



Submission to the Inquiry into the Migration Amendment
(Regaining Control Over Australia's Protection Obligations)
Bill 2013

23 January 2014

1. Introduction

The Asylum Seeker Resource Centre (ASRC) is Australia's largest not-for profit asylum seeker organisation in Australia. Provision of legal assistance to asylum seekers is an integral part of our work and we have proudly advocated for thousands of asylum seekers at all stages of the Australian Refugee Determination Process since we opened our doors to asylum seekers in 2001. As such we believe we are perfectly placed to provide an insight from a practical perspective on the importance of the Australian complementary protection regime and the Australian government's compliance with its non-refoulement obligations under international law.

The ASRC is strongly opposed to the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. We believe that, if implemented, it will result in a return to a mechanism whereby the Minister is required to consider more than 2000 applications per year to determine whether any of them engage Australia's obligation to respect the international principle of non-refoulement. This legislation will result in a return to a highly criticised, inefficient, ineffective system that lacks transparency and does not afford natural justice or procedural fairness to individuals seeking protection in Australia. It will put vulnerable people's lives at risk and breach the Australian government's obligation to uphold basic principles of international law.

At the core of this submission we will address:

- The background and need for the introduction of a complementary protection regime in Australia
- The implementation of complementary protection
- Unfounded criticism of Australia's complementary protection regime
- What will happen if complementary protection is repealed

2. Background

The Refugee Convention requires nations to provide protection to people with a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group. Australia is a signatory to the Convention and codified its protection obligations within the Migration Act 1958.

Australia is also a signatory to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC), which all require nations not to return people to countries where they face a real risk of:

- Torture
- Cruel or inhuman treatment or punishment
- Degrading treatment or punishment
- Arbitrary deprivation of life

- The death penalty

In March 2012, these non-refoulement obligations under the ICCPR, CAT and CROC were also codified within the Migration Act as complementary protection.

Now, the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 seeks to repeal the fair and transparent process of complementary protection for those seeking broader protection from life-threatening harm, to return to Ministerial decision-making.

3. Non Refoulement – Australia's obligations

In order to understand the importance of the debate currently before parliament, one must have a clear understanding of the reach of the principle of non-refoulement. In particular, it must be understood that non-refoulement is guaranteed beyond the framework of the Refugee Convention.

In accordance with the principle of non-refoulement, Australia is prohibited from removing an individual to a country where they face persecution resulting in torture, cruel, inhuman and/or degrading treatment or punishment. The principle of non-refoulement stems from the right enshrined in Article 14 of the Universal Declaration of Human Rights to seek and enjoy in other countries freedom from persecution.

The principle of non-refoulement is codified in Article 33 (1) of the 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention). Additionally, the CAT expressly forbids state parties from returning any individual, regardless of whether they meet the definition of a refugee, to a country where they face torture,¹ and the ICCPR implicitly forbids it under Articles 6 and 7. Australia has ratified both treaties and is bound by international law to respect and enforce these provisions, regardless of whether the individual facing such harm is found to be a refugee as defined by the Refugee Convention.

4. What is complementary protection?

Complementary protection is simply a codification of the guarantee of protection against refoulement for individuals who are facing significant harm, for reasons other than the five Refugee Convention reasons.

Complementary protection is the most effective and transparent way for Australia to honour its commitment to uphold its broader non-refoulement protection obligations under the CAT, the ICCPR and the CROC.

Australia is not alone in recognising the importance of this codification. Similar regimes can be found in the Canadian Immigration and Refugee Protection Act (2001), the European

¹ CAT Article 3.

Council Qualification Directive (2004) and the New Zealand Immigration Act (2009), to name a few.

5. Why was complementary protection introduced?

Whilst the Migration Act 1958 (Cth) upheld the principle of non-refoulement established by the UN Refugee Convention, until the introduction of the complementary protection regime was introduced in 2012, there was no codification of the same obligation under other international human rights instruments.

This was irrational. Prior to this time, there were two different decision making processes established for people claiming protection as a refugee and those seeking protection from harm for a broader reason than that of race, religion, nationality, political opinion or membership of a particular social group. Those people not fitting the Refugee Convention definition were only able to access protection by Ministerial Intervention; a non-compellable, non-reviewable process with no procedural safeguards or transparency.

