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Submission by Immigration Advice and Rights Centre
Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Introduction

The Immigration Advice and Rights Centre ("IARC") is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent immigration advice. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), client information sheets (including in relation to protection visa applications, Refugee Review Tribunal ("RRT") appeals and requests for Ministerial intervention) and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence victims.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience in the administrative and review processes applicable to Australia's immigration law.

Previous response to *Migration Amendment (Complementary Protection) Bill 2009*

In 2009, IARC, in collaboration with the Refugee Advice and Casework Service (RACS) submitted a response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009* (**Complementary Protection Bill**). IARC welcomed the principles and measures introduced by the Complementary Protection Bill as an example of Australia implementing a more humane immigration system. The submission stated that:

We appreciate the significance of the amendments introduced by the Complementary Protection Bill and believe that they will assist to create a fairer and more humane detention system under Australian immigration law.

IARC continues to believe that the amendments introduced by the Complementary Protection Bill 2009 created a fairer and more humane protection visa framework than the previous framework. Since 24 March 2012, Australia's non-refoulement obligations under 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") were assessed in a framework of transparency and accountability, where decisions were reviewable and where legislative interpretation was robustly and publicly debated and challenged by academics and the judiciary.

IARC's concerns regarding current bill

The current bill proposes to repeal the complementary protection provisions which were implemented into the protection visa framework at section 36(2)(aa) of the *Migration Act (Cth) 1958* ("the Act") on 24 March 2012.

IARC is opposed to this current bill for several reasons:

The current bill will revert Australia's non-refoulement obligations under ICCPR, CAT and CROC back to a non-delegable, non-compellable, non-reviewable process.

Prior to 24 March 2012, Australia's non-refoulement obligations under ICCPR, CAT and CROC were assessed only after an applicant had been unsuccessful at both the primary and review stage of the protection visa process, under section 417 of the Act, which gave a non-compellable[1], non-delegable[2] and non-reviewable[3] intervention power to the Minister for Immigration and Border Protection ("the Minister").

Since 24 March 2012, Australia's non–refoulement obligations under these international human rights instruments have been streamlined and placed within a statutory process. Those who did not meet the criteria for protection under section 36(2)(a) have had their claims also assessed under Australia's non-refoulement obligations in the ICCPR, CAT and CROC, under the same statutory framework.

The current bill will revert Australia's non-refoulement obligations under the ICCPR, CAT and CROC from a statutory process to an administrative process subject to the Minister's powers of intervention, which are non-delegable, non-compellable and non-reviewable. The previous framework did not afford those seeking Ministerial intervention procedural fairness. Australia's non-refoulement obligations under international human rights laws are absolute and non-derogable; the implications of such obligations is that every request be assessed on its merits in a comprehensive, fair and reviewable process. The previous framework did not provide such a mechanism, and therefore runs the risk of falling short of meeting our international obligations. This process is a reversion to an archaic process of administrative law, without transparency or independent review.

Due to the nature of the Minister's powers under section 417 of the Act, the Minister cannot be compelled to consider a person's request. The Minister is under no obligation to exercise his intervention power. Only those who meet certain criteria will have their claims referred to the Minister by the Ministerial Intervention Unit ("MIU"). Even after referral by the MIU, the Minister is not obliged to consider the request.

Ministerial intervention requests are made in writing to the Minister, and are assessed by the MIU to determine whether the request meets certain criteria, before being referred to the Minister. This assessment is made based on the papers. This may put applicants who are unable to express themselves appropriately in writing at a significant disadvantage, with no further opportunity to be heard or advocated on behalf of, in person. The reality is that not every visa applicant is able to express their claims in such a way in writing as to meet the criteria for consideration by Minister. This may be for many different reasons, including lack of knowledge about the necessary requirements, lack of writing or expressive English language skills, lack of representation or other vulnerabilities. Without access to the current statutory framework an applicant has very limited chance to engage, explain, understand and provide information, potentially leading to decisions that may not reflect the real risk of significant harm and therefore potentially leading to a decision that may violate Australia's obligations under international law.

