QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/001(*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Returnees - Number of Returns -

Asked:

How many people have been removed from and returned to Australia in the period 2012–2015? Please indicate whether the return was due to a failed removal or a refusal of entry.

Answer:

Due to the way the Department manually records this information it is not possible to provide accurate data for the period in question.

The number of people returned to Australia from a transit country each year is very low; the department estimates that it is less than five per year.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/002 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection Visas - effects of attempted removal

Asked:

The Refugee Advice and Casework Service commented:
…the circumstances contemplated by the amendments in Schedule 1—including situations in which a person is refused entry into their country of origin when accompanied by Australian officials—may have significant implications for whether that person faces a risk of harm in that country in the future. Aborted attempts at removal resulting in a person being brought back to Australia will foreseeably attract significant attention from the authorities of the destination country in some cases. For people who fear harm at the hands of the authorities of that country, this may constitute a significant change in circumstances (Submission 5, p. 6).
Might the circumstances of an attempted removal fundamentally affect a person's protection claims? If so, how will this change of circumstances be considered if amended section 48A is enacted? Does the proposed measure accord with the principles of natural justice?

Answer:

The Department has in place procedures that ensure a removal does not place a person into a situation where they face a risk of harm. These include:

- not activating removals until a person's outstanding visa applications (including protection visa applications) and immigration status have been finally determined or resolved.
- providing that a person's privacy is protected at all times by ensuring that the release of identifying information to foreign governments is only made in accordance with the requirements in the Privacy Act 1988 and the Migration Act 1958 (the Act).
- conducting a final pre-removal clearance check to ensure that any previously unassessed non-refoulement issues are accounted for and that it is now safe to remove the person to their destination country.

As a result, removals operations are undertaken in a manner which minimises any effect on a person's protection claims.

Currently, in the rare event that a removal operation draws significant and adverse attention to a person being removed and creates possible sur place protection

issues, the person can seek to have the s48A bar lifted to enable a fresh protection visa application to be lodged. Ministerial intervention under section 417 of the Act, or the Minister's powers under section 195A, may also be available to be exercised in certain cases.

This measure is a technical amendment to ensure consistent operation of section 42, 48 and 48A of the Migration Act 1958. A person who is an unlawful non-citizen (UNC) and liable to be removed can still seek independent action, such as a court injunction, to stay removal activity.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/003 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection visas - Sections 42 and 48 -

Asked:

Do existing sections 42 and 48 operate to prevent people returned to Australia, as the result of a refusal of entry, from making a further application for a protection visa?

Answer:

At present, the effect of subsection 42(2A) of the Act is that a person who has been removed to another country under section 198 who is then refused entry by the destination country and returned directly to Australia, does not require a visa to return. In addition, subsections 48(2) and 48A(1A) provide that any bars on making a further visa application that applied to the person continue to apply.

There is an inconsistency however, for persons who have their removal aborted in transit prior to reaching their destination country. The amendment will remedy this inconsistency by ensuring the same provisions currently in operation for persons returned to Australia due to bring refused entry by a destination country apply to a person returned from a transit country, or a person returned at any point up until their entry into the destination country.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/008 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection visa statutory bars - Section 48B -

Asked:

How many times has the Minister exercised the powers under section 48B of the Migration Act 1958 in the period 2012–2015?

Answer:

In the period 2012-15 the Minister has exercised his power under section 48B to lift the section 48A application bar 30 times.

The low numbers reflect the reality that the vast majority of requests to the Minister to exercise his section 48B power do not raise substantially new or different claims from those already assessed in the initial, unsuccessful protection visa application as to warrant re-consideration. In many instances, the requests to the Minister were also received after the applicant had already exhausted their judicial review options and were unsuccessful.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/009 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection visa statutory bars - Unaccompanied minors -

Asked:

How many minors have arrived unaccompanied in the period 2012–2015?

Answer:

The amendment inserting subsection 48A(1AA) into subsection 48A(1C) does not affect unaccompanied minors. The purpose of the amendment is simply to clarify the interaction between the two subsections and the overall operation of section 48A.

Nevertheless, according to the Department's statistics, between 1 January 2012 and 30 September 2015, 2538 unaccompanied minors (UAMs) arrived in Australia by suspected illegal entry vessels (of these, 2312 were passengers and 226 were crew).

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/004 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry -Protection visas - section 48 rendering asylum seekers stateless -

Asked:

The Law Council of Australia submitted that amended section 48 could effectively render asylum seekers stateless (Submission 7, p. 6). What is your response and could this outcome lead to arbitrary detention under international law? Can you describe what mechanisms mitigate against arbitrary and indefinite detention?

