

# Migration Amendment (Protection Obligations and Other Measures) Bill 2014 – Supplementary Submission

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## **Senate Committee on Legal and Constitutional Affairs**

**10 September 2014**

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## Introduction

1. On Friday 5<sup>th</sup> September 2014, the Law Council of Australia, represented by Ms Carina Ford, Ms Sarah Moulds and Ms Nicola Knackstredt, appeared before the Senate Committee on Legal and Constitutional Affairs to give evidence at the Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014 (the Bill). This appearance followed the making of a written submission to the Inquiry, dated 4 August 2014.
2. During the course of the oral Hearing, the representatives of the Law Council undertook to take on notice questions from the Committee. These questions related to:
  - the issue of the proposed retrospective application of the Bill, and
  - whether or how the harsher impacts of retrospectivity could be addressed without undermining the primary rationale of the Bill.

These questions were asked in the context of a broader exchange about the appropriate threshold for determining complementary protection claims. As a result, this submission also outlines the Law Council's concerns with the proposed changes to this threshold. During the hearing the Committee also asked the Law Council whether it had any background information relating to the Full Court of the Federal Court's decision in *SZQRB*. A brief summary of the background to this case is included at the end of this submission.

## Questions on Notice

### Retrospectivity

#### Law Council's Recommendation

3. In light of the concerns outlined below, the Law Council submits that the changes proposed by the Bill should not be applied retrospectively – but apply to applications lodged after the date of Royal Assent. This will be easier to implement, more cost effective and efficient and far fairer to applicants.
4. It is difficult to propose any other approach to the application of these proposed changes that would not give rise to the many issues we have identified or be consistent with the *Acts Interpretation Act 1901* (Cth).<sup>1</sup>

#### Discussion

5. The Law Council considers that the retrospective measures in the Bill offend rule of law principles. Principle 1 of the Law Council's Rule of Law principles<sup>2</sup> states that:

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<sup>1</sup> For example, section 7(2) of the *Acts Interpretation Act* relevantly provides:

*If an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:*

...

*(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or*

...

*(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.*

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*The law must be both readily known and available, and certain and clear*

6. In the context of the current Bill, this principle means that protection visa applicants should be able to know the law that will apply to the determination of their protection claims at the time they apply. The Law Council is concerned that the Bill offends this principle by seeking to apply the proposed changes retrospectively – that is by seeking to make changes to the legal framework that has already been applied at various stages in the decision making process to the determination of protection claims. In addition to this in principle concern, the Law Council considers that this approach may also lead to administrative difficulties and delays.
7. Each schedule of the Bill has its own complex application provisions. For example:
  - (a) Schedule 1 of the Bill (that includes proposed new section 5AAA<sup>3</sup> relating to the applicant's responsibility to specify his or her claim), will apply to applications or administrative processes that start after the commencement of this Part of the Bill, but also to those applications or processes that started *before the commencement* of this Part of the Bill<sup>4</sup> that have not yet been finally determined which would also therefore include any matter still pending at the RRT or a matter that is remitted back from the Courts and is pending at the RRT or the Department of Immigration and Border Protection (the Department).
  - (b) The proposed changes to threshold for determining protection claims in Schedule 2 of the Bill will apply to both the determination of protection visa applications, but also administrative processes<sup>5</sup> where an assessment is required to be made as to whether Australia's complementary protection obligations are invoked (such as decisions relating to involuntary returns in cases where a person may have failed the character test). These changes will apply to assessments and applications made on or after this Part of the Bill commences, as well as assessments or applications made *before* the commencement of the Part, that have yet to be finally determined or completed as outlined above.<sup>6</sup>
  - (c) In relation to the changes proposed by Schedule 4 of the Bill, such as those relating to the provision of oral reasons, the general rule is that these changes will apply an application to the MRT or the RRT for review of a decision if the application was made on or after the commencement this Schedule, or if the applicant was made *before* the Schedule commences unless a decision on the review had been made. It is noted that special provisions apply to the commencement of the proposed amendments relating to the dismissal of Tribunal applications.<sup>7</sup>
8. These provisions give rise to both principled and practical concerns, as summarised below:
  - (a) Retrospective application of the proposed changes to the complementary protection threshold to existing protection claims risks unfairness,

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<sup>2</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

<sup>3</sup> Schedule 1, Item 1.

