



## Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

### **MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION AND OTHER MEASURES) BILL 2015**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015*. We have long argued that Australia's complementary protection framework plays an essential role in protecting people at risk of torture and other forms of serious harm. While we welcome the Government's decision to preserve this framework, we are concerned that the amendments proposed in the Bill are likely to significantly weaken Australia's system of complementary protection and result in the denial of protection to people who have genuine and compelling claims. We therefore recommend that the Bill not be passed.

#### **1. The importance of complementary protection**

- 1.1. Australia's complementary protection framework provides an essential lifeline for these individuals who, while they may not be considered refugees under international law, are nonetheless in need of protection due to the risk of torture or other forms of cruel, inhuman or degrading treatment or punishment. Since being introduced in 2012, this framework has protected many people from being returned to situations where they would face serious human rights violations, including family violence, honour crimes, revenge attacks, torture and violent extortion.
- 1.2. RCOA commends the Government's decision not to proceed with the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, which sought to repeal the complementary protection provisions of the *Migration Act 1958*. We also welcome the Government's decision not to proceed with the changes to the threshold for granting complementary protection as originally proposed in the *Migration Amendment (Protection and Other Measures) Bill 2014*. However, we are disappointed that the Government is now seeking to enact a Bill which would significantly weaken the level of protection provided by Australia's complementary protection framework.

#### **2. Changes to the status determination process**

- 2.1. RCOA is concerned by provisions of this Bill which seek to extend the application recent changes to the refugee status determination process to Australia's complementary protection framework. When these changes were introduced through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, RCOA expressed serious concerns about several new requirements which set unreasonably high thresholds for granting refugee

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status.<sup>1</sup> We are therefore troubled to see that these requirements are now being extended to the complementary protection framework.

- 2.2. One of our key concerns relates to the requirement that a person's fear of serious harm must apply to all parts of their receiving country. As a result, a person will not be eligible for protection on complementary grounds if they can relocate to a part of their country where they are considered not to be at risk of harm. RCOA believes that these provisions would distort the status determination process, inappropriately shifting the focus of decision-making from an assessment of the level of risk faced by the individual towards an assessment of whether or not they can move elsewhere. They would also impose an unjustifiably onerous burden of proof on people seeking protection, potentially resulting in the denial of complementary protection to people who would be at real risk of harm if returned to a receiving country.
- 2.3. We are also greatly concerned that decision-makers will not be required to consider whether it would be "reasonable" to expect a person to relocate, thus complementary protection would be denied even if relocation would cause a person significant hardship. The Explanatory Memorandum accompanying the Bill states that an assessment of whether internal relocation "would provide the person with ideal or preferred living circumstances" is not required to satisfy Australia's non-*refoulement* obligations. RCOA believes that this reasoning is seriously flawed.
- 2.4. The existing reasonableness test does not merely require decision-makers to consider whether a person would enjoy "ideal or preferred living circumstances" after relocation but whether they would suffer undue hardship as a result of relocation. For example, it would not be considered reasonable for an asylum seeker to relocate to an area which is uninhabited, where they could not legally rent or own property, where they do not speak the language or where they would have no means of subsistence. RCOA believes that it would undermine the purpose of complementary protection if those seeking such protection on these grounds were expected to render themselves destitute or endure serious social isolation in order to avoid being tortured or otherwise seriously mistreated.
- 2.5. Furthermore, as we argued in our submission to the Senate inquiry into the *Legacy Caseload Act*, a person cannot be said to be free from the threat of serious harm if they must endure ongoing and significant hardship in order to avoid harm. Indeed, 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" are considered forms of "serious harm" which may in turn warrant the grant of refugee status.
- 2.6. RCOA is also concerned by provisions which would deny complementary protection if "effective protection measures against significant harm" are available in their receiving country. However, the existing definition of "effective protection" in the *Migration Act* fails to accurately reflect the circumstances in which a person can be said to be adequately protected from serious harm. For example, the definition stipulates that state protection should consist of "an appropriate criminal law, a reasonably effective police force and an impartial judicial system", even if these institutions are not actually "effective" in a particular case. While the Explanatory Memorandum states that this provision would not apply "if the person is unable to access state protection that would normally be effective but in their particular circumstances is not", this is not stated in the Bill itself.
- 2.7. Additionally, the current definition of "effective protection measures" includes protection provided by non-state actors (such as, according to the Explanatory Memorandum, "the United Nations or friendly forces"). As we noted in our submission on the *Legacy Caseload Act*, while non-state actors may be able to provide important forms of protection in some circumstances, they cannot possibly command the same level of protection capacity as a state. Non-state actors cannot, for example, confer legal status, grant visas, provide permission to access government services or prevent removal against the wishes of a state. In addition, while they are expected to adhere to certain principles of international law, non-state actors are not bound by international treaties (and their

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<sup>1</sup> RCOA's submission to the Senate inquiry into the *Legacy Caseload Act* can be found at <http://www.refugeecouncil.org.au/r/sub/1410-Legacy-Caseload.pdf>

associated accountability and oversight mechanisms) in the same manner as states. RCOA is therefore of the view that protection provided by non-state actors should not be considered equivalent to state protection.

