THE LAW SOCIETY
OF NEW SOUTH WALES

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7 August 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee welcomes the opportunity to provide submissions on the Migration Amendment (Protection and Other Measures) Bill 2014 ("Bill").

1. Amendments relating to protection visas and review process

The Bill introduces section 5AAA which seeks to identify that it is the responsibility of a non-citizen to specify all particulars of his or her claims and provide sufficient evidence to establish those claims. The Bill provides that the Minister does not have a responsibility or obligation to specify or establish a non-citizen's claims.

With respect to the responsibility of advancing or establishing claims it is settled that the protection visa process, particularly with reference to the Refugee Review Tribunal, is inquisitorial (as opposed to adversarial) in nature with there being no particular onus on either the applicant or the decision maker[1]. The process ordinarily requires a visa applicant to advance claims through an application process with a decision maker to then assess the credibility of those claims in determining whether Australia's protection obligations are engaged and whether other criteria necessary for the grant of the visa have been satisfied.

While there is no general duty on the part of a decision maker to make inquiries[2] the process necessarily requires a decision maker to ascertain and evaluate relevant facts and consider

[1] See for example *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53
[2] see *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 at [24] and limited circumstances where duty may arise at [25]

claims that clearly arise on the evidence and material[3]. This important process ensures that protection is not denied to a person simply because of their inability to clearly articulate a claim. The Committee submits that proposed section 5AAA undermines the current inquisitorial nature of protection obligation assessment and should not be adopted.

Item 14 of Part 2 introduces section 423A which requires the Tribunal to draw an inference unfavourable to the credibility of a claim or evidence if the Tribunal is satisfied that an applicant does not have a reasonable explanation why the claim was not raised or the evidence was not presented before the primary decision was made. The Committee is concerned that the proposed section does not permit the Tribunal to consider the merit of a claim or the credibility of evidence in determining what weight, if any, it should be given.

The Committee considers that the Tribunal, in providing a mechanism of review that is fair, just, economical, informal and quick[4], should have an unfettered power to consider new claims and information to determine its relevance and reliability. While the Committee accepts that delay in producing evidence may be a relevant consideration going to the credibility of the new evidence, it considers that the Tribunal must be permitted to consider and test the evidence or the claim for itself before forming a view about it. Requiring the Tribunal to dismiss credible and relevant evidence simply because there is no reasonable explanation for the delay in producing it greatly undermines the Tribunal's task of coming to the correct or preferable decision and may lead to breaches of Australia's *non-refoulement* obligations under international law, including the *International Covenant on Civil and Political Rights*[5] ("ICCPR") and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*[6] ("CAT"). The Committee opposes the proposed section 423A.

2. Threshold test for complementary protection

Schedule 2 of the Bill seeks to address the decision in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 where the Full Court of the Federal Court found the threshold to be applied in assessing claims against complementary protection is whether there is a "real chance" of significant harm; being the same test that is applied to assessments under the Refugee Convention. The Bill proposes to change the existing test of assessing claims against the CAT or the ICCPR (complementary protection) under the *Migration Act 1958* ("Act"), the Migration Regulations 1994 or any other instrument made under the Act to a "more likely than not" test.

Section 36(2)(aa) of the Act currently provides that a criterion for a protection visa is that the applicant for a visa is:

> *a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or*

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[3] *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263 (16 September 2004)

[4] Section 420 of the Act

[5] UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 000, p.171, available at http://www.refworld.org/docid/3ae6b3aa0.html [accessed 7 August 2014].

[6] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p.85, available at: http://www.refworld.org/docid/3ae6b3a94.html [accessed 7 August 2014].

The Committee notes that the phrase "substantial grounds", which appears in Article 3 of the CAT, has been considered by the UN Committee against torture who has rejected the proposition that the danger to an individual must be "highly likely to occur" but has adopted a view Article 3 requires something more than a mere possibility of torture which does not need to be highly likely to occur[7]

Likewise, with respect to the use of the term "real risk" the United Kingdom Asylum and Immigration Tribunal in *Kacaj v Secretary of State for the Home Department* [2001] INLR 354 at [12] stated:

> Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in *R v Governor of Pentonville Prison* ex p. Fernandez[1971] 2 All E.R. 691 at p.697, cited by Lord Keith in *Sivakumaran* at [1988] 1 All E.R. 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution. The test formulated by the European Court requires the decision maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment. That is no different from the test applicable to asylum claims...The words 'substantial grounds for believing' do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They merely indicate the standard which must be applied to answer that question and demonstrate that it is not that of proof beyond reasonable doubt... In our view, now that the European Court has fixed on a particular expression and it is one which is entirely appropriate for both asylum and human rights claims, it should be adopted in preference to any other, albeit others may be intended to convey the same meaning.

The Committee is mindful that in some jurisdictions, including Canada and the United States, a 'more likely than not' test has been adopted, however, considers the interpretation adopted by the Full Court in *SZQRB* to be consistent with Australia's *non-refoulement* obligations under International law. The Committee opposes the introduction of section 6A and proposed amendments to section 36(2)(aa).

The Committee would welcome the opportunity to appear before the Senate Committee to expand on its written submission and address other aspects of the Bill. If you have any questions about this submission, please contact Vicky Kuek, policy lawyer for the Committee on (02) 9926 0354 or by email at victoria.kuek@lawsociety.com.au.

Yours sincerely,

Ros Everett
President

[7] see *E.A. v Switzerland* CAR/C/19/D/028/1995 at [11.3]