Dissenting Report By Labor Senators

Introduction

1.1 In the view of Labor Senators, this Bill cannot regain control over Australia's protection obligations. That control has never been lost. **Accordingly, Labor Senators recommend that the Bill not be passed.**

1.2 In March 2012, the then Labor government instituted a statutory regime for assessing complementary protection claims. That statutory scheme was the product of multiple reviews into the previous scheme which relied entirely on the minister's personal, non-delegable, non-reviewable and non-compellable powers. Those reviews highlighted the gross inefficiency and unfairness of that non-statutory process.

1.3 It is that process to which the government now wishes to return. Whilst the statutory scheme for complementary protection introduced by Labor was evidence based and effective policy making, there is no evidence to support the government's Bill. Apart from the department, all submissions received by the committee in relation to this Bill opposed its introduction.

1.4 At the public hearing on 14 February 2014, the committee heard overwhelming and compelling evidence as to why this Bill would, if passed, lead to inefficiency. Moreover, it would increase the risk of errors and undermine Australia's ability to provide protection to vulnerable people including women at risk of honour killings and girls at risk of genital mutilation.[1]

1.5 Labor Senators also highlight that both the Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights have raised serious concerns with the Bill.[2] Their concerns include the failure to define the proposed administrative arrangement for considering complementary protection claims and concerns about the Bill's compatibility with Australia's human rights obligations.

1.6 In this dissenting report, we set out the background to the introduction of complementary protection by the previous Labor government and highlight the overwhelming evidence received by the committee on why this Bill should not proceed.

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[1] A number of witnesses raised these concerns including: Ms Misha Coleman, Executive Officer, Australian Churches Refugee Taskforce, Mr Gregory Hanson, Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre, Mr Kon Karapanagiotidis, Chief Executive Officer, Asylum Seeker Resource Centre , Mr David Manne, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre, Associate Professor Jennifer Burn, Director, Anti-Slavery Australia, University of Technology, Sydney. See *Proof Committee Hansard,* 14 February 2014.

[2] Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, 11 December 2013, p. 27 and Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament,* February 2014, p. 45.

Background

1.7 In this section we set out what the term 'complementary protection' means, why the then Labor government introduced a statutory scheme for assessing complementary protection claims in 2012 and, finally, we question the government's rationale for the Bill.

What is complementary protection?

1.8 Complementary protection is the term used to describe a category of protection under international law for people who are not refugees as defined in the Refugee Convention, but who, if returned to their home country are at a real risk of suffering significant harm. Due to the real risk of significant harm these individuals engage Australia's non-refoulement (non-return) obligations.

1.9 Australia's non-refoulement obligations are engaged by the International Covenant on Civil and Political Rights (the ICCPR), the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, the Convention on the Rights of the Child (the CRC) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT). These treaties provide protection from the real risk of:

- arbitrary deprivation of life;
- imposition of the death penalty;
- being subject to torture; or
- being subjected to cruel, inhuman or degrading treatment or punishment.

1.10 Examples where complementary protection obligations have been found to arise include:

- women who would be subject to forced marriage;
- women who would be subject to domestic violence or honour killings;
- young girls who would be subject to genital mutilation; and
- individuals who, because of their sexual orientation, would be subject to torture or death.

Why was a statutory scheme for complimentary protection introduced into the Migration Act 1958?

1.11 Complementary protection provisions were introduced into the Migration Act 1958 ('the Act') on 24 March 2012. Prior to the commencement of these provisions, Australia assessed its non-refoulement obligations through administrative processes which either went towards the exercise of the minister's personal non-compellable intervention powers under the Act or through pre-removal assessment procedures.

1.12 In December 2007, the then Minister for Immigration & Citizenship, Senator the Hon Chris Evans, commissioned businesswoman and former senior public servant, Ms Elizabeth Proust, to undertake an independent review of the department's effectiveness particularly in the area of managing processes associated with the

minister's discretionary powers under the Act. The minister was concerned that he was 'playing god' when personally making decisions on individual visa cases and this was not an efficient nor effective use of resources.[3] How best to manage and utilise the minister's limited resources, as well as improve the administration of the visa processing scheme were key considerations of this review.[4]

1.13 The Proust Report recommended the introduction of a scheme for complementary protection that no longer relied on the minister's discretion.[5] The volume of applications, together with their complexity, militate against any minister having the capacity to effectively consider complementary protection claims under his or her non-delegable and discretionary powers. That report took the view that a statutory scheme for considering complementary protection claims:

> …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.[6]

1.14 In addition to the Proust Report, this very committee has on multiple occasions recommended the introduction of a statutory scheme for complementary protection, for example:

- the Senate Legal and Constitutional References Committee report, *A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000);
- the Legal and Constitutional References Committee report, *Administration and Operation of the Migration Act 1958* (March 2006); and
- the Senate Legal and Constitutional Affairs Legislation Committee report, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (October 2009).

