Canberra Refugee Action Committee – Submission to Senate Legal and Constitutional Affairs Legislation Committee on Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Canberra Refugee Action Committee

The Canberra Refugee Action Committee (RAC) is a Canberra-based committee with online supporters currently numbering around 2000, and attracting numbers to rallies in excess of that. The Committee was founded in 1999 and has been continuously active since in advocating for a refugee and asylum policy that is humane and in accordance with our international obligations and common decency, and that responds to the protection needs of all asylum seekers, including those who come by boat. Our members and supporters have always included a wide range of people from different backgrounds, a number of whom are involved with refugee issues in the community, and who bring their knowledge to RAC's advocacy.

Overview concerning complementary protection and proposed legislation

Complementary protection is intended to complement protection against *non-refoulement* (broadly, non-return to persecution or other relevant danger) under the Refugee Convention[1] where there are human rights obligations of *non-refoulement* under other international instruments such as the ICCPR and the CAT.[2] In Professor McAdam's words:

> Complementary protection is typically granted where the treatment feared does not reach the level of severity of 'persecution', or where there is a risk of persecution but it is not linked to one of the Refugee Convention grounds.[3]

The complementary protection provisions in the *Migration Act 1958* (Cth) (Migration Act) may thus be seen as the implementation of Australia's obligations under "the expanded principle of *non-refoulement*".[4]

As defined in the existing provisions of the Migration Act, there has to be a real risk of "significant harm" if a person is returned to the country of origin or some other place where *non-refoulement* cannot be confidently expected. The term "significant harm" is defined in the existing legislation as extending to: arbitrary deprivation of life; carrying out of the death penalty; subjection to torture, or cruel, or inhuman or degrading treatment or punishment (present section 36(2A)).

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[1] Art. 33(1), Prohibition of expulsion or return ('refoulement').
[2] See Arts 1 and 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the International Convenant on Civil and Political Rights (1966), in particular Art. 7.
[3] Jane McAdam, "Human Rights and Forced Migration", chap. 16, *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh & others, pages 204–205.
[4] Jane McAdam, "Australian Complementary Protection: A Step-By-Step Approach" (2011) 33 *Sydney Law Review* 687 at 691.

Unfortunately, this Bill represents an unwarranted narrowing of the scope of complementary protection for those making claims in Australia, and the opening up of deliberate gaps between what Australian authorities will recognise as founding a valid claim for complementary protection and what would found protection at the international level. The Government recognises that there will be such gaps, and assures the public, in the Explanatory Memorandum (Ex Memo) and accompanying Statement of Compatibility with Human Rights (statement of compatibility), that where the new provisions result in refusal of a claim to complementary protection, those to whom Australia continues to have obligations of *non-refoulement* will not be subject to *refoulement* but will be managed by means of the Minister's personal, non-compellable and non-reviewable discretion. [5] In effect this is to return in part to the earlier concept, before the adoption of complementary protection regimes, of merely temporary protection,[6] where those concerned were not recognised as having a legal status in the same way as recognised refugees are.

As Professor McAdam wrote in connection with the introduction of complementary protection in Australia as a basis for a protection visa: "Leaving people in limbo is inconsistent with international human rights law."[7]

In broad terms the problems with the government's present approach are the following (see below for other problems):

- There could be a considerable number of such unsuccessful applicants who cannot be returned to the their countries of origin or other countries and who could be left indefinitely with no legal status, subject to manipulation and pressure to agree to return to places where they face torture or other significant harms, and liable to arbitrary and possibly indefinite detention or equally arbitrary short-term arrangements dependent on the policies of the Minister of the day.
- In addition, the creation of gaps between entitlement to complementary protection and Australia's obligations of *non-refoulment* exposes unsuccessful claimants for the former to potential danger of *refoulement*. It is recognised in international human rights law that, where there are obligations of *non-refoulement*, a state does not provide sufficient protection against this outcome when that depends solely on the discretion of a Minister or other official.[8]
- Moreover, it only makes sense to introduce some of the specific proposed limitations on complementary protection – eg removing the provision that a relocation to another part of the country where there would be no risk of

[5] See eg statement of compatibility at para 60: "Australia's *non-refoulement* obligations do not … extend to an obligation to grant permanent residency or any particular type of visa to a person who has been found to engage one of Australia's *non-refoulement* obligations. Rather, for people who are found to be owed a *non-refoulement* obligation but are ineligible for the grant of a protection visa on character or national security grounds, Australia will put in place appropriate measures to ensure protection of the person's fundamental human rights."

[6] See Guy Goodwin–Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed, 2007, 289–290.

[7] Jane McAdam, note 4, at 729.

[8] The Parliamentary Joint Committee on Human Rights (PJCHR) notes that "treaty monitoring bodies have found tha the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and the CAT": PJCHR, *30th Report to the 44th Parliament*, tabled 10 November 2015, at para 1.122. See below on "Excluded Persons".

significant harm must be "reasonable" (present section (2B)(a); compare proposed section 5LAA(1)(a)) – if the department then actually removes the person to a "safe area" of the relevant country if he or she will not go voluntarily. The need for something akin to a test of "reasonableness" of "relocation" (or "internal protection/flight alternative") is almost universally accepted, but Australia is proposing to strip it away resulting in an increased likelihood of *refoulement* to acknowledged situations of real risk of signifcant harm. (See below for a detailed discussion of this proposed change.)

- In additon, we note that section 197C of the Migration Act, introduced in 2014 by the Legacy Caseload Bill, provides that for the purposes of removal of an unlawful non-citizen under section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of that person.

