The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 [Provisions]

March 2014

ISBN 978-1-74229-971-6

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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.

Recommendation 2

4.9 The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendation.

Chapter 1
Background

The referral

1.1 On 5 December 2013, the Senate referred the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 [Provisions] (the Bill) to the Senate Legal and Constitutional Affairs Legislation Committee, for inquiry and report by 3 March 2014.[1] On 3 March 2014, the Senate extended the reporting date of this inquiry to 18 March 2014.

1.2 The Bill was introduced in the House of Representatives on 4 December 2013, by the Hon Scott Morrison MP, Minister for Immigration and Border Protection.[2] The Bill would amend the *Migration Act 1958* (the Act) to remove the statutory criterion for grant of a protection visa on 'complementary protection' grounds and other related provisions. Instead, Australia's complementary protection obligations under international law would be considered through administrative processes as was previously the case prior to March 2012.[3]

Australia's obligations under international law

1.3 Australia acceded to the *Convention Relating to the Status of Refugees* on 22 January 1954 and the *Protocol Relating to the Status of Refugees* on 13 December 1973 (together the Refugees Convention). As a party to the Refugee Convention, Australia owes protection obligations to individuals who have 'a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' if returned to their home country. A central protection obligation is the principle of 'non-refoulement', which prohibits return of an individual to a country in which he or she may be persecuted.

1.4 In addition to protection obligations under the Refugee Convention, Australia has assumed additional non-refoulement obligations under international law to non-refugees. These obligations exist where there is a real risk that if Australia was to return an individual to their home country they would suffer a certain type of harm. Protection from return in situations that engage these non-refoulement obligations is often referred to as 'complementary protection'; that is, protection under international treaties that is additional to the protection given to refugees under the Refugee Convention.

1.5 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

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[1] *Journals of the Senate* No. 7—5 December 2013, p. 24.

[2] *Votes and Proceedings* No 10—4 December 2013, p. 163.

[3] *Explanatory Memorandum* (EM), Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, p. 1.

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.

Complementary protection considerations under Australian law

1.6 Complementary protection provisions were introduced into 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.

1.7 The Migration Amendment (Complementary Protection) Bill 2011 introduced complementary protection provisions into the Act. The introduction of a statutory framework for considering complementary protection claims had been considered by 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 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). In October 2009, the Senate Legal and Constitutional Affairs Legislation Committee report *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* recommended a bill introducing complementary protection provisions in to the Act be passed subject to amendments.

1.8 The 2012 amendments provided for a combined protection visa assessment process of both Australia's obligations under the Refugee Convention and Australia's non-refoulement obligations under the ICCPR, CRC and CAT. In order for a non-citizen to receive complementary protection, the minister must have substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. In addition, the 2012 amendments provided unsuccessful applicants for complementary protection with equivalent administrative review rights as persons seeking protection under the Refugee Convention.[4]

1.9 The Bill seeks to amend the Act to remove the criterion for the grant of a protection visa on the basis of complementary protection from the Act. The Bill seeks to move the assessment of Australia's complementary protection obligations to a separate administrative process. According to the Explanatory Memorandum, the government will re-establish a similar administrative process to that which existed

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

prior to the 2012 amendments. Australia's non-refoulement obligations would be assessed administratively either as part of pre-removal procedures or through the minister's personal and non-compellable public interest powers to grant a visa under the Act.[5] The administrative process that would be used by the Department of Immigration and Border Protection (department) if the Bill was passed was further explained in an additional submission from the department.[6] Complementary protection obligations will be assessed by the primary decision maker:

- if the person is in detention -
  - immediately following a negative primary protection decision by the department; and
- if the person is in the community -
  - in the event that the Refugee Review Tribunal (RRT) on review confirms the department's primary protection decision that the person is not a refugee.[7]

1.10 The department will also maintain access to ministerial intervention and pre-removal assessment processes to ensure those in need of Australia's protection are not refouled in breach of international law.[8]

Rationale for the Bill

1.11 The second reading speech discloses the rationale for introducing the Bill as being based on the need to regain control of Australia's protection obligations. During the second reading speech, Mr Morrison stated:

> It is the government's position that it is not appropriate for Australia's non-refoulement obligations under the CAT and the ICCPR to be considered as part of a Protection visa application under the Migration Act. Such a measure creates another statutory product for people smugglers to sell.[9]

1.12 Given that only 57 applicants have satisfied the requirements for the grant of a protection visa on complementary protection grounds, the government argues that the complementary protection provisions of the Act are 'costly and inefficient':

> The complementary protection provisions that were introduced in the Migration Act by the previous government are complicated, convoluted, difficult for decision-makers to apply and are leading to inconsistent outcomes.[10]

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[5] EM, p. 1.