Answer:

As highlighted in the above response to question 3, the intent of this measure is to ensure sections 42, 48 and 48A operate as intended, ensuring their consistent application across all possible incomplete removals events. It could not, in itself, lead to arbitrary detention.

A statement of compatibility with human rights has been undertaken in relation to this amendment, which assessed that the measure is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. On the issue of arbitrary detention, this assessment specifically states:

> Article 9 of the International Covenant on Civil and Political Rights (ICCPR) relevantly provides that no-one shall be subjected to arbitrary or unlawful detention. The proposed amendments engage this right by requiring the detention (under section 189 of the Act) of unlawful non-citizens who are returned to Australia following an attempted removal under section 198 of the Act. Australia takes its obligations to non-citizens in immigration detention very seriously. The Australian Government's position is that the detention of individuals is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, detention that is not 'arbitrary' must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved. While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Act, they present a

reasonable response to achieving a legitimate purpose under the ICCPR, being the safety of the Australian community and integrity of the migration programme. Further, the re-detention of unlawful non-citizens who are brought back to the migration zone will also be for the legitimate purpose of completing their removal from Australia under section 198 of the Act.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/010 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection visa statutory bars - Safeguards for minors and the mentally impaired -

Asked:

Most submitters have questioned whether item 1 in Part 1 of Schedule 3 to the Bill breaches Australia's international law obligations. What is your response? Does the proposed measure remove safeguards against the non-refoulement of children and people with mental impairment?

Answer:

The amendment in item 1 of Part 1 of Schedule 3 to the Bill does not breach Australia's non-refoulement and other international obligations.

The Department's view is that the amendment is a technical amendment that clarifies the interaction between subsections 48A(1AA) and (1C) of the Act, and does not broaden the situations in which a minor or a person with a mental impairment who was previously refused a protection visa applied for on their behalf is prevented from making a further protection visa application.

Where a minor or a person with a mental impairment has personal claims for protection that were not included in the earlier (refused) protection visa application, the Department's view is that there are already adequate safeguards in place including:

- the Minister's intervention powers under section 48B;
- the right to seek judicial review and be heard in a judicial proceeding; and
- pre-removal clearance processes that provide another opportunity for protection claims to be assessed to ensure compliance with Australia's international obligations.

The amendment does not remove or diminish the availability of these safeguards. The Department considers that the amendment, in conjunction with these safeguards, strikes an appropriate balance between the protection of vulnerable persons and preventing non-citizens without a lawful basis for remaining in Australia from making further unmeritorious protection visa applications to prolong their stay in Australia.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/005 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Visa cancellation - Privacy concerns

Asked:

The Law Council of Australia submitted that, as the Bill widens the scope for the collection of personal identifiers, the Privacy Commissioner should be asked to prepare a privacy impact statement (Submission 7, p. 8). What is your response and how have privacy concerns been considered in the Bill?

Answer:

These amendments do not expand the types of identifying information that can be collected from non-citizens, or the circumstances in which they may lawfully be disclosed.

Prior to the introduction of the Bill, the Department consulted with both the Attorney-General's Department and the Office of the Australian Information Commissioner (OAIC) and, as a result of these consultations, completed a privacy threshold assessment. This assessment concluded that a Privacy Impact Assessment is unnecessary and found that:

- the small number of non-citizens likely to be impacted by the amendments; and
- the amendments proposed by the Bill do not undermine or alter the robust framework established in the Migration Act and Australian Border Force Act that ensure legal privacy protections for non-citizens.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/011 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Protection visa statutory bars - Additional safeguards for minors and the mentally impaired

Asked:

In its report on the Migration Legislation Amendment Bill (No. 1) 2014 at para 2.29, the committee recommended:

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

Can you please tell the committee whether any consideration has been given to this recommendation and the outcome of that consideration?

Answer:

The Department has not implemented specific additional safeguards as it is the Department's view that the existing safeguards are adequate and sufficient. Minors or mentally impaired persons who raise personal claims for protection that warrant further consideration and that were not previously included in the protection visa application that was made on their behalf (for example by a parent) will, consistently with the Department's usual practice, be recommended to the Minister for exercise of his Ministerial intervention power under section 48B. The pre-removal clearance processes provides an additional opportunity for the minor or the mentally impaired person's personal protection claims to be fully assessed to ensure compliance with Australia's international obligations.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/006 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Visa cancellation - decision review -

Asked:

The Law Council of Australia stated, in relation to item 10 in Schedule 2:
…this amendment may result in the deportation of a person serving a sentence of imprisonment whose visa has been cancelled before they have had the opportunity to seek judicial review of the cancellation…if this person – or indeed a person whose visa is cancelled on character grounds or whose visa has been cancelled by the Minister on character grounds in place of a non-adverse decision – does not make a representation within the required time, then they are not afforded access to merits review (as this is a Ministerial decision) and their only option is to pursue judicial review (Submission 7, p. 10).
What is your response?

