

## CHAPTER 2

### PROVISIONS

2.1 Item 2 of Schedule 1 seeks to insert into the Act a definition of 'cruel or inhuman treatment or punishment' as being an act or omission by which:

- severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person:
  - for the purpose of obtaining from the person or from a third person information or a confession; or
  - for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - for the purpose of intimidating or coercing the person or a third person; or
  - for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); or
  - for any reason based on discrimination that is inconsistent with the Articles of the Covenant on Civil and Political Rights [the Covenant]; or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person for any other reason so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

2.2 However, it does not include an act or omission:

- that is not inconsistent with Article 7 of the Covenant; or
- arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

2.3 The purpose of expressly stating what 'cruel or inhuman treatment or punishment' does not include is to confine the meaning of 'cruel or inhuman treatment or punishment' to circumstances that engage a non-refoulement obligation. The purpose of this amendment is to provide a definition of 'cruel or inhuman treatment or punishment' derived from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant, which is relevant when considering whether a non-citizen, or a member of the same family unit of the non-citizen, is a person in Australia to whom the Minister is satisfied Australia has a non-refoulement obligation.<sup>1</sup>

2.4 Item 3 would define degrading treatment or punishment as an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. It

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<sup>1</sup> Explanatory Memorandum, p. 4.

does not include an act or omission that is not inconsistent with Article 7 of the Covenant or that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

2.5 Items 6 and 7 define serious offence, in Australia and overseas respectively. The definition would catch crimes that are violent, drug-related, involve damage to property, the penalty for which is at least 3 years imprisonment under the law of the Australian Capital Territory. In the case of a serious Australian offence, offences relating to immigration detention are included within the definition.

2.6 Item 8 would define torture act or omission by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person:

- for the purpose of obtaining from the person or from a third person information or a confession; or
- for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- for the purpose of intimidating or coercing the person or a third person; or
- for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- for any reason based on discrimination that is inconsistent with the Articles of the Covenant.

2.7 However, the definition does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant. For the purposes of this definition, the act or omission is not limited to one that is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity as is required under Article 1, paragraph 1 of the CAT. Torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity.

2.8 Item 11 would insert a new criterion for a protection visa that the applicant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because of a following matters, listed at proposed subsection 36(2A) :

- the non citizen will be arbitrarily deprived of his or her life; or
- the non citizen will have the death penalty imposed on him or her and it will be carried out; or
- the non citizen will be subjected to torture; or

- the non citizen will be subjected to cruel or inhuman treatment or punishment; or
- the non citizen will be subjected to degrading treatment or punishment.

2.9 The Bill does not make provision for the grant of a protection visa merely on the basis of statelessness; successful applicants must satisfy the government of their status as refugees or that they face a consequence listed at 36(2A) to succeed.

2.10 Item 12 would extend the opportunity to remain in Australia to a family member of a successful applicant for a protection visa provided for under the amendments at Item 11.

2.11 There is taken not to be a real risk that a non citizen will be irreparably harmed in a country because of a matter mentioned in subsection 2A if the Minister is satisfied, under proposed subsection 36(2B), that:

- it would be reasonable for the non citizen to relocate to an area of the country where there would not be a real risk that the non citizen will be irreparably harmed because of a matter mentioned in that subsection; or
- the non citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non citizen would be irreparably harmed because of a matter mentioned in that subsection; or
- the real risk is one faced by the population of the country generally and is not faced by the non citizen personally.

2.12 According to the Explanatory Memorandum, Australia's non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. A real risk of harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. The purpose of new subsection 36(2B) is to ensure Australia's non-refoulement obligations are applied and implemented consistently with international law.<sup>2</sup>

2.13 Furthermore, proposed subsection 36(2C) provides that a non citizen is taken not to satisfy the criterion necessary for a claim under the provisions of the Bill if the Minister has serious reasons for considering, at proposed paragraph 36(2C)(a) and (b) that:

- the non citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- the non citizen committed a serious non political crime before entering Australia; or

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2 Explanatory Memorandum, p. 10.

- the non citizen has been found guilty of acts contrary to the purposes and principles of the United Nations; or

the Minister considers, on reasonable grounds, that:

- the non citizen is a danger to Australia's security; or
- the non citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

2.14 In such cases the Minister will retain solely responsible for deciding whether the person may remain temporarily or permanently in Australia.<sup>3</sup>

2.15 These provisions would provide the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

2.16 Item 14 would amend arrangements, reflected in subsection 36(3), in respect of protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

2.17 While subsection 36(3) would remain in place, new subsection 36(4) would provide that subsection 36(3) does not apply in relation to a country in respect of which:

- the non citizen in question has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
- the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen choosing to go to another country, there would be a real risk that the non-citizen would be irreparably harmed as a result.

2.18 Substitute subsections 36(5) and (5A) would exclude the application of 36(3) in circumstances where the person (of the Minister) has a well-founded fear that the country to which the person might have taken refuge would return the person to their country of origin.

2.19 The provisions of this item incorporate into the Migration Act the principle that if a non-citizen can avail themselves of a right to enter and reside in a third country and in doing so they will not face a real risk of being irreparably harmed, then the non-citizen is not owed a non-refoulement obligation.

2.20 Item 16 would update subparagraph 91N(3)(a)(i) in line with the other amendments in the Bill, by substituting 'protection' for 'asylum', the effect of which

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3 Department of Immigration and Citizenship, *submission* 16, p. 6.

would be to empower the Minister to declare that a country provides effective procedures for meeting claims for protection.

2.21 Items 25 and 27 relate to the disclosure of identifying information about an applicant for protection under the Refugee Convention to a country in respect of which the application is made, or a person or body who might disclose that information to such a country. Item 29 would authorise the disclosure of identifying information when an applicant has been found not to be owed an obligation under the relevant provisions.

2.22 Items 30, 32 and 33 would provide for the review of a decision not to grant (or under Item 31, cancel) a protection visa by the Refugee Review Tribunal (RRT), except where the decision to refuse the visa was made after consideration by the Minister that the applicant may have committed certain serious crimes, may be a danger to Australia's security, or having been convicted of a serious crime, is a danger to the community. Such decisions may, however, be reviewable by the Administrative Appeals Tribunal (AAT).

