



**Submission on the Migration Amendment (Regaining Control over Australia's
Protection Obligations) Bill 2013**

Prepared by Professor Susan Kneebone with Dr Azadeh Dastyari, Adam

Fletcher, Dr Maria O'Sullivan and Tania Penovic

On behalf of the Castan Centre for Human Rights Law

Faculty of Law, Monash University

Dated 23 January 2014

Introduction and Background

On 4 December 2013, the government introduced the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 which seeks to repeal the complementary protection provisions in the Migration Act 1958 (Cth).

We thank you for the opportunity to comment upon this important piece of legislation.

Since 24 March 2012, applicants for a protection visa can have their claims assessed not only against this definition in the 1951 Refugee Convention, but also against complementary protection criteria. Pursuant to section 36(2) of the Migration Act 1958 (Cth), Australia is not permitted to remove people to countries where they face a real risk of one or more of the following:

- arbitrary deprivation of life;
- the death penalty;
- torture;
- cruel or inhuman treatment or punishment;
- degrading treatment or punishment.

These obligations arise pursuant to Australia's obligations under the following treaties:

- *International Covenant on Civil and Political Rights*,¹ ('ICCPR'), arts 6, 7;
- *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*,²
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,³ ('CAT'), art 3;
- *Convention on the Rights of the Child*⁴ ('CROC').

Complementary protection was introduced by the Migration Amendment (Complementary Protection) Bill 2011 to give effect to Australia's international obligations under these treaties. Prior to this the **only** basis upon which protection claims could be assessed in relation to these obligations was pursuant to the power granted to the Minister for Immigration under s417 of the Migration Act.

It is our submission that the repeal of the 2011 complementary protection legislation, would reinstate the role of the Minister for Immigration under s417 of the Migration Act as the sole process for assessment of complementary protection claims, and would be a retrogressive step which would lead to inefficiencies and risk of *refoulement*. We elaborate upon our reasons for that submission below.

¹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

² Opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

³ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

⁴ Adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

The problem with the s417 discretion

Section 417, the so-called 'safety-net' provision or 'humanitarian' discretion, gives the Minister for Immigration the power to grant a visa (substituting 'a more favourable decision') when all other avenues for claiming refugee status under Australian law have failed.⁵ Section 417(1) gives the Minister the power to substitute for the RRT a decision 'more favourable to the applicant' if he or she 'thinks that it is in the public interest to do so'.⁶

In exercising the powers under s. 417, the Minister can take into account the CAT, ICCPR and CROC obligations. Added by amendment to the Migration Act in 1989, this power was intended to balance inflexible regulations with a general discretion.⁷ However in the late 1990s it was increasingly used in the context of failed asylum cases, or applications for protection visas.⁸ It has also been used to achieve major policy objectives. For example in 2003 when the government decided to begin re-processing the applications of people from East Timor who had fled in the early 1990s, (and for whom processing of visa applications had been frozen), it rejected the opportunity to create a special visa category, and instead processed each case individually through the use of s. 417.

The number of applications for s. 417 interventions in 'humanitarian' cases has been consistently high. In 2006-2007, the department received over 4,000 requests for ministerial intervention.⁹ As of February 2008, there were 2,400 requests for intervention being processed by the Department.¹⁰ However the overall success rate on s.417 applications in 'humanitarian' (mainly refugee) cases has typically been as low as 5.1%.¹¹ During his term of office, the then Minister for Immigration, Kevin Andrews, dealt with 1,846 requests for intervention, resulting in 479 intervention acts.¹²

The use of s. 417 has been subject of three major inquiries,¹³ which have been critical of the lack of accountability and of the way in which the Minister has exercised this discretion

⁵ In practice, decisions can also be referred to the Minister by the Department of Immigration, or the RRT or by the individual. Subsection 3 states that the power can only be exercised by the Minister 'personally'.

⁶ **Note: this section is drawn from Susan Kneebone, Chapter 4 'The Australian Story: Asylum Seekers Outside the Law' in Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press, 2009), pp.207-210.**

⁷ Kerry Carrington, 'Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context', Parliament of Australia, (2003-2004) 3 *Current Issues Brief*.

⁸ From 1996 to end 2002 it was used 1,916 times – 1,046 times re RRT decisions and 516 times re MRT decisions: Kerry Carrington, 'Ministerial Discretion in Migration Matters'.

⁹ Topsfield, 'Bigger say for courts on migrants', The Age.

¹⁰ Peter Hughes, 'Answer to the Senate Standing Committee on Legal and Constitutional Affairs', Canberra, 19 February 2008, p. 71, <http://www.aph.gov.au/hansard/senate/commtee/S10636.pdf> (accessed 14 March 2008).

¹¹ Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958* (Canberra: LCRC, 2006), chapter 4, p. 125.

¹² Illingworth, 'Answer to the Senate Standing Committee on Legal and Constitutional Affairs', p. 56.

¹³ Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (Canberra: Commonwealth of Australia, June 2000); Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*; Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958*.

which is non-delegable, 'non-compellable and non-reviewable'.¹⁴ The *Sanctuary Under Review Report 2000*¹⁵ was prompted by the cases of failed asylum seekers, Mr Elmi,¹⁶ and a Chinese woman who was returned to China when she was eight months pregnant. Once there she was subjected to a forced abortion, as she was in breach of the 'one child policy'. The Senate inquiry in 2004 was prompted by allegations of patronage. Increasingly the focus of critics has been upon the procedural aspects of the decision-making process. The lack of transparency which follows from the informal nature of the process¹⁷ and the standardized form of the statements which are required to be made to Parliament are cited as evidence of this problem. In this process the Minister is assisted by a team of fifty persons who investigate and report to the Minister. Applications are first vetted by an officer of the Department and those which come within the guidelines¹⁸ which have been prepared for the exercise of the s. 417 discretion, are passed on to the Minister for personal consideration.

