sub-item 10(1) of the Marriage Equality Amendment Bill 2013 that enables regulations to be made which amend "Acts (other than the Marriage Act 1961) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act.

I thank the Committee for the opportunity to respond.

The rationale for the inclusion of such a power is primarily to help with efficiency. There are likely to be a large number of references in other legislation that would require minor amendment upon passage of the Marriage Equality Amendment Bill 2013. The required amendments would simply update the statute books to reflect the policy in the Bill; given this it was considered pragmatic to provide a mechanism to facilitate the process in a timely manner.

The proposed regulation making power was included as an administrative tool to help with the smooth implementation of the Bill's policy- it is not designed or intended to be an inappropriately delegated legislative power.

Committee Response

The committee thanks the Senator for her response and, if the bill proceeds to further stages of debate, **requests that the key information above be included in the explanatory memorandum.**

Migration Amendment Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2014*. The Minister responded to the committee's comments in a letter dated 6 March 2014. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2014 - extract

Background

This bill amends the *Migration Act 1958* (the Migration Act) to:

- put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder;
- clarify the operation of the statutory bar on making a further protection visa application; and
- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) and associated measures.

Trespass on personal rights and freedoms—personal liberty

Rights and liberties unduly dependent on non-reviewable decisions—adequacy of merits review rights

Schedule 3, item 1, proposed new subsection 36(1A) and (1B)

This item amends section 36 of the *Migration Act* by introducing a specific criterion for the grant of a protection visa: namely, the absence of an adverse security assessment issued by ASIO that the applicant is a direct or indirect risk to national security. The amendment is in response to the High Court's decision in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, which invalidated delegated legislation provisions that provided for an identical criterion for the grant of a protection visa.

In addition, items 2 to 6 seek to amend paragraphs 411(1)(c) and (d) and section 500 of the *Migration Act* to remove the ability for the Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT) and the AAT to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

The statement of compatibility accepts (at p. 9) that the result of these provisions, in the context of the mandatory detention regime established by the Act, may be that an applicant for a protection visa in relation to whom Australia has non-refoulement obligations and who has received an adverse security assessment will remain in detention indefinitely.

The statement of compatibility argues that these provisions are consistent with article 9(1) of the ICCPR which provides for a right to liberty and security of the person. The key points of justification for the approach are that:

- (1) the policy of detention of persons who unlawfully enter Australia on the basis of an adverse security assessment is a reasonable measure taken to control immigration and to protect national security. In particular, the statement of compatibility concludes that ‘taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) are considered reasonable, necessary and proportionate to the security risk that they are found to pose’ (at pp 9 and 10); and
- (2) the existence of arrangements for ‘independent review of the initial issue of and continuing need for an adverse security assessment’ (at p. 10). Here the statement of compatibility is referring to the administrative arrangements for review by the Independent Reviewer of Adverse Security Assessments. (See Attorney-General, *Independent Review Function—Terms of Reference*, October 2012.)

The proposed approach gives rise to the question of whether the liberty interests of an asylum seeker who has received an adverse security assessment has been appropriately balanced against the broader interests of the public in maintaining national security. The committee's view is that the result of these amendments, which is that affected persons may be indefinitely detained, is a significant issue which might be seen to trespass unduly on personal rights and liberties. **Nevertheless, in light of the information available in the material accompanying the bill, which will assist individuals to assess the proposed approach, the committee draws its concerns to Senators and leaves to the Senate as a whole the question of the acceptability of detaining persons indefinitely on the basis of an adverse security assessment, in circumstances where, in practice, they cannot be removed from Australia.**

However, the committee is interested to seek further information from the Minister about the arrangements for independent review of adverse security assessments (instead of review by the RRT, MRT and AAT, discussed above). These arrangements are not

explained in any detail in the material accompanying the bill, though the statement of compatibility does note that the work of the Independent Reviewer commenced on 3 December 2012 and that the:

Reviewer's role is to review ASIO adverse security assessments given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the Department to 'engage Australia's protection obligations under international law, and not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled'' (at p. 12).

After noting these matters, the statement of compatibility concludes that 'existing avenues for merits review' are not affected.

