



THE LAW SOCIETY
OF NEW SOUTH WALES

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1 December 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Secretary,

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

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee welcomes the opportunity to provide comment on the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the "Bill"). In the Committee's view the Bill will likely lead to breaches of Australia's non-refoulement obligations under the *Convention against Torture* ("CAT") and the *International Covenant on Civil and Political Rights* ("ICCPR"). The Committee notes that these obligations are absolute and should not be abrogated.

Item 11 in Part 1 of Schedule 1 introduces a new section 5LAA which amends the operation of the Complementary Protection provisions found in the *Migration Act 1958* (Cth) (the "Act"). Under the existing provisions Australia's protection obligations do not arise where it would be reasonable for an individual to relocate to an area within their country where there would not be a real risk that they will suffer 'significant harm'¹. This is commonly referred to as the 'relocation test'. What is reasonable would generally depend on the particular circumstances of the person and the impact on them should they relocate within their country.

Under the proposed changes in new subsection 5LAA(1), there will only be a real risk that a 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.

¹ Significant harm is given an exhaustive definition in section 36(2A) of the *Migration Act 1958* to include arbitrary deprivation of life; the death penalty; torture; cruel or inhuman treatment or punishment; and degrading treatment or punishment. This is reproduced in new subsection 5LAA(3) of the Bill.

In providing guidance on how the new definition would operate, the Explanatory Memorandum to the Bill states²:

In considering whether a person can relocate to another area, a decision maker is required to take into account whether the person can safely and legally access the area upon returning to the receiving country.

However, the Committee submits that the correct approach to statutory construction requires that attention be given to the text, context and legislative purpose. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, Hayne, Heydon, Crennan and Kiefel JJ stated at [47]³:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention.

The Committee submits that, despite the views expressed in the Explanatory Memorandum, the clear text of proposed section 5LAA requires decision makers to find that a non-citizen is not a person in respect of whom Australia has protection obligations unless they can be satisfied that the real risk of significant harm relates to all parts of the country.

The Committee notes that it made a submission to the Senate inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. In it, the Committee observed that similar changes to the definition of a refugee under the Act imposed on asylum seekers an almost impossible task of having to demonstrate a well-founded fear of persecution in all areas of a receiving country. Likewise, under the proposed section 5LAA, it is likely to be irrelevant to the test of "real risk of significant harm" if a non-citizen could not relocate to another part of the country because of, for example, civil war, outbreak of disease, or because the area does not have schools, running water, electricity or other basic infrastructure.

The Committee considers that in some circumstances, it is likely to be an almost impossible task for any individual seeking protection to adduce evidence of a real risk relating to all areas of the country from which he or she is seeking protection – noting that issues going to general safety or legal access would not be relevant considerations.

Given that applicants are likely to face serious practical difficulty in meeting the evidentiary burden imposed under new s 5LAA, the Committee opposes the introduction of this section and recommends that it be rejected.

The Committee would welcome the opportunity to appear before the Senate Committee to expand on its written submission. Questions can be directed to Vicky Kuek, policy lawyer for the Committee.

Yours sincerely,

John F Eades
President

² At paragraph [55]. See also the Statement of Compatibility with Human Rights at [20]

³ Citations omitted