The broad cases for and against the Bill

The government's principal justification for this Bill is that, given the continuation of the complementary protection process (which it had earlier sought to remove from the Migration Act, or reduce its threshold test),[9] the amendments will "more closely align the statutory complementary protection framework with the statutory refugee framework, as recently inserted by the Legacy Act".[10] It expresses concern that those who fail to obtain refugee status, as a result of the changes made to the Refugee Convention definition of "a refugee", "could satisfy the complementary protection framework". In the Minister's view, addressing "this inconsistency … will restore Australia's interpretation of Australia's complementary protection obligations". As he correctly states, the Bill proceeds by utilising "various concepts … to determine whether there is a real risk of suffering significant harm so as to give rise to a non-refoulement obligation". [11]

In addition, the Minister claims that there are decisions granting complementary protection under the existing legislation – presumably made by the courts and/or Refugee Review Tribunal (the RRT or the Tribunal), but the Minister does not identify them for public scrutiny – of a kind that he says weren't meant originally to be covered by these provisions. These include, he says, cases based on "selling adult movies or supplying alcohol in countries which severely punish those activities", cases where the successful claimants have been involved in serious crimes in the home countries or were fleeing because of association with criminal gangs.

However, we note that the government has not attempted to explain why there is a need to introduce such legislation at this point, in statistical or other terms. **(complete)**

In addition to the points made above about the dangers of applicants being left in a legal limbo or being exposed to the danger of *refoulement*, the following are significant.

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[9] See respectively the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, and the Migration Amendment (Protection and Other Measures) Bill 2014.
[10] Quoted from the Minister's 2nd Reading Speech, *Hansard,* House of Representatives, 25 September 2014, page 5 (Proof Copy).
[11] Minister's 2nd Reading Speech, *Hansard*, House of Representatives, 14 October 2015, page 4 (Proof Copy).

While the argument about removing an inconsistency between the present processing of refugee and complementary protection claims may appear plausible, it pays insufficient attention to international jurisprudence and practice concerning the human rights obligations of *non-refoulement*, and ignores the degree of informed criticism that was aimed at the changes to the refugee definition introduced by the December 2014 Legacy Caseload Act.

We strongly oppose this attempt to assimilate entitlement to complementary protection status to those narrowed provisions concerning entitlement to refugee staus introduced in late 2014**.** Those changes embodied bad law and bad policy: they will have detrimental effects on the so-called integrity of our protection system, and should not be further extended.

Further, complementary protection is in general terms intended as a safety net for those who, for one reason or another do not meet the refugee definition but whose return would subject them to real risks of severe human rights abuses (see above). This expanded form of *non-refoulement* has grown up beside the refugee system and is not confined to the requirements of refugee law. Great care should be taken not to undermine complementary protection by subjecting it to limitations that are not part of the jurisprudence of the human rights monitoring committees.

As Professors Goodwin-Gill and McAdam have written:

> [Art. 3 of CAT] "may provide relief for those who are unable to demonstrate a link between torture (as a form of persecution) and one of the five 1951 Convention grounds; [and] those overlooked as refugees due to narrow domestic interpretations of the Convention definition; … [12]

Rather than subjecting complementary protection claims to those narrowed interpretations, in appropriate cases it should be possible to redress at least some of the statutory refugee codification's deficiencies, given the severity of the harms that the applicant may suffer. This is why international law has developed an obligation of *non-refoulement* in these circumstances.

The other important general point against these changes is that the obligations of *non-refoulement* on human rights grounds are, in international law, absolute and non-derogable. For governments to apply their own spin as to when these obligations will be met raises grave risks of breaching them. In Professors Goodwin-Gill and McAdam's words:[13]

> Under international law, there are cogent reasons why a legal status equivalent to that accorded by the Refugee Convention ought to apply to **all persons protected by the extended principle of *non-refoulement*.** … (our emphasis)

While many "codified complementary systems" are subject to similar criticisms, those authors correctly point out that:

> … domestic complementary protection regimes cannot oust States' international protection responsibilities – they simply leave them unregulated at the domestic level.[14]

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[12] Goodwin-Gill & McAdam, note 6, 303.
[13] Note 6, at 331.
[14] Note 6, at 334.

This is acknowledged by the government (see above) and one wonders why they are expending energy on this matter just so that they can deal with applicants without legal oversight.

Certainly, the existing provisions of the Migration Act relating to complementary protection already make provision concerning some of the issues dealt with in the present Bill (in particular, on relocation, effective protection, and "personal" risk: see existing section 36(2B)). However, as seen from the discussion in the following sections, the present Bill renders all these qualificatons of when "a real risk" arises **far more difficult** for an applicant to meet.

We urge the Committee and the Parliament not to support the specific changes discussed below, which individually and collectively threaten the supposedly non–derogable and absolute nature of the obligations of *non-refoulement* to risk of significant harm.

Specific measures contained in new sections 5LAA and 5LA and amendments to section 36

(a) Relocation or internal protection alternative (section 5LAA(1)(a))

The proposed provision is deceptively simple (section 5LAA):

> (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 particular harm in a country if:
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> (a) the real risk relates to all areas of the country; …

There is a similar provision for refugees in section 5J(1)(c).[15] Section 5LAA(1)(a) replaces section 36(2B)(a) which speaks of relocating to an area of a country where there is not a real risk of significant harm, but only if the relocation would be "reasonable" to require it.

We oppose the removal of the "reasonableness" test currently contained in section 36(2B)(a), adopted throughout much of the world, and clarified by the UNHCR in its guidelines on internal flight.[16] We contend below that without such a test the "relocation" doctrine would risk becoming both inhumane, and would fail to achieve the alternative protection it is based on.