It meant there was a fair, accountable, reviewable process for one group facing life-threatening harm and a non-compellable, non-reviewable process for another. The consequences of a negative protection assessment would be equally as life threatening for both categories of individuals; but the decision making process to which each category was subjected was significantly different in terms of achieving basic notions of justice. In March 2012 this legislative anomaly was rectified with the insertion of the complementary protection regime into the Migration Act.

The introduction of complementary protection was the result of many years of careful consideration and debate. It was not a legislative amendment that was made lightly. It was made in response to wide concern about the inefficient and unsatisfactory process of leaving non-refugee protection decisions to the Minister under the section 417 non-compellable, non-reviewable powers. This concern was expressed by:

- United Nations bodies;
- Australian Senate Committees;
- Australian Human Rights Commission; and
- Australian civil society.

6. International calls for a complementary protection regime in Australia

In 2005 the UNHCR Executive Committee of the High Commissioner's Programme recognised the importance of complementary protection regimes as a positive way of ensuring that individuals who fall outside of the definition of the Refugee Convention were duly granted protection.² The UNHCR Executive Committee encouraged States:

² UN High Commissioner for Refugees (UNHCR), Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, 7 October 2005, No. 103 (LVI) - 2005, available at: <http://www.refworld.org/docid/43576e292.html> [accessed 19 January 2014] (paragraph i).

*“to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs [...]”*³ and noted that such a system should be *“fair and efficient.”*⁴

In 2008, the UN Committee Against Torture, examining Australia’s compliance with its international obligations stemming from the Convention Against Torture, expressed concern that:

*“the prohibition of non-refoulement is not enshrined in the State party’s legislation as an express and non-derogable provision, which may also result in practices contrary to the Convention. The Committee also [noted] with concern that some flaws related to the non-refoulement obligations under the Convention may depend on the exclusive use of the Minister’s discretionary powers thereto.”*⁵

The Committee recommended that Australia:

*“should explicitly incorporate into domestic legislation, [...] the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice. The State party should also...adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister’s discretionary powers to meet its non-refoulement obligations under the Convention.”*⁶

In 2009, the UN Human Rights Committee, expressing concern about reports of “cases in which the State party has not fully ensured respect for the principle of non-refoulement,”⁷ recommended that Australia:

*“should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.”*⁸

Also in 2009, The Office of the United Nations High Commissioner for Refugees (UNHCR) commented on the need for a legislative approach to assessing all matters concerning non-refoulement:

³ Ibid paragraph q.

⁴ Ibid paragraph r.

⁵ UN Committee Against Torture (CAT), Concluding observations of the Committee against Torture : Australia, 22 May 2008, CAT/C/AUS/CO/3, available at: <http://www.refworld.org/docid/4885cf7f0.html> [accessed 16 January 2014]

⁶ Ibid

⁷ UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Australia, 7 May 2009, CCPR/C/AUS/CO/5, paragraph 19, available at: <http://www.refworld.org/docid/4a129b130.html> [accessed 16 January 2014]

⁸ Ibid

“UNHCR particularly welcomes the intention to enable claims for complementary protection under international human rights treaties to be considered “in a transparent process that is subject to merits review and scrutiny by the courts”⁹

As such, there could not be a clearer message from international bodies that a transparent, efficient, clear and independent complementary protection process needed to be put in place.

7. Committees of Inquiry recommend the introduction of complementary protection

For almost 12 years there was ongoing consideration by Australian parliamentary bodies regarding the flawed ministerial intervention powers for people other than refugees in need of Australia's protection.

As early as 2000, the Senate Legal and Constitutional References Committee examined the question of the appropriateness of the minister's discretionary powers to implement Australia's international obligations, in its report “A Sanctuary Under Review” (June 2000).

In 2004 the Senate Select Committee's Inquiry into Ministerial Discretion in Migration Matters recommended:

“that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.”¹⁰

The Committee concluded that:

“[t]here is a serious risk that Australia is in continuing breach of Article 2 of the ICCPR because it does not have appropriate systems in place to provide 'effective remedies' for breaches of human rights instruments. It also seems likely that the discretionary process is an inadequate mechanism for offering protection from refoulement because it is incompatible with the obligation under Article 3 of the CAT, which is considered to be 'absolute'.¹¹ [T]he Committee concludes that in the future complementary protection might be a significant and positive development towards eliminating the risk of Australia being in breach of its international human rights obligation. Complementary protection has the potential to enable migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Convention asylum seekers who are in genuine need of humanitarian protection.”¹²

⁹ http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09_000.pdf (paragraph 5)

¹⁰ Senate Select Committee on Ministerial Discretion in Migration Matters, March 2004, paragraph 8.82, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/report/c08.