A number of scrutiny issues of concern arise in relation to the existence of independent review as a justification for the proposed amendments. First, the role of the Independent Reviewer of Adverse Security Assessments is not established by statute. As such there are no statutory guarantees of independence. Indeed, the scheme is subject to administrative alteration or abolition at any time.

Second, the adequacy of the review process is not clear. Although the Terms of Reference (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012) state that 'ASIO will provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the Reviewer on the basis that it will be provided to the eligible person', it is also stated that the 'reasons will include information that can be provided to the eligible person to the extent able without prejudicing the interests of security'. This process appears to allow ASIO to determine how much of a person's case to disclose, without either the affected person or the independent reviewer being in a position to challenge the decision. Clearly, an affected person's ability to make submissions to the independent reviewer will be compromised if insufficient details of the case against them are disclosed.

Third, it should be emphasised that the Independent Reviewer's powers are limited to issuing a non-binding 'opinion' and to providing 'such opinion to the Director-General, including recommendations as appropriate' (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012, p. 1). These arrangements for review thus clearly fall short of what is normally involved with independent merits review by tribunals such as the RRT, MRT and AAT, which all typically exercise determinative powers.

In light of the above issues, and given the possible consequences of these amendments for the liberty of affected persons, the committee seeks further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis. In seeking such advice the committee is aware that judicial review remains open to affected persons (this is emphasised in the statement of compatibility (at p. 12)). However, the committee is aware that it is unlikely that judicial

review will in practice provide meaningful review. First, in the absence of more robust disclosure of reasons requirements, it may be difficult to argue grounds of review other than a breach of procedural fairness. Second, the normal requirements of procedural fairness may be overridden by national security interests.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Under the heading "Trespass on personal rights and freedoms - personal liberty; Rights and liberties unduly dependent on non-reviewable decisions - adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 16 seeks "further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis".

The amendments in Schedule 3, item 1 of the bill will amend the *Migration Act 1958* (the Migration Act) to provide that a criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act)). The proposed amendment to insert new subsection 36(1B) provides a criterion that is either met or is not met and that is based on an adverse security assessment provided by ASIO.

The amendments in Schedule 3, item 1 of the bill do not affect existing avenues for merits review or judicial review of the adverse security assessment from ASIO. Additionally, the amendments do not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Furthermore, the amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

The adequacy of review mechanisms for adverse security assessments and whether it would be more appropriate for an independent review process to be placed on a statutory basis are issues that are not appropriate to address within the Migration Act.

These matters fall within the portfolio responsibilities of the Attorney-General. However, the Attorney-General has provided me with the following information in response to the Committee's concerns.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security.

There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of her findings are provided to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report.

Committee Response

The committee thanks the Minister for his response, however, the scrutiny problems identified in *Alert Digest No. 1 of 2014* about the review process for adverse security assessments remain. The key scrutiny points made by the committee are:

- the consequence of the amendments is that persons with an adverse security assessment, but who are refugees, may be subjected to indefinite detention;
- part of the government's justification for this result is the existence of 'independent review of the initial issue of and continuing need for an adverse security assessment'; and
- although the overall balance to be struck between liberty and national security is a matter for the senate as a whole, there are scrutiny issues about the adequacy of the independent review of adverse security assessments.

Although it is true to say that the review process is not addressed by the Migration Act, amendments to the Migration Act are being justified in part by reference to the existence of the review process, about which the committee has asked some questions from a scrutiny perspective. The committee notes the advice the Minister obtained from the Attorney-General in relation to the review mechanisms for adverse security assessments. **However, the committee remains concerned about persons being subjected to indefinite detention on the basis of an adverse security assessment given the concerns raised about the review mechanism for these assessments. The committee remains interested in whether it would be appropriate, in the context of the amendments proposed in this bill, to ensure that the independent review process is placed on a statutory basis. The committee therefore seeks the Minister's further advice about this matter.**

Under the heading "Trespass on personal rights and freedoms - personal liberty; Rights and liberties unduly dependent on non-reviewable decisions - adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 14 expresses its view that "the result of these amendments, which is that affected persons may be indefinitely detained, is a significant issue which might be seen to trespass unduly on personal rights and liberties. Nevertheless, in light of the information available in the material accompanying the bill, which will assist individuals to assess the proposed approach, the committee draws its concerns to Senators and leaves to the Senate as a whole the question of the acceptability of detaining persons indefinitely on the basis of an adverse security assessment, in circumstances where, in practice, they cannot be removed from Australia."