<sup>4</sup> Schedule 1, Item 15.

<sup>5</sup> Schedule 2, Item 8.

<sup>6</sup> Schedule 2, Item 8.

<sup>7</sup> Schedule 4, Item 34.

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administrative difficulties and would risk contravening Australia's international obligations

- (i) For example, a protection visa applicant may have already satisfied a decision maker the he or she has a 'real risk' of torture upon return and been recommended for a grant of a protection visa on complementary protection grounds. Under the proposed changes, this application could be 're-opened' to be assessed under the 'more likely than not' threshold – creating administrative burdens on the primary decision maker to ensure that the applicant is provided with procedural fairness and given the opportunity to provide evidence in support of this higher threshold. As discussed below, the use of the higher threshold also gives rise to the risk that people who are owed protection under international law will be returned to a place of harm.
  - (ii) The jurisprudence on 'real risk of harm' is now established and far easier to follow than will be the case if a higher test is applied which will no doubt lead to an increase in judicial review and further applications being required to be reconsidered once it is determined what 'more likely than not' means. The Law Council notes that the meaning of 'more likely than not' was the subject of much debate.
- (b) Retrospective application of proposed changes will lead to administrative difficulties and denial of procedural fairness when applied to applications currently before the MRT-RRT
- (i) A number of the changes proposed in the Bill seek to replace discretionary mechanisms relating to the assessment of credibility with provisions that would require adverse inferences to be drawn unless a reasonable explanation is given. The proposed new provisions incorporate safeguards including that a warning be given to applications, such as a warning that reliance on bogus documents may result in the refusal of protection unless a reasonable explanation is given. It will be impossible to give this warning retrospectively if an applicant has already provided a bogus document that has been considered bogus.
  - (ii) When applied retrospectively – that is to claims already underway before either a Departmental decision maker or the RRT – these provisions raise procedural fairness concerns and administrative difficulties. For example, how can the applicant who has relied upon an identity document that is believed to be false, but that has nevertheless satisfied a primary decision maker of the merits of his or claim, be warned about the consequences of reliance of this document under the proposed new provisions? What opportunities should be provided to the applicant to demonstrate that he or she may have a reasonable explanation for reliance on that document?
  - (iii) Similar concerns arise in the context of the proposed changes that apply to applicants who seek to adduce new evidence or bring new claims in support of their application to the RRT. These changes require the RRT to draw an adverse inference as to the credibility of the evidence or the claim unless a reasonable explanation is given. If applied retrospectively, the RRT would be required to invite all applicants whose applications have not been finally determined to address the RRT on this change to the law and where appropriate to adduce evidence in support of their 'reasonable explanation'. This would be required to occur even

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in cases where the RRT member has already made credibility findings that take into account the reasons for the making of late claims or the adduction of further evidence.

- (iv) Another example is where a person who fails to appear before the Tribunal has their application dismissed and be given 7 days in which to apply for reinstatement of their application. Currently, if the applicant fails to appear at the hearing, the MRT-RRT can make a decision in his or her absence but cannot dismiss or reinstate an application.<sup>8</sup> If changes to the MRT-RRT apply to people whose applications are not yet finalised, they will be held to a higher standard than at the time that their application was made.
  - (v) The Law Council also considers that any retrospective changes will also result in administrative delays and costs and a likelihood of appeals to the Courts on various issues relating to the retrospective nature of the changes. For example, in the above situation, the MRT-RRT would be required to contact all affected applicants informing them of the procedural changes in the Tribunals that will affect the way their applications are handled and invite them to re-appear to address changes in the law.
  - (vi) Changes would also need to be made to the MRT-RRT's existing Guidance Note on Credibility<sup>9</sup> which currently states that the assessment of credibility in each case is a matter for the member constituting the tribunal to determine, having regard to the individual circumstances and evidence. It addresses the following issues: evidence and findings; Tribunal hearings; oral evidence; contradictions, inconsistencies and omissions; demeanour; delay in making an application for protection; expert evidence and documentary evidence.
- (c) Retrospective application of proposed changes will also cause unfairness and delays for applications before the Minister
- (i) For example, a person who has relied on a bogus document to support their application – because, for instance, he or she belongs to a minority group that cannot access official documentation without risk of persecution – will not have the opportunity to be warned of the consequences of providing this document because the provisions requiring the Minister to make an adverse decision and seek further information were not in place at the time of application.
  - (ii) As with the MRT-RRT, there will also be significant administrative delays and deficiencies arising from these changes, as the Minister should notify all applicants who have not yet had a final decision granted.