The current approach Australian courts have adopted in this matter is that of the UK House of Lords in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, where the court, with the assistance of the UNHCR guidelines, essentially formulated the following test of reasonableness:

> Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.[17]

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[15] Section 5J(1)(c) reads: "… the person has a *well-founded fear of persecution* if: … (c) the real chance of persecution relates to all areas of a receiving country".

[16] UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article IA(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees,* HCR/GIP/03/04, 23 July 2003.

[17] Quoted Goodwin-Gill & McAdam, note 6, at 126.

A similar test is applied in a number of other jurisdictions (eg European Qualification Directive, Art. 8(1), and Canadian courts).[18] Its theoretical basis is essentially that textual source of the "relocation" principle[19] is to be found in the concept in the Refugee Convention Art. 1A(2) of a "well-founded fear of persecution", concluding that a claim cannot be well-founded if there are areas of the country of origin where fear of the relevant persecution(s) would not be justified.[20] That is essentially the way in which section 5J(1)(c) proceeds, by defining the circumstances in which a person can be said to have a "well-founded fear of persecution".

The Explanatory Memorandum (Ex Memo) claims that the amendment is consistent with Australia's *non-refoulement* obligations under ICCPR and the the CAT" (para 58) and that: "International jurisprudence on Australia's *non-refoulement* obligations confirms that consideration should be given to whether a person will face **a real risk in the whole of the country".** (para 59) (our emphasis)

However, the Parliamentary Joint Committee on Human Rights (PJCHR) concludes in its 30th Report to the present Parliament[21] that under international human rights law the "weight of evidence would suggest that [it] is not the case" that an 'internal flight option' **negates** a claim for protection against refoulement" and that "it is clear from the jurisprudence that such relocation must be reasonable and practicable" (our emphasis). The practical result of removing the reasonableness test would "result in a person being ineligible for protection even though it may not be reasonable for them to relocated internally. This would leave such individuals subject to refoulement in breach of Australia's international legal obligations." (para 1.102, at 21–22)

The cases identified by the PJCHR[22] do not indicate that the "relocation principle" has played a significant role in the decisions of UNCAT – in only one of those cases did UNCAT refer in its disposition of a complaint to an "internal flight alternative" (*HMHI v Australia)*,[23] and then only after having already decided the case on other grounds.[24]

While not conclusive, of course, the absence of any reference to relocation or internal flight/protection alternatives in the International Law Commission's *Draft articles on*

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[18] See James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed, 2014, 350–351.
[19] The other terms used are internal flight alternative, and internal protection alternative.
[20] In addition to Goodwin-Gill & McAdam, note 6, 123–126, and Hathaway & Foster, note 18, 335ff, see eg Kirby J's judgment on the history of the concept in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, 30 August 2007. Even if the courts had adopted the powerfully argued competing approach of Hathaway & Foster, concentrating on the words in Art. 1A(2) of the Convention relating to "protection", an inquiry would still be necessary into what other aspects of protection would need to be available in an "internal protection alternative", not just the bald requirement that a claim for protection "relates to all areas of the country".
[21] PJCHR, note 8..
[22] PJCHR, note 8, in note 6 to para 1.102.
[23] *HMHI v Australia*, CAT/C/28/D/177/2001, I May 2002, where UNCAT noted that the State party did not intend to return the complainant to Mogadishu in Somalia and that under the UNHCR voluntary repatriation programme he could "choose the area of Somalia to which he wishes to return" (para 6.6).
[24] Indeed in one case, UNHRC stated that "it would not be **unreasonable** to expect him to settle in a location, especially one more distant from Touba [in Senegal], where such protection would be available to him", referring also to "adequate and effective protection" (our emphasis: *BL v Australia*, CCPR/C/112/D/2053/2011). See also Manfred Nowak, former UN Special Rapporteur on Torture, *An Analsysis of the various legal issues under Article 3 CAT* (reference from PJCHR 30th Report, note 8.)

the expulsion of aliens, with commentaries, 2014[25] does not help to establish the propositions in the Ex Memo summarised in (1) and (2) above. Draft Art. 24 deals with the obligation not to expel an alien to a State contrary to Art. 3 of the CAT, and refers to General Comment No. 20 of the UNHCR. It makes no mention of "all areas of a country" or of an internal flight/protection alternative or relocation, which might have been expected if the Ex Memo were correct. The UNHRC's *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, adopted at the 44th Session, also does not refer to an "internal flight alternative" in the brief paragraph on not returning individuals to torture etc.

The claims of the Government have not been demonstrated to be correct about the international human rights jurisprudence, and the risk of *refoulement* as a result of the passage of this Bill is real, as it is under the similar provisions in the Legacy Caseload Act 2014.

We note that the Ex Memo both rejects a "reasonableness" test of relocation, but also states that a decision maker must take into account "whether the person [the applicant] can safely and legally access the area upon returning to the receiving country" (para 55). The wording of the provision does not specifically sanction ascertaining whether relocation is safely and legally accessible to the claimant, without which, of course, relocations would be unworkable. The PJCHR notes that it is not enough to rely on administrative or discretionary safeguards in such matters.[26] **If, contrary to our submission, the provision proceeds, it should specifically provide that a relocation alternative is subject to safe and legal access by the particular applicant.**

The UN guidelines, and other authorities,[27] also deny that a positive decision in relation to a protection claim must in international law be based on lack of protection in the "whole territory of origin" (UNHCR, *Guidelines No. 4*, 31 at para 6). Such a requirement is illogical and unfair in that a refugee or complementary protection claimant must show specific factors that underlie the fear of persecution or alleged serious risk of significant harm, and these will often be of a local and not a national character. If the decision maker suggests that a relocation alternative would be possible in a specific place or places, the applicant should have an opportunity to deal with that in terms of his or her own knowledge and circumstances.