- 2.8. The proposed provisions relating to internal relocation and effective protection may also result in the denial of protection in circumstances where an ostensibly 'safe' part of a person's receiving country is, in practice, anything but safe. For instance, territory held by "friendly forces" may be deemed 'safe' under the proposed provisions but it is highly unlikely that this supposed safety would prove either adequate or durable. Armed forces cannot create the institutional structures necessary to ensure long-term effective protection (including those which this Bill stipulates are essential for effective state protection, such as a judicial system) and the rapidly-changing conditions typical of conflict situations may result in areas previously considered to be relatively 'safe' becoming profoundly dangerous within a very short period of time. Indeed, in a country which is affected by active conflict or insecurity, it is doubtful that any region could be accurately regarded durably 'safe'. RCOA believes that it would be deeply misguided to deny protection on the basis of such dubious assessments of 'safety'.
- 2.9. Finally, RCOA is concerned about provisions which would deny access to protection to people who could modify their behaviour to avoid serious harm. While these provisions do include significant exemptions, it remains unclear when a person *would* be expected to modify their behaviour to avoid harm. The Explanatory Memorandum provides only one example of circumstances in which a person may be expected to modify their behaviour – "refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation". In RCOA's view, however, this example raises more questions than it answers. For example, in what circumstances would it be considered "reasonable" for a person to find another occupation? If a person considers their occupation to be fundamental to their identity or conscience, would they still be expected to find another? Is it even reasonable to expect a person to abandon their career or field of expertise in order to avoid serious harm?
- 2.10. In summary, RCOA strongly opposes provisions of the Bill which seek to extend provisions introduced last year through the *Legacy Caseload Act* to the complementary protection framework. We are greatly concerned that these changes could result in the denial of protection, on grounds which are not fair or reasonable, to people who are at risk of serious harm in their country of origin.

### **3. Personal risk of harm**

- 3.1. Subsection 5LAA(2) of the Bill states that, in order to be granted complementary protection on grounds of a risk that is "faced by the population of the country generally", a person must establish that they are "at a particular risk". The Explanatory Memorandum further elaborates that, in circumstances where the population of a country is at heightened risk of violence in general, a person would not be granted complementary protection "unless there were a further factor or characteristic indicating that the individual themselves or a class of persons that they belong to, are the intended target of such violence".
- 3.2. The criterion of 'particular risk' is inconsistent with international law and would, at its most extreme, arguably permit return even if the entire population of a country was at risk due to indiscriminate violence. Such an interpretation would undermine the very purpose of human rights law, as the more widespread human rights violations are in a country, the less likely a person would be able to obtain protection from it.
- 3.3. We welcome the acknowledgement in the Explanatory Memorandum that, in some cases, "the level of risk of harm arising from generalised violence across a region or country may be truly real and personal for an entire population". However, the language of the Bill itself does not reflect this recognition. Furthermore, this explanation fails to consider the circumstances of individuals who may be at heightened risk of harm due to factors such as age, gender or disability, even if they are not being specifically targeted on these grounds. For example, an unaccompanied child or single woman would typically be at much higher risk of harm in a conflict situation, even if they are not being specifically targeted on the basis of their age or gender. RCOA thus believes that this provision

may serve to exclude from protection people who are at serious risk of harm, including vulnerable individuals who would at particularly high risk if returned to a receiving country.

#### **4. Character provisions**

- 4.1. RCOA has a number of concerns relating to the proposed changes to character provisions for people applying for complementary protection. Unlike the Refugee Convention, the international legal instruments which form the basis of Australia's complementary protection obligations<sup>2</sup> do not permit the exclusion of certain individuals from protection on the basis of criminal activity. As such, the extension of character provisions under the complementary protection framework may not be compatible with Australia's international legal obligations.
- 4.2. In addition, RCOA has previously expressed serious concerns about provisions of the *Migration Act* which operate to restrict access to independent merits review.<sup>3</sup> We are therefore troubled by the proposal to extend the application of section 502 of the *Migration Act* to decisions made in regard to complementary protection. It remains RCOA's position that decision-making on character issues should be subject to independent merits review, given the potentially serious consequences which can stem from visa refusals on character grounds. In the case of a person seeking protection, for example, the consequences of visa cancellation or refusal on character grounds could include prolonged indefinite detention or deportation to country where they may be at risk of serious harm.
- 4.3. Furthermore, the Government has failed to justify the need to extend the Minister's powers under section 502 to complementary protection cases. The Statement of Compatibility with Human Rights accompanying this Bill merely states that the Government "now considers it appropriate" to extend the scope of this provision.
- 4.4. Finally, RCOA wishes to highlight the risks associated with amending section 336F to broaden the circumstances in which personal identifiers of visa applicants may be disclosed to foreign countries or entities. While this provision is designed to apply to people who have been found not to be in need of protection, we believe that the measures proposed in this Bill and introduced by other recent legislation (in particular the weakening of protections against *refoulement* under the *Legacy Caseload Act*) create real risks that people will be wrongly denied protection and deported to danger. As such, the proposed amendments increase the risk that a person could be placed in danger as a result of disclosures under Section 336F.

#### **5. Recommendation**

- 5.1. In light of the concerns outlined above, RCOA recommends that the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015* not be passed.

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<sup>2</sup> The Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

<sup>3</sup> See, for example, RCOA's submissions to the parliamentary inquiries into the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (<http://www.refugeecouncil.org.au/r/sub/1410-Character.pdf>); and the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (<http://www.refugeecouncil.org.au/wp-content/uploads/2015/10/1507-Citizenship.pdf>).