



Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Submission to Senate Legal and Constitutional Affairs Legislation Committee

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Introduction/Recommendation

The Castan Centre for Human Rights Law (Castan Centre) thanks the Committee for the opportunity to comment on the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (2015 Bill).

The Explanatory Memorandum for the 2015 Bill states that the Government's goal, as reflected in this and two previous related Bills (now Acts),¹ is to 'deliver a more effective and efficient onshore protection status determination process.' With respect, the 2015 Bill would not improve the efficiency of the complementary protection process, and would only undermine its effectiveness. It would also result in a deficient implementation of Australia's *non-refoulement* obligations. The Government's argument that the present system is too generous, and has been abused by 'criminals and bikies,' does not hold up to scrutiny.

We therefore recommend the Bill not be passed.

Background

Complementary protection, as the committee would be aware, is for applicants who have already been denied refugee protection but cannot be returned to their own country due to a specific danger. In 2012, the test for this danger was incorporated in to the *Migration Act 1958* by the *Migration Amendment (Complementary Protection) Act 2011* (2011 Act).² To be eligible for a protection visa on the basis of this test, an applicant must face 'a real risk of significant harm as a necessary and foreseeable consequence of...being removed.'

The 2011 Act implemented in domestic legislation Australia's *non-refoulement* obligations under the International Covenant on Civil and Political Rights, Convention Against Torture and Convention on the Rights of the Child. Prior to its commencement in 2012, these obligations were implemented only through the Ministerial Intervention process (see further below).

As a Legal Officer in the Attorney-General's Department who worked on the 2011 Act, I can assure the Committee that a careful balance was struck in interpreting the relevant international law, and that the position reached reflected (as would be expected) a consensus between immigration, security and human rights law experts in the Australian Public Service. The position taken was a relatively conservative one – indeed, its restrictive

¹ The two previous Acts in the package are the *Migration Amendment (Protection and Other Measures) Act 2015* and the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

² See *Migration Act 1958*, s 36(2)(aa).

nature compared with contemporary jurisprudence was criticised by international law experts at the time.³

In December 2013, the Government introduced the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 (Regaining Control Bill). This Bill sought to wind back the law to the pre-2012 position, under which the Minister had a discretion to grant, or refuse, complementary protection without any requirement to give reasons. The discretion was neither compellable nor reviewable, and was out of step with both international law and the practice of like-minded States, which prompted the development of the 2011 Act in the first place. For further detail, please see the Castan Centre's submission on the Regaining Control Bill.⁴

The 2011 Act made genuine efficiency gains (by integrating the complementary protection assessment process into the refugee status determination process). Of course, it also added much-needed transparency and accountability to Australia's previous system for preventing *refoulement*,⁵ which was described by a former Immigration Minister as 'playing God' with asylum seekers' futures.⁶

The Present Bill Constitutes a Poorer Implementation of Australia's Obligations

The Castan Centre welcomes Minister Dutton's announcement, in his Second Reading Speech for the 2015 Bill, that 'the best way forward is for the complementary protection provisions to remain in the Migration Act,'⁷ and consequently for the Regaining Control Bill to be abandoned (as the Castan Centre recommended in its submission⁸). However, the Minister goes on to say that the 2015 Bill would modify the existing provisions 'slightly' due to a 'broadening of Australia's complementary protection obligations in a way that goes beyond current international interpretations.'⁹

The 2015 Bill would bring the complementary protection regime into line with the refugee protection regime as amended in 2014 and earlier this year. Specifically, it precludes protection where there is a finding that there is effective protection available somewhere within the candidate's own country. This is so even if this involves relocation (regardless of the reasonableness of that relocation) or behaviour modification by the applicant. According

³ See submissions to the committee's previous inquiry into the Migration Amendment (Complementary Protection) Bill 2009:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/migration_complementary/submissions> (in particular submissions 5 and 21).

⁴ Kneebone, Dastyari, Fletcher, O'Sullivan and Penovic, *Submission on the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013*, January 2014:

<http://www.monash.edu/data/assets/pdf_file/0004/138469/migration-amendment-sub.pdf>.