That is, the decision should be made on its facts (real chance of serious harm, or real risk of significant harm in a particular place), and only then should the issue of a relocation alternative etc. be raised in relation to a specific area (or areas) of the relevant country of origin.

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[25] *Draft articles on the expulsion of aliens, with commentaries*, 2014, adopted by the International Law Commission (ILC) at its 66th session in 2014, and submitted to General Assembly of UN as part of report on work of that session (A/49). Also in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.

[26] PJCHR at note 8.

[27] Hathaway & Foster, note 19, at 337 ff, draw attention to the traps of basing relocation requirements on the "well-founded fear" provision rather than the protection provision in the Refugee Convention definition of a refugee.

As Hathaway and Foster argue in their contribution to UNHCR's Global Consultations in 2003,[28] a point equally applicable to complementary protection:

> … **because IPA [internal protection alternative] is defined in part by whether or not it can deliver an 'antidote' to the applicant's well-founded fear of being persecuted**,[29] it follows that it should never be used in an accelerated procedure to deny refugee status before inquiring fully into the particular circumstance of an applicant. … (our emphasis)[30]

This avoids the danger of the present relocation/internal flight alternative which "encourages decision-makers to move directly to the question of internal protection without first assessing the nature of the claim put by the applicant".[31] In this way, or through the use of an "all areas" test as in the present Australian proposal, the onus could be put "on the applicant to establish that he or she cannot relocate or seek protection internally", which involves the difficulties of "proving a negative proposition".[32]

> Given the difficulties in proving a negative proposition, it is not surprising that in some jurisdictions this has manifested itself as a requirement for the applicant effectively to establish 'country wide persecution'. (at 337)

New section 5LAA(1)(a) proceeds in this way, eliminating all reference to the situation in supposedly "safe" territory, adding to the applicant's difficulties in making his or her case under the new procedures introduced into the refugee status determination process in 2014. If the provision proceeds, guidance to decision makers should make it clear that the correct way to conduct the determination on this issue is first to examine the case in its facts, and only then, if relevant, proceed to an examination of any relocation alternative. **Even better, the provision should be amended to ensure that a specific finding of "safety" must specifically be made by decision makers after assessment of the case put by the applicant.**

The government also refers to specific cases *SZATV v Minister for Immigration and Citizenship* and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 which it considers go too far in taking into account "the practical realities of relocation" (which include the safe and legal accessibility of the territory, approved by government), and referring to such matters as "potential diminishment in quality of life or financial hardship" resulting from relocation.[33] Those potentially life-devastating factors are made to sound trivial.

The actual decision in *SZATV*, that it was erroneous of the RRT to have required the applicant to move elsewhere in the Ukraine and "live 'discreetly' so as not to attract

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[28] James C Hathaway & Michelle Foster, "Internal protection/relocation/flight alternative as an aspect of refugee status determination", chap. 6.1 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed. Erika Feller, Volker Turk and Frances Nicholson, Cambridge UP, 2003, at 411.

[29] See note 27, 393 ff on this process.

[30] For discussions concerning the content of protection under the internal protection alternative as proposed by Hathaway, see Hathaway & Foster, note 19, 350 ff, and Penelope Mathew, "The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited", chap. 9 in *The Ashgate Research Companion to Migration Law, Theory and Policy*, ed. Satvinder S Juss, 2013, 189–208.

[31] Note 18, at 339.

[32] Hathaway & Foster, note 18, at 337.

[33] See Ex Memo, at para 60.

the adverse interest of the authorities in his new location" (joint judgment of Gummow, Hayne and Crennan JJ, at [32]), indicates the way in which a combination of the two matters, relocation and an expectation of acting discreetly, could effectively deprive an applicant of his or her civil rights under the new legislation.

Likewise, the decision in *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45 (12 November 2014) (a Kabul truck driver threatened by the Taliban on the road) also indicates the importance to an applicant's life and existence of the reasonableness inquiry connected to a virtual relocation question.

Again, the Ex Memo's contention that only the existence of factors that amount to real risks of "significant harm" should be taken into account in making a relocation decision. That is too limited an approach to be taken, as is evident in a decision of the Full Court of the Federal Court in 1999:

> It cannot be reasonable to expect a refugee to avoid persecution by moving into an area of great danger, whether that danger arises from a natural disaster (for example, a volcanic eruption), a civil war or some other cause. A well founded fear of persecution for a Convention reason having been shown, a refugee does not also have to show a Convention reason behind every difficulty or danger which makes some suggestion of relocation unreasonable. … [34]

Australia should not abandon the "reasonableness" test in relation to potential relocation unless it replaces it with the more satisfactory internal protection approach, favoured by such authorities as Professors Hathaway and Foster and Professor Mathew.[35]

We strongly urge the Committee and the Parliament to reject the proposed new section 5LAA(1)(a). Simply to remove the "reasonableness" test would be to place Australia out of step with much of the rest of the world and to run real risks of *refoulement* of those who might not be able to remain in the allegedly "safe" location.

If the legislation does proceed without a "reasonableness" test, it should be further amended by provisions that require the decision maker to determine, first, whether there is a real risk of significant harm to the applicant on the facts advanced, and then, if necessary, to determine whether there is a place of "safety" accessible and in practice open to the applicant, first giving the applicant an opportunity to respond to the suggestion.

(b) Requirement that a real risk is faced by a person personally (section 5LAA(1)(b) and (2))

When complementary protection was first introduced into the Migration Act in 2011,[36] it included the following provision (section 36(2B)(c)):

> (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: …

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[34] Joint judgment of Burchett and Lee JJ, Moore J concurring in the result for slightly different reasons: *Perampalan v MIMA* ([1999] FCA 165 (1 March 1999) at [19].
[35] See note 30.
[36] By the *Migration Amendment (Complementary Protection) Act 2011*.

