centre for advocacy, support and education for refugees

SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS:

INQUIRY INTO THE MIGRATION AMENDMENT (REGAINING CONTROL OVER AUSTRALIA'S PROTECTION OBLIGATIONS) BILL 2013

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Introduction: CASE for Refugees

1. CASE (Centre for Advocacy, Support and Education) for Refugees is a not for profit community legal centre that provides free legal advice, representation and advocacy to refugees, humanitarian visa holders and people from culturally and linguistically diverse backgrounds who live in Western Australia. Since its inception in 2002, CASE has grown to be a primary provider of specialist legal services to refugees and asylum seekers in Western Australia. In 2012/13, we assisted 680 clients from 54 countries. Our work includes the preparation of onshore protection visa applications, and representation at the Refugee Review Tribunal and Migration Review Tribunal. We also assist a significant number of successful offshore humanitarian entrants with family reunion applications.

2. This submission reflects the experience and expertise of CASE for Refugees, as outlined.

Background

3. The Bill amends the *Migration Act 1958* (Cth) to remove the criterion for grant of a protection visa on 'complementary protection' grounds. Complementary protection is an internationally recognised term that refers to non-refoulement obligations accepted by states when they ratify the *International Covenant on Civil and Political Rights*, *Convention on the Rights of the Child*, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the S*econd Opt Protocol to the ICCPR Aiming at Abolition of the Death Penalty*. It complements a state's non-refoulement obligations under the *Refugees Convention* and *Protocol*.

4. The Complementary Protection provisions allow that a person is eligible for a Protection Visa if there are 'substantial grounds for believing that, as a necessary and foreseeable consequence of their removal, there is a real risk that [they] will suffer significant harm'.[1] There is a statutory definition of 'significant harm' in the *Migration Act*:

   A non-citizen will suffer significant harm if:

   (a) the non-citizen will be arbitrarily deprived of his or her life; or
   (b) the death penalty will be carried out on the non-citizen; or
   (c) the non-citizen will be subjected to torture**;** or
   (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
   (e) the non-citizen will be subjected to degrading treatment or punishment**.**[2]

5. A person is not considered to be at real risk of significant harm if she can safely relocate within her country, can obtain protection from her state, or if the risk she faces is one faced by the population generally and not by her personally.[3]

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[1] *Migration Act 1958* (Cth) s 36(2)(aa)
[2] *Migration Act 1958* s36(2A)
[3] *Migration Act 1958* (Cth) s 36(2B)

6. Criminals and people of poor character are exempted from protection, both by clauses within the *Migration Act* that relate to serious crimes,[4] and by the *Migration Regulations* which require all protection visa applicants to undergo character and security checks, including criminal record checks before their visa is granted.[5]

Who does Complementary Protection assist?

7. The experience of CASE has been that Complementary Protection assists a small group of people who are in need of international protection but whose situation does not clearly fit within the *Refugees Convention* definition of a refugee. Typically, this is because the reason the person faces serious or significant harm in their country of nationality is not their race (or ethnicity), nationality, religion, nationality, social group or political opinion.

8. During the period from 24 March 2012 to 15 December 2013, CASE has assisted with the lodgement of 82 protection visa applications. Of these, only 8 were made solely or primarily on complementary protection grounds. Due to processing delays, a decision has only been made on one of them. That was a positive decision made by the Department, without the need for review.

9. All of the 8 complementary protection applications, CASE has lodged were for women and/or children who faced a harm within their family or close community in countries where law enforcement agencies were unable or unwilling to protect them from that harm.

10. All of the applicants entered Australia by air with a valid passport and Australian visa.

Repealing Complementary Protection provisions will result in additional costs, delay and inefficiency

11. In his Second Reading speech in relation to the Bill, Minister Morrison suggested that the small number of people utilising the complementary protection provisions meant that consideration of their claims in the protection visa process was 'costly and inefficient'. [6] CASE's view is different.

