Legislative Brief

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

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The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 proposes a number of significant changes to the provisions for complementary protection in Australia.

Under the complementary protection regime contained in the *Migration Act* since 2012, asylum seekers processed in Australia have been able to claim protection on broader grounds than those contained in the Refugee Convention, reflecting Australia's obligations under international human rights law.

Section 36(2)(aa) of the Migration Act provides that a person may be eligible for a protection visa if there is a real risk that they will suffer significant harm as a consequence of being removed from Australia. 'Significant harm' is defined to include arbitrary deprivation of life, the death penalty, torture, and cruel, inhuman or degrading treatment (section 36(2A)), giving effect to Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).

The bill proposes changes including:

- Introducing a requirement that a risk of harm be faced in all areas of the relevant country, and faced by the person personally (over and above risk to the general population) in order to obtain complementary protection;
- Establishing that there will not be a risk of significant harm if the person can take reasonable steps to avoid the harm;
- Expanding the definition of 'effective protection' to provide that a person will not be eligible for complementary protection if they can avail themselves of protection by non-State actors;
- Widening the exclusion clauses for grant of protection visas;
- Limiting access to merits review for decisions relating to complementary protection.

The Bill was introduced into Parliament on 14 October 2015, and referred to the Senate Legal and Constitutional Affairs Legislation Committee on 15 October 2015. The Committee presented its report on 18 February 2016. The report recommended passage of the bill following amendments to various sections, however the Australian Labor Party and Australian Greens issued dissenting reports recommending that the bill should not be passed.

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Country-wide risk

What the Bill will change

The proposed section 5LAA(1)(a) requires that a real risk must relate to all areas of the country in order for a person to be considered at risk of significant harm. The proposed change means that a decision maker will not have to consider whether it is *reasonable* for an applicant to relocate elsewhere within the country to escape the feared harm, overturning Australian judicial authority on this point. This creates an additional burden for the applicant to demonstrate that there is no part of their origin country that is safe for them.

Comment

The new provision requires that that a well-founded fear of persecution or a real risk of harm must be faced in all areas of a country, which is at odds with established refugee and human rights law. International refugee and human rights law do not require that a well-founded fear of persecution or a real risk of harm need to be faced in all areas of a country. The new provision therefore inserts an additional, limiting phrase that is inconsistent with the ordinary meaning of the Refugee Convention and complementary protection jurisprudence – contrary to international best practice. The provision is inconsistent with the protective object and purpose of the Refugee Convention and human rights-based non-refoulement because a 'country-wide persecution requirement' imposes on an applicant 'an impossible burden and one which is patently at odds with the refugee definition'.[1]

International practice is consistent in requiring a State to be satisfied that where an applicant is at risk of persecution or serious harm in one part of the country, he or she will only be returned to an alternative part of the country if he or she has the prospect of re-establishing a life with dignity.

The International Covenant on Civil and Political Rights and the Convention Against Torture, which Australia has ratified, provide an absolute prohibition on returning people to conditions where they face a real risk of being arbitrarily deprived of their life, or a real risk of being tortured or exposed to other cruel, inhuman or degrading treatment or punishment. Given the absolute nature of this obligation, it is particularly important to rigorously scrutinise whether it is reasonable to return a person to the country in question. This includes considerations of whether a person can integrate, has family links, cultural ties, linguistic competence and so on in the place to which relocation is contemplated. The proposed amendment prevents Australian courts from applying pre-existing authority on whether relocation would be reasonable, putting Australia at risk of violating its international legal obligations, and taking an approach that diverges markedly from comparable jurisdictions.

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[1] UNHCR, Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees (April 2001) note 28 http://www.refworld.org/docid/3b20a3914.html.

Requirement of personal risk

What the Bill will change

Proposed section 5LAA(1)(b) requires that a person demonstrate that a real risk is faced by them personally in order to establish a real risk of significant harm. Proposed section 5LAA(2) adds that if the real risk is faced by the population of the country generally, the person must be at a particular risk for it to count as a 'personal' risk.

Comment

The requirement that an applicant face a risk that is particular and personal is inconsistent with the approach in refugee law, which rejects 'singling out'. This provision creates a risk that people will be left unprotected in situations of general but significant danger.

The provision appears to create an obligation for the applicant to demonstrate that they are at a greater risk than the rest of the population in order to be eligible for complementary protection. As the Refugee Advice and Casework Service points out, 'it would allow the exclusion of those applicants who are found to face a real risk of significant harm but who face that risk to the same extent or for the same reasons as other people in the same country'.[2] These limitations on eligibility for complementary protection are contrary to international jurisprudence, previous Australian judicial authority and the protective purpose of the original legislation.

Modification of behaviour

What the Bill will change

Proposed section 5LAA(5) provides that there is no real risk that a person will suffer significant harm if he or she could take reasonable steps to modify his or her behaviour so as to avoid such a risk, provided that modification would not conflict with a characteristic fundamental to the person's identity or conscience, conceal an innate or immutable characteristic, or do any of the things listed in paragraph (c). This provision effectively puts the onus on an applicant to avoid significant harm.

Comment

Requiring that the applicant alter or modify their behaviour to avoid significant harm is fundamentally at odds with international human rights law. Discretion or modification requirements have been rejected across the common law world,[3] and by the Court of Justice

[2] Refugee Advice and Casework Service, *Submission to Senate Legal and Constitutional Affairs Committee for* Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (26 November 2015) 3 http://www.racs.org.au/wp-content/uploads/2015/11/2015-11-26-RACS-CP-Other-Measures-Bill.pdf

[3] See, for example, Australia: *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; United Kingdom: *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010]

of the European Union.[4] It is generally found to be unacceptable to put the onus on an applicant to avoid significant harm.