1.15 The 2009 report of this committee considered an earlier iteration of the Bill that ultimately introduced the statutory scheme for complementary protection claims. In that report, the committee took the view that the Australian community expects complementary protection claims, which raise grave protection concerns, 'to be dealt

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[3] Senator the Hon Chris Evans, *Senate Legal and Constitutional Affairs Committee: 2007/08 Budget Estimates*, May 2008.

[4] Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations*, January 2008.

[5] Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations*, January 2008, p. 19 (Recommendation 19).

[6] Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations*, January 2008, p. 11.

with through a process that affords natural justice and access to independent merits review'.[7]

1.16 Submitters to that inquiry overwhelmingly supported the introduction of a statutory scheme for assessing complementary protection claims. The department submitted at the time that the reforms were necessary because the administrative arrangements were considered to be inefficient and lengthy:

> 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.[8]

1.17 In addition, the department submitted that the introduction of complementary protection legislation would not take away from the minister's ability to intervene in unique cases and in fact may improve his or her capacity to focus on those cases 'which raise unique and exceptional circumstances as originally contemplated when this power was created'.[9]

1.18 Other inquiries also recommended a statutory scheme for assessing complementary protection claims including: the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004) and the Legal and Constitutional References Committee report *Administration and Operation of the Migration Act 1958* (March 2006).

1.19 Based on this overwhelming evidence that complementary protection claims should not be left to the discretionary powers of the minister, the then Labor government introduced on 24 March 2012, the current statutory regime for considering complementary protection claims. The 2012 amendments provided for a combined protection visa assessment process of both Australia's obligations under the Refugees Convention and Australia's non-refoulement obligations under the ICCPR,

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[7] Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009*, October 2009, p. 42.

[8] Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Complementary Protection) Bill 2009, October 2009, p. 3.

[9] Department of Immigration and Citizenship, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry on the Migration Amendment (Complementary Protection) Bill 2009*, October 2009, p 3.

CRC and CAT.[10] This combined assessment is efficient and ensures applicants do not have to go through separate and unnecessary processes to access complementary protection. As a result of this scheme, the burdens on the applicant are necessarily reduced and government resources are not tied up in unnecessary processes.

What is the rationale for removing the statutory scheme and how would it work?

1.20 The current regime has been in place for less than two years. Given the wealth of evidence supporting this approach, it is beholden on the minister to explain why he has proposed, though this Bill, to remove the statutory scheme and replace it with the former failed scheme based on ministerial discretion. The minister has not made even the slightest case for this Bill. His second reading speech contained a number of contradictory arguments. For example, on the one hand the Bill is necessary to regain control over Australia's protection obligations, on the other only 57 applicants have been granted a protection visa on the complementary protection grounds.[11] Given thousands of protection visas are issued every year, the small number of successful applicants for complementary protection belies any notion that Australia has lost control of its protection obligations.

1.21 The return to Australia's non-refoulement obligations being considered through an administrative process gives full decision making discretion to one person – the Minister for Immigration and Border Protection. And yet, two months after he had introduced the Bill into the other house, he had not yet decided on the administrative processes that he will use to assess complementary protection claims. During the public hearing into this Bill, the department could not explain in any detail how complementary protection claims would be managed and processed because the minister had not signed off on the policy.[12] How can this parliament support a Bill to remove an effective scheme when the alternative has not yet been fully elaborated?

1.22 Accordingly, Labor Senators are of the view that the minister has singularly failed to explain both the rationale for the Bill and how the government's proposed approach would work in practice.

Evidence to the committee

1.23 Submitters put forward a range of reasons why the Bill should be rejected. In this section, we highlight three key reasons in turn:

- inefficiency,
- risks associated with removing standard legal processes and protections, and
- risk of harm to vulnerable people.

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[10] *Explanatory Memorandum*, Migration Amendment (Complementary Protection) Bill 2011.

[11] Hon. Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 4 December 2013, p.1521.

[12] 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.

Inefficiency

1.24 Submitters and witnesses highlighted that the Bill would introduce significant inefficiency in the processing of complementary protection claims. Ms Nicolle's evidence to the committee was emblematic of many submissions when she noted 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.[13]

1.25 In addition to the inefficiency of burdening complementary protection claimants with unnecessary processes, the removal of merits review will have particular implications for the courts. Dr Thom was representative of a number of submitters when he 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.[14]

1.26 Further, the Asylum Seekers Resource Centre (ASRC) noted the impact the Bill would have on Australian charities:

> When there is not efficient, quality and timely decision making that meets obligations, who pays for it? Charities pay for it….Why would we want a model that bleeds resources from charities? They are helping people, having to support them [complementary protection applicants] for years.[15]

1.27 In addition to these views, a number of migration agents made submissions to the inquiry. Those submissions contrasted the efficiency of the current statutory scheme with the inefficiency of the process proposed in the Bill.