¹¹ Ibid, paragraph 8.86.

¹² Ibid paragraph 8.94.

In February 2008, the then Minister for Immigration and Citizenship, Senator the Hon. Chris Evans, appeared before the Standing Committee on Legal and Constitutional Affairs. Senator Evans stated:

“In a general sense I have formed the view that I have too much power. The act is unlike any act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm.”¹³

In an independent report commissioned by Senator Evans, Elizabeth Proust commented on the proposed introduction of complementary protection:

“[t]his proposal has the advantage of transparency, efficiency, accountability and, for the applicant gives more certainty and reduces the time involved in the processing. For the Minister, it would be a significant reduction in workload.”¹⁴

8. The Migration Amendment (Complementary Protection) Bill 2009

In 2009, the Migration Amendment (Complementary Protection) Bill 2009 was introduced and was referred to the Senate Legislation Committee on Legal and Constitutional Affairs, for inquiry and report.¹⁵ In its report the Committee recommended that the Bill be passed. It described the essence of the complementary protection Bill, stating:

“[i]t ensures that all people who may be owed Australia’s protection have access to the same transparent, reviewable and procedurally robust decision-making framework that is currently available to applicants who make claims under the refugees convention.”¹⁶

The Committee went on to describe the ministerial intervention process as “widely considered to be inefficient and unnecessarily burdensome on all parties.”¹⁷ The Committee quoted from the submission it received from the Department of Immigration and Citizenship:

¹³

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F10636%2F004%22>.

¹⁴ Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations, Elizabeth Proust, 31 January 2008 at page 11 (available at <http://www.nswbar.asn.au/circulars/july/proust.pdf>).

¹⁵ http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/migration_complementary/report/report.pdf (paragraph 1.1).

¹⁶ http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/migration_complementary/report/report.pdf (paragraph 1.6)

¹⁷ Ibid paragraph 1.11.

“The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister’s personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia’s other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.”¹⁸

Finally, the Committee, recommending that the Bill be passed, stated:

“The committee is mindful that the community would expect claims of the type and gravity dealt with in this Bill to be dealt with through a process that affords natural justice and access to independent merits review. On the whole, the committee considers that this Bill achieves that outcome.”¹⁹

In a submission to the 2009 Senate Standing Committee on Legal and Constitutional Affairs Inquiry, the Australian Human Rights Commission (the Commission), recommended the introduction of complementary protection. It highlighted one of the dangers of the ministerial intervention system that the current government proposes to reintroduce:

“One of the effects of the current system of Ministerial discretion in these cases is the possibility of prolonged immigration detention, which may lead to breaches of article 9(1) of the ICCPR. To get to the stage at which exercise of the Minister’s section 417 discretion may be considered, asylum seekers must first make an application for a refugee protection visa and apply for review of that decision. It is not until they have exhausted that process that they can be considered by the Minister under section 417. Once they reach the section 417 stage, the process can take months. Overall, the process can take years. This is particularly inefficient as it requires people who fear harm if returned to their country of nationality, but who do not fall within the definition of refugee, to frame their claim as one for refugee status so that their real claim can be assessed at the end of that process. This means that resources are expended and costs incurred in assessing claims that may be unmeritorious as refugee claims, but are compelling as claims for the protection of human rights.”²⁰

¹⁸ Ibid.

¹⁹ Ibid paragraph 3.46.

²⁰ Australian Human Rights Commission (AHRC), Inquiry into the Migration Amendment (Complementary Protection) Bill 2009, September 2009, paragraphs 13 & 14. available at: <http://www.refworld.org/docid/4ec3b9152.html>. [accessed 20 January 2014]

Civil society organisations made 36 submissions²¹ to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry and were supportive of the proposed introduction of complementary protection.

Unfortunately the 2009 Complementary Protection Bill was not debated and lapsed. The bill was reintroduced in 2011 and finally came into effect on 24 March 2012.