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen generally.

The proposed replacement of this provision is as follows (section 5LAA(1)((b) and (2)):

(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: …

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

(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 particular risk for the risk to be faced by the person personally.

The Labor Government expressed its thinking on this provision only in very general terms, stating, however, that: "The purpose of new subsection 36(2B) is to ensure that Australia's *non-refoulement* obligations are applied and implemented consistently with international law. (para 85) (our emphasis)

The courts have tended to interpret section 36(2B)(c) as posing a simple binary test – if the risk relied upon by the applicant as founding complementary protection under section 36(2)(aa) is one that is "faced by the population of the country generally, as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk, the provisions of s 36(2)(aa) [are] not to be engaged". (Rares J in *SZSPT v Minister for Immigration and Border Protection* [2014] FCA 1245, 3 November 2014) at [11]). Put slightly differently, "if the population were generally exposed to the risk of torture, as opposed to the person as an individual or by reason of some characteristic that distinguished him or her from the characteristics of the general populace, then the exception was meant to operate, odd as that may seem." (*SZSPT*, at [13])[37]

Had the courts read section 36(2B)(c) in the light of the international jurisprudence and the statement in the 2011 Ex Memo, that it was intended to be "applied and implemented consistently with international law" (see above), the decisions may have paid more attention to the effect of the words "and is not" so as to accept that there could grammatically and logically be **both** a real risk shared by the population generally **and** a coexisting real risk faced by the non-citizen personally.

As Professor McAdam has commented, unless the approach to risk of significant harm is that "the applicant faces a real risk of any of the proscribed forms of harm, irrespective of whether it is individually targeted", the evidentiary burden for complementary protection goes beyond that required under the Refugee Convention, which "undermines it as a *complementary* form of protection".[38]

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[37] See also Jagot J in *SZSSY v Minister for Immigration and Border Protection* [2014] FCA 1144, 28 October 2014, at [91].

[38] Jane McAdam, note 4, at 714. As McAdam also points out (714–5, note 125), the general principle adopted by the UNHCR (and the jurisprudence of a number of states) is that "generalised violence and armed conflict" do not oust the definition of a refugee "where a nexus to at least one of the five Convention grounds can be established". For Australia, see the pre-2011 joint judgment of O'Connor, Tamberling and Mansfield JJ in *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 87 FCR 280, 26 March 1999 at 290, [37], specifically rejecting the need for a "differential impact" referred to by Lord Lloyd in *Adan v Secretary of State for the*

While the international jurisprudence in this regard does require "the existence of a personal risk of torture" (ie there are substantial grounds to believe the applicant will be subject to torture),[39] Article 3(2) of the CAT specifies that relevant considerations in decisions on the return to torture dealt with in Article 3(1)[40] include "where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". In McAdam's words: "… widespread violations of human rights **can** help to substantiate the existence of torture, rather than deny it on the grounds that such violations are faced by the population generally", but need not **necessarily** have that result. (our emphases)[41]

The EU courts (in relation to Art 3 of the European Convention on Human Rights) and the Canadian courts have taken a different approach to that in the Australian legislation, the European Court of Justice determining that (in cases of generalised violence) "an applicant does not have to 'adduce evidence that [the applicant] is specifically targeted by reason of factors particular to his personal circumstances'. Rather, the threshold is met where the indiscriminate violence feared 'is so serious that it **cannot fail to represent a likely and serious threat to that person**."[42] (our emphasis)

The strength of each of the two factors – being personally affected, and indiscriminate violence – may be in inverse relation depending on the degree of violence. This is referred to in the 2015 Statement of Compatibility with Human Rights as where "the risk [is] so high that the risk truly was real for the population" (para 26).

In addition, as the 2015 Ex Memo recognises, members of a specific group may also be targeted, not just individuals (para 26), resulting in a real personal risk for a member of that group.

The Australian provision in existing section 36(2B)(c) as interpreted by the courts is thus inconsistent with the broad international jurisprudence relating to expulsion contrary to human rights grounds, as well as with the underlying logic of this form of protection as a "safety net".

<u>The 2015 proposals – section 5LAA(1)(b)</u>

There are two key policy intentions behind the government's proposals, and they are in considerable tension. They are aimed both at firming up the need for "personal risk" as something normally over and above more generalised fears in situations of widespread violence and chaos, perhaps civil war, **and** at allowing for "personal risk"

Home Department [1998] 2WLR 702 eg at 713, so that in a situation of clan warfare the applicant "must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare".

[39] Committee Against Torture, General Comment No. 1, adopted 21 November 1997, also referred to in *ILC Draft articles on the expulsion of aliens*, note 25, at para 3 of the commentary on draft Article 24: "Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment". **See note 154 of the *Draft articles* on "personal risk" equating to "substantial grounds etc.".**

[40] "1. No State party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Art. 3(1), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, Vol. 1465, No 24841, p 85.

[41] McAdam, note 4, at 713.

[42] *Elgafaji v Staatsecretaris van Justitie*, Case C-465/07, European Court of Justice, Grand Chamber, 17 Februrary 2009, at [45], quoted McAdam, note 4, at 713.

to be recognised in **some circumstances** where the population generally is faced with the same risk of significant harm as the applicant. (see eg Ex Memo, para 70)

On the first, the Statement of Compatibility with Human Rights (statement of compatibility) attached to the Ex Memo refers to the need for "additional grounds to be adduced by the applicant that he or she is personally at risk". "… while the existence in the relevant country of consistent patterns of of gross flagrant or mass violations of humand rights is a relevant consideration, this, of itself, does not constitute a real risk of significant harm for the purposes of complementary protection. In such cases, additional grounds must be adduced by the applicant to show that he or she is personally at risk. / However, this does not mean that the person must be individually targeted." The prevalence of "random criminal violence" would not constitute "a personal risk of significant harm to a person" "unless there was some factor or characteristic to show why the person or a class of persons mght be targeted". (paras 25–26)

The government clearly wants to move away from the judicial intepretations of the existing provision, but not to open the "floodgates" to everyone in a situation of civil war or widespread violence.

