Australian National University

ANU COLLEGE OF LAW

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Via email: legcon.sen@aph.gov.au

SUBMISSION TO THE MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION AND OTHER MEASURES) BILL) 2015

We thank the Committee for the opportunity to make a submission to the Inquiry in relation to this Bill.

The ANU Migration Law Program, within the Legal Workshop of the ANU College of Law, specialises in developing and providing programs to further develop expertise in Australian migration law. These include the Graduate Certificate in Australian Migration Law and Practice, which provides people with the necessary knowledge, skills and qualifications to register as Migration Agents, and the Master of Laws in Migration Law.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

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INTRODUCTION

According to the Bill's Explanatory Memorandum, the main intention of the Bill is to bring the complementary protection provisions in line with the provisions that were inserted into the Migration Act 1958 (Cth) by Schedule 5, Part 2 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) ('Legacy Caseload Act') to 'deliver a more effective and efficient onshore protection status determination process'.[1] As we noted in our submission to the Legacy Caseload Act (Submission No 168), the changes created a new self-contained statutory framework that is inconsistent with international refugee law principles and jurisprudence.[2] We refer the Committee in particular to the following concerns expressed in our earlier submission, which are also relevant to this Bill, including:

- Altering the 'real chance' test for refugee status in ways that are inconsistent with international refugee law;
- Removing the 'reasonableness' criterion for assessing whether or not a person could relocate elsewhere within the country of origin to avoid persecution;
- Introducing the possibility that non-state actors can provide for 'effective protection' from persecution, with no requirement that the protection be stable, durable or effective; and

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[1] Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures Bill) 2015, 1.
[2] See, ANU Migration Law Program, Submission to the Senate Committee on Legal and Constitutional Affairs' Inquiry into the Migration and Maritime Amendment (Resolving the Legacy Caseload) Bill 2014.

- Requiring that a person take reasonable steps to modify their behavior in order to avoid the risk of persecution.

In our view, proposed s 5LAA — which proposes carrying over these changes to the complementary protection regime — will result in similar breaches of international law, and ultimately heighten the risk of *refoulement* of asylum-seekers. While we have previously argued that the test for complementary protection should not be of a higher standard than that for refugee status determination, this was contingent on a refugee definition that is consistent with international jurisprudence on *refoulement*.[3] In our view, neither the Legacy Caseload Act, nor the changes proposed in this Bill, are consistent with international refugee law. On this basis, we do not support the introduction of s 5LAA.

We will not cover the proposed s 5LAA in detail. Instead, we endorse the submission of the Kaldor Centre for International Refugee Law and the Institute for International Law and the Humanities in relation to this provision, and we commend their submission to the Committee. We also endorse the submission of the Law Council of Australia.

The focus of submission is on provisions in the Bill that relate to merits review.

PROPOSED S 36(2C) AND MERITS REVIEW

The Bill seeks to insert a new s 36(2C) into the *Migration Act* to provide that:

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if the Minister has serious reasons for considering that:

(a) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
(b) the non-citizen committed a serious non-political crime before entering Australia; or

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[3] See ANU Migration Law Program, Submission to the Senate Legal and Constitutional Affairs Committees' Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014.

(c) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations.

Under s 502 of the *Migration Act*, the Minister may exercise the power in 'the national interest' to issue a certificate that a person is to be 'excluded person'.[4] Under subsection 500(1), the effect of such a certificate is that a person is excluded from accessing merits review before the Administrative Appeals Tribunal. The Bill also proposes (in item 31) that a person who is taken not to satisfy the criterion for a protection visa under s 36(2C) will be 'excluded' from accessing merits review before the AAT under s 500. In our view, this provision is unnecessary and heightens the risk of *refoulement*.

While there is nothing in the *Refugee Convention* that requires States to provide for merits review, it is well recognized that merits review is an important and essential safeguard to ensure against *refoulement*. For example, the treaty monitoring bodies have found that the provision of effective and impartial review of *non-refoulement* decisions is integral to compliance under the ICCPR and the CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

> *The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy…**requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove**...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.*[5]

The Parliamentary Joint Committee on Human Rights (PJCR) has noted that 'in the Australian context, the requirement for independent, effective and impartial review of *non-*

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[4] *Migration Act 1958* (Cth) s 502. This power is only exercisable by the Minister personally and the Minister must provide a notice to Parliament within 15 sitting days of that decision after the day on which the decision is made.

[5] Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7] (emphasis added).

refoulement decisions is not met by the availability of judicial review, but may be fulfilled by merits review'.[6] We agree with the PJCR that merits review is necessary in this context.

Further, the necessity of merits review is heightened under the proposed amendments because the provision is drafted in such a manner that makes any judicial challenge to the exercise of broad, discretionary executive power extremely difficult. Subsection 36(2C) deems a person to not meet the criteria upon the Minister having 'serious reasons' for considering the person has engaged in the conduct specified. The provision does not require that the applicant be given any notice of the decision, or indeed that any 'decision' actually be made by the Minister. If persons are not afforded procedural fairness and are not notified of the grounds on which any 'decision' is made, this makes judicial review difficult at best and impossible at worst.

Further, given the absolute prohibition on return of a person to place of persecution under international refugee and human rights law, we argue that removal on the basis of 'national interest' without any access to merits review is not a proportionate response. Rather, it gives rise to the possibility of politicised decisions. While Australian courts have not conclusively determined the limits of the 'national interest' test, cases to date suggest that the power is necessarily broad.[7] For example, in *Plaintiff s156*, the Court stated that 'what is in the national interest is largely a political question'.[8] In our view, there is a risk that s36(2C) and s500 could be used in a political manner to facilitate the denial of protection and the indefinite detention of asylum-seekers.

In addition, item 32 proposes to extend the application of s503 to those who are refused a protection visa on complementary protection grounds under the proposed s 36(2C). The effect of this is that those who are refused under this criterion will be permanently banned from entering Australia, either on a temporary or permanent basis, and there are no waiver criteria. Without adequate access to merits review, there is a real risk that incorrect decisions cannot be rectified, with the effect that a person is permanently excluded from Australia. This is neither a desirable or fair.

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[6] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report, *Thirtieth report of the 44th Parliament*, 26.
[7] See eg, *Madeferri v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326.
[8] *Plaintiff s156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014), [40].

In sum, merits review of such decisions is necessary not only to ensure that Australia's *non-refoulement* obligations are met, but also to avoid the situation of leaving asylum-seekers in limbo. As the Kaldor Centre and IILAH highlighted in their submission, while the provision permits the refusal of a protection visa, the absolute prohibition on removal to a place of persecution places people at risk of indefinite detention without any formal legal status.