9. Complementary protection introduced

The Migration Amendment (Complementary Protection) Bill 2011's Explanatory memorandum stated:

"The purpose of the amendments in this Bill is to establish an efficient, transparent and accountable system for considering complementary protection claims, which will both enhance the integrity of Australia's arrangements for meeting its non-refoulement obligations and better reflect Australia's longstanding commitment to protecting those at risk of the most serious forms of human rights abuses."²²

a. How the mechanism works

The Australian complementary protection regime came into effect on 24 March 2012. Since then, an individual seeking to engage any of Australia's non-refoulement obligations makes an application to the Department of Immigration and Border Protection. Pursuant to section 36 (2)(a) of the Migration Act, applicants have their claims assessed against the Refugee Convention to determine whether the harm feared is found to be for the reasons of race, religion, nationality, political opinion or membership of a particular social group. If the harm feared is found not to be for a Refugee Convention reason, the same decision maker will assess the applicants claim for protection under the complementary protection criteria set out in section 36 (2) (aa) of the Migration Act.

The mechanism for assessment is the same for both categories of protection; with initial assessment by the Department of Immigration and the right to the review of a negative decision by the Refugee Review Tribunal (RRT). In both instances, the applicant has the right to give evidence in person, receive representation by a migration agent, respond to any adverse information, and will receive written reasons if the decision is negative. A negative decision under section 36 (2) (a) and/or 36 (2)(aa) of the act can be subject to review by the Federal Magistrates Court if the decision maker has made an error of law in their reasoning. At all stages of the process, principles of natural justice apply. If an applicant is successful at the Department or the RRT they will be eligible for a protection visa once they have undergone the final character and health checks.

²¹ http://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd079#_ftn22.

²² <http://parlinfo.apf.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4522%22>.

b. Case studies

The ASRC would urge the Committee to keep at the forefront of its mind whilst considering this Bill that complementary protection exists for a very important purpose – to protect incredibly vulnerable human beings from torture and other serious forms of harm. The human face to this debate is sometimes lost in political rhetoric and jargon.

The ASRC believes that to properly understand the gravity of a decision to repeal complementary protection, one must understand the nature of the cases that have been decided under the regime. It is also important to consider what would have happened if those successful applicants did not have the benefit of their cases being considered under a fair, transparent, efficient process with a right to review. These human beings; all with a personal story, emotions, feelings, hopes, dreams and aspirations, face a real risk of arbitrary deprivation of life, the death penalty, torture, cruel, inhuman or degrading treatment or punishment if removed from Australia to a country where the state could not protect them from such harm.

As indicated in the submission to this Committee from Professor Jane McAdam et al, a summary of these cases can be found on the Kaldor Centre for International Refugee Law website.²³ It is not possible to summarise all of these cases in this submission. However, some notable decisions where the RRT concluded that applicants were eligible for complementary protection include:

- The case of a mentally unwell man from Ghana who would be sent to a “prayer camp” where people in his situation might be subjected to verbal and physical abuse, denied medical treatment and “*chained up to logs, trees or other fixed spots, [...] for 24 hours a day. Many had to eat, sleep, defecate and urinate in the same spot. They are also regularly denied food and drink in order to get rid of “evil spirits.”*²⁴
- A man from Nepal who the RRT found to have “*provided information to the police in Nepal which led to the arrest and imprisonment of [a number of] drug dealers. The Tribunal [accepted] his claim that members of his family have been subjected to intimidation and threats by persons involved in the drug trade; and that those persons have threatened to kill the applicant for being a police informant.*”²⁵ The RRT accepted that the applicant and his family were now at even greater risk because the drug dealers had been released from prison and the authorities would not be able to provide him with protection against them.
- An applicant from Afghanistan at risk of armed robbery, kidnapping and shooting while travelling on roads where there is no state protection.²⁶ The applicant has a wife and a number of young children and the RRT accepted that he would “*need to travel on a regular basis to obtain medical care for himself or his family.*”²⁷

²³ http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/australian_cp_successful_fc_26_10_13.pdf

²⁴ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/633.html> paragraph 38.

²⁵ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/374.html> paragraph 33.

²⁶ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/469.html> paragraph 81 & 82.

²⁷ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/469.html> paragraph 80.

