

LABOR SENATORS' ADDITIONAL COMMENTS

Introduction

1.1 Labor senators are concerned with the widespread confusion about the intended meaning and application of the new complementary threshold and the proposed changes to the delivery of certain decisions by the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).

Meaning and application of the threshold for complementary protection

1.2 Schedule 2 of the bill makes significant changes to the way Australia will determine if it has protection obligations in relation to a certain non-citizen. Specifically, the bill inserts a new section 6A that provides that a non-citizen is not entitled to complementary protection unless that person can prove that it is 'more likely than not' he or she will suffer significant harm if removed from Australia.¹

1.3 Labor Senators note that in evidence before the committee, the Department of Immigration and Border Protection (department) conceded that the meaning and application of 'more likely than not' was expressed inconsistently in the explanatory memorandum,² the Minister for the department's second reading speech,³ and the department's submission to this inquiry.⁴ As such, the department agreed that an amended explanatory memorandum ought to be published⁵ 'in order to clarify the confusion around the "more likely than not" threshold and how it is intended to apply to decision makers.'⁶

1.4 The confusion surrounding the threshold for complementary protection centred on whether it would be interpreted by decision makers on the balance of probabilities or a quantifiable greater than 50 per cent chance style test. These issues are outlined below.

Balance of probabilities

1.5 The department's written submission to this inquiry explained the government's intention as follows:

The 'more likely than not' test is considered to be a workable and meaningful test that is already understood in Australian law and by the

1 Migration Amendment (Protection and Other Measures) Bill 2014, s. 6A.

2 Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, p. 3.

3 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, p. 9.

4 Department of Immigration and Border Protection *Submission 14*, p. 11.

5 Dr Wendy Southern, Deputy Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 5 September 2014, p. 61.

6 Department of Immigration and Border Protection, answer to question on notice, 5 September 2014 (received 12 September 2014), p. 3.

Courts as it is the same as the 'balance of probabilities' standard in civil proceedings.⁷

1.6 Labor senators note that the balance of probabilities test is not applied on a crude mathematical 50/50 basis. Instead, it requires a decision maker to weigh up the facts and evidence before them, giving weight to or discounting relevant factors dependent on the circumstances, and drawing a conclusion as to whether the balance of probabilities is satisfied. For example, an administrative decision maker considering a complementary protection claim might give weight to the magnitude of the harm that an applicant may suffer if removed from Australia, such as female genital mutilation or honour killings, when determining where the balance of probabilities sits.

50/50 test (greater than fifty per cent chance)

1.7 An alternative interpretation of the 'more likely than not' complementary protection threshold is that it apply on a crude mathematical basis. i.e. a '50/50' test. This gives rise to concern for Labor senators that a non-citizen may be removed from Australia if there is only a 49 per cent chance that they will suffer significant harm.

1.8 The department's written submission to this inquiry explained that it is not the government's intention that the 'more likely than not' threshold will be applied in this arbitrary fashion:

It has been suggested that a refugee may be returned to a country where they have a 49 per cent chance of being subject to torture. **This is not the case** [emphasis added].⁸

The explanatory memorandum and second reading speech

1.9 The misunderstanding about the government's intended meaning and application of the 'more likely not' threshold arises from shortcomings in the explanatory memorandum and second reading speech.

1.10 The explanatory memorandum states:

The risk threshold of "more likely than not" means that there would be a greater than fifty percent chance that a person would suffer significant harm in the receiving county.⁹

1.11 Similarly, the Hon Scott Morrison MP, Minister for the department stated in the his second reading speech that:

'More likely than not' means that there would be a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to.¹⁰

7 *Submission 14*, p. 11.

8 *Submission 14*, p. 11.

9 Explanatory Memorandum, p. 3.

10 The Hon. Mr Scott Morrison, Minister for Immigration and Border Protection, *House of Representatives*, 25 June 2014, p. 9.

1.12 In light of the department's evidence before the committee, the explanatory memorandum and the Minister's second reading speech represent a poorly-expressed attempt at explaining the meaning of 'more likely than not.' The department's evidence suggests that expressing the test on a 'greater than fifty percent' basis was an attempt to explain the balance of probabilities standard in plain English terms.

1.13 In response to a question on notice from Senator Jacinta Collins' regarding the clarity of the explanatory memorandum, the department agreed that:

Further clarity could be provided in the explanatory memorandum to more closely reflect the further information provided to the Committee by the Department in its initial submission and during the course of the hearing.¹¹

1.14 Labor Senators welcome the department's commitment to redraft the explanatory memorandum in order to clarify the confusion around the application of the 'more likely than not' test and its application by decision-makers.

1.15 Unfortunately, in expressing the balance of probabilities standard in such terms, the department and the Minister have caused a misunderstanding about the test that is intended. They have given the false impression that the 'more likely than not' test will be applied on a crude mathematical basis. Labor senators are unaware of any such test applying in any other field of Australian law.

Labor Senators' view

1.16 The department should deliver on its commitment to publish an amended explanatory memorandum to clarify that the government does not intend the 'more likely than not' test to be applied in an unsophisticated mathematical fashion. Pursuant to the evidence provided, Labor senators understand that the amended explanatory memorandum will clarify that the normal civil standard of balance of probabilities is intended to apply.

1.17 Similarly, the Minister ought to make a supplementary second reading speech to clarify the current misunderstanding. Both the explanatory memorandum and the Minister's second reading speech have interpretive effect. The confusion arising from the existing explanatory memorandum and Minister's second reading speech must not be allowed to persist.

1.18 Labor senators' view is that failure to take the above mentioned steps will lead the law into a state of confusion, and could also expose vulnerable persons, especially women and children, to risk of being removed from Australia and subjected to the most abhorrent of harms.

Changes to the delivery of decisions by tribunals

1.19 Schedule 4 of the bill makes significant changes to the processes and administration of the MRT and RRT. Specifically, items 12 and 27 seek to empower the tribunals to dismiss applications in the case of an applicant's failure to appear;¹²

11 Department of Immigration and Border Protection, answer to question on notice, 18 September 2014, p. 8.

12 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 362B; ss. 426A.

and items 17 and 32 seek to empower tribunals to provide an oral statement of reasons where it makes an oral decision.¹³

No written statement where oral decision made

1.20 Currently where the tribunal gives an oral statement of reasons, they must also provide a written statement. However, the proposed change will require the Tribunal to provide a written statement only at the request of the applicant where an oral decision is made.

Power to dismiss an application where an applicant fails to appear

1.21 Currently where an applicant fails to appear before a tribunal after being invited to do so, the tribunal has the power to determine the review without the applicant's further input. However, under the proposed change tribunals will be able to dismiss an application where an applicant fails to appear after being invited, without considering the information before it.

1.22 Labor senators note that where an application is dismissed where an applicant fails to appear, the tribunals will have the power to reinstate the application if reinstatement is requested by the applicant within a specific period of time and it is considered appropriate to do so.¹⁴

Labor Senators' view

1.23 Labor Senators remain concerned that the broadening of the powers of the MRT and RRT is a watering down of current requirements.

**Senator the Hon Jacinta Collins
Deputy Chair**

Senator Catryna Bilyk

13 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 368D; ss. 430D.

14 Migration Amendment (Protection and Other Measures) Bill 2014, ss. 362B; ss. 426A.