IARC is concerned about the non-reviewable nature of the previous framework because of its very real potential for error and therefore placing a person's life at real risk. The current framework allows the review of primary departmental decisions through an independent body called the Refugee Review Tribunal ("RRT"). This two-step process ensures a person will not be refouled contrary to the non-refoulement obligations to a country where they are likely to face danger. Many primary refusal decisions are overturned by the RRT after further assessment of the applicants' claims. Under the current framework decision makers must put adverse information to the applicant for comment; this framework has resulted in many applicants being able to provide further evidence to justify overturning primary refusal decisions. Without procedural fairness, Australia runs a real risk of making decisions that are potentially in breach of our non-refoulement obligations, and thereby placing a person's life in grave danger.

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[1] Section 417(7)
[2] Section 417(3).
[3] Section 476(2)(d).
[4] Minister Morrison's Second Reading Speech, House of Representatives, 4 December 2013.

The non-delegable nature of the Minister's intervention powers places an incredible burden on the Minister to get it right the first time. Given the already onerous burdens on the Executive, it would seem unusual to place yet further burdens where the better administrative process would be to have such matters determined under the current law. By repealing the complementary protection provisions in this Bill, Australia is taking away this important process, which has established procedures for both merits and judicial review. The current law arguably satisfies the international obligations on Australia and reduces the risk of making errors which may result in people suffering serious human rights abuses.

It will reduce and inhibit robust debate on the issue of international human rights law in Australia

IARC believes in the importance of a robust public debate about legal issues, particularly human rights in Australia. Complementary protection provisions were introduced less than two years ago, and since then the academic conversation surrounding the provisions has been lively and informative. Legislative interpretation has been challenged by the judiciary. Most comparative jurisdictions have a similar administrative process for complementary protection and Australia's decision makers are able to benefit from lessons learned internationally in the evolution of the law in this area.

Repealing the well-overdue reform of complementary protection removes Australian jurisprudence from these international trends and isolates the development of human rights law in Australia.

It will create a hierarchy of international human rights law

IARC firmly believes that the non- refoulement obligations under the ICCPR, CAT and CROC are just as important and significant, as those under the Refugees Convention. Persons who are claiming protection under complementary protection should have the right to have their claims heard and assessed by a transparent, accountable and reviewable system, in the same way as those seeking protection under the Refugees Convention. The current system seeks to ensure that these non-refoulement obligations are assessed in a similar manner.

The implication of repealing the complementary protection provisions is that Australia considers some non-refoulement obligations more important than others, or that some claims for protection under Australia's non-refoulement international obligations are somehow more deserving of a transparent framework than other non-refoulement obligations.

The current framework is efficient, cost-effective and humane

IARC disagrees with the suggestion that the current protection visa framework is "costly and inefficient".[4]

It is more efficient to have these key non-refoulement obligations assessed at the same time, rather than require a further administrative process to consider the different obligations. Where someone meets the Refugee Convention criteria, then no complementary protection assessment is really necessary.

From the perspective of a Community Legal Centre, the previous framework is an unnecessary cost to tax payers and a drain on our limited resources due to the time and cost spent on three separate processes for one client (or more if family members are included): an application to the DIBP, an application to the RRT (including the cost and time of an RRT hearing) and a 417 Ministerial request to the DIBP. This does not include the added cost to tax payers of processing separate applications for bridging visas while awaiting the section 417 outcome. The current framework is also conducive to the mental wellbeing of applicants given the shorter processing time.

IARC believes the benefits of a transparent, accountable and reviewable framework to assess Australia's non-refoulement obligations under international human rights law far outweighs the financial cost associated with implementing such a framework.

[4] Minister Morrison's Second Reading Speech, House of Representatives, 4 December 2013.

Minister has the power to refuse protection visa to persons who pose risk to Australia

The Minister has said that complementary protection has been used to grant protection to persons who have committed serious crimes in their home country.

Section 36(2)(C) of the Act allows for the Minister to refuse to grant a protection visa to persons whom the Minister has serious reasons for considering that they have committed a crime against peace, war crime or crime against humanity, a serious non-political crime, or is guilty of acts contrary to the purposes and principles of the United Nations. The Minister can also refuse to grant a protection visa to a person whom the Minister has reasonable grounds to consider that they are a danger to Australia's security or community.

The Minister may also refuse or cancel a visa if he or she reasonably suspects that the person does not pass the character test pursuant to section 501 of the Act.

These mechanisms are in the Act to prevent persons who pose or may pose a risk to Australia from being granted protection in Australia.

IARC's recommendation

IARC recommends the bill not be passed, for the reasons given above.

Please do not hesitate to contact IARC if we can provide further information or comment.