Justice for Refugees SA

E: info@justiceforrefugeessa.org
A: PO Box 6036 Halifax St, Adelaide SA 5000

9 December 2015

Dear Committee Secretary,

Inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015. We understand the delay in the lodgement of our submission and kindly request you to take it into consideration.

Our submission, which was formed by concerns, raised members of the South Australian public at a community meeting, focuses on two key points which raised the most reservations amongst members:

- Item 11: changes to the definition of complementary protection
- Items 16 and 31: merits review and threats to national interest.

We further take issue with proposed amendment 5LAA(4), and second the concerns expressed in the submissions of the Institute of International Law and the Humanities, University of Melbourne.

You will find attached a list of signatories supporting this submission, all who were present at this meeting.

Yours Sincerely,

John Haren,
President of *Justice for Refugees*

ITEM 11: CHANGES TO THE DEFINITION OF COMPLEMENTARY PROTECTION

….. After section 5L

Insert:

5LAA Real risk that a person will suffer significant harm

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
   (b) the real risk is faced by the person personally.

The proposed changes, as listed above, go against the original spirit of complementary protection by significantly narrowing the test and placing a high level of burden on asylum seekers by requiring them to prove that their fear of serious harm applies to all parts of the receiving country. For these claims to be satisfied, would result in applicant who have only lived in remote areas, have little knowledge of other parts of their country and may be illiterate, to hypothesise as to the risks associated with an area they know nothing about. Reports that are provided to the governmental departments do not consider the practical limitations of relocation to an unknown but "safe" area.. This attitude is reflected in the proposed Bill by the removal of 'reasonableness' from the definition, suggesting a shift in focus to whether or not relocation is possible. This change has serious repercussions, meaning that despite the risk, hardship and cultural implications, relocation can be considered a viable alternative to asylum in Australia, despite evident impracticalities and risk.

Under the current test, decision makers must consider whether the person would enjoy 'ideal or preferred living circumstances' after relocation, as well as whether the person would suffer undue hardship due to relocating. This considers factors such as availability of housing, whether armed groups control the area, whether family networks are present, the ethnicity of the area, the main language or dialect spoken, as well as many other factors. Removing this requirement of reasonableness would allow people to be returned to place where they could possibly live in destitution or severe hardship, all in the name of avoiding persecution. Furthermore, under the *Migration Act,* 'significant economic hardship that threatens the person's capacity to subsist' and 'denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist' is seen as 'serious harm'- this could of itself lead to refugee status.

> .....
>
> (2) For the purposes of paragraph (1)(b), 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.
>
> .....

This provides that if there is a risk faced by the population generally, the applicant must face a particular risk. This is clearly an issue as proving such a risk, especially when removed from the context of a larger-scale risk to the population, may be extremely difficult. Further, if a risk exists currently that threatens the population of which the applicant is a part, it seems reasonable that they may in the future be exposed to a particular risk. The UNHCR is of the opinion that when a risk is assessed, it should be assessed in the context of the overall situation in the applicant's country of origin. Any other method is likely to increase the likelihood of mass violations of human rights, thus undermining the complementary protection framework entirely.

> (5)There is not a real risk that a person will suffer significant harm in a country if the person could take reasonable steps to modify his or her behaviour so as to avoid a real risk that the person will suffer significant harm in the country, other than a modification that would:
>
> (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
>
> (b) conceal an innate or immutable characteristic of the person; or
>
> (c) without limiting paragraph (a) or (b), require the person to do any of the following:
>
> (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
>
> (ii) conceal his or her true race, ethnicity, nationality or country of origin;
>
> (iii) alter his or her political beliefs or conceal his or her true political beliefs;
>
> (iv) conceal a physical, psychological or intellectual disability;
>
> (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
>
> (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

This subsection states that the applicant will not have a real risk of persecution if they are able to modify their behaviour so as to avoid harm. Characteristics essential to a person, such as religion and sexuality, are excluded from this. However, modifications may include such things as

employment, which may make life extraordinarily difficult for those living in already strained circumstances. Many of those who would seek complementary protection do not have the resources to seek alternative employment so as to reduce the risk of persecution. While the requirement of behavioural modification is currently legal, as per Minister for Immigration and Border Protection v SZSCA, but the extent of its application has traditionally only been to minor social issues such as the consumption of alcohol or adult films.

Recommendations

Subsections 5LAA(2) and 5LAA(5) in particular have the potential to greatly restrict the ability of applicants to seek complementary protection, and as such would place these people at great risk of harm. As such, Justice for Refugees would recommend in respect of s5LAA(2) that the requirement for personal risk be removed and the UN endorsed standard of risk to the population instead be retained. S5LAA(5) should be removed from the Bill entirely.

ITEMS 16 & 31: MERITS REVIEW AND THREATS TO NATIONAL INTEREST

This section of the submission deals with the joint operation of proposed s 36(2C) and 502, specifically regarding the potential for limit of review of adverse decisions.