At the same time, it is prepared to recognise that in certain situations the risk may become "so high that the risk truly was real and personal for the population", and be so "dangerous, consistent or targeted towards groups as to pose significant harm to individuals". (our emphasis) The statement uses a striking metaphor to encapsulate this situation:

> It may be possible in such circumstances that the level of risk faced by a person in an area of generalised violence may crystallise into a personal, direct and real risk of harm in their case. (Statement, para 26)

Comments

This is a nuanced discussion, but we contend that the words used in the provision itself are inappropriate – particularly that, where there is a risk faced by the population of a country generally, it is necessary that "the person must be at particular risk for the risk to be faced by the person generally". Decision makers and courts reading that might well not feel able to apply it to the situation addressed in the explanatory material where the level of risk facing a person "may crystallise into a personal, direct and real risk of harm in their case". **We think the actual provision goes further than the logic of the government's arguments for change requires, and that it could do a great deal of harm in its present form.**

We note in connection with what is required to establish "personal risk", the ILC's *Draft articles on expulsion* do require a "personal risk" of harm but don't require something additional to show a "substantial ground" of a real risk even in a situation of a "consistent pattern of gross, flagrant or mass violations of human rights"; targeting is not necessary. That is, determining whether there is "personal risk" is part of the normal process of assessment, which does involve "a present and foreseeable danger", and consideration of "the absolute nature of the prohibition".[43]

[43] *Draft articles*, note 25, at paras 2 and 3 (and supporting notes) of the commentaries to draft Article 24.

Conclusions

Given the tension between the linked aims of the provisions, the actual wording of section 5LAA(1)(b) and (2) is inconsistent with part of the case made in the explanatory material, and runs the risk of effectively reproducing the old exception as interpreted by the courts. It goes further than is necessary to meet its aims. While it properly discards the view that generalised risk and personal risk cannot coexist, it could do considerable harm in its present form.

Without seeking to rewrite the proposed provisions, it is strongly suggested that the essential message that should be embodied by legislation in this area – though not needed in our view – is captured in the words of the Federal Court of Canada, which in McAdam's words:

> **… has held that while a claimant must establish a personal and identifiable risk, this 'does not mean that the risk or risks feared are not shared by other persons who are similarly situated'.[44]**

It needs to do so in a way that does not invite interpretation that requires a significant *level of difference* in the situation of the applicant in all cases. What is needed is that in all the circumstances the applicant has shown substantial grounds for identifiable risks in his or her situation and the general situation (see McAdam, previous paragraph), even if the risks are also shared by the community generally.

For example, this may be because of the omnipresence of violence so that the population generally is at a very high risk that must include the applicant (as mentioned in the statement of compatibility, para 26); it may be because of the applicant's membership of a targeted group even though there is also a generalised risk of violence; it may be because of expected proximity to the worst of the violence; or it may be for some other identifiable reason that would increase the risks to which the applicant would be subject. These circumstances do not call for a legislative requirement of "a particular risk" in all cases, which could be misinterpreted, but rather the proper consideration of all factors that would face the applicant on return.

Note: Some may fear that "floodgates" will open in relation to countries where there is chaos, generalised violence and/or civil war. Proposed section 5LAA(1)(b) and (2) could certainly adversely affect legitimate claims and the wellbeing of significant numbers of applicants. However, situations where – in the words of the the statement of compatibility at para 26 – "the level of risk faced by a person in an area of generalised violence may crystallise into a personal, direct and real risk of harm in their case" are unlikely to be frequent and will certainly usually be limited in time and area. We should not run the risk of breaching *non-refoulement* obligations when they clearly apply.

(c) "Effective protection measures" – section 5LAA(4)

Proposed new section 5LAA(4) incorporates the provisions concerning "effective protective measures" in section 5LA of the Migration Act introduced by the Legacy Caseload Act in 2014 in relation to refugee claims.

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[44] Taken from McAdam, note 4, at 714 including note 120; the Canadian case she quotes from is *Surajnarain v Canada (Minister of Citizenship and Immigration*) 2008 FC 1165 at [11]. McAdam also refers to a number of other Canadian cases.

The original proposal was considerably expanded and amended during the passage of the legislation along the lines suggested in a number of submissions including our own, in particular ensuring that for protection to be "effective" a State has to be "willing and able" to offer the protection, and that its ability to offer protection depends on its accessibility and durability, in addition to "an appropriate criminal law, a reasonably effective police force and an impartial judicial system".

The major disputed feature remaining in this legislation is the continued provision for "protection" by non-State actors, although here as well significant amendments were made during the Parliamentary process. The current provision refers to:

> a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; (section 5LA(1)((a)(ii))

and not just to "a source other than the relevant State" as in the original proposed section 5J(2)(b). In effect, the provision now mirrors the relevant provision in the EU Qualification Directive, Art. 7.[45]

The government did not accept the argument drawn from some Australian and British decisions that the issue of eg a political organisation's control of an area of a country is relevant at the well-founded fear stage of decision-making, not the examination of issues of protection.

