UnitingJustice AUSTRALIA

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Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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

UnitingJustice Australia is a unit of the Uniting Church in Australia Assembly

Introduction

The Uniting Church in Australia (UCA) believes in the dignity of all people and is committed to work for justice and to oppose all forms of discrimination. In the *Statement to the Nation* made by the Inaugural Assembly in 1977, the Uniting Church promised to "seek the correction of injustices wherever they occur", to "work for the eradication of poverty and racism within our society and beyond" and "to oppose all forms of discrimination which infringe basic rights and freedoms".[1]

The Uniting Church in Australia has been providing care and support to asylum seekers and refugees and advocating for their just and humane treatment since its formation in 1977. The Church's chaplains have served in immigration detention centres including those in Woomera, Port Hedland, Curtin, Baxter and Christmas Island. Many clergy and members have been supporting asylum seekers in the community and visiting the centres for years, and others are active advocates for just policies.

The Uniting Church's 2015 statement, *Shelter from the Storm*, sets out a number of important principles that we should apply to Australia's policies, legislation,and practices toward asylum seekers, refugees and humanitarian entrants.

- All people should be treated with respect and accorded the dignity they deserve as human beings.
- Australia should do its fair share to ease people's sufferings in the context of what is a global problem and not shift our responsibilities to poor and developing countries.
- Policies should be driven by bipartisan commitments to a humanitarian response focussed on protection needs and to upholding our obligations under international law.
- The Australian Government must be transparent in the implementation of its policies, open to scrutiny by the courts and the media and to critique and advocacy from civil society.[2]

The Australian Government must uphold the international treaties and conventions that Australia has signed including:

- United Nations Convention Relating to the Status of Refugees (the Refugee Convention);
- the Universal Declaration of Human Rights;
- the Convention on the Rights of the Child (CRC);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and
- the International Covenant on Civil and Political Rights (ICCPR).

1 Uniting Church Assembly, *Statement to the Nation*, 1977, available at http://unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation

2 Uniting Church Assembly, *Shelter from the Storm*, 2015, available at http://unitingjustice.org.au/refugees-and-asylum-seekers/uca-statements/item/1105-shelter-from-the-storm

There should be no discrimination towards asylum seekers for reasons of race, religion, country of origin, or mode of arrival.

Consistent with Article 3 of the Refugee Convention, there should be no discrimination towards asylum seekers for reasons of race, religion, country of origin or mode of arrival.[3] The Australian response towards asylum seekers should be culturally sensitive and take into account the situations from which people have come. People should be able to find hope, shelter and restoration from the despair and persecution from which they have fled.

UnitingJustice Australia welcomes the opportunity to contribute to the Senate Legal and Constitutional Affairs Committee's inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015. Our assessment of this Bill is made on the basis of Australia's international non-refoulement obligations and our moral obligation to provide shelter to those in need of protection.

The Uniting Church's Advocacy for Complementary Protection

Complementary protection refers to the protection owed a person as a result of obligations under international treaties and conventions other than the Refugee Convention, such CAT or ICCPR. It is contrary to Australia's non-refoulement obligations to return a person to the country from which they have fled if there is a real risk they would suffer harm, be arbitrarily deprived of life, or be subject to torture or cruel or inhuman treatment or punishment.

Through UnitingJustice Australia, the Uniting Church has been advocating for complementary protection for over 10 years. In a submission to the 2005 Senate Legal and Constitutional Committee inquiry into the administration and operation of the Migration Act 1958, we recommended the development of complementary protection legislation:

> A system of complementary protection is the best alternative. In brief, this would include assessment of cases against non-refugee protection, non-refoulement, and other humanitarian obligations arising from international treaties at the primary stage of an onshore protection visa claim and the introduction of a humanitarian visa with criteria for grant based on these obligations or amendment of existing onshore protection visas to include criteria for grant based on a "de-facto" refugee status.[4]
>
> A system of complementary protection would help ensure that all protection needs are fully explored and that Australia does not breach its non-refoulement obligations, nor our other international obligations.[5]

In 2009, UnitingJustice welcomed the proposed development of complementary protection legislation and in our submission to the Senate Standing Committee on Legal and Constitutional Affairs we wrote:

3 *Convention and Protocol Relating to the Status of Refugees*, available at http://unhcr.org.au/unhcr/images/convention%20and%20protocol.pdf

4 UnitingJustice Australia and Hotham Mission, August 2005, p. 10, available at http://unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/594-inquiry-into-the-admin-and-operation-of-the-migration-act

5 ibid. p. 11

We believe that this legislation will give better consistency to a process that is already occurring through the Minister's intervention powers. It will ensure a better and more humane process for those seeking protection through complementary protection grounds, assist us to ensure we meet our international obligations in this area and bring us into line with other developed countries which already have complementary protection in place.[6]

General Comments

Complementary protection is a vital lifeline for those who do not meet the refugee definition under the Refugee Convention.

