

Labor Senators' Dissenting Report

Key Issues

1.1 Labor Senators oppose the passage of the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the bill).

1.2 In 2014, the government, as part of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, implemented the statutory refugee framework by codifying the Refugee Convention and the existing state of the case law in Australia within the Migration Act.

1.3 The effect of this change was to remove all references to the Refugee Convention from the Act and to seek to limit the role of international court decisions in the development of Australian law.

1.4 Labor opposed those amendments at that time and continues to hold the view that the Refugee Convention should play a critical role in Australian law, and references to it in the Act were appropriate and represented good legislative practice.

1.5 Additionally, Labor has always supported a robust regime of complementary protection. It was the former Labor government that implemented the statutory complementary protection framework within the Migration Act in 2011 and we continue to support it now.

1.6 The government said its amendments in late 2014 codified the obligations which exist under the Refugee Convention into the Act and codified the state of Australia's law in respect of the refugee assessment process.

1.7 The stated reason by the government was that it would want, as jurisprudence develops in this area, to have Australian courts' decisions determine the progress and path that our law takes, rather than the decisions of international courts and other countries.

1.8 Labor's concern was that by codifying the Refugee Convention and the case law there was a significant risk of creating gaps in Australian law, particularly in relation to considerations of behaviour modification and how that would apply to those seeking protection, or the reasonableness of finding alternative locations within the country of origin.

1.9 Labor Senators note that the UNHCR's submission reflected these concerns, specifically:

UNHCR has serious concerns regarding these proposed amendments that are being made to align the complementary protection framework with the new refugee framework.¹

1.10 Similarly, the Refugee Advice and Casework Service (RACS) noted:

The Bill would be extremely dangerous for the people we work with as it would expose many of them to a risk of serious human rights abuses.²

...

In particular we oppose the proposed subsection 5LAA(5), which would allow decision makers to place the onus of avoiding significant harm on an applicant, even in situations in which the risk of harm is objectively high.³

Real risk relating to all areas of the country

1.11 Labor Senators are particularly concerned regarding the proposed modification to the 'internal relocation' or 'internal flight' principle for complementary protection.

1.12 On this point, the UNHCR noted:

International refugee protection, as set out in the 1951 Refugee Convention, does not support an approach which would place an individual who has a well-founded fear of persecution in one area of the country, in another area of that country where his or her fundamental human rights would be violated.⁴

1.13 Furthermore, the RACS stated:

Combined with section 5AAA (introduced by the *Migration Amendment (Protection and Other Measures) Act 2015*), which places the onus of proof for making out protection claims wholly upon the applicant, this amendment would require an applicant for protection to provide evidence of a real risk of serious human rights abuses in every area of a country. In relation to the refugee definition, this evidentiary task has been described as "an impossible burden" for an applicant.

Further, combined with the proposed amendments in relation to "particular risk" discussed above, this amendment would require an applicant to distinguish the risk that they would suffer harm in a particular place from the risk faced by other people in that place, including areas of which the applicant may have little knowledge. The provisions permit the refusal of an applicant's application unless they can do this in relation to every area of the relevant country.

1 United Nations High Commissioner for Refugees (UNHCR), *Submission 15*, p. 5.

2 Refugee Advice and Casework Service (Aust) Inc, *Submission 8*, p. 1.

3 Refugee Advice and Casework Service (Aust) Inc, *Submission 8*, p. 2.

4 United Nations High Commissioner for Refugees (UNHCR), *Submission 15*, p. 6.

The new provisions allow the government to refuse a protection visa application on the basis of nothing more than the identification of an "area" of the country in which the decision maker considers that the risk of significant harm is something less than a real risk. In this way, it unacceptably allows the refusal of applications even in relation to applicants with serious protection needs.⁵

Behaviour modification to avoid a well-founded fear of persecution

1.14 As noted above, Labor Senators also have a particular concern regarding the amendments relating to behaviour modification.

1.15 On this point, Labor Senators note the submission of UNHCR which stated:

Proposed subsection 5LAA(5) specifies that an applicant does not have a real risk of significant harm if reasonable steps could be taken to modify his or her behaviour so as to avoid a real risk of harm, yet excluding specified modifications.

In accordance with international refugee law, a person cannot be denied refugee status based on a requirement that she or he can change or conceal his or her identity, opinions or characteristics in order to avoid persecution. Individuals who hold certain political views, religious beliefs or sexual orientation/gender identity are entitled to freedom of expression and association in the same way as others. Persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

Although UNHCR acknowledges that the legal issue is different in that it concerns the risk of harm irrespective of any connection to a real or imputed Convention ground, the question is not whether the applicant, by being discreet, could live in that country without attracting adverse consequences, as is proposed by this amendment to the Migration Act. In UNHCR's view, an objective and fact-specific examination of the nature of the applicant's predicament upon return and whether this amounts to persecution or significant harm is required. The role of the decision maker is to assess risk (whether the fear of persecution or significant harm is well-founded or gives rise to a real risk (as relevant)) and not to demand conduct (pronounce upon what that the applicant should or should not do).⁶

Conclusion

1.16 This bill is effectively a consequential amendment to the removal of the Refugee Convention from the Migration Act and flowing that into the complementary protection framework. So, accordingly, and consistent with these previously articulated positions, Labor opposes this bill.

5 Refugee Advice and Casework Service (Aust) Inc, *Submission 8*, p. 4.

6 United Nations High Commissioner for Refugees (UNHCR), *Submission 15*, p. 11.

1.17 Labor Senators note that no one seeking protection under either the Refugee Convention or the complementary protection framework will be disadvantaged if the bill is not passed by the Parliament.

Recommendation 1

1.18 Labor Senators recommend that this bill not be passed.

**Senator Catryna Bilyk
Senator for Tasmania**

**Senator Alex Gallacher
Senator for South Australia**