However, the amendments do not remove the fundamental objections put by commentators like Hathaway and Foster that this:

> … confuses the object and purpose of the Refugee Convention – that being to provide at-risk individuals with surrogate or substitute protection – with the ability to provide them with at least some measure of relative safety. Even if a clan or militia were able to prevent the immediate threat of harm, indeed even if it operated its own version of what the EU refers to as 'an effective legal system,' the 'protection' afforded would be subject to little, if any, accountability at international law. **The net result would thus be to deny refugee status on the basis of access to the efforts of some entity that, whatever its past record of *de facto* authority or power, bears no ongoing legal duty to protect anyone**.[46] (our emphasis)

As they also write, this is to ignore the Convention's "principled commitment to restoring refugees to membership in a *national* community, that is, in a political community that has clear protective duties under international law".[47]

We therefore maintain our objection to the inclusion in section 5LA of reference to 'protection' by non-State parties or organisations, and to its extension to applicants for complementary protection. Those parties or organisations – even internationatal organisations – cannot offer anything like the scope of full protection under international law, and the pretence that they can is entirely lacking in principle.

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[45] EU Qualification Directive, Art. 7, "Actors of protection".
[46] Hathaway & Foster, note 18, 291–292.
[47] Ibid., at 292; and see note 20 on that page, including the reference to *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (the Malaysian Arrangement Case).

(d) Behaviour modification – Section 5LAA(5)

This provision mirrors that applicable to refugee claims in section 5J(3), introduced in 2014.

Section 5J(3) also underwent considerable amendment during the course of consideration of the Legacy Caseload legislation, in particular to make it clear that **alteration and concealment** of the beliefs or characteristics referred to in most of the Convention grounds were not required. That is to be welcomed.

However, the amendments did not rule out expecting behaviour modification in the case of membership of particular social groups, other than where membership is based on sexual orientation, gender identity, or intersex status. This indicates a general antipathy to that Convention ground that can have severe consequences for classes of applicants who fear serious harm if returned.

Moreover, we note that while the amendments remove the need for concealment or alteration of certain beliefs or characteristics, they leave untouched more active behaviour such as so-called "proselytisation" concerning eg politics or religion or sexual orientation which may be banned or persecuted in practice in the country of nationality. This issue applies equally to complementary protection.

As a result, there is scope under these provisions for "activists" to be expected to refrain from advocating for their causes (even peacefully), and which might well not be covered by the exceptions in section 5LAA(5)(a) and (b) (or the equivalent in section 5J(3)(a) and (b)) for characteristics "fundamental" to identity or conscience or for an innate or immutable characteristic. The late Soviet dissident Andrei Sakharov, the more recent Russian activists Pussy Riot, Pakistani advocate of education for girls and women, Malala Yousafzai, or a religious preacher or political activist advocating his or her cause in a park or at a rally, might not come within those exceptions if faced with significant harm (or persecution on a Convention ground).[48]

Those changes relating to concealment or alteration of the basic grounds underlying claims for a well-founded fear of persecution were highly necessary in order to prevent a wholescale undermining of the Convention's purposes. Nonetheless, an applicant will still need to negotiate further legislated barriers, such as whether some modification of behaviour in the future would be "reasonable" and whether certain characteristics are "innate" or "immutable". Further, the modification requirement can extend into all sorts of areas where the livelihood or wellbeing of the applicant could be at stake.

The PJCHR has concluded that the claim in the statement of compatibility that this amendment is "consistent with Australia's *non-refoulement* obligations" (para 31of the SoC) is incorrect:

> This provision engages Australia's non-refoulement obligation as an individual, who would otherwise be granted protection in Australia, may be deemed ineligible if they could modify their behaviour in a way that was considered not to be in conflict with their fundamental identity. (para 1.108)
>
> The jurisprudence does not support the position outlined in the statement of compatibility. The obligation to protect against refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors. [A footnote refers to *Appellant S395/2002* (referred to below) at [40]–[41], per McHugh & Kirby JJ.]

[48] See PJCHR, note 18, for similar examples and comments.

The PJCHR also comments on the additonal barriers to applicants mentioned above.

It has therefore sought the advice of the Minister on how "the changes can be compatible with Australia's absolute non-refoulement obligations in light" of these concerns. (para 1.115)

The whole idea of so-called "reasonable steps to modify … behaviour" to avoid persecution is fundamentally objectionable in terms of the purposes of the Refugee Convention and the nature of the *non-refoulement* obligations in relation to torture etc., and should never have been introduced. As we contended in our 2014 submission, the proposal was quite inconsistent with the majority judgments in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473. The central point made in the judgments is that such an inquiry "invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality" (McHugh and Kirby JJ, at [43] **check**). (For that and other conclusions on which the majority judgments were based, see our earlier submission.)

There is an equally strong case to avoid such a measure in relation to *non-refoulement* on the basis of human rights obligations, where the potential harms are severe and the obligations are absolute and non-derogable.

Where the Ex Memo asserts that applicants should reasonably be expected to avoid some voluntary actions such as breaking the law on return (para 81), or "refrain from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation" (para 84) – undoubtedly referencing such High Court decisions as *SZATV* (see above, Ukrainian journalist critical of the provincial government held should not be expected to move and abandon journalism) and *Minister for Immigration and Border Control v SZSCA* [2014] HCA 45 (Kabul-based truck driver case) – in the Parliamentary Committee's view:

> The jurisprudence does not support the position outlined in the statement of compatibility. The obligation to protect against refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors. The courts have found that persecution does not cease to be persecution simply because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. [49] (at para 1.111, citing among other cases *S395/2002*, see above, homosexuals from Bangladesh held should not be expected to act "discreetly", as well as *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, and a number of other British cases)

Conclusion

The application of this severe and largely open-ended restriction on absolute obligations of *non-refoulement,* imposed through the modification of behaviour provision in proposed section 5LAA(5), should not be proceeded with in relation to complementary protection. This has been a deeply flawed exercise from the beginning, in relation to refugee determinations as well as complementary protection, and should be abandoned.