- Another applicant in Afghanistan was found to face harm at the hands of an individual who had already murdered the applicant's father and was engaged in a land dispute.²⁸
- An applicant who, if returned to Iraq, would be subject to a state sanctioned "honour killing" for committing adultery.²⁹
- Several applicants from Syria who were found to be personally at risk of arbitrary deprivation of life because they lived in a region currently being disputed between government and rebel forces.³⁰
- An Albanian applicant who was at risk of arbitrary deprivation of life out of revenge for a blood feud occurring between two relatives and the applicant would receive no state protection because the authorities of Albania are unable to address the problem of blood feuds.³¹

It is impossible to say whether these applicants would have been afforded protection under the previous system of ministerial intervention. However, as will be highlighted below, if they were subjected to the system of ministerial intervention, they would have been one of thousands of cases considered personally by the Minister, with little if any opportunity to give evidence in person to support their case, no transparency as to the reasoning used by the Minister to make his/her decision and no opportunity to appeal an unfavourable decision. It is particularly telling that these cases were decided by the RRT. That is to say, their applications for protection were initially rejected by the Department of Immigration and Border Protection and it wasn't until their cases were considered by an independent, expert tribunal that they were found to be eligible for protection.

10. Unfounded and misleading criticism of complementary protection

Some criticism of the complementary protection mechanism has been made by the current government and the Department of Immigration and Border Protection. This criticism is misleading and incorrect.

a. "Another product on the shelf for people smugglers"

Minister Morrison has described complementary protection as "*another product on the shelf for people smugglers*."³² As argued above; this is a very misleading assertion. Although the

²⁸ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/635.html> paragraph 70.

²⁹ <http://www.austlii.edu.au/au/cases/cth/RRTA/2012/1069.html> paragraph 85.

³⁰ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/288.html> and <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/287.html>.

³¹ <http://www.austlii.edu.au/au/cases/cth/RRTA/2013/82.html>.

³² Minister Morrison – Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 – Second Reading

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F72de5436-cc84-439a-b82f->

ASRC does not agree with this simplified, politicised language used by the government; if we must use the same analogy, then the 'product' is actually the international principle of non-refoulement. This is not 'another product'. The principle of non-refoulement exists under the ministerial intervention mechanism as well. Complementary protection did not create the principle of non-refoulement; it just sought to ensure that it was applied consistently, openly and fairly. Indeed, the Minister himself asserts in his introduction of the Bill that "*the principle of non-refoulement should be and is upheld in this Bill.*"

Under this absurd claim, this legislation would see the Minister 'responsible for selling a product to people smugglers' through the process of ministerial intervention. Fair application of the principle of non-refoulement is not a 'product sold by people smugglers'; it is a well-entrenched principle of international law that Australia must respect and apply.

b. Protection visas under complementary protection being granted to undesirable people

The second criticism put forward by the Department of Immigration and Border Protection is that complementary protection has been used to benefit people involved in criminal gangs.³³ However this is baseless, as applicants for complementary protection are excluded from the grant of a protection visa pursuant to section 36 (2C) of the Migration Act.³⁴

c. Interpretation by the courts

The third criticism put forward by the government is that the extent of Australia's protection obligations under the ICCPR and the CAT has been broadened by interpretation by the Courts "beyond the Government's view of what is required under international law".³⁵ There is criticism of the fact that the courts have "equated the threshold of 'real risk' that a person will suffer significant harm with the threshold of a 'real chance' as applied under the Refugees Convention" suggesting that the correct threshold test to apply is "a 'more

[89066b3333e9%2F0048;query=BillId_Phrase%3A%22r5155%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=5](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_bill/Submissions) .

³³ Department of Immigration and Border Protection Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations (Bill 2013) page 5, available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_bill/Submissions.

³⁴ Migration Act 1958 section 36.

"Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

³⁵ Department of Immigration and Border Protection Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations (Bill 2013) page 5.

probable than not' risk of harm, that is, as more than a 50 per cent chance of suffering significant harm."

This criticism is particularly insidious. In a common law system, it is precisely the role of the courts to apply and interpret the law. In 1989 in the case of *Chan v Minister for Immigration and Ethnic Affairs* the High Court of Australia interpreted the test under s 36(2)(a) of the Migration Act as a 'real chance' that the applicant will face persecution for a Convention reason if returned to the applicant's country of nationality.³⁶ If the courts now decide, upon transparent legal reasoning that the correct interpretation of the law under section 36 (2) (aa) (complementary protection) is that the threshold of risk should be analogous to the 'real chance' threshold required under the refugee convention and affirmed in *Chan*, then the government must respect this interpretation.

