NEW SOUTH WALES SOCIETY OF
LABOR LAWYERS

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Inc 9896948

Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015*

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The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

This submission was approved by the New South Wales Society of Labor Lawyers Executive. It is in line with the Society's principles, objectives and values.

(INC9896948)

Introduction

1. The NSW Society of Labor Lawyers opposes the enactment of the *Migration Amendment (Complementary Protection and Other Measures) Bill* 2015 ("the *Bill*").

2. In particular, the NSW Society of Labor Lawyers oppose the enactment of the proposed section 5LAA of the *Migration Act* by the *Bill*. We submit that this provision, if enacted, would risk *refoulement* of applicants to receiving countries in a manner inconsistent with Australia's international obligations.

3. In the following submissions, we focus in particular on amendments made to the 'internal relocation alternative' by the proposed subsection 5LAA(1)(a).

s5LAA and Australia's International Obligations

4. The *Explanatory Memorandum* to the *Bill* states that the modified test in relation to internal relocation "is consistent with Australia's *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)".[1] The *Explanatory Memorandum* proceeds to note that '[i]nternational jurisprudence on Australia's *non-refoulement* obligations confirms that consideration should be given to whether the person will face a real risk of significant harm in the whole of a country',[2] and that "there must exist a risk of harm to the entire territory of the State, with no internal flight alternative".[3]

5. We submit that the *Explanatory Memorandum* is incorrect. Relevant provisions under the ICCPR and CAT giving rise to non-*refoulement* obligations have, in fact, been interpreted (by courts and national legislatures) as either providing no scope for internal relocation at all, or as implicitly requiring that regard be had to whether internal relocation would in fact be reasonable.

6. We submit that the preferable view is that the ICCPR and the CAT do not require that an 'internal relocation alternative' be considered in the assessment of non-*refoulement* obligations. We note, in this regard, the Full Federal Court's decision in *Minister for Immigration v MZYYL* [2012] FCAFC 147. In this decision, the Full Federal Court stated that the ICCPR and the CAT (along with the Convention on

[1] *Explanatory Memorandum,* para [58].
[2] *Explanatory Memorandum,* para [59].
[3] *Explanatory Memorandum,* para [59].

the Rights of the Child) "do not require the non-citizen to establish that the non-citizen could not relocate within that country",[4] explicitly distinguishing Australia's present statutory position from the stance of the conventions themselves.

7. The view taken in the *Explanatory Memorandum* (that "consideration should be given to whether the person will face a real risk of significant harm in the whole of a country") is hence inconsistent with the view taken by the Full Federal Court (albeit in *obiter*) in *MZYYL*. To amend the *Act* still further would create an even greater divide between the terms and protections of the ICCPR and CAT and the protection offered by the *Act*.

8. In the alternative, we note that equivalent 'complementary protection' schemes in other nations have required that regard be had not only to whether the applicant for protection would face a real risk of harm (of a kind enlivening a nation's non-*refoulement* obligations) in a prospective site of relocation, but also to additional factors. We note, in this regard, the following examples:

    a. *In the European Union:* Under Article 8(1) of Council Directive 2004/83/EC (29 April 2004) ("the Qualification Directive", the principal EU document governing the grant of refugee status or "subsidiary protection"), regard must be had to whether 'the applicant can reasonably be expected to stay in [the prospective site of internal relocation]'.

    b. *In New Zealand:* Under sections 130 and 131(2) of the *Immigration Act*, regard must be had to whether an applicant could access 'meaningful domestic protection' in determining whether they are owed obligations under the ICCPR or CAT. This has been interpreted to extend to regard to whether such a person would be "require[d]… to live in conditions of squalor and destination, or otherwise endure extreme hardship inconsistent with basic human dignity, in order to avoid being subjected to the arbitrary deprivation of life or cruel treatment elsewhere in the country of nationality [or] former habitual residence".[5]

    c. *In the United Kingdom:* In *Dhima,* the High Court of England and Wales implicitly accepted the finding made on the part of the state that the 'internal flight alternative' is 'as applicable to human rights claims [those

[4] *Minister for Immigration v MZYYL* [2012] FCAFC 147 [18] (Lander, Jessup and Gordon JJ).
[5] *AC (Russia)* [2012] NZIPT 800151 [108].

arising under article 3 of the European Convention on Human Rights] as to asylum claims'.[6] Although Australia is not a party to the European Convention on Human Rights, article 3 is framed in equivalent terms to relevant provisions of the ICCPR and CAT traditionally understood to give rise to non-*refoulement* obligations.

9. The European Union, New Zealand and the United Kingdom have hence regarded their 'complementary protection' obligations (that is to say, obligations under treaties other than the *Refugees Convention*, including the ICCPR and the CAT) as requiring regard to whether any prospective internal relocation would be reasonable. **Australia's proposed reforms in this regard are not matched by any comparable country**. The *Bill* amounts, in effect, to the development of a highly idiosyncratic interpretation of the ICCPR and CAT, without precedent or support from the legislatures or courts of other nations. We submit that this 'interpretation', conflicting as it does with how these treaties have been understood and enforced in other nations, would be in conflict with Australia's international obligations.

10. The approach taken by the European Union and New Zealand is consistent with that adopted by the UN Human Rights Committee itself, the principal UN body charged with the interpretation of the ICCPR. In its 2006 *Concluding Observations* with regard to Norway, the UN Human Rights Committee (in examining the extent of Norway's compliance with the ICCPR) observed that "[t]he State party [Norway] should apply the so-called internal relocation alternative only in cases where such alternative provides full protection for the human rights of the individual".[7]

11. Although we acknowledge the somewhat unusual context (a report on national compliance with the ICCPR rather than the resolution of an individual complaint to the Committee) in which these observations arose, we submit that this observation nonetheless signals the view of the UN Human Rights Committee that national compliance with the ICCPR requires regard, in the determination of non-*refoulement* obligations, to whether a person would enjoy full protection of their human rights in a site of prospective internal relocation. The proposed

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[6] *Dhima v Immigration Appeal Tribunal* [2002] EWHC 80 (Admin) [12]
[7] *Concluding Observations of the Human Rights Committee, Norway,* UN Doc. CCPR/C/NOR/CO/5 (2006) <https://www1.umn.edu/humanrts/hrcommittee/norway2006.html>.

amendments would hence be in breach of the United Nations' interpretation of the ICCPR.

Conclusion

12. Given the above, we submit that the Senate should not pass the *Bill* as presently framed, in light of its potentially severe adverse effects upon individual applicants and upon Australia's compliance with its international obligations.