⁵ See Migration Amendment (Complementary Protection) Bill 2011, *Explanatory Memorandum*, 1.

⁶ See McAdam, 'Playing God on asylum seekers is unacceptable,' *ABC's The Drum*, 5 December 2013:

<<http://www.abc.net.au/news/2013-12-05/mcadam-playing-god-on-asylum-seekers-is-unacceptable/5137794>>.

⁷ See House of Representatives *Hansard*, 14 October 2015, Speech commencing 9.03am (Minister Dutton).

⁸ See above n 4.

⁹ *Ibid*.

to current international human rights and refugee law jurisprudence on the subject, the latter requirement may be consistent with Australia's obligations, but the former is not.

Consideration of the reasonableness of internal relocation away from persecution, in relation to refugee status determination, was removed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*. The removal of a reasonableness test – as also proposed by the Bill presently being examined – puts us out of step with like-minded nations and current jurisprudence.¹⁰ It precludes due consideration of the applicant's individual circumstances, including difficulties associated with gender, age and disability in many countries. For example, if a woman is expected to relocate to another area of her own country away from family, but is not allowed to move freely in public or work without a male relative's consent, the 'internal protection alternative' may not be meaningful.¹¹

In addition, the High Court found in 2007 that the reasonableness requirement meant an assessment as to whether an applicant may safely and legally relocate, or whether safety could only be achieved by going into hiding.¹² This must be what the Minister is alluding to when he says failed applicants may not be able to live in 'perfect or preferred circumstances' on return.¹³ The Explanatory Memorandum explains further that the amendment is intended to preclude consideration of 'potential diminishment (sic) in quality of life or financial hardship which may result from the relocation.'¹⁴ Such statements do not appear to reflect the jurisprudence accurately.

The reasonableness requirement was included in both the refugee and complementary protection regimes because without it, the so-called 'Internal Flight Alternative'¹⁵ is not a genuine protection alternative. Consequently, it should not have been removed from the refugee protection regime by the Regaining Control Act, and it should not be removed from the complementary protection regime by the 2015 Bill.

As stated above, a 'behavioural modification' test may be legal according to current jurisprudence.¹⁶ However, it is appropriate to note briefly that the kind of behavioural modification which the Minister has stated that he sees as 'reasonable' is not breaking the law in the person's own country on return. The examples he gives are 'selling adult movies and drinking or supplying alcohol' in countries which severely punish those activities.¹⁷

¹⁰ See previous Castan Centre submission to this Committee's *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, October 2014, 9.

¹¹ See eg Rebecca Wallace, 'Internal Relocation Alternative in Refugee Status Determination: is the Risk/Protection Dichotomy Reality or Myth? A Gendered Analysis' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edwards Elgar Publishing Limited, 2013) 289, 95. A relevant Australian case example is *Naiz v MIMIA* [2005] FCAFC 37.

¹² See *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 27 [78-80].

¹³ See Second Reading Speech, above n 7.

¹⁴ Migration Amendment (Complementary Protection and Other Measures) Bill 2015, *Explanatory Memorandum*, [60].

¹⁵ See UNHCR, *Internal Flight or Relocation Alternative*, July 2003: <<http://www.unhcr.org/3f28d5cd4.html>>.

¹⁶ See eg O'Sullivan, 'Minister for Immigration and Border Protection v SZSCA: Should Asylum Seekers Modify their Conduct to Avoid Persecution?' (2015) 36 *Sydney Law Review* 541.

¹⁷ Second Reading Speech, above n 7.