Although the bill limits the effect of the modification requirements by protecting fundamental characteristics, it remains unclear how this would be interpreted. As UNHCR stated in its submission to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 'Persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action'. The lack of clarity on how this provision will be interpreted and the onerous obligations placed upon applicants erode the effectiveness of the complementary protection regime in preventing individuals from experiencing harm.

Effective protection measures

What the Bill will change

Proposed section 5LAA(4) states that a person will not be considered to suffer significant harm in a country if effective protection measures against significant harm are available to the person in the country. The definition of effective protection measures is found in section 5LA of the Migration Act, which was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*. This provision established that protection against persecution can be provided not only by States, but also a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory.

Comment

The provision that effective protection can be provided by non-State actors is problematic for a number of reasons.

First, it can be argued that 'protection' in the context of the Refugee Convention and, by extension, human rights law, can only mean State protection, since article 1A(2) refers to a refugee's inability or unwillingness to avail himself or herself of the protection of his or her country of nationality or former habitual residence. Further, non-State actors cannot be party to the Refugee Convention, ICCPR, CAT and other international human rights instruments, meaning that that the protection they give is not subject to the same scrutiny and accountability that is achieved in treaty-ratifying States. Non-State actors are unlikely to be in a stable position with undisputed control of territory – giving the protection they provide a high degree of impermanence and volatility.

UKSC 31; United States: *Karouni v Gonzales* (2005) 399 F 3d 1163 (USCA 9th Cir); New Zealand: *Refugee Appeal No 74665/03* [2005] INLR 68; Canada: *Fosu v Canada* (2008) 335 FTR 223 (Can. FC 2008).

[4] *Bundesrepublik Deutschland v Y (C-71/11) and Z (Case C-99/11)*, Court of Justice of the European Union (Grand Chamber) 5 September 2012, para 79.

The cumulative problems associated with non-State actors create immense factual and practical difficulties for decision-makers, and requires constant assessments of the changing capabilities of rebel groups, militias, clans, tribal groups that may lack reliable or comprehensive information. The experience of other States demonstrates that this has a negative impact on the quality of decisions, as there remains no settled criterion for when a non-State actor can be an actor of protection in European case law, and non-State entities are not usually considered stand-alone protection actors.[5]

Ineligibility for grant of protection visa

What the Bill will change

Proposed section 36(2C) of the Migration Act provides that a person can be refused complementary protection if:

> (a) 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
>
> (b) the non-citizen committed a serious non-political crime before entering Australia;
>
> or
>
> (c) the non-citizen has been guilty of acts contrary to the purposes and principles ofthe United Nations.

Comment

As noted above, the ICCPR and CAT establish an absolute prohibition on return to treatment proscribed under those treaties, regardless of a person's conduct. People who satisfy the grounds for complementary protection but also meet the criteria in proposed section 36(2C) are not eligible for protection visas, but unable to be sent back to their countries of origin. The proposed amendments therefore leave those who have satisfied one of these criteria in a legal limbo. Without legal status, they would likely remain in immigration detention indefinitely.[6] Holding people without lawful justification is also contrary to international law, and may in some circumstances amount to cruel, inhuman and degrading treatment.[7]

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[5] ECRE, *Actors of Protection and the Application of the Internal Protection Alternative: European Comparative Report* (2014) 50 http://www.ecre.org/component/content/article/63-projects/326-apaipa.html

[6] ICCPR, art 9(1) and consistent line of authority from the UN Human Rights Committee.

[7] UN Human Rights Committee, Views: *Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (30 August 2013) [3.12] ('*FKAG and others v Australia'*); UN Human Rights Committee, Views: *Communication No 2136/2012*, 108th sess, UN Doc CCPR/ C/108/D/2136/2012 (20 August 2013) [3.14] ('*MMM and others v Australia'*).

Therefore, the Migration Act should recognise the absolute nature of the non-refoulement obligation and grant some form of legal status to all individuals who cannot be returned.

Restricted access to merits review

What the Bill will change

The Bill amends section 411(1)(d)(i) such that a decision to cancel a protection visa on new subsection 36(2C) grounds (ie. in respect of complementary protection) is not reviewable by the Administrative Appeals Tribunal (AAT) in its Migration and Refugee Division. Item 31 of the Bill restricts access to merits review for people seeking complementary protection where the Minister has decided not to grant a protection visa on grounds of national interest under section 502(1)(a)(ii).

Comment

Merits review is an essential part of procedural fairness and should be accessible to those who are subject to decisions on complementary protection. A robust and independent review system through the AAT gives applicants the vital chance to argue their case. Access to merits review is particularly necessary for those affected by the provisions on ineligibility for grant of complementary protection, as an unsuccessful result can lead to indefinite detention.

As the Law Council of Australia notes, the rule of law requires that 'protection determination processes should include procedural fairness guarantees, such as the right to present and challenge evidence, and be accompanied by the provision of independent legal advice'.[8] Without merits review on critical decisions, the Bill falls short of the review standards under the ICCPR.[9] To ensure procedural fairness and compliance with treaty obligations, merits review should be made accessible to those affected by complementary protection decisions.

This legislative brief was prepared by Oliver Moore and is based on the submission by the Kaldor Centre for International Refugee Law and the Institute for International Law and the Humanities to the Senate Legal and Constitutional Affairs Legislation Committee.

[8] Law Council of Australia, *Asylum Seeker* Policy, (6 September 2014) 7 https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf

[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.