Chapter 3

Key issues

3.1 This chapter discusses the key issues raised in submissions and evidence presented to the committee in respect of the Bill.

Key issues identified by submitters and witnesses

3.2 The committee received 30 submissions on this Bill including one submission endorsed by 21 individual academics. The concerns expressed in submissions and evidence before the committee can be summarised as:

- that the Bill would put at risk Australia's compliance with international law;
- that the Bill would remove standard legal processes and protections such as due process;
- the Bill would risk harm to vulnerable people; and
- that the Bill would introduce inefficiency in the processing of protection claims.

3.3 In this chapter, each of these four concerns will be discussed in turn, together with the response from the department.

Risk of non-compliance with international law

3.4 Many submitters raised concerns about the Bill's impact on Australia's compliance with international human rights law. Some submitters and witnesses were unequivocal in their assessment of the human rights compatibility of the Bill, such as Professor Jane McAdam who argued:

> Repealing complementary protection and returning to a non-compellable and non-reviewable discretionary process would be a retrograde step. It cannot ensure compliance with Australia's non-refoulement obligations under international human rights law.[1]

3.5 Nevertheless, the majority of witnesses argued that the Bill itself would not cause a breach of international law but rather the administrative process that would be put in place by the Bill posed a greater risk of breach than the current statutory scheme.[2]

3.6 In this manner, Professor Ben Saul from the Law Council of Australia argued:

> Of course, these conventions do not prescribe in detail the process by which states must ensure they do not return a person to a risk abroad. However, they do obviously anticipate that, whatever method a country uses, it will have sufficiently robust safeguards and procedural protections to ensure

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[1] Professor Jane McAdam, *Proof Committee Hansard*, 14 February 2014, p. 20. See also *Submission 4 and Submission 12*, p. 4.

[2] For more information see S*ubmission 11, Submission 22,* and *Submission 27.*

> that a person is not returned to harm. We do not think that a discretionary ministerial process, absent of legislative rules and safeguards, is sufficient to achieve compliance with our international obligations.[3]

3.7 In a similar argument, Professor Gillian Triggs, President, Australian Human Rights Commission, stated that:

> We are concerned that the bill will weaken significantly the complementary protections that are due as a matter of international law in Australia and that this will increase the risk that Australia will not comply with our international non-refoulement obligations. We think there will be an **increase in the risk** that Australia will return people to their countries of origin despite the fact there is a real risk they will suffer irreparable harm, including torture or death, on their return [emphasis added].[4]

3.8 The United Nations High Commissioner for Refugees (UNHCR) also raised its concerns about the Bill, whilst nevertheless noting that there was no obligation under international law to follow a specific process for assessing complementary protection claims:

> UNHCR acknowledges, as highlighted in the second reading speech for the Bill, that there is no obligation imposed on Australia to follow a particular process in respect of fulfilling its *non-refoulement* obligations. However, UNHCR is of the view that a single procedure enhances the fairness and efficiency of Australia's asylum system, as international protection obligations owed by Australia are considered during the initial assessment by a decision maker, which provides greater certainty for applicants and enhances efficiency (both time and cost efficiency).
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> Removal of the complementary protection framework from the Act, so that Australia's non refoulement obligations are only considered through an administrative process means that there are two separate processes in place to consider international protection claims. UNHCR's view is that this is not fair and efficient as it involves separate decision makers and legal processes to consider international protection claims.[5]

3.9 However, the department stated that the government's intention is to uphold Australia's obligations under international law. Ms Alison Larkins from the department told the committee:

> I do not think there is any question about us lessening our obligations. Our fundamental obligation is not to remove people to a place where they may be harmed…[6]

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[3] Professor Ben Saul, Member, National Human Rights Committee, Law Council of Australia, *Proof Committee Hansard*, 14 February 2014, p. 46.

[4] Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Committee Hansard*, 14 February 2014, p. 43.

[5] *Submission 17*, p. 4.

[6] Ms Alison Larkins, First Assistant Secretary, Refugee Humanitarian and International Policy, Department of Immigration and Border Protection, *Proof Committee Hansard*, 14 February 2014, p. 33.

3.10 Professor Triggs acknowledged the government commitment to Australia's international obligations and that an administrative process per se was not a breach:

> The government has stated that it does not intend to resile from its complementary protection obligations and that, following the passage of the bill, it intends to fulfil its obligations through alternative administrative means. I have a couple of comments about that. One of course is to welcome the government's commitment to its non-refoulement obligations. The second is that achieving human rights outcomes through administrative means is acceptable. There is nothing about it which is in and of itself a problem.[7]

3.11 Nevertheless, Professor Triggs highlighted that:

> The difficulty, however, is that the lack of detail as to how these administrative means will actually work is the cause of the underlying concerns we have that there will be an increased risk of breach of our obligations.[8]

3.12 A second human rights concern raised by a number of submitters, including the Human Rights Law Centre and Refugee Advice and Casework Service (RACS), was the test that would be applied by the department to assess complementary protection claims would not be consistent with international law.[9] Professor Triggs explained the concerns as:

> …the complementary protection provisions, if they are to be repealed, implies that the minister will apply a different test to assess applications for complementary protection. This arises from the minister's second reading speech that the current protection provisions have set the burden of proof at too low a…level. The minister's view, as I understand it, is that the test should be 'more likely than not' or 'necessity', rather than what is, in our view, the accurate international legal standard of 'real risk' to be measured according to the evidence. So we are concerned that the minister has suggested in the second reading speech that a test will be applied which will lead to even greater concerns that our human rights standards will not be met.[10]

3.13 The department subsequently clarified that in assessing complementary protection claims under the proposed administrative arrangements it would apply the lower test as set out in Australia's current case law and which is compliant with international law. The department specifically submitted that assessing

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[7] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 14 February 2014, p. 43.