[49] PJCHR,, note 18.

Exclusion clauses – section 36

> … non-return to torture or cruel, inhuman or degrading treatment or punishment is **absolute**, no matter how reprehensible or dangerous an individual's conduct. (our emphasis)
>
> The status of the 'domestically excluded' is particularly precarious, in part because international law does not provide a clear remedy.[50]

We note that no substantive changes are being proposed to the exclusion clauses based on Articles 1F and 33(2) of the Refugee Convention, though there has been a re-arrangement of their location. As discussed earlier in this submission,[51] the exclusions will continue to have the result that even those who might otherwise have been held to be eligible for a protection visa on complementary protection grounds will be "ineligible" for a visa, and in the words of the Ex Memo it is recognised that such exclusion by legislation does not extinguish "any *non-refoulement* obligations Australia may owe to that person" (para 105).

We are not aware what happens at the moment in these cases, or what exactly will happen in the future:

- Does the applicant get a full assessment of his/her claim that Australia owes *non-refoulement* obligations to him or her, despite the fact that new section 36(2C) renders him or her inelegible for a protection visa, so that there will not be any mistake on that score down the track?
- If the answer is yes, what happens when the decision maker decides against the applicant on the obligation question? This cannot be tested in the RRT (see what will be amended section 411(1)(c)) or by right in the IAA (the Minister determines which specific decisions or classes of decisions may be reviewed: section 473BC, and can exclude specific applicants or classes of applicants: section 5(1), definition of "excluded fast track review applicant"). In that case questions arise about the compatibility of these provisions with human rights (see below on the operation of section 502 and the views of the PJCHR). Also, in the course of the passage in 2014 of new section 197C of the Migration Act providing that *non-refoulement* obligations are not relevant to removal of an unlawful non-citizen under section 198, the Minister and Department argued that such persons would have been through a rigorous *non-refoulement* assessment process – we hope that will be the case here, but the absence of merits review seems fatal to its compliance with human rights standards.
- We are puzzled by the statement in the Ex Memo at para 105 that "**it is open to decline to grant a visa** to a person who has committed crimes of the type listed in new subsection 36(2C)". The wording of that subsection does not provide any discretion, but provides that if the Minister "has serious reasons for considering that" the terms of the subsection are met the applicant is ineligible for a protection visa.

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[50] Goodwin-Gill & McAdam, note 6, at 333 and 334. The text refers to *Chahal v UK* (1988) 23 EHRR 413 on the first point.

[51] See Overview (above) at 2.

– We are deeply concerned that no detail has been provided as to exactly what sort of treatment will be given to those who do not qualify for a protection visa on these grounds, but who otherwise satisfy the complementary protection grounds, whether they will be eligible for some other visa or whether they may face lengthy periods of detention, perhaps indefinitely, until the risks have resolved, if they do. This is completely unsatisfactory and liable to result in breaches of international human rights, given the probably absence of merits review.

Finally, while it is unlikely to prompt action by this Committee or government, the exclusion clauses (modelled on those in Article 1F of the Refugee Convention) remain totally inappropriate, considering the lack of review of refusal of decisions under section 36(2C), the **absolute** obligations of *non-refoulement* on human rights grounds that underlie complementary protection, and the additonal failure, if removal is being effected under section 198, to provide any mechanism for contesting any possible *refoulement*.[52]

Excluding persons from AAT review – amendments to section 502(1)(a)(ii)

This matter is dealt with in detail in the PJCHR 30th Report (see note 8) and we will only make brief comments here.

We note that in essence the amendments "expand the scope of section 502 of the Migration Act to relate to persons seeking complementary protection", and not only applicants for protection visas based on refugee status. Section 502 is concerned with review by the Administrative Appeals Tribunal (AAT) under section 500 of refusals to grant, cancel or not to revoke visas, and provides that the Minister personally may declare a person to be an "excluded person" and therefore not eligible to seek AAT review where they would otherwise be eligible to. The kinds of decision caught by the section are those based on assessments of character, and the criteria for making such a declaration are that the seriousness of the circumstances giving rise to the making of a decision on character make it in the national interest to make the declaration.

Without going into detail, we note that the 30th Report of the PJCHR raises the issue of incompatibility with Australia's human rights obligations of the lack of merits review of decisions made by the Minister personally under section 502, stating that:

> … treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and the CAT. … (para 1.122)

The Committee rejected the view in the statement of compatibility that merits review was not required under the ICCPR or the CAT and stated that the availability of judicial review only in relation to questions of law was insufficient to satisfy obligations under Article 13 of the ICCPR.

As already mentioned in relation to section 36(2C), a person denied the right to review by the AAT, and who quite probably would not be eligible for (the wholly inadequate) fast track procedures of the IAA, will not have had a refusal of *non-refoulement* status tested, and may (given section 197C, above) find him- or herself being removed without ever having had an independent assessment of whether they

[52] See eg Goodwin-Gill & McAdam, note 6 above, at 333.

are the subject of *non-refoulement* obligations on Australia's part. They may also find themselves in immigration detention without having had an opportunity to make their case before an independent tribunal.

We are deeply worried by the growing use of discretionary and unreviewable powers by the Minister to manage both refugee and complementary protection applicants, and urge this Committee to take account of the PJCHR's conclusions (waiting if necessary for the Minister's answer to its request for comment on those conclusions) and recommend that the power in section 502 to declare a person to be an "excluded person" not be expanded to applicants for complementary protection.