A search of the case law suggests that in fact applicants are usually granted protection (either refugee or complementary) on multiple grounds, with punishment (legal or extra-legal) for selling contraband constituting only a part of the relevant claim.¹⁸ In the Federal Circuit Court decision of *SZSTZ*, which is probably one of the cases to which Minister Dutton alludes in his Second Reading Speech, the decision was based largely on the consideration of how the Taliban target those ‘infidels’ who associate themselves with alcohol, rather than because the laws of Afghanistan prescribe harsh punishments for selling it.¹⁹ To say that it is reasonable for such people simply to refrain from breaking the law when they return is not only an oversimplification; it also fails to acknowledge the serious risks they face which have been acknowledged by the courts. In a further demonstration that the existing system for assessing complementary protection claims is not as lax as the Government claims it to be, an Iranian applicant who was also linked to the sale of alcohol in his home country was unsuccessful in a case decided just a few months after *SZSTZ*.²⁰

‘Criminals and Bikies’ Justification

The current Government’s former Immigration Minister claimed in 2013 (in discussing the Regaining Control Bill) that the complementary protection system had, since 2011, been abused by ‘criminals and bikies.’²¹ This claim is repeated in the Second Reading Speech for the 2015 Bill.²² However, this situation was anticipated by the 2011 Act, and there is already an exclusion clause to deal with it.²³

Only one case of a motorcycle gang member (from New Zealand) having been granted complementary protection has been reported.²⁴ Officials questioned in Parliament about the case stated that criminal history is not taken into account ‘under the complementary protection criterion itself,’²⁵ but apparently omitted to mention the test in subsection 36(2C) of the *Migration Act 1958*, which relevantly excludes people in respect of whom ‘the Minister has serious reasons for considering that [he/she]...committed a serious non-political crime before entering Australia.’ This appears to be a case of the Department of Immigration and Border Protection failing to investigate the man’s history before granting the visa, rather than any lack in the legislation. No evidence has been presented to suggest that the other criminals mentioned in the Explanatory Memorandum for the 2015 Bill could not have been excluded under subsection 36(2C).

¹⁸ See eg 1212039 [2012] RRTA 1117 (4 December 2012).

¹⁹ *SZSTZ v Minister for Immigration and Anor* [2015] FCCA 93.

²⁰ See *SZTOY and Anor v Minister for Immigration and Anor* [2015] FCCA 2314.

²¹ See Peatling, ‘Politics Wrap,’ *Sydney Morning Herald*, 4 December 2013: <<http://www.smh.com.au/federal-politics/the-pulse-live/politics-wrap-december-4-2013-20131203-2ypf>> (Scott Morrison, 1.39pm).

²² See Second Reading Speech, above n 7.

²³ See *Migration Act 1958*, s 36(2C).

²⁴ See Martin, ‘Visa protection for convicted NZ bikie,’ *The Australian*, 19 November 2013:

<<http://www.theaustralian.com.au/news/latest-news/visa-protection-for-convicted-nz-bikie/story-fn3dxiwe-1226763143543>>.

²⁵ Ibid.

Conclusion

The three-Bill package of which this 2015 Bill forms part is clearly intended to narrow the scope of protection under the *Migration Act 1958*. It has removed references to the 1951 Refugees Convention from the Act, as if to deny the international law basis for Australia's protection obligations.

The Minister claims that this is being done to 'restore Australia's intended interpretation' of its obligations.²⁶ In truth, the Australian Government intended to fulfil its obligations with regard to complementary protection better in 2011 (hence the 2011 Act), but has since changed its policies. Of course, the current Government is entitled to undo the previous Government's reforms if Parliament approves.

However, the Committee should be aware that the rationale for tightening protection in this manner (for example, because 'criminals and bikies' are taking advantage) is not well-founded in fact. The Committee should also be aware that, if an applicant who would meet the current requirements is denied protection due to the changes proposed in the 2015 Bill, the consequences will by definition be of the utmost gravity (arbitrary deprivation of life, execution, torture or other cruel, inhuman or degrading treatment or punishment). Given that complementary protection is reserved for a small minority of the overall protection caseload,²⁷ there is no justification to expose applicants to potential consequences such as these.

²⁶ See Second Reading Speech, above n 7.

²⁷ See AAT, *Migration and Refugee Division Caseload Report – FY to 31 October 2015*: <<http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics.pdf>>, 5; also Kaldor Centre submission on Regaining Control Bill, December 2013: <<http://www.kaldorcentre.unsw.edu.au/publication/submission-senate-legal-and-constitutional-affairs-legislation-committee-migration-0>>.