The decision whether a person with an adverse security assessment is granted a protection visa or not is separate from the policy decision about how a person with an adverse security assessment is managed while their immigration status is resolved.

The proposed amendment to section 36 contained in Schedule 3 to the bill reflects the government's position that a person who is owed protection but who has an adverse security assessment should not be granted a protection visa. It does not determine the management of a person with an adverse security assessment who has been found to engage Australia's protection obligations while their immigration status is resolved.

The government continues to explore options for third country resettlement and removal from Australia in line with Australia's international obligations for refugees who are subject to an adverse security assessment from ASIO.

Committee Response

The committee thanks the Minister for taking the opportunity to provide this additional information. The committee restates its view that **in light of the information available in the material accompanying the bill, which will assist individuals to assess the proposed approach, the committee draws its concerns to Senators and leaves to the Senate as a whole the question of the acceptability of detaining persons indefinitely on the basis of an adverse security assessment, in circumstances where, in practice, they cannot be removed from Australia.**

Senator Helen Polley
Chair



SENATOR SARAH HANSON-YOUNG
Australian Greens' Senator for South Australia

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11 March 2013

Toni Dawes
Committee Secretary
Standing committee for the Scrutiny of Bills
Parliament House
Canberra

Dear Ms Dawes,

I refer to your letter dated 13 February 2014 relating to comments contained in the Scrutiny of Bills Committee's *Alert Digest No.1 of 2014 (12 February 2014)*.

The Committee has indicated that it has concerns with Schedule 1, sub-item 10(1) of the Marriage Equality Amendment Bill 2013 that enables regulations to be made which amend "Acts (other than the Marriage Act 1961) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act.

I thank the Committee for the opportunity to respond.

The rationale for the inclusion of such a power is primarily to help with efficiency. There are likely to be a large number of references in other legislation that would require minor amendment upon passage of the Marriage Equality Amendment Bill 2013. The required amendments would simply update the statute books to reflect the policy in the Bill; given this it was considered pragmatic to provide a mechanism to facilitate the process in a timely manner.

The proposed regulation making power was included as an administrative tool to help with the smooth implementation of the Bill's policy – it is not designed or intended to be an inappropriately delegated legislative power.

Kind regards,

Senator Sarah Hanson-Young



The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1402/01026

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Senate Scrutiny of Bills Committee - Migration Amendment Bill 2013

Thank you for your letter dated 13 February 2014 in relation to the comments made in the Committee's *Alert Digest No. 1 of 2014* tabled on 12 February 2014.

I would like to provide the following information to the Committee as a result of the comments made in the *Alert Digest* in regards to the Migration Amendment Bill 2013 (the bill).

Under the heading "Trespass on personal rights and freedoms – personal liberty; Rights and liberties unduly dependent on non-reviewable decisions – adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 16 seeks "further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis".

The amendments in Schedule 3, item 1 of the bill will amend the *Migration Act 1958* (the Migration Act) to provide that a criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act)). The proposed amendment to insert new subsection 36(1B) provides a criterion that is either met or is not met and that is based on an adverse security assessment provided by ASIO.

The amendments in Schedule 3, item 1 of the bill do not affect existing avenues for merits review or judicial review of the adverse security assessment from ASIO. Additionally, the amendments do not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Furthermore, the amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

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The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security.

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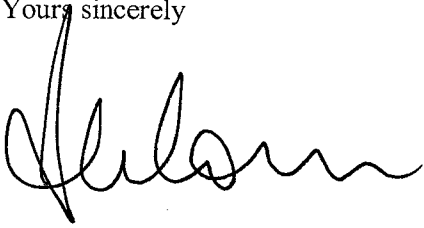
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The decision whether a person with an adverse security assessment is granted a protection visa or not is separate from the policy decision about how a person with an adverse security assessment is managed while their immigration status is resolved.

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The government continues to explore options for third country resettlement and removal from Australia in line with Australia's international obligations for refugees who are subject to an adverse security assessment from ASIO.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Scott Morrison', written in a cursive style.

The Hon Scott Morrison MP

Minister for Immigration and Border Protection

6 / 3 / 2014