Australian Government

Department of Immigration and Border Protection

ACTING SECRETARY

13 January 2014

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

Dear Committee Secretary,

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Thank you for the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee for Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

I have enclosed the department's submission to the inquiry.

Yours sincerely

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Department of Immigration and Border Protection

DIBP Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

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The Department of Immigration and Border Protection welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, following the introduction of this Bill into the House of Representatives on 4 December 2013. The Bill passed the House of Representatives on 11 December 2013.

1.0 CONTEXT AND BASIS OF THE BILL

Complementary protection is the term used to describe a category of protection for people who are not refugees as defined in the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol (Refugees Convention), but who also cannot be returned to their home country, because there is a real risk that they would suffer certain types of harm that would engage Australia's international *non-refoulement* (non-return) obligations.

The complementary protection framework was introduced into the Migration Act on 24 March 2012 by the previous government, to allow consideration of claims raising Australia's *non-refoulement* 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) as part of the protection visa process and to allow a protection visa to be granted if those obligations are engaged and other visa requirements are met.

It is the current government's position that it is not appropriate for Australia's *non-refoulement* obligations under the CAT and the ICCPR to be considered as part of a protection visa application under the Migration Act. Doing so creates a channel for asylum seekers to gain access to a permanent protection visa outcome even though they were found not to be a refugee.

Australia accepts that the position under international law is that Australia's *non-refoulement* obligations under the CAT and the ICCPR are absolute and cannot be derogated from. Australia remains committed to adhering to our *non-refoulement* obligations under the CAT and the ICCPR. However, whilst those obligations are to not return the person to a place where a real risk of significant harm exists; there is no obligation imposed upon Australia to grant a particular type of visa to those people who engage *non-refoulement* obligations.

The Government proposes to remove the complementary protection criterion from the Migration Act and instead implement an administrative process, similar to the process that was undertaken in the years prior to the enactment of the complementary protection legislation in March 2012. However, the new administrative process will be more transparent and efficient in its consideration of complementary protection claims and will include the development of a more effective decision making model.

An administrative process will allow the Minister for Immigration and Border Protection to deal with cases in a flexible and constructive manner and will be able to properly assess whether a person's specific circumstances engage Australia's *non-refoulement* obligations

under the CAT and the ICCPR as interpreted by the Government in accordance with international law.

Background – Relevant Court Cases

While the intention of the complementary protection legislation was to interpret and implement Australia's *non-refoulement* obligations under the CAT and the ICCPR without expanding the obligations in a way that goes beyond current international interpretations, the courts have since broadened the scope of the interpretation of these obligations beyond the Government's view of what is required under international law. The courts' interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties.

Contrary to the Government's understanding of the standard to be applied with respect to complementary protection, the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33* (SZQRB) equated the threshold of 'real risk' that a person will suffer significant harm with the lower threshold of a 'real chance', as applied under the Refugees Convention.

The 'real chance' test as applied in the Refugees Convention context can be as low as a ten per cent chance of harm. This test is lower than that required to meet Australia's complementary protection obligations. The Department had been applying the real risk test as a 'more probable than not' risk of harm, that is, as more than a 50 per cent chance of suffering significant harm. This is consistent with the standard applied by the United States of America and Canada.

Further, contrary to the Government's understanding of its obligations, the Full Federal Court in *Minister for Immigration and Citizenship v MZYYL [2012] FCFA 147* (MZYYL) found that the standard of state protection required for the Minister to be satisfied that there is not a real risk that the person will suffer significant harm under the complementary protection criterion is higher than the standard of state protection required when determining whether a person has a "well-founded" fear of persecution for a Refugees Convention related reason.

As a result of the MZYYL decision in combination with the lower risk threshold established by SZQRB, even where a person's home country has a functioning and effective police and judicial system, in order for Australia to conclude that a country will in fact manage to protect the person from the risk of harm, the protection by that country's authorities must reduce the level of harm to below that of a 'real chance'. The real chance test is a very low bar and lower than required under the CAT and the ICCPR.