In the case of the *Minister for Immigration and Citizenship v MZYLL [2012]*, before the Full Federal Court of Australia, the Minister did not challenge the argument that the standard of proof to be applied for complementary protection should be analogous to the 'real chance' (i.e. lower than 'more likely than not') test applied in refugee cases under s 36 (2) (a).³⁷

In the case of *Minister for Immigration and Citizenship v SZQRB [2013]* the Full Federal Court held that the correct test for complementary protection is the same 'real chance' test applied for Refugee Convention applicants under s 36 (2)(a).³⁸ The High Court subsequently refused the Minister special leave to argue this point,³⁹ and therefore, as it stands, the correct test to be applied under Australian law is the real chance test – analogous to the test applied when considering applications for protection under the Refugee Convention.

It should not come as a surprise to the Senate Legal and Constitutional Affairs Legislation Committee that the question of the standard of proof for complementary protection has been left to the Courts to decide. This issue was raised in several submissions to this Committee in 2009 and indeed, the unclear wording of the proposed legislation on this point was reported by the Committee in its report in 2009.⁴⁰

It should also be noted that under comparative law and international law, there is strong jurisprudence and commentary to suggest that in Australia the threshold test applied to complementary protection is rightly analogous to the 'real chance' test applied under the Refugee Convention.

In 1997, the UN Committee Against Torture, in its first general comment stated:

³⁶ *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 per McHugh J at 429 and Mason CJ at 389, Dawson J at 398, and Toohey J at 407.

³⁷ "The Tribunal held, and the Minister does not now challenge, that in assessing "real risk ... of significant harm" to the non-citizen under s 36(2)(aa) of the Act, that question may be resolved by asking whether there is a "real chance" that the non-citizen will suffer significant harm if he is removed from Australia to the receiving country: Decision at [153]-[154]" *Minister for Immigration and Citizenship v MZYLL* [2012] FCAFC 147, [2012] FCAFC 147, Australia: Federal Court, 24 October 2012 at paragraph 31.

³⁸ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 paragraph 246.

³⁹ *Minister for Immigration and Citizenship v SZQRB* [2013] HCATrans 323 (13 December 2013).

⁴⁰ Report - Senate Legal and Constitutional Affairs Committee, Migration Amendment (Complementary Protection) Bill 2009 (Cth of Australia, Canberra, 2009) Paragraphs 3.8 to 3.19.

“Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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.”⁴¹

The UN Human Rights Committee now looks at the ‘real risk’ of harm such as that considered by articles 6 and 7 of the ICCPR when considering individual communications. In the individual opinion by UN Human Rights Committee members of the 2011 UN Human Rights Committee case of *Pillai v Canada*,⁴² the Committee stated that:

“Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, [...], demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a "necessary and foreseeable consequence" of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.”⁴³

The UNHCR stated in 2009, in relation to the proposed Australian complementary protection regime:

“UNHCR is of the view that there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection. The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face, are all arguments in favour of adopting an approach that is no more demanding for people potentially in need of complementary protection than it is for refugees. It would be desirable to include the standard of proof in legislation to ensure consistency”⁴⁴

In New Zealand, where the complementary protection regime is implemented through the Immigration Act 2009, in the case of *AK (South Africa) [2012] NZIPT 800174 (16 April 2012)*, the Immigration and Protection Tribunal New Zealand held that:

“as to the “in danger of” threshold, it signals a degree of risk which is less than the balance of probabilities but more than mere speculation or conjecture. [...] It is a threshold analogous to the real chance threshold long-established in refugee law.”⁴⁵

⁴¹ UN Committee Against Torture (CAT), General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), 21 November 1997, A/53/44, annex IX, available at: <http://www.refworld.org/docid/453882365.html> [accessed 20 January 2014] Para 6.

⁴² *Pillai v Canada* (Communication No. 1763/2008) available at http://www.worldcourts.com/hrc/eng/decisions/2011.03.25_Pillai_v_Canada.pdf

⁴³ *Ibid.*

⁴⁴ http://www.unhcr.org/au/pdfs/UNHCRPaper6Jan09_000.pdf Paragraph 25.

⁴⁵ *AK (South Africa) [2012] NZIPT 800174 (16 April 2012)*. <http://www.nzlii.org/nz/cases/NZIPT/2012/800174.html> paragraph 79.

