26 November 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee

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

Dear Committee Secretary

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

The Refugee Advice & Casework Service (**RACS**) is a specialised refugee community legal centre and has been assisting people seeking asylum in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the **Bill**). This submission is endorsed by two other legal organisations that work closely with people seeking asylum in Australia and have extensive experience in the legal and procedural challenges facing protection visa applicants:

- The Humanitarian Group; and
- The Refugee and Immigration Legal Service.

1. Summary

The Bill would be extremely dangerous for the people we work with as it would expose many of them to a risk of serious human rights abuses. RACS is particularly concerned about two changes to the scope and meaning of what constitutes a real risk of significant harm under the *Migration Act 1958* (the **Act**):

- the requirement that a real risk of significant harm must be established in all areas of an applicant's home country, thereby removing any requirement for decision-makers to consider whether meaningful protection can be achieved through relocation (proposed subsection 5LAA(1)); and
- the introduction of an additional requirement that an applicant be "at particular risk" relative to other members of the population (proposed subsection 5LAA(2)).

Our submission focuses on these provisions, which would exclude broad categories of people from eligibility for protection under Australian law. Three case studies illustrate how we anticipate that the amendments would affect our clients in practice. The case studies do not contain real names or personally identifying information.

The Bill would modify several other features of the complementary protection framework in the same terms as changes made to the refugee criterion by Schedule 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the **Legacy Caseload Act**). In particular we oppose the proposed subsection 5LAA(5), which would allow decision makers to place the onus of avoiding significant harm on an applicant, even in situations in which the risk of harm is objectively high. Our concerns reflect those that we voiced in relation to the equivalent provisions introduced by the Legacy Caseload Act.[1]

In relation to the consistency of the Bill with international standards and international human rights law, we refer the Committee to:

- the joint submission of the Kaldor Centre for International Refugee Law and the International Refugee Law Research Programme at the Institute for International Law and the Humanities at the University of Melbourne; and
- the Human Rights Scrutiny Report of the Parliamentary Joint Committee on Human Rights.[2]

In particular, we note that some statements by the government in relation to the compatibility of the Bill with human rights law and the alignment of Australian practice with that of other countries appear to be misguided.

The government has previously suggested that the complementary protection framework has been open to “widespread abuse” and allows individuals convicted of serious crimes to be granted protection visas.[3] This emerged again in the Minister’s Second Reading Speech.[4] We stress that this view is unsustainable on any reading of the existing legislation or analysis of its operation in practice. The Act currently provides the Minister with very broad powers to decide that a person is not eligible for complementary protection for a wide range of reasons related to security and character, including the person’s criminal record or the Minister’s view that the person is a danger to the community.[5]

While the government claims there is a need to align the complementary protection criterion with the narrower definition of refugee that was introduced by the Legacy Caseload Act, we urge the Committee to consider the risks that these changes pose for the people that Australia may return to situations of human rights abuses as a result of the passage of the Bill, and the consequences of this for Australia’s compliance with its international legal obligations.

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[1] Senate Legal and Constitutional Affairs Committee, Inquiry into the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 134: Refugee Advice and Casework Service, 31 October 2014, 31-39, available at <http://www.aph.gov.au/DocumentStore.ashx?id=17748442-a6bc-4d9d-b4e4-ea443c452633&subId=301497> (accessed 19 November 2015). The non-exhaustive enumeration of protected attributes subsequently included in the bill and now forming part of subsection 5J(3) and the proposed subsection 5LAA(4) do not change the substance of our concerns in relation to modification of behaviour.

[2] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: 30th Report of the 44th Parliament, 10 November 2015, 19–27.

[3] Parliament of Australia, House of Representatives, Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, Second Reading Speech, Scott Morrison MP, 4 December 2013; ‘Scott Morrison Being “Mean for the Hell of It” to Asylum Seekers: Labor’, *Sydney Morning Herald,* 4 December 2013 <http://www.smh.com.au/federal-politics/political-news/scott-morrison-being-mean-for-the-hell-of-it-toasylum-seekers-labor-20131204-2ypst.html#ixzz2mYK9E0OW> (accessed 19 November 2015).