The courts' interpretation of the complementary protection provisions in both these cases has broadened the interpretation of Australia's complementary protection obligations beyond what was originally intended. As a result there have been instances where an individual's claims have been found to meet the complementary protection criterion, despite the fact that the Government, consistent with our international obligations, did not intend for the legislation to cover such cases.

Under the current complementary protection framework, there have 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. While character provisions in the Migration Act allow a visa to be refused to persons of character concern, the result of the above court cases is that there can be a finding that the complementary protection criterion is met in circumstances which arguably do not engage Australia's *non-refoulement* obligations under international law.

2.0 PURPOSE OF THE BILL

The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (the Bill) proposes to amend the Migration Act to remove the criterion for grant of a protection visa on "complementary protection" grounds, and other related provisions.

The purpose of this Bill is to give effect to the Government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations on complementary protection grounds are matters for the Government to attend to in other ways.

Instead, Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012. Where the Minister for Immigration and Border Protection is satisfied that the person engages Australia's *non-refoulement* obligations under the CAT and the ICCPR, it is then available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

This bill allows the Government to restore what it considers to be the most appropriate mechanism for considering complementary protection claims in a way that significantly reduces the risk of the framework being exploited.

This amendment does not propose to resile from Australia's international obligations, nor is it intended to withdraw from any Conventions to which Australia is party. It merely reflects how the Government wishes to meet those obligations. Australia remains committed to adhering to its *non-refoulement* obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's *non-refoulement* obligations under these treaties will not be removed in breach of those obligations.

3.0 CONTENT OF THE BILL

3.1 Repeal of complementary protection framework

Currently section 36 of the Act establishes a criterion for the grant of a protection visa on "complementary protection" grounds, where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

This Bill will amend the Migration Act to remove the criterion for the grant of a protection visa on the basis of complementary protection.

This will be achieved by amending the Migration Act to repeal the provisions relating to complementary protection within section 36 of the Act and other related provisions.

As a result this amendment, an application for a protection visa will only be assessed on the basis of claims under the Refugees Convention.

3.2 Application of amendments

The proposed amendments will apply to the following groups:

- Non-citizens who apply for a protection visa after the Act commences, including those who apply on the day it commences; and

- Non-citizens who applied for a protection visa before this Act commences, and who had not yet had a primary decision made on their application before commencement; and

- Non-citizens who applied for a protection visa before this Act commences and who had been refused a protection visa by the primary decision maker, but who have sought, or who are still able to seek, review in the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT) and no decision has been made by the RRT or the AAT.

Non-citizens who have not yet had a primary decision on their protection visa application will not have their protection visa application considered against the complementary protection criteria irrespective of whether they applied for a protection visa before or after the commencement of the Act.

3.3 Transitional provisions – RRT and AAT review

Non-citizens who had a primary decision to refuse their visa application made, prior to the commencement of the Act, will still be able to seek review of that decision in the RRT or AAT, however, the AAT or RRT will not be able to review those aspects of the primary decision that relied on the complementary protection criteria.

This means that the RRT and AAT will apply the new law when reviewing these decisions, and not the law that existed at the time of the primary decision.

4.0 HUMAN RIGHTS IMPLICATIONS

In accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011,* the Bill is accompanied by a Human Rights Statement of Compatibility. The Department of Immigration and Border Protection refers the Committee to the Statement of Compatibility which assess the Bill against the rights and obligations contained in the seven core human rights treaties.

The Refugees Convention is not covered by the scope of the Human Rights (Parliamentary Scrutiny) Act 2011 or the Statement of Compatibility. The Department's view is that the arrangements under the Bill are consistent with Australia's obligations under the Refugees Convention. This is because the amendments made by the Bill do not impact on refugee assessments. Complementary protection relates to those who have been found not to be refugees.