Answer:

This amendment does not alter existing departmental practice in relation to the removal from Australia of a person who is seeking judicial review of a cancellation decision.

The introduction of a new removal power and amendment to the existing removal power of 198(2A) will provide certainty about when a person becomes liable for removal. It is intended that a non-citizen whose visa has been mandatorily cancelled under subsection 501(3A) and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/012 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Maritime Powers Act 2013 - Compliance with international law -

Asked:

Most submitters to the inquiry expressed concern that proposed subsection 40(3) of the Maritime Powers Act 2013 potentially breaches Australia's international law obligations. In your view, is this concern justified? Are the kinds of activities relevant to Operation Sovereign Borders captured by the provision?

Answer:

The concern is not justified. The amendment to section 40 in fact facilitates compliance with Australia's obligations under the Convention in that it requires the relevant maritime officer or the Minister to consider that the passage is in accordance with the United Nations Convention on the Law of the Sea (the Convention). In giving consideration to Australia's obligations under the Convention, the Executive will apply accepted principles of treaty interpretation including the requirement to interpret those obligations in good faith.

This particular amendment has been designed to ensure that where maritime operations take place within the waters subject to the sovereignty of another country, such as the territorial sea, they take place consistent with our obligations under the Convention.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/007 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - categories of non-citizens unaffected -

Asked:

Are there any other categories of non-citizens to whom sections 194–195 of the Migration Act 1958 do not apply?

Answer:

The categories of non-citizens to whom section 194-195 of the Migration Act do not apply are defined at paragraph 193(1) of the Act.

The categories of persons include, among others, non-citizens who have not been immigration cleared, non-citizens who have had a visa cancelled or refused personally by the Minister under section 501, 501A or 501B, and non-citizens whose enforcement visa has ceased to be in effect and have not been granted a substantive visa.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 21 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

MMP/013 (*Inquiry into the Migration and Maritime Powers Amendment Bill (No.1)*) – Parliamentary Inquiry - Retrospective Application

Asked:

Submitters argued that the retrospective application of provisions proposed in Schedules 2 and 3 to the Bill breach rule of law principles (see for example, Law Council of Australia, Submission 7, pp 11–13 and Refugee Council of Australia, Submission 3, p. 3). The Senate Standing Committee for the Scrutiny of Bill has also commented in Alert Digest No. 11 of 2015:
In general, individuals should be entitled to rely on the current law to determine their rights, including rights to apply for important benefits such as a protection visa. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.
Can you please respond to these comments?

Answer:

<u>The Schedule 2 amendments</u>

The Bill proposes that items 10, 11, 12, 20 and 21 of Schedule 2 apply retrospectively.

The introduction of a new removal power at item 10, and amendment to the existing removal power of 198(2A) at item 11, will provide certainty about when a person becomes liable for removal. It is intended that a non-citizen whose visa had been mandatorily cancelled under subsection 501(3A) and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal. Applying the amendments retrospectively to these persons provides clarity on when the person can be removed under section 198.

The retrospective application of the amendment at item 12 means that all applicants for judicial review of the Minister's decision under section 501CA or section 501BA will have access to the same level of the Court (the Federal Court) as other applicants seeking judicial review of personal decisions of the Minister under 501, 501A, 501B and 501C. Character decisions often involve similar issues and legal principles and it is important that they are heard in the Federal Court, which is experienced in this area.

The retrospective application of the amendment at item 20 will ensure that all persons cancelled under one of the character provisions are treated consistently in

terms of their ability to return to Australia, and that any person who may be cancelled prior to the Bill passing is subject to the same provisions as a person who is cancelled afterwards.

Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers. This is particularly the case where some character cancellation powers are not enlivened until another power has been used (for example, the Minister's power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised). The retrospective application of the amendment at item 21 will ensure that confidential information provided to the department prior to the introduction of this amendment is protected and dealt with by the same administrative procedures used for all of the character cancellation and revocation powers.

The Schedule 3 amendments

The Department's view is that these amendments are technical in nature and address an inadvertent omission in the Act by inserting a reference to subsection 48A(1AA) in subsection 48A(1C). The Department considers the amendment to be a clarification of the interaction between subsection 48A(1AA) and subsection 48A(1C) as always intended and does not broaden the circumstances in which a minor or a person with a mental impairment would be prevented from making a further protection visa application.

Further, the Department is not aware of any case since 25 September 2014 in which a minor or a mentally impaired person who was previously refused a protection visa has sought to apply for a further protection visa relying on a ground or criterion that is different from the ground or criterion on which the refused application was based. Therefore, the retrospective commencement of the amendment is not expected to have any adverse impact.