[8] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 14 February 2014, p. 43.

[9] *Submission 21* and *Submission 15.*

[10] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 14 February 2014, p. 43.

complementary protection claims: 'The 'real chance' threshold will be applied in accordance with current case law…'[11]

3.14 A third human rights concern, which also links to the argument below on inefficiency, was that an administrative process may lead to delays in processing. This is of particular concern when individuals are in detention awaiting determination of their protection visa application. Professor Triggs explained:

> We are concerned that, because the mandatory detention provisions of the Migration Act apply, delays in receiving decisions from the minister will have the effect of unnecessarily prolonging detention of applicants and that will lead again to concerns about arbitrary detention. We are also concerned that the minister's powers will be noncompellable and discretionary and that they will lead to inefficiencies in time and processing and will lead to inconsistent decision making.[12]

3.15 The department subsequently clarified that complementary protection claims will be expedited with a view to minimising delays in processing. The department submitted that:

> Whilst dependent upon the complexity of the case, once the case is allocated back to the initial primary decision maker (where possible), the indicating timeframe for completing a non-refoulement obligations assessment is:
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> - 21-30 days for people in detention; and
> - 30-45 days for people in the community.[13]

3.16 The committee notes that these timelines are significantly shorter than the current 234 days taken by the RRT to decide a case.[14]

Removal of standard legal processes and protections such as due process

3.17 Concerns about derogations from due process were expressed by a number of submitters and witnesses. As one example, Professor Saul argued:

> We think that the rule of law, which the Law Council seeks to actively promote and defend, requires limits to be placed on the use of executive power. We do not think it is appropriate to use broad discretionary ministerial powers which are non-compellable and non-reviewable, particularly when they affect fundamental rights like freedom from torture or the death penalty. Rule of law principles also require Australia to honour its international obligations under the convention against torture, the International Covenant on Civil and Political Rights, and the second optional protocol to that covenant.[15]

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[11] *Submission 3.1,* p. 4.

[12] Professor Gillian Triggs, Australian Human Rights Commission, *Proof Committee Hansard,* 14 February 2014, p. 43.

[13] *Submission 3.1,* p. 5.

[14] *Submission 3.1,* p. 2.

[15] Professor Ben Saul, Law Council of Australia, *Proof Committee Hansard,* 14 February 2014, p. 46.

3.18 Similarly, Mr David Manne of the Refugee and Immigration Legal Centre argued:

> Due process in this country lies at the heart of the basic safeguards for individuals in relation to fundamental rights and in relation to ensuring that we do not violate rights and endanger lives.[16]

3.19 Professor Saul argued for the current statutory scheme. Whilst not ameliorating all his concerns, the professor did agree that greater clarity on administrative process would be:

> …an improvement on the current situation, and of course we would welcome greater clarity in the form of guidelines and the like. I guess we would separate clarity on procedural matters relating to the making of those decisions as opposed to further clarity on the substantive legal tests to be applied—in other words, the way in which the minister would propose to interpret complementary protection or Australia's international obligations. Both obviously are important and for both we would be keen to see more clarity.[17]

3.20 The committee notes that following submissions and the public hearing, the department has provided more information that goes some way to assuage these concerns. This further information is discussed below.

Risk of harm to vulnerable people

3.21 A large number of submissions to the committee focused on the potential harm to particularly vulnerable people if the Bill is passed.

3.22 Submitters highlighted the importance of complementary protection for women who face harm within their family or community in countries where law enforcement agencies are unable or unwilling to protect them from that harm.[18]

3.23 The committee also received submissions from the Coalition Against Trafficking in Women Australia (CATWA) and Anti-Slavery of Australia who highlighted the importance of complementary protection for women who are the victims of human trafficking, servitude and slavery.[19] The Australian Churches Taskforce highlighted the important protections complementary protection provides to young girls at risk of genital mutilation.[20] Rainbow Communities Tasmania demonstrated the importance of complementary protection to individuals at risk of torture or death due to their sexual orientation or gender identity.[21]

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[16] Mr Manne, Refugee and Immigration Legal Centre, *Proof Committee Hansard*, 14 February 2014, p. 7.

[17] Professor Ben Saul, Member, National Human Rights Committee, Law Council of Australia, *Proof Committee Hansard*, 14 February 2014, p. 48.

[18] *Submission 5*, p. 3.