The 2006 committee noted that the government had chosen to ignore the recommendations of the previous inquiries.¹⁹ It concluded that:

If at the end of the day the Government intends to honour Australia's obligations under international treaties and conventions such as CAT, CROC, and ICCPR, then it would make sense to provide for it upfront, rather than giving it to the Minister involved.²⁰

The above was the context in which the complementary protection provisions were introduced into the Migration Act 1958 in 2011. In 2008 the then new Minister for Immigration, Senator Chris Evans famously said that he was 'uncomfortable ... playing God'²¹ through the use of s. 417. The question that the Committee must consider is

¹⁴ Subsection 7 states that the Minister 'does not have a duty to consider whether to exercise the power under subsection (1) ... whether ... requested to do so by the applicant ... or in any other circumstances'.

¹⁵ Senate Legal and Constitutional References Committee, *A Sanctuary Under Review*, chapter 8.

¹⁶ Mr Elmi was a Somali asylum seeker who made a claim for refugee status, based on his membership of a minority clan which had a well-documented history of persecution from the dominant clan in Mogadishu. His claim was rejected on the basis that any harm he faced upon return to Somalia would be because of the generalised situation of civil war rather than for any Convention reason. He had unsuccessfully sought review of his case by the High Court, and he had been refused humanitarian entry by the Minister for Immigration under s. 417 of the Migration Act. The circumstances of his removal are described in Poynder, 'Mind the Gap', pp. 189-190. In *Elmi v. Australia* (Communication No 106/98, UN Doc No CAT/C/22/D/120/1998, 25 May 1999). UNCAT rejected Australia's argument that CAT did not apply. The circumstances of his removal are considered in Mary Crock, 'A Sanctuary Under Review: Where to from here for Australia's Refugee and Humanitarian Program?' (2000) 23 *UNSW Law Journal* 246 at 261-264. See also Senate Legal and Constitutional References Committee, *A Sanctuary Under Review*, chapter 7, 'The Case of Mr SE'.

¹⁷ E.g. the woman *refouled* to China made repeated verbal requests: Carrington, 'Ministerial Discretion in Migration Matters'.

¹⁸ Note the guidelines were amended in 2005 following the 2004 inquiry to include consideration of Australia's obligations under CAT, ICCPR and CROC.

¹⁹ Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958*, para. 4.118.

²⁰ *Ibid.*, para. 4.119 – however it agreed that some ministerial flexibility is required.

²¹ Topsfield, 'Bigger say for courts on migrants', *The Age*. The Immigration Minister has commissioned a report on the use of discretionary powers: Senator Evans, 'Answer to the Senate Standing Committee on Legal and Constitutional Affairs', p. 22. In May 2008 further controversy emerged over the fact that the new Minister

whether it is good governance to reinstate the use of a broad discretionary power with a proven poor record. As the use of s. 417 shows, there is a risk in its use of corruption and favouritism, and idiosyncratic and inconsistent decision-making which brings the process and the office of the Minister for Immigration into disrepute.

A transparent process is needed

The current complementary protection provisions of the Migration Act are broadly consistent with Australia's international obligations. Even without a special procedure Australia is still bound by 1984 CAT, the 1966 ICCPR and the 1989 CROC. A transparent and independent process must be provided to ensure these obligations are met.

As the experience of application of s. 417 shows, there is a risk of lack of transparency in the process. Without the current complementary protection regime, Australia does not otherwise have a 'safety-net' procedure to ensure that it is fulfilling its obligations re the international standard of *non-refoulement*.

As is explained in the Submission on this Bill by the Andrew and Renata Kaldor Centre for International Refugee Law University of New South Wales (to which several of the Castan Centre members for this Submission are also signatory – 'Kaldor Centre Submission'), introduction of a transparent complementary protection system aligned Australian law with comparable provisions in 27 countries. In the absence of the complementary protection provisions Australia does not have such a process.

The current process is working and is transparent

As the Kaldor Centre Submission outlines:

Between 24 March 2012 and 19 November 2013, a total of 55 protection visas had been granted on the complementary protection grounds. This represents a tiny proportion of the thousands of protection visas granted during the same period. (p3)

Thus there is no suggestion that the complementary protection provisions are being over used. Moreover, the fact that the Refugee Review Tribunal (RRT) which makes these decisions is an independent and highly respected merits review tribunal ensures that there is a transparent and efficient process. There is no evidence that the RRT is not performing this role effectively. The Committee thus needs to consider whether there is a demonstrated need for reform \ repeal of the complementary protection provisions.

The Explanatory Memorandum incorrectly describes the application of the complementary protection provisions as 'part of the protection visa process'. This is both incorrect and misleading. In fact they are applied as part of a **separate process** undertaken after a negative conclusion on refugee \ protection visa status at the primary (departmental) stage.

had intervened in only a few cases since taking office – see Refugee Council of Australia, 'Controversy Highlights Need to Reform Refugee Determination System', Press Release, 13 May 2008.

The provisions are applied by the RRT in the exercise of its independent merits review function. Application of the provisions can lead to a protection visa outcome which the government has chosen to confer. But it is misleading to conflate the two-tiered protection visa process (primary plus merits review) with a complementary protection process.

In Conclusion

We submit that the current legislation is both unnecessary and that it will lead to inefficiencies, by turning back the clock to a tried and failed process.

The Explanatory Memorandum refers to the need to 'attend to the issue of complementary protection in other ways'. The problem is that this requires an administrative process and other than the discredited s. 417 process, there is 'no other' way to ensure that *refoulement* does not occur.