In the United Kingdom, when considering a case regarding non-refoulement and a potential violation of Article 3 (torture) of the European Convention on Human Rights, the UK Supreme Court stated:

“It is well established that a breach of Article 3 of the ECHR is proved “where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment” (Vilvarajah v UK (1991) 14 EHRR 248 para 103. [...]It would add considerably to the burdens of hard-pressed immigration judges, who are often called upon to decide claims based both on the Refugee Convention and the ECHR at the same time, if they were required to apply slightly different standards of proof to the same facts when considering the two claims.”⁴⁶

The ASRC strongly believes that the ‘real chance’ threshold (i.e. lower than ‘more likely than not’) is the correct test to apply for complementary protection applications. It is an interpretation of the law that is consistent with jurisdictions in other countries and it is consistent with the international instruments that the complementary protection regime was designed to reflect in Australian law.

Given the overriding humanitarian objective of granting protection both under the Refugee Convention and complementary protection, and the fact that the consequences for wrongfully returning an individual to face harm are life-threatening for both categories of individuals, it would be illogical and dangerous for the same decision maker to have to apply two different standards of proof to the same set of facts for the same applicant which, if applied incorrectly, will result in life-threatening danger for the applicant and a breach of international law by the Australian state.

11. What will happen if complementary protection is repealed?

In order to understand how this system will work if the Bill is passed, one must consider how it operated prior to the introduction of complementary protection in 2012.

As has been highlighted above, applying ministerial discretion to questions of non-refoulement was an inadequate mechanism which lacked transparency and accountability; a mechanism that afforded no certainty to the applicant, no right to procedural fairness or natural justice, no consideration by an expert independent body and no right to judicial review by the Courts.

a. A return to an inefficient decision making process

Ministerial intervention was an incredibly inefficient mechanism for applicants seeking to engage the consideration of Australia’s non-refoulement obligations. Prior to lodging an application for ministerial intervention under section 417 of the Migration Act, an applicant was required to lodge an application for protection under section 36 of the Migration Act, and

⁴⁶ MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at paragraphs 12 & 13.

have that application assessed by the Department of Immigration and the Refugee Review Tribunal. This procedure was a requirement, regardless of whether there was no question or assertion that the applicant did not fit the definition of a refugee and was seeking protection for reasons connected to Australia's obligations under the ICCPR, the CAT or the CROC. Essentially, the applicant was required to apply in an erroneous system just in order to get access to the Minister.

In practical terms, this drawn out and inefficient system had devastating consequences for applicants who fell within this category. For those living in the community, it meant a long wait, going through a process that was not designed for them. This caused unnecessary anxiety and uncertainty to the applicant and expense to the Department of Immigration and the RRT. Applicants going through this time consuming and costly process, accruing a debt to the Commonwealth upon rejection at the RRT, were exposed to an unfair system nobody would expect of a thriving democratic nation which honours the separation of powers and the rule of law. For those applicants in immigration detention, having to go through this process meant a long wait in detention; possibly resulting in Australia violating international law due to arbitrary detention as noted in the Australian Human Rights Commission submission cited above.

It was the ASRC's experience, advocating for individuals facing many forms of significant harm that are protected under the ICCPR, the CAT and the CROC, that many of our initial requests for ministerial intervention under s 417 were rejected by the Minister on the first occasion. Often we were required to submit three or more requests to the Minister. On some occasions, despite submitting important new supporting evidence that had not been considered by the Minister, subsequent applications were rejected without further consideration by the Minister. On other occasions we were forced to engage in the slow and costly (both for the State and the applicant) process of submitting an individual communication to the UN treaty bodies such as the Human Rights Committee before the Minister would intervene. When the Minister did intervene, the client was not granted a protection visa, but a seemingly unrelated visa such as the Former Resident (subclass 1510 visa).

The additional trauma created by this system, for already incredibly vulnerable individuals, was cruel and unnecessary. If their cases were considered today under the complementary protection regime, they most certainly would be found to be eligible for a protection visa under section 36 (2) (aa) – and most likely at the first instance or upon review by the RRT, without ever having to apply to the Minister.

b. A return to an unfair and untenable decision-making process

Under the previous system of ministerial intervention, once rejected by the RRT, an applicant for protection for non-refugee related reasons was subjected to an incredibly unfair process which lacked transparency.

The applicant would send a written request to the Minister to intervene and honour Australia's international protection obligations. In our experience applicants for ministerial intervention were almost never invited to give evidence in support of their application or to rebut any potentially negative findings. The applicant would simply receive a letter stating

that the Minister had decided not to use his or her powers under section 417. To add to the unfair nature of this mechanism, the applicant was not permitted to have that unfavourable decision reviewed by the Courts.