9. The Law Council notes that a number of these concerns have been shared by the Parliamentary Joint Committee on Human Rights (PJCHR) and the Scrutiny of Bills Committee (SBC) in their considerations of this Bill.

- (a) For example, the PJCHR has noted that the retrospective application of proposed section 5AAA of the Bill, (relating to the responsibility of asylum seeker to provide evidence for claims) constitutes a limitation on article 14(1)

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<sup>8</sup> *Migration Act 1958* (Cth) ss 362B (MRT) and 426A (RRT).

<sup>9</sup> Available at: <http://www.mrt-rrt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>

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of the *International Covenant on Civil and Political Rights* and requires adequate justification (ICCPR).<sup>10</sup> The SCB also noted that the proposed application of the changes to the complementary protection threshold to assessments made as a result of an application for a visa or as part of an administrative process which commenced prior to the commencement of the Part raised a 'question of fairness as to whether applications or administrative processes which have already been commenced should be dealt with by reference to the law as it existed at the time of the application or when the administrative processes were commenced'.<sup>11</sup> The SCB noted that neither the explanatory memorandum nor the Statement of Compatibility addresses this issue.<sup>12</sup>

## Complementary Protection

10. The Law Council welcomed the discussion during the Hearing about the proposed changes to the threshold for assessing whether Australia's complementary protection obligations are invoked.
11. The Law Council's position in relation to these reforms is made clear at paragraphs [102]-[114] of its primary submission. However, it wishes to use this opportunity to respond to a number of matters raised during the Hearing:
- (a) The Law Council considers that there is no basis for adopting a stricter approach to assessing the risk of harm in complementary protection claims than that taken in relation to claims for protection under the *Convention Relating to the Status of Refugees* (Refugee Convention).
  - (b) As the High Court has observed, it is not helpful or appropriate to prescribe a specific domestic standard of proof such as 'more likely than not' (derived from contexts where the claim relates to past conduct) to an assessment of whether international human rights obligations are invoked as a result of a risk of future harm.<sup>13</sup>
  - (c) At the Hearing the Department suggested that the proposed changes to the complementary protection provisions were necessary to ensure that Australia was meeting its relevant international human right obligations. This suggestion has been contested by all other submission makers (other than the MRT-RRT), including by the Law Council. It has also been rejected by the PJCHR, which concluded that the proposed new approach to complementary protection is inconsistent with Australia's relevant obligations and in fact imposes a higher test and therefore puts Australia at breach of its international obligations. For example, the PJCHR noted that:
    - (i) Article 3(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) provides that there must be 'substantial grounds for believing' a person would be in danger of being subjected to torture;

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<sup>10</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of the 44th Parliament; Bills introduced 23 - 26 June 2014; Legislative Instruments received 7 - 20 June 2014*, 15 July 2014, 45, [1.252].

<sup>11</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 8 of 2014, 9 July 2014, 20.

<sup>12</sup> *Ibid.*

<sup>13</sup> The Law Council recognises that this has been noted by the UK Courts, such as *Rehman* [2003] 1AC 153; and the High Court in *FTZK v Minister Immigration and Border Protection* [2014] HCA 26.

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- (ii) The UN Committee Against Torture's General Comment 1 states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable;<sup>14</sup> and
  - (iii) The UN Human Rights Committee's General Comment 31 states there must be 'substantial grounds for believing that there is a real risk of irreparable harm'.<sup>15</sup>
- (d) The Department also suggested that the 'more likely than not' approach has formed part of accepted Departmental practice before and after the existing complementary protection provisions came into effect in March 2012 and that this approach is reflective of the legislative intent of the introductory Bill. The Law Council notes that, contrary to this suggestion, the Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) introducing the complementary protection provisions refers to 'real risk of significant harm' and 'personal and present' – picking up the language of both the General Comments on the CAT and the ICCPR, rather than expressing support for the application of a 'more likely than not' threshold.
- (e) The Law Council also notes that the 'more likely than not' approach to the determination of complementary protection claims has not been reflected in either the MRT-RRT's Guide to Refugee Law: Chapter 10 Guide to refugee law - Chapter 10: Complementary protection<sup>16</sup>, or the Application form for a Protection (Class XA) Visa<sup>17</sup>.

