

Chapter 1

Introduction

Referral

1.1 The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the Bill) was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, on 14 October 2015.¹ The Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) on 15 October 2016 for inquiry and report by 18 February 2016.²

1.2 The proposals to refer the Bill by the Senate Selection of Bills Committee requested that the committee 'further investigate potential impacts and unintended consequences of the Bill',³ and whether this 'will potentially see people in genuine need of protection returned to danger'.⁴

Conduct of inquiry

1.3 Details of the inquiry, including a link to the Bill and associated documents, were placed on the committee's website.⁵ The committee wrote to a number of organisations and individuals, inviting submissions by 26 November 2015.

1.4 The committee received 20 submissions for the inquiry. The list of submissions to the inquiry is listed at Appendix 1; details of the public hearing are provided at Appendix 2; and questions on notice and other material received by the committee are listed at Appendix 3. The committee thanks the Department of Immigration and Border Protection and other organisations that assisted with the inquiry.

Purpose of the Bill

1.5 The Bill seeks to amend the *Migration Act 1958* (the Act) 'to more closely align the statutory complementary protection framework with the statutory refugee framework'.⁶

1 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11122.

2 *Journals of the Senate*, No. 122—15 October 2015, p. 3260.

3 Senate Selection of Bills Committee, *Report No. 13 of 2015*, 15 October 2015, Appendix 7.

4 Senate Selection of Bills Committee, *Report No. 13 of 2015*, 15 October 2015, Appendix 6.

5 See:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Complementary_Protection

6 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11120.

Background

1.6 The *Migration Amendment (Complementary Protection) Act 2011*, introduced by the previous government, amended the Migration Act to allow protection visas to be granted on complementary protection grounds. 'Complementary protection' is a category of protection for people that are not refugees, but cannot be returned to their home country because there is a real risk that they would suffer a significant harm that would engage one of Australia's international *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR) or the Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁷

1.7 According to the Migration Act, a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life;
- the death penalty will be carried out on the person;
- the person will be subjected to torture;
- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.⁸

1.8 The government has stated that the Bill has been introduced as part of a legislative reform process that seeks to ensure a more effective and efficient onshore protection status determination process.⁹ It has also stated that the Bill would align the complementary protection statutory framework with the refugee statutory framework, and diminish the likelihood that certain individuals would be granted protection, such as those involved in serious crimes or associated with criminal gangs.¹⁰

1.9 In 2013, the government introduced the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. This sought to repeal the complementary protection provisions of the 2011 Act. In the second reading speech, the minister discussed a number of concerns with the complementary protection provisions, these included:

- cost and inefficiency;
- creating an incentive for people to come to Australia;
- people associated with criminal gangs or that have committed serious crimes satisfying the criteria for complementary protection;
- the criteria being complicated and difficult for decision makers to apply; and,

7 Explanatory Memorandum (EM), p. 2.

8 Proposed subsection 5LAA(3) of the Bill. This is the same as *Migration Act 1958* (Cth) s 36(2A) which it replaces.

9 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11120.

10 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11121.

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- interpretation by the courts in a way that has broadened Australia's obligations beyond what is required by international law.¹¹

1.10 The committee considered the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, and recommended that it be passed.

1.11 That Bill was passed by the House of Representatives in December 2013, but was not debated in the Senate and was discharged in October 2015. When the current Bill was introduced into Parliament, the minister stated that the government had considered concerns raised in response to the 2013 Bill and had decided to modify the complementary protection provisions in the Migration Act rather than repeal them.¹²

Overview of the Bill

1.12 According to the Explanatory Memorandum, the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 would amend the Migration Act to:

- strengthen the statutory complementary protection framework by aligning its standards with equivalent standards established in the new statutory refugee framework, as inserted by Part 2 of Schedule 5 to the Legacy Act;
- clarify the reference to 'protection obligations' in subsection 36(3), by specifying the source of the obligations;
- clarify that the 'country' in subsection 5H(1), which outlines the meaning of 'refugee', is intended to be the same country as the 'receiving country', by referring directly to the definition of 'receiving country' in subsection 5(1) of the Migration Act;
- align the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J of the Migration Act;
- amend subsection 36(2C), to remove duplication between paragraph 36(2C)(b) and subsection 36(1C) in the Migration Act, which both operate to exclude an applicant from the grant of a protection visa on character-related grounds;
- amend subsection 336F(5), which authorises disclosure of identifying information to foreign countries, to include information pertaining to unauthorised maritime arrivals who make claims for protection as a refugee and fall within the circumstances of subsection 36(1C) of the Migration Act;
- amend subsection 502(1) of the Migration Act, which allows the minister to personally make a decision, that is not reviewable by the Administrative Appeals Tribunal (AAT), to apply to persons who have been refused the grant

11 The Hon Scott Morrison MP, (then) Minister for Immigration and Border Protection, *House of Representatives Hansard*, 4 December 2013, pp 1521–1523.

12 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11122.

of a protection visa on complementary protection grounds for reasons relating to the character of the person; and

- amend subsection 503(1) of the Migration Act, which relates to the exclusion of certain persons from Australia, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.¹³

Consideration by other committees

1.13 The Senate Standing Committee for the Scrutiny of Bills sought advice from the minister to explain why merits review of a decision in the AAT is not warranted in relation to declarations that a person is an 'excluded person'.¹⁴ The minister responded that the intention is to ensure consistency when dealing with non-citizens of serious character concern, and noted that merits review is not an international treaty obligation. However, the Scrutiny of Bills Committee observed that judicial review is significantly narrower than merits review, and responded with 'its view that an appropriate form of merits review is warranted in relation to the making of these decisions...and leaves the question of whether the proposed approach is appropriate to the Senate as a whole'.¹⁵

1.14 The Parliamentary Joint Committee on Human Rights (PJCHR) assessed the proposed changes against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (ICCPR). The PJCHR sought the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's *non-refoulement* obligations.¹⁶ To date, no response from the minister has been published.

13 EM, pp 2–3.

14 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 12 of 2015*, p. 19.

15 Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2015*, 2 December 2015, pp 754–755.

16 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report, Thirtieth report of the 44th Parliament*, p. 71.