For a person facing death or torture, this lack of transparency was beyond comprehension. It is analogous to an individual on death row submitting his or her defence in writing and then not being permitted to give evidence, attend a trial or to hear the judge's reasons for an unfavourable decision. To use the same death row analogy; the defendant would have no right to appeal the conviction or the sentence.

In a country that prides itself on the rule of law, a mechanism completely lacking in natural justice and procedural fairness falls well short of any notion of justice. No one person should have the final responsibility of deciding the fate of an individual facing death or torture if returned to a country of risk; of "playing God" as described by Minister Evans.

Upon examination of the official figures from the Department of Immigration from the past five years,⁴⁷ it would appear that the Minister had an untenable level of responsibility responding to requests for ministerial intervention under section 417. The figures below demonstrate the sheer number of 417 applications received and processed every year.

Year	Requests received	Requests finalised ⁴⁸	Requests finalised by the Minister	Visas Granted
2012 – 13	2021	510	151	435
2011 – 12	2031	612	862	458
2010 – 11	2467	2958	1952	375
2009 – 10	2453	3128	2025	563
2008 – 09	2845	2705	1787	610

It is difficult to comprehend how the Minister could possibly give the level of thought and consideration required to so many matters, where a negative determination could possibly be a question of life and death for the applicant. In 2009-10, for example, the Minister personally signed off on 2025 requests. If the Minister worked all 52 weeks of the year, he would have been required to finalise almost 40 applications per week. There were also a further 3128 requests finalised that year; presumably, for at least some of the applications, because the requests were deemed inappropriate by staff at the Ministerial Intervention Unit and were not forwarded to the Minister for consideration.

Based on these figures, it is impossible to imagine how the current Minister can assert that moving back to the system of ministerial intervention for complementary protection matters will be a better way to "*ensure that where a person raises claims that are found to engage Australia's non-refoulement obligations under the CAT and the ICCPR they will not be*

⁴⁷ <http://www.immi.gov.au/about/reports/annual/2010-11/html/outcome-2/protection-visas-onshore.htm#table50> & <http://www.immi.gov.au/about/reports/annual/2012-13/pdf/2012-13-diac-annual-report.pdf> (page 129)

⁴⁸ Described in the report as "this category includes request finalised as inappropriate to consider, or no power under section 417 and repeat requests not referred to the Minister as they do not meet the guidelines." And "Total requests finalised include finalisations by the minister, department and client withdrawal."

*removed from Australia in breach of these obligations but, rather, dealt with in the most appropriate manner to resolve their case.*⁴⁹

This reliance on an individual's non-compellable, non-reviewable powers to determine questions of life and death are inappropriate in any circumstance; particularly in light of the sheer number of applications being considered by the Minister as highlighted above. It is particularly inappropriate when that decision-maker is also in charge of developing asylum seeker policy for the Nation. Politics and party-policy must play no role in the determination of an individual's plea for life-saving protection.

12. Conclusion

Repealing complementary protection provisions from the Migration Act would be a huge step backwards for human rights in Australia. If the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill is successful, it will destroy a mechanism that took more than a decade of careful consideration to create. It will result in a return to a mechanism that places extraordinary power and responsibility into the hands of one individual, an individual who will be required to carefully assess more than 2000 applications per year to ensure that our protection obligations as a nation are not breached. It will replace an effective and transparent mechanism with one that has been shown to be inefficient, lacking in transparency, lacking in accountability, and providing no judicial fairness or natural justice to individuals who have come to Australia seeking freedom from arbitrary deprivation of life, torture and other significant forms of harm.

The name of the Bill is as misleading as the justification provided by the government for its introduction. The principle of non-refoulement exists and will continue to exist regardless of the outcome of this Bill. The question parliament should be asking itself is how, as a Nation, do we want to implement that principle? Do we want to utilise a mechanism that has been recommended by international bodies, parliamentary bodies and Australian civil society over the past decade, or do we want to return to a mechanism where one individual is required to 'play God' with the fate of vulnerable human beings?

The name of the Bill says it all. This Bill is not about justice. It is about a government which seeks to regain control from the independent Refugee Review Tribunal, the Courts, and the public scrutiny that transparent decision making processes allow.

⁴⁹ Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 Second Reading Speech, 4 December 2014.