The Law Council also notes that the threshold is now consistently applied as being a real chance test. It considers that this test does not need to be revised, as to do so would only provide for greater complexity when determining decisions and cause difficulties for applicants seeking to understand the two different tests. It also considers that the change is unnecessary on the basis that the current complementary protection threshold has not resulted in a significant number of applications being granted.

## **Minister for Immigration and Citizenship v SZQRB<sup>18</sup>**

12. The Law Council also notes that at the Hearing, Committee members were interested in the background to the Full Court of the Federal Court decision in *Minister for Immigration and Citizenship v SZQRB*<sup>19</sup> (in respect of which special leave to appeal to the High Court was refused on 13 December 2013).

- (a) This decision clarified that the threshold to be applied to the determination of claims for protection on complementary grounds should be the same as that applied to the determination of claims made under the Refugee Convention – namely a 'real risk' or 'real chance' approach.

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<sup>14</sup> The General Comment provides that: 'The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial... and that such danger is personal and present' (at [7]). This was confirmed in the Committee's case *Gbadjavi v Switzerland* (2009).

<sup>15</sup> At [12]. This was confirmed in *Pillai v Canada* (2011).

<sup>16</sup> Available at: <http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-refugee-law.aspx>

<sup>17</sup> Available at: <http://www.immi.gov.au/allforms/pdf/866.pdf>

<sup>18</sup> [2013] FCAFC 33 (20 March 2013).

<sup>19</sup> [2013] FCAFC 33 (20 March 2013).

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- (b) The applicant, a Hazara man (known as SZQRB) sought asylum in Australia by boat and was detained on Christmas Island. As a boat arrival he was precluded from applying for protection under the Migration Act unless the Minister lifted the statutory bar. However, SZQRB was able to access a non-statutory protection status determination process that applied at that time, outlined in Guidelines issued by the Minister, which included an 'International Treaties Obligations Assessment (ITOA)' of SZQRB's claim.
- (c) The Departmental officials conducting the ITOA applied the 'more likely than not' standard to SZQRB's claims.
- (d) The purpose of the ITOA process was to determine whether SZQRB was a person to whom Australia had protection obligations by reason of being party to the CAT and ICCPR. The ITOA specifically noted that Article 3 of CAT required Australia not to 'expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.<sup>20</sup> The ITOA also noted article 6 ('no-one shall be arbitrarily deprived of his life') and Article 7 of the ICCPR ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment').
- (e) In a unanimous decision, the Full Court of the Federal Court held that the ITOA conducted by the Department was not carried out according to law because the wrong test was applied in considering whether SZQRB was entitled to protection under the CAT or ICCPR.
- (f) The Court found that the ITOA assessed whether it '*was more likely than not* that SZQRB would be arbitrarily deprived of his life if returned to Afghanistan, noting that this is a higher threshold than the '*real chance*' test used in the Refugee Convention under Australian law.<sup>21</sup>
- (g) The Court held that the correct test to be applied when considering whether SZQRB would suffer significant harm is the 'real chance' test and accordingly found that the ITOA did not apply the appropriate standard.<sup>22</sup>
- (h) The Court also held that the ITOA process was flawed in that SZQRB was not accorded procedural fairness. The Department failed to alert SZQRB of information that was relevant to the decision that Australia's non-refoulement obligations would not be breached if he were returned.<sup>23</sup>

13. Further information about this case is available in the Law Council's submission to this Committee on the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth) made in January 2014.<sup>24</sup>

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<sup>20</sup> [2013] FCAFC 33 at [238].

<sup>21</sup> [2013] FCAFC 33 at [240]-[246] per Lander and Gordon J; with whom Besanko, Jagot and Flick JJ agreed on this issue.

<sup>22</sup> [2013] FCAFC 33 at [246]-[247].

<sup>23</sup> [2013] FCAFC 33 at [262] per Lander and Gordon J with whom Besanko, Jagot and Flick JJ agreed; note Flick J also made further comments on the denial of procedural fairness in His Honour's separate judgment.

<sup>24</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, 23 January 2014, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2774-MigrationAmendmentRegainingControlOverAustraliasProtectionObligationsBill2013.pdf>. See in particular pages 18-19.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.