[4] Parliament of Australia, House of Representatives, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, Second Reading Speech, Peter Dutton MP, 14 October 2015.

[5] *Migration Act 1958*, section 36(2C).

2. Introduction of "particular risk" as an additional requirement

Our first concern is with proposed subsection 5LAA(2) which would have the effect of qualifying the operation of the existing paragraph 36(2B)(c) and relocating it to section 5LAA.

The existing paragraph 36(2B)(c) deems that there is no "real risk" of significant harm if "the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally". The new provision would modify the this provision by requiring that "if the real risk is faced by the population of the country generally, the person must be at a *particular risk* for the risk to be faced by the person personally."

The provision appears to install an additional requirement that the person be at a greater risk than the rest of the population in order to be eligible for complementary protection in Australia. It would allow the exclusion of those applicants who are found to face a real risk of significant harm but who face that risk to the same extent or for the same reasons as other people in the same country.

As such, the proposed subsection 5LAA(2) would create a legal fiction: it would permit a person to be deemed *not* to face a real risk of serious human rights abuses even when they do. This results in the refusal of a protection visa application and in most cases the result that the person must be removed from Australia. In light of these serious consequences, the government has not demonstrated why such a provision is justified or in line with international standards.

Commenting on the existing paragraph 36(2B)(c) prior to its introduction in 2012, Professor Jane McAdam expressed that:

> At its most extreme, it could be argued that this provision would permit return even where a whole country were at risk of genocide, starvation or indiscriminate violence, which would run contrary to the fundamental aims and principles of human rights law.[6]

The proposed subsection 5LAA(2) goes even further to create the applications that Professor McAdam warned against.

Example case study 1: "At particular risk"

For several years, Sami's country of origin has been one of the most violent and politically unstable in the world. It is affected by multiple internal and external armed conflicts and its population is subject to widespread displacement.

In considering Sami's application for a protection visa, the Australian Government considers that it is clear that Sami would face a real risk of significant harm on return to his country. However, Sami is unable to demonstrate that he is "at particular risk" in comparison to the population of the country. Relying on the new subsection 5LAA(2), the Minister refuses application. He is later returned to his country of origin involuntarily.

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[6] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Complementary Protection) Bill 2011, *Submission 21*, Associate Professor Jane McAdam, 35.

3. Real risk relating to all areas of the country

Our second concern relates to the proposed modification to the "internal relocation" or "internal flight" principle for complementary protection.

The existing paragraph 36(2B)(a) has the effect that where a decision maker is satisfied that there is a real risk that a person will suffer significant harm in a certain part of the country, the person is not eligible for complementary protection if it would be reasonable (in the sense of "practicable") for the person to relocate to an area of the country where such a risk would not exist. The proposed paragraph 5LAA(1)(a) would change this position to require an applicant to establish a real risk of significant harm in all areas of the country in order to engage Australia's protection obligations under Australian law.

Combined with section 5AAA (introduced by the *Migration Amendment (Protection and Other Measures) Act 2015*), which places the onus of proof for making out protection claims wholly upon the applicant, this amendment would require an applicant for protection to provide evidence of a real risk of serious human rights abuses in every area of a country. In relation to the refugee definition, this evidentiary task has been described as "an impossible burden" for an applicant.[7]

Further, combined with the proposed amendments in relation to "particular risk" discussed above, this amendment would require an applicant to distinguish the risk that they would suffer harm in a particular place from the risk faced by other people in that place, including areas of which the applicant may have little knowledge. The provisions permit the refusal of an applicant's application unless they can do this in relation to every area of the relevant country.

The new provisions allow the government to refuse a protection visa application on the basis of nothing more than the identification of an "area" of the country in which the decision maker considers that the risk of significant harm is something less than a real risk. In this way, it unacceptably allows the refusal of applications even in relation to applicants with serious protection needs.