Prior to the introduction of complementary protection into Australia's protection visa process, Australia relied upon the discretion of the Minister to satisfy its non-refoulement obligations, and received criticism from United Nations treaty monitoring bodies, parliamentary committees, and even from a Minister for Immigration and Citizenship, the Hon. Chris Evans, for presiding over a process that was not transparent and granted inappropriate decision-making power to the Minister.[7] Since the legislation was introduced in March 2012, about 100 complementary protection visas have been granted.[8] The exact number of complementary protection visas granted is not known, although the Department reported that 55 complementary protection visas had been issued in September 2013, a small proportion of the 1,200 protection visas granted at that time.9 Despite this small number, UnitingJustice believes that the legislative enshrinement of a system of complementary protection is a vital lifeline for those who do not meet the refugee definition under the Refugee Convention but still trigger our protection obligations under other treaties.

As noted in the Explanatory Memorandum, this Bill is intended to bring the provisions for complementary protection under the Migration Act 1958 in line with changes made to the refugee provisions made under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (the Legacy Caseload Bill) Section 5J. UnitingJustice expressed concern about the Legacy Caseload Bill in our submission to the Senate Legal and Constitutional Affairs Legislation Committee in October 2014.[10] Those amendments to the Migration Act, now passed, increase the risk of Australia returning people to harm. We noted at that time that there have been cases of Hazara men returned to Afghanistan and then tortured or murdered.[11] These latest proposed changes increase the risk of refoulement.

6 UnitingJustice Australia, Submission to the inquiry into the *Migration Amendment (Complementary Protection) Bill 2009*, September 2009, p. 4, available at http://unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/611-inquiry-into-migration-amendment-bill-2009

7 M. Metherell, 'I should not play God: Evans', Sydney Morning Herald, 20 February, 2008, http://www.smh.com.au/news/national/i-should-not-play-god-evans/2008/02/19/1203190824140.html

8 Not all refugee review tribunal cases are made public. See J. McAdam and F. Chong, 'Complementary protection in Australia two years on: an emerging human rights jurisprudence', Federal Law Review, 42(3), 2014, p. 443

9 Andrew and Renata Kaldor Centre, 'Fact sheet: Complementary Protection', Friday July 25, 2014, available at http://www.kaldorcentre.unsw.edu.au/publication/complementary-protection

10 UnitingJustice Australia, Submission to the Inquiry into the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, October 2014 http://unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/980-inquiry-into-the-migration-and-maritime-powers-legislation-amendment-resolving-the-asylum-legacy-caseload-bill-2014

11 W. Maley, 'Australia's folly sends Afghan Hazaras to torture and death', *The Conversation*, 15 October, 2014, http://theconversation.com/australias-folly-returns-afghan-hazaras-to-torture-and-death-32939

Section 36(2)(aa) of the Migration Act determines that a person meets the criteria for a protection visa if there is a real risk they will suffer significant harm if removed from Australia and sent to a 'receiving country'. The added qualifications to this clause included in proposed subsections 5LAA(1) and (2) of this legislation further qualify the definition such that a 'real risk' would only exist if

- the real risk relates to all areas of the country and
- the real risk is faced by the person personally.

There is considered 'no real risk' that a person will suffer significant harm if

- the person could take reasonable steps to modify his or her behaviour,
- the person could relocate to an area of the country where there would not be a risk of significant harm,
- effective measures against harm are available to the person in the country, or
- the risk is faced by the population generally and not by the person personally.

Steps to modify behaviour

Proposed Section 5LAA(5) states that an asylum seeker will be deemed not to have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid persecution. We note that the requirement to modify behaviour is out of step with common law in other jurisdictions, and has been rejected by the European Court of Justice.

Last minute amendments to the Legacy Caseload Bill clarified that people seeking protection were not expected to alter their religious beliefs, conceal a disability, enter into or remain in a marriage to which they are opposed, or change their sexual orientation or gender identity. However, this proposed Bill still leaves open the question of whether a person's profession would be regarded as behaviour that could be modified. For journalists, human rights advocates or artists, for example, renouncing their profession would not only be likely to be personally devastating but could make the Australian Government complicit in silencing voices of dissent in countries where there are significant breaches of human rights. Under such circumstances Australia would be compromising the right to freedom of expression among other rights.

The idea of putting the onus on the applicant to avoid significant harm, is a position that is fundamentally at odds with international human rights law. There is also very little clarity as to how this legislation will be applied in practice, giving rise to further concerns about refoulement.

Relocation to another area of the country

Section 5J(1)(c) states that the person has a well-founded fear of persecution if the real chance of persecution relates to all areas of a receiving country. The addition of section 5LAA (1)(a) confirms that for complementary protection the real risk of significant harm must also relate to all areas of the country. This Bill attempts to raise the criteria for complementary protection in a manner inconsistent with international human rights law, which does not require that a real risk of harm be faced in all areas of the country. Further, it has the practical effect of placing the burden on the applicant to show that there are no parts of the country where they could find effective protection. For example, if a person is fleeing Syria for fear of persecution by ISIS under the terms of CAT, he or she would have to prove that ISIS has control of the whole country, despite the fact that all of Syria is considered a dangerous place generally. The Department of Foreign Affairs recommends against travelling anywhere in Syria.[12]

This Bill attempts to raise the criteria for complementary protection in a manner inconsistent with international human rights law.

The Explanatory Memorandum indicates that the proposed paragraph 5LAA (1)(a) reflects the Government's intention that the 'reasonableness' of relocation no longer be a part of the test. UNHCR guidelines set out best practice for determining risk relating to all areas of the country of origin. These factors, based on a test of reasonableness, include consideration of the respect for human rights in the part of the country being considered, as well as consideration of whether the person would 'face economic destitution or existence below at least an adequate level of subsistence' in that part of the country.[13] This legislation does not provide for such risk determination factors.

Level of effective protection

Section 5LA(1)(a)(i) and (ii) relates to the effective protection against significant harm that is available to the person in the country by the relevant State or a party or organisation, including an international organisation, that controls the relevant state or a substantial part of the territory of the relevant state. Proposed section 5LAA(4) further enshrines this concept in law. The idea of whether a non-state actor is able to offer effective protection to a person at risk of significant harm is highly controversial and has been difficult to prove in practice. Such groups are not bound by any international conventions or treaties, they do not have stable control over the territory in question, and it is difficult to ascertain how they would adequately offer protection.[14]

12 DFAT Smart Traveller warning for Syria: Do not travel, viewed 23 November 2015 http://smartraveller.gov.au/countries/syria

13 UNHCR, 'Guidelines on international protection: "Internal flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04, 23 July 2003, http://www.unhcr.org/3f28d5cd4.pdf

14 J. McAdam and M. Foster, Submission to Senate Legal and Constitutional Affairs Committee, Inquiry into the Provisions of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 167, 31 October 2014, pp18-20, http://www.kaldorcentre.unsw.edu.au/publication/submission-senate-legal-and-constitutional-affairs-legislation-committee-migration-and

Risk faced by the person personally

It is also likely to be incumbent upon the person seeking protection to demonstrate that the level of risk posed by serious and indiscriminate human rights violations or real risk of significant harm are particular to them as an individual rather than a risk faced by the population generally (5LAA(1)(b) and (2)). This approach is counter to international jurisprudence, which suggests that an applicant may face a personal risk of significant harm even in cases where 'almost anyone would be potentially affected'. It is understood in refugee law, and in the European courts and in the Court of Justice of the European Union that a person experiencing persecution or facing real risk of significant harm in a situation of generalised violence or conflict should not have to demonstrate further distinguishing risk factors.[15]

Limits to merit review

The proposed section 36(2)(c) seeks to allow the Minister to make decisions about 'excluded persons', who will not be able to seek merits review at the Administrative Appeals Tribunal (ATT). These decisions would extend the 'character grounds' refusals to those people seeking a protection visa for complementary protection reasons. As we stated in our submission to the inquiry into the Legacy Caseload Bill, the introduction of limited appeals mechanisms and the resulting prompt removal of failed asylum seekers risks refoulement. The UNHCR has expressed concern about Australia's refugee application processes, highlighting numerous discrepancies between initial assessment and final review outcome.[16] We reiterate concern for the welfare of asylum seekers who are returned following limited merits review.

UnitingJustice Australia recommends that the Bill not be passed.

15 J. McAdam and F. Chong, 'Complementary protection in Australia two years on: an emerging human rights jurisprudence', *Federal Law Review*, 42(3), 2014, p454

16 UNHCR Submission to the Expert Panel on Asylum Seekers, 2012, http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=258&catid=37&Itemid=61

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