12. The alternative scheme, in place prior to the introduction of the complementary protection provisions, and the one to which the Government seeks to return, required applicants to apply for a protection visa, *even when they knew they did not qualify*. They then needed to wait several months for a Departmental interview in order to have their claims assessed by an officer of the Department. In most cases, the Department had the cost of providing an interpreter for that interview. The officer then had to write a detailed decision refusing the application.

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[4] *Migration Act 1958* (Cth) s 36(2C)
[5] *Migration Regulations 1994* (Cth) Sch 2, cl 866.225; Sch 4, cl 4001, 4003A
[6] Scott Morrison MP, Second Reading Speech: Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, 4 September 2013, House of Representatives.

13. Following the negative decision, the person seeking complementary protection had to apply to the Refugee Review Tribunal, even though she and her legal representatives knew that the application did not have any prospect of success. She then had to wait for a hearing date while the Tribunal Member researched her case. Finally, a hearing was provided and the Member was required to provide a written decision.

14. Finally, after receiving a negative decision from the RRT, the complementary protection applicant was permitted to ask the Minister to exercise his power under s 417 of the *Migration Act* and grant her a visa on complementary protection grounds. Still more delays ensued, as the Department assessed her claims against the Minister's Guidelines and, after finding they were met, referred the matter to him or her for consideration.

15. In short, the process was uncertain and stressful for applicants, and expensive and time-consuming for the Department.

Repealing the Complementary Provisions will remove Australia's capacity to meet its international obligations

16. The Minister for Immigration and Border Protection has stated that the government intends to meet its non-refoulement obligations under the ICCPR and CAT through reliance on his 'personal and non-compellable intervention powers to consider granting a visa'.[7]

17. In the view of CASE, this is an inadequate and unreliable mechanism for ensuring that people at risk of torture and death are identified and protected. Firstly, the power to which the Minister refers is non-compellable,[8] meaning that there is no legal process by which the Minister can be required to consider using his power. Secondly, the power must be exercised personally by the Minister and is non-reviewable. Thirdly, the power is not transparent, with no requirement for the Minister to provide reasons or allow potential applicants procedural fairness.[9]

18. While the safeguards of review, transparency and procedural fairness may at times appear inconvenient from a policy perspective, where the consequences of an incorrect decision are that a person is killed or tortured, it is essential that the system adopted by Australia takes advantage of all available mechanisms to minimise the potential of an incorrect decision being made. In our view, a power with the characteristics of s 417 is unable to sufficiently guarantee that. This position is supported by UNHCR, which after studying the Complementary Protection regimes in sample countries with varying legal systems and refugee protection regimes, concluded:

> It is suggested that states employ a single asylum procedure which will look at both the 1951 Convention refugee definition as well as the criteria suggested

[7] Scott Morrison MP, Second Reading Speech: Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, 4 September 2013, House of Representatives.
[8] *Migration Act 1958* (Cth) s 417(7).
[9] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636

above for non-Convention refugees. Preferably in each case, determination officers should examine the 1951 criteria first before move on to the grounds for non-Convention refugee protection. Any status determination procedure should be accompanied by adequate safeguards, such as a right of appeal. Moreover, there is no sound basis for adoption different standards of proof.[10]

19. The current regime includes statutory definitions of significant harm, which are derived from international instruments and case law. CASE has found that this has enabled us to advise clients on their prospects of success more reliably than we could under the previous system. Given that the Minister's intervention powers under the Act do not *require* him or her to assess an applicant's risk of significant harm, much less make public which, if any, international precedents and decisions will be applied in assessing that, it is very difficult to provide accurate advice under such a scheme. We envisage this that returning to that system may substantially increase the number of claims as potential applicants as a result.

Recommendations

20. CASE for Refugees recommends that the Bill not be passed. We consider that repeal of the complementary protection provisions will have a detrimental impact on processing times, efficiency of the system, the wellbeing of asylum-seekers, the quality of decision-making and predictability of outcomes. Importantly, we have real concerns that Australia will be less able to meet its international obligations if this Bill passes.

[10] UNHCR, Legal and Protection Policy Research Series, 'Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection') PPLA/2005/02 (June 2005).