Example case study 2: "Real risk of significant harm relating to all areas of the country" - the impossible burden

Amal is a 21 year-old woman. Most of her country of origin, including her family's home area, has been controlled for many years by a violent political movement that has been condemned internationally for systematic massacres against civilians. It is very clear that Amal would face a real risk of serious human rights abuses in almost all parts of the country.

Other, much smaller areas of the country are tenuously controlled by regional governments who would not pose a threat to Amal. However, these areas are subject to frequent attacks by armed groups, which have led to high insecurity, dysfunctional local economies, high unemployment and widespread poverty. Amal

[7] James C. Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003, 369.

has never visited those areas and does not know anyone there. She does not speak or understand the language that is spoken in those areas.

Interviewed in relation to her protection visa application, the Australian Government asks Amal why she considers that she would face a real risk of significant harm in several towns which the interviewer names. Amal has never heard of these towns and she is unable to respond with confidence. Her application is refused on the basis that she did not establish that the real risk of significant harm that she faces relates to all areas of the country.

Relevance of the safety and lawfulness of relocation

The government has stated that if the proposed section 5LAA were to become law, a decision maker would be required to take into account whether the person can safely and legally access the area upon returning to the receiving country.[8]

Despite the government's stated intention for the safety and lawfulness of accessing an area of relocation to be taken into account, the proposed section 5LAA contains no such requirement. Accordingly, under the proposed provision, a person who was found not to satisfy the complementary protection criterion because of a decision maker's failure to take into account the legal or security barriers to accessing the proposed area of relocation, may not have any avenue to redress.

While RACS recommends that the Bill not be passed, if it is the intention of the Parliament for the new provisions to be introduced, RACS strongly recommends that the intention that the safety and legality of an area be considered by decision-makers be codified in the words of section 5LAA. An example would be:

> (1) For the purposes of the application of this Act and the regulations to a particular person, there is a real risk that the person will suffer significant harm in a country if:
>
> > (a) the real risk relates to all areas of the country **and the person can safely and legally access an area to which the real risk does not relate.**

We raise this in order to demonstrate the significant disparity between the words of the Bill and the government's description of its proposed operation. We do not suggest that such a reformulation of the provision would be consistent with international human rights law, and we stress that it would significantly weaken the existing protections against non-refoulement and increase the risk of Australia breaching its international obligations.

Example case study 3: Failure to take into account whether applicant can access a place in which they would not face a real risk of significant harm

Mari and her husband have two children in primary school in Australia. Their country of origin is affected by civil conflict and their home area has been captured by armed groups that are hostile to people of her religious background. The government of the country maintains control of some suburbs of the capital, where citizens (including people of Mari's religion) have been largely protected from fighting.

[8] Explanatory Memorandum, [55]; Statement of Compatibility with Human Rights, [20]; Parliament of Australia, House of Representatives, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, Second Reading Speech, Peter Dutton MP, 14 October 2015.

> However, the parts of the capital considered to be acceptably safe are increasingly inaccessible to those who are not wealthy or well-connected. With no family or personal contacts in the capital and with limited financial means, it is extremely unlikely that Mari and her family will be able to access accommodation in a safe area.
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> A decision maker finds that in light of the relative safety of some suburbs in the capital, Mari and her husband are unable to demonstrate that their risk of significant harm relates to all areas of the country, and the application is refused.

Although there may be doubt as to whether the decision to refuse the application in the case study above would comply with what the government has stated will be Departmental policy, the decision would be consistent with the new section 5LAA.

4. Closing remarks

The limitations in the statutory refugee definition introduced by the Legacy Caseload Act mean that the existing framework for complementary protection is vital for avoiding a practical degradation of the level of protection offered to refugees applying for protection in Australia. Installing similar limitations in the complementary protection framework would expose vulnerable people seeking asylum in Australia to the risk of being removed to a country where they could face serious human rights abuses. This threatens Australia's compliance with its international obligations.

Please do not hesitate to contact us for further information or clarification.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

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With: