HOUSE OF REPRESENTATIVES

BILLs

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Second Reading

SPEECH

Wednesday, 14 October 2015

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr DUTTON (Dickson—Minister for Immigration and Border Protection) (09:03):

I move:

That this bill be now read a second time.

The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 is the final instalment in a package of legislative reforms that implements the government's election commitments to ensure a more effective and efficient onshore protection status determination process.

Following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (the Legacy Act) in December last year and the Migration Amendment (Protection and Other Measures) Act 2015 in March this year, this bill amends the statutory framework in the Migration Act relating to the determination process for persons seeking protection on complementary protection grounds.

Complementary protection is the term used to describe a category of protection for people who are not refugees, as defined in the Migration Act, but who cannot be returned to their receiving country (that is, their country of nationality or country of former habitual residence if they do not have a nationality) because there is a real risk that they would suffer a certain type of harm that would engage Australia's international non-refoulement (or non-return) obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Specifically, this bill will amend the Migration Act to more closely align the statutory complementary protection framework with the statutory refugee framework, as recently inserted by the Legacy Act.

Without these amendments, there is an inconsistency between the two frameworks. In particular, a person who would be refused protection under the current refugee framework for one of the new exceptions to the refugee test relating to internal relocation alternatives, effective protection measures or behaviour modification could satisfy the complementary protection test because those exceptions are not yet included in the complementary protection framework. This bill addresses this inconsistency, and in doing so, will restore Australia's intended interpretation of Australia's complementary protection obligations.

To be clear, as is the case under the current statutory complementary protection framework, non-refoulement obligations will not be engaged in every case in which a person claims that they will suffer some type of harm if returned to another country. This bill will not alter the requirement that in each case there must be substantial grounds for believing that, as a necessary and foreseeable consequence of being returned, there is a real risk that a person will suffer significant harm of a particular type as contained in the relevant human rights treaties, namely:

- the arbitrary deprivation of life;
- having the death penalty carried out;
- being subjected to torture;
- being subjected to cruel or inhuman treatment or punishment; or
- being subjected to degrading treatment or punishment.

Rather, the bill will clarify the interpretation of various concepts used to determine whether a person will face a real risk of suffering significant harm so as to give rise to a non-refoulement obligation.
This is now necessary as there have been instances of several persons having been found to meet the complementary protection criterion on a wide variety of grounds, such as selling adult movies and drinking or supplying alcohol in countries which severely punish those activities, despite the fact that the government, consistent with our international obligations, did not intend for such cases to be covered by the legislation. There have also been several persons who have been found to meet the complementary protection criteria where they have been involved in serious crimes in their home countries, or are fleeing their home countries due to their association with criminal gangs. Therefore, in tightening the various tests that determine whether there is a real risk that a person will suffer significant harm, this bill will diminish the likelihood of such persons being granted Australia's protection.

The bill will clarify that, in relation to complementary protection, a real risk of significant harm needs to relate to all areas of a receiving country. This amendment aligns the criteria for complementary protection with the existing criteria under the refugee framework in the Migration Act.

In the case of complementary protection claims, a person who could relocate to a safe part of the receiving country upon their return to that country would be found not to face a real risk of significant harm. In considering whether a person can relocate to another area of the receiving country, a decision maker is required to take into account whether the person can safely and legally access an internal flight alternative such that it would mitigate a 'real risk' of 'significant harm' to the person. This test is consistent with international jurisprudence on Australia's non-refoulement obligations under the ICCPR and the CAT.

The bill also amends the provision relating to a generalised risk to put beyond doubt that complementary protection is only available where the real risk of significant harm is faced by a person personally, rather than being an indiscriminate risk of harm faced by the population in the receiving country generally.

This amendment is not intended to elevate the level of risk which must be demonstrated to satisfy the 'real risk' test under complementary protection grounds. Rather, and consistent with international jurisprudence on the interpretation of the ICCPR and the CAT, this amendment clarifies that, while the existence of a consistent pattern of gross, flagrant or mass violation of human rights in the relevant country is a relevant consideration, such circumstances of themselves will not meet the necessary threshold of constituting a 'real risk' of 'significant harm' for the purposes of complementary protection.

There may be occasions, however, where levels of generalised violence in a country can become so dangerous, consistent or targeted towards groups as to pose significant harm to individuals. It may be possible in such circumstances that the level of risk faced by a person in an area of generalised violence may crystallise into a personal, direct and real risk of harm in their case. This amendment ensures that such issues are taken into consideration in the analysis of a person's complementary protection claims.

This bill will amend the provision relating to state protection measures when determining whether a person faces the relevant risk of harm relating to complementary protection to clarify that a person will not face a real risk of significant harm if effective protection measures are available to the person through state or non-state actors in a receiving country.

This amendment aligns the criteria for complementary protection, relating to state protection measures, with the equivalent provisions in the new refugee framework and makes clear that, when determining whether a person engages Australia's complementary protection obligations, consideration must be given to the level of effective protection available in the receiving country to ascertain if such protection will mitigate the risk of harm towards the person. The intention of this amendment is to clarify, consistent with Australia's non-refoulement obligations under the ICCPR and the CAT, that the level of protection offered by a country to a person must only be sufficient so as to mitigate a 'real risk' of 'significant harm' to them, rather than provide them with 'perfect' or preferred circumstances under which the person might wish to live.

The bill will also introduce a provision to exclude a person from complementary protection who could take reasonable steps to modify their behaviour so as to avoid a real risk of significant harm in a receiving country, other than a modification that would conflict with the person's innate or immutable characteristics, or which is fundamental to the person's identity or conscience.

The aim of this provision, an equivalent of which exists in the refugee framework, is to reflect that some harm could be brought about by a person's own voluntary actions—by, for example, breaking the law upon their return.
to the country—and that in some circumstances it is reasonable to expect a person not to engage in such actions so as to avoid a real risk of harm.

To be clear, while this bill makes several changes to the framework for assessing protection claims on complementary protection grounds, it does not, however, affect the substance of Australia's adherence to its non-refoulement obligations. Australia's non-refoulement obligations under the ICCPR and the CAT are absolute and cannot be derogated from. Therefore, even if a person is considered ineligible to be granted a protection visa—on character-related grounds, for example—Australia would still be bound by its non-refoulement obligations not to remove that person to their receiving country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person's removal to that country, there would be a real risk that the person will suffer significant harm. The government will continue to comply with these obligations and Australia remains bound by them as a matter of international law.

Further, this bill does not amend the risk threshold for assessing Australia's non-refoulement obligations under the ICCPR and the CAT. The 'real chance' risk threshold for assessing complementary protection in the Migration Act will remain intact. It currently applies to both the refugee and complementary protection contexts and is not amended in either context by this bill.

I wish to foreshadow that the government will no longer be proceeding with the amendments in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (the Regaining Control Bill). The House would be aware that the Regaining Control Bill was introduced into the parliament in December 2013 and has remained on the Senate Notice Paper since this time. The Regaining Control Bill seeks to repeal the complementary protection provisions from the Migration Act. Consequently, Australia's non-refoulement obligations would be managed through an administrative process.

In determining to discharge the Regaining Control Bill from the Senate Notice Paper, the government has considered the concerns raised by the parliament and its relevant committees on certain aspects of the bill. On balance the government considers that the best way forward is for the complementary protection provisions to remain in the Migration Act but be modified slightly as per the terms of this bill. This will ensure that Australia continues to align with the practices of other like-minded countries, including New Zealand, Canada, the United States of America and many European countries.

Since the introduction of complementary protection into Australia's protection visa processes in March 2012, various judicial interpretation issues have arisen in the current legislative framework, which has resulted in the broadening of Australia's complementary protection obligations in a way that goes beyond current international interpretations. As a result, there have been instances in which an individual's claims have been found to meet the complementary protection criterion despite the fact that the government, consistent with its international obligations, did not intend for the legislation to cover such cases.

It is therefore necessary to restore the intended interpretation of the complementary protection provisions in the Migration Act so as to ensure that only those who are in need of Australia's protection will be eligible for a protection visa on complementary protection grounds.

This bill also makes several technical amendments to the statutory framework in the Migration Act to ensure that the existing provisions in the Migration Act work as originally intended and will not change the substance of the amended provisions.

I commend the bill to the House.

Debate adjourned.