[19] *Submission 6* and *Submission 8.*

[20] Ms Misha Coleman, Executive Officer, Australian Churches Refugee Taskforce, *Proof Committee Hansard*, 14 February 2014, p. 9.

[21] *Submission 2*, p. 3.

3.24 The committee acknowledges the sincerity with which submitters and witnesses expressed these concerns. The committee also notes that the minister and the department have both confirmed that Australia will continue to uphold its non-refoulement obligations and that those who are found to be owed protection will not be returned to harm. The committee accepts the government's reassurance that the Bill seeks to change *how* these cases will be assessed and processed but does not diminish Australia's fulfilment of its protection obligations under international law.

Inefficiency

3.25 Submitters and witnesses argued that the Bill would introduce significant inefficiency in the processing of complementary protection claims. The committee notes that much of this evidence was premised on the government implementing an administrative arrangement for assessing complementary protection claims the same or similar to that which existed prior to 2012. The department clarified that administrative arrangements would be implemented that are in fact largely consistent with the current statutory arrangement (see below).

3.26 The following evidence by Ms Sophie Nicolle to the committee is an example of the arguments put by submitters that the Bill:

> …creates an administratively inefficient practice for the department. The amendment would force complementary protection claimants to undergo the futile process of being assessed against refugee convention obligations that they plainly do not engage. Only then may they request ministerial intervention to have that claim assessed against Australia's other obligations.[22]

3.27 In similar evidence, Dr Graham Thom argued that:

> …if cases cannot go through an open and transparent system, which they currently have, these things will fall to the courts. This is what we have seen in the past…This is another cost that will play out for those individuals but also for the Commonwealth, and it is something that we think is unnecessary when those determinations could easily have been made at the first instance.[23]

Additional information from the department

3.28 On 3 March 2014, the committee received an additional submission from the department which provided significantly more detail on how the government proposes to manage complementary protection claims if the Bill is passed.

3.29 The department submitted that:

> Under the proposed administrative process the primary protection decision maker will still be undertaking an assessment of non-refoulement obligations under the ICCPR and the CAT but doing so either immediately

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[22] Ms Sophie Nicolle, Government Relations Adviser, Amnesty International Australia, *Proof Committee Hansard,* 14 February 2014, pp 2-3.

[23] Dr Graham Thom, Refugee Coordinator, Amnesty International Australia, *Proof Committee Hansard,* 14 February 2014, p. 9.

> following the primary protection visa decision or RRT decision, and similar access to Ministerial intervention and pre-removal assessment process will be maintained.[24]

3.30 This proposal is in contrast to the administrative process that existed prior to the introduction of the current statutory scheme. Under that administrative process, individuals who were not refugees under the Refugee Convention, but who engaged Australia's other non-refoulement obligations, had to first apply for a visa for which they are not eligible and exhaust merits review before their claim could be considered by the minister personally.

3.31 In addition, the department noted that the primary decision maker who undertakes the non-refoulement obligations assessment would be: 'provided with detailed policy and procedural guidance to support these non-refoulement obligations assessments'.[25]

3.32 Key aspects of procedural fairness would be provided including that at the non-refoulement obligations assessment stage: 'The Department will write to the person and seek further information relevant to the assessment of non-refoulement obligations'.[26]

3.33 In addition, applicants would be afforded the opportunity to comment on any country information used in the assessment that has a negative bearing on the person's claim and, on a case by case basis, a decision maker may decide to interview the applicant.[27]

3.34 In the event that an individual is assessed as engaging Australia's complementary protection obligations, then the individual's case would be referred to the Ministerial Intervention Unit for consideration against the Minister's Guidelines for exercise of the minister's invention powers under the Act.[28] The applicant would then be afforded the opportunity to provide any additional information to the Ministerial Intervention Unit including family circumstances and any other significant humanitarian concerns.[29] The Ministerial Intervention Unit will then provide a submission to the Minister along with the non-refoulement obligations assessment and recommendations on the option for the type of visas the Minister may wish to grant.[30]

3.35 The department also confirmed, in order to provide greater transparency:

> The guidance material supporting the process will be publicly available. Public information specifically designed for reference by the people having

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[24] *Submission 3.1,* p. 7.

[25] *Submission 3.1,* p. 5.

[26] *Submission 3.1,* p.4.

[27] *Submission 3.1,* p. 5.

[28] *Submission 3.1,* p. 5.

[29] *Submission 3.1,* p. 5.

[30] *Submission 3.1,* p. 5.

> their…claims against Australia's non-refoulement obligations under the ICCPR and the CAT assessed will also be made available.[31]

3.36 The committee welcomes the government's commitment to make this information publicly available in the interests of procedural fairness and transparency. Given the number of submissions expressing concerns about how the process would work in practice if the Bill is passed, the committee urges the government to release all draft documents, appropriate for public release, that would be used in the administrative process.

Recommendation 1

3.37 The committee recommends that the department release consultation drafts of the guides and supporting material it intends to use as part of the administrative assessment of complementary protection claims if the Bill is passed and actively consults with stakeholders in finalising those guides and supporting materials.

[31] *Submission 3.1,* p. 5.