ITEM 16

Subsections 36(2A), (2B) and (2C)

Repeal the subsections, substitute:

Ineligibility for grant of protection visa

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

ITEM 31

Subparagraph 502(1)(a)(ii)

After “36(1C)”, insert “or (2C)”.

The proposed s 36(2C) provides that applicants for complementary protection may be refused – regardless of the strength of their claim – should the Minister have 'serious reasons' to consider they satisfy ss (2C)(a),(b) or (c). Under the proposed amendments to s 502(1)(a), should the Minister then hold that it is in the national interest, the applicant may be prevented from seeking merits review of that decision. The seriousness with which non-refoulement is handled in the International sphere necessitates sufficient safeguards against possible contravention of Australia's obligations

Under the proposed amendments, an applicant may be refused a visa (regardless of whether they satisfy legislative tests for complementary protection) on the grounds that the Minister has 'serious reasons for considering' they meet any of the relevant subsections of s 36(2C). This test relies on the subjective opinion of the Minister at the time, and is therefore subject to political bias. The test's threshold appears exceedingly low, requiring mere reasons for considering, rather than any standard of proof. There do not appear to be restrictions on from where said reasons could be derived, giving rise to potential for misinformation, political bias, or the receiving country influencing the outcome.

These shortcomings are compounded by the potential that applicants for complementary protection may, under this section and s 502(a)(ii), be precluded from accessing merits review. This potentially renders the decision made – on the low threshold discussed above – final, provided the Minister further considers to prevent merits review would be in the 'national interest.'[1]This result is consummately unfair. While Merits review is not expressly required by International Legal Instruments, its importance in cases of possible refoulement is established in International Case Law,[2] and the articulation of non-refoulement principles in multiple International Legal Instruments is demonstrative of its significance.

It is argued in the Statement of Compatibility with Human Rights to the Explanatory Memorandum that, although access to merits review may be prevented, access to judicial review is sufficient to satisfy Australia's treaty obligations. The obligation cited, Article 13 of the *ICCPR*, is to allow non-citizens facing expulsion from a nation to 'submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority.' It is our submission that, as judicial review is a form of review limited to errors of process, non-citizens captured by s 502 would not be able to present '***the*** reasons against… expulsion' but rather ***restricted*** reasons against expulsion.

[1] *Migration Act 1958* (Cth) s 502(1)(b).
[2] *Aziga v Sweden*, Communication No. 233/2003, U.N Doc. CAT/C/34/D/233/2003 (2005).

Were the decision to expel made in accordance with procedure, but based entirely on factual error, there would be no avenue of appeal. This seems to contravene the intention behind Article 13.

Further, as was discussed in the submissions of the Australian National University, the breadth of the power conferred on the Minister under s 36(2C) combined with the lack of identified procedural requirements leave little scope for grounds for judicial review.

The importance of ensuring appropriate safeguards against error is compounded by the severity of the Amendments' effect. The Statement of Compatibility with Human Rights to Explanatory Memorandum states that applicants who engage Australia's *non-refoulement* obligations 'will not be removed in breach of those obligations.' However, without access to Merits Review, and unable to be granted a visa, this could result in the indefinite detention of affected applicants. While indefinite detention for migration purposes is not unconstitutional in Australia,[3] it contravenes established International law.[4] Australia has already been soundly criticised by International Human Rights Bodies for our treatment of asylum seekers and refugees. This provision potentially gives rise to grounds for more such criticism. Should the non-citizens be expelled, under Item 32 (proposing to extend application of s 503 to include applicants denied a visa under s36(2C)) they may be permanently banned from entering Australia, leaving no recourse to rectify incorrect decisions. The finality of this result is not judicious.

Recommendations

We submit that Items 16 and 31 are rejected in full. Together, these items create a system where applicants for protection may be rejected on the opinion of the Minister, and may be unable to challenge this decision. Given that applicants in this situation face either indefinite detention or return to a country in which they may suffer extreme harm, we submit the safeguards against error are insufficient against the potential consequences. We submit that such measures are un-Australian, and are incompatible with the egalitarian principles and 'fair go' which the Department itself identifies in the Australian Values Statement.

[3] *Al Kateb v Godwin* (2004) 219 CLR 562.
[4] *International Covenant on Civil and Political Rights*, entered into force 23 March 1976, Article 9, para. 1.

SIGNATORIES INVOLVED IN THE DRAFTING OF THESE SUBMISSIONS AT PLANNING MEETING ON 4TH DECEMBER, 2015, at Clayton Wesley Uniting Church, Beulah Park.

Sandro Bracci	Julie-Ann Bingham
Ruth Harbison-Grisham	Katherine Russel
Anne Davenport	David White
Nadia Baldassi-Winderlich	Frank Broderick
Tareena Martin	Lesley Walker
Karolinka Dawidziak Pacek	Tina Dolgopol
Sarah Mack	Stephen Watkins
Meredith Evans	Richard Dale
Kim Voss	David Winderlich

Note: The submissions were later approved at a Justice For Refugees Committee Meeting on Monday