1.28 Ms Tompson, a registered migration agent, submitted in relation to the existing statutory scheme that:

> To put it simply, there is not a significant administrative burden involved in asking a departmental decision-maker or RRT decision-maker to consider broad human rights instruments and the definition of serious harm when considering a protection visa application because there is no additional process. There is no additional interview, no separate tribunal, only an

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

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

[15] Mr Kon, Karapanagiotidis, Chief Executive Officer, Asylum Seeker Resource Centre, *Proof Committee Hansard*, 14 February 2014, p. 6.

> additional set of criteria that a decision-maker must consider during the same interview and determination process. … One can easily follow the decision-maker's method: after ruling that an applicant is not a refugee, the decision-maker goes on to use largely the same facts to make a determination against the 36(2)(aa) [complementary protection] criteria.[16]

1.29 In contrast to this simple and clear process, the Migration Institute of Australia submitted that the proposal in the Bill would increase costs and introduce inefficiency:

> Removing the requirement for the RRT to consider complementary protection claims can only result in further increased costs to the Government in having to process these claims administratively and a duplication of services. ….The new system as currently proposed will result in the applicant's claims having to be considered by a Ministerial Unit staffed by Departmental officers who will need to examine each claim de nuovo (which is currently the role of the RRT). This does not appear to be in line with the Government's intentions of trying to work more productively within its current limited resources.[17]

Risks associated with removing standard legal processes and protections

1.30 In addition to introducing inefficiency, submitters expressed concerns that the proposal in the Bill would undermine key protections under Australian law for those seeking protection on the grounds of complementary protection. As Mr David Manne argued persuasively:

> 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.[18]

1.31 And yet this Bill would remove those basic safeguards and institute a system:

> …proposing to vest one person,—the minister of the Crown in this country—who presumably has a lot of other things on his or her plate, to be deciding the individual fate of so many people.[19]

1.32 The sheer volume of cases which are referred to the minister for consideration was highlighted by the ASRC:

> In 2009-10, for example, the Minister personally signed off on 2025 requests. If the Minster worked all 52 weeks of the year, he would have been required to finalise almost 40 applications per week.[20]

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[16] *Submission 18,* p. 13.

[17] *Submission 30,* p. 3.

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

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

[20] *Submission 13,* p. 17.

1.33 The risk of reverting to a system that requires the minister to decide so many cases is compounded by the removal of merits review. The Human Rights Law Centre noted the critical importance of merits review in remedying errors:

> The decision as to whether or not an asylum seeker genuinely needs protection from serious harm can involve evaluating vast and often conflicting country information, assessing complex evidence, making highly subjective credibility assessments and applying technical legal principles.
>
> Competent decision makers exercising their powers in good faith may still make mistakes. There must be processes in place to correct them, especially given that the consequence of error can be the return of a person to face serious human rights violations.[21]

1.34 The importance of merits review is also highlighted by the fact that, of the very few individuals who have been granted a protection visa on the grounds of complementary protection, 'a high proportion of visas that have been granted on those grounds have been from an RRT determination'.[22]

1.35 Accordingly, it is unsurprising that multiple submitters argued strongly that this the Bill would heighten the risk that errors would be made, resulting in Australia breaching its non-refoulement obligations under international law. For example, Mr Manne argued:

> …What all of this would do is take us back to a process, back to a situation, where there would be on any view be a higher risk of harm to people seeking protection from danger, and the real potential for serious mistakes and miscarriages of justice.[23]

1.36 In addition to removing merits review, Labor Senators raise concerns about the limited availability of judicial review. In this regard we note commentary from the Scrutiny of Bills Committee (which were endorsed by the Law Council):[24]

> ….Although the High Court's jurisdiction under section 75(v) of the Constitution would continue to be available in principle …, in practice the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability. If the new administrative process for decision-making … is linked to the exercise of the Minister's personal and non-compellable intervention powers to grant a person a visa under the Migration Act …, the scope for judicial review will depend on whether the Minister has made a decision to consider the exercise of these powers in a particular case. If the Minister refuses to even consider the exercise of these powers, the result is likely to be that judicial review would

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[21] *Submission 21,* p. 5,

[22] Mr Hanson, Refugee and Immigration Legal Centre, *Proof Committee Hansard,* 14 February 2014, p. 13.

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

[24] Law Council of Australia, *answers to question on notice*, 14 February 2014, (received 14 February 2014), p. 1.

> in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may arise as to the utility of declaratory relief.[25]

1.37 The Scrutiny of Bills Committee raised similar concerns in relation to the effectiveness of judicial review for decisions taken by departmental officers as part of a pre-removal process:

> … Assuming the ultimate source of power exercised is non-statutory Executive power, then questions may arise as to how effective judicial review of its exercise would be. The 'constitutional writs' (such as mandamus) are available only on the basis of jurisdictional errors and, typically, such errors are identified by reference to the statute under which a decision is made.[26]

Risk of harm to vulnerable people

1.38 Whilst the minister raised the furphy of complementary protection being used by criminals and bikies,[27] evidence to the committee demonstrated that the primary beneficiaries have been particularly vulnerable groups.

1.39 CASE for Refugees submitted that it had personally made eight complementary protection applications since the introduction of the statutory scheme in 2012. All of those cases:

> **….**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.[28]

1.40 In similar evidence, the Human Rights Law Centre noted:

> The Bill will repeal provisions that protected a Pakistani woman who faced the risk of being killed by her family because she did not marry the first cousin to whom she was 'betrothed from birth'. She fell outside the Refugee Convention because her risk of being killed was not due to her race, religion, nationality, political opinion or membership of a particular social group. She was granted a protection visa on complementary protection grounds after the Refugee Review Tribunal found that she faced a risk of harm, accepted evidence about the inability and unwillingness of the local police and judiciary to protect would be victims of honour killings and found that there was no other area to which she could relocate where she would be safe.[29]

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[25] Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, 11 December 2013, p 30.

[26] Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, 11 December 2013 p 31.

[27] Hon. Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 4 December 2013, p.1521.

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

[29] *Submission 21*, p. 8.

1.41 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.[30] The Australian Churches Taskforce highlighted the important protections complementary protection provides to young girls at risk of genital mutilation.[31]

1.42 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:

> If the provisions are repealed, there is a real risk that LGBTI asylum seekers will be exposed to very serious international human rights violations, including torture or death contrary to our international legal obligations. Removing a codified basis to have claims considered against the complementary protection criteria means that Australia cannot guarantee that LGBTI asylum seekers will be protected from removal to significant harm.[32]

1.43 The National Ethnic Disability Alliance (NEDA) submitted that the Bill raised concerns for people with a disability, particularly those who are vulnerable due to a cognitive impairment.[33]

1.44 Finally, a number of submitters raised concerns that the Bill had implications for the unity of families. Currently under the Act, where an individual is granted a protection visa on the grounds of complementary protection, their immediate family members are also eligible for a protection visa. This Bill would remove these provisions, potentially in breach of international law as highlighted by RACS:

> The proposed Bill also risks Australia violating international obligations under the ICCPR and CRC which require the best interests of the child and family unit to be protected. Under the existing provisions, a grant of protection to a person on complementary grounds will also be extended to that person's family. This guarantee will be removed under the proposed amendments and will be left as a matter to be decided by the Minister at his discretion.[34]

Additional information from the department

1.45 On 3 March 2014, nearly three months after the Bill was introduced to the other house, the committee received an additional submission from the department.[35] This additional submission sets out how the department and the minister would assess and process complementary protection claims if the legislation was passed. This

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[30] *Submission 6,* and *Submission 8.*

[31] Ms Misha Coleman, Executive Officer, Australian Churches Refugee Taskforce, *Proof Committee Hansard,* 14 February 2014, p. 6.

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

[33] *Submission 23,* p. 2.

[34] *Submission 15,* p. 5.

[35] *Submission 3.1.*

additional information, whilst useful to understanding how the government proposes to manage complementary protection claims, does not address the concerns of submitters. The administrative arrangement do not provide merits review of the department's primary decision and the minister will not be compelled to grant a visa where a complementary protection obligation is found to exist.

1.46 Further, the actual policy documents that will be used as part of the administrative process have not been publicly released. The department stated that:

> The guidance material supporting the process will be publicly available. Public information specifically designed for reference by the people having their… claims against Australia's non-refoulement obligations under the ICCPR and the CAT assessed will also be made available.[36]

1.47 These documents should have been drafted and released for public comment. All departmental manuals and guidance materials which would form part of the administrative process for assessing complementary protection claims need to be publicly released so that they may scrutinised. A short summary of how the minister and department envisage running the process is not sufficient information to provide a basis for passing this Bill.

Conclusion

1.48 The introduction of a statutory scheme for complementary protection by the Labor government in 2012 brought Australian law into line with the 27 countries of the European Union (EU), Canada, the United States, New Zealand, Hong Kong and Mexico. The statutory scheme improved efficiency. It significantly reduced the number of cases personally before the minister, improving their ability to focus on truly unique or complex cases. With a robust scheme or merits review, the statutory scheme reduced the risk of error thus improving Australia's ability to provide necessary protection, particularly to vulnerable groups.

Recommendation 1

1.49 Given the success of the statutory scheme for assessing complementary protection claims introduced by Labor in 2012, Labor Senators recommend that the Bill not be passed.

Senator the Hon Lisa Singh
Deputy Chair

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