[6] *Submission 3.1.*

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

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

[9] Hon. Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 4 December 2013, p.1522.

[10] Hon. Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 4 December 2013, p.1523.

1.13 On introducing the Bill, the minister explained that a number of individuals who had been found to engage complementary protection obligations were people who had committed serious crimes in their home countries, or people associated with criminal gangs or involved in blood feuds.[11]

1.14 Another reason for introducing the Bill is to respond to recent court decisions that have changed the test for assessing complementary protection claims. The department argued that the courts have applied the statutory provisions for complementary protection in a manner inconsistent with the department's interpretation.[12] The courts have equated the threshold of 'real risk' that a person will suffer significant harm with the lower threshold of a 'real chance', as applied under the Refugee Convention.[13]

1.15 Further, the court's decisions have the result that even where a person's home country has a functioning and effective police and judicial system, in order for the Australian government to conclude that the person's home country will in fact manage to protect the person from the risk of harm, the protection by that country's authorities must reduce the level of harm to below that of a 'real chance'. The department submitted that the 'real chance test' is a very low bar and, according to the department, lower than required under the CAT and the ICCPR.[14]

1.16 Whilst the complementary protection provisions would be removed from the Act, according to the government:

> …the bill does not propose to resile from or limit Australia's non-refoulement obligations, nor is it intended to withdraw from any Conventions to which Australia is a party. Australia remains committed to adhering to our non-refoulement obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's non-refoulement obligations under these treaties will not be removed from Australia in breach of these obligations.[15]

1.17 The government also stressed the advantages of moving from a statutory to an administrative process, including that:

> The Minister for Immigration and Border Protection's personal powers have the advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably

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

[12] *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 and *Minister for Immigration and Citizenship v MZYYL* [2012] FCFA 147.

[13] *Submission 3*, p 4.

[14] *Submission 3*, p 4.

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

unique and complex, and who may be disadvantaged by rigidly codified criterion.[16]

Conduct of the inquiry

1.18 In accordance with the usual practice, the committee advertised the inquiry on its website. The committee also wrote to relevant organisations inviting submissions by 23 January 2014. The committee received 30 submissions. A full list of submissions is provided at Appendix 1.

1.19 The committee held a public hearing in Melbourne on 14 February 2014.

1.20 A list of stakeholders who have evidence to the committee at the public hearing is provided at Appendix 2.

Structure of the report

1.21 This report considers the Bill as follows:

- chapter 2 provides a brief overview of the provisions contained in the bill;
- chapter 3 discusses the key issues raised in submissions and evidence to the committee; and
- chapter 4 sets out the committee's views and recommendations.

Acknowledgement

1.22 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.23 References in this report to the committee Hansard are to the proof. Hansard and page numbers may vary between the proof and the official Hansard transcript.

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

Chapter 2

Provisions

2.1 The majority of the provisions in the Bill are consequential or transitional amendments which flow from Item 4 and Item 6 of Schedule 1.

2.2 Item 4 repeals paragraph 36(2)(aa). The purpose of this amendment is to give effect to the government's policy intention that complementary protection claims should be considered administratively and not as part of statutory criterion for the grant of a protection visa.

2.3 This paragraph establishes the criterion for the grant of a protection visa on the grounds of complementary protection. The paragraph provides that a criterion for a protection visa is that the applicant is a non-citizen in Australia, in respect of whom the minister is satisfied Australia has protection obligations because the minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. Significant harm is defined in subsection 36(2A).

2.4 Item 6 repeals paragraph 36(2)(c) which extends the availability of protection visas to family members of those found eligible for complementary protection visas under paragraph 36(2)(aa).

2.5 Item 17 repeals and replaces paragraphs 411(1)(c) and 411(1)(d). These are consequential amendments as a result of the repeal of section 36(2)(aa) by Item 4. Section 411 of the Migration Act deals with decisions which are reviewable by the Refugee Review Tribunal (RRT). Decisions relating to applications for protection visas on the grounds of complementary protection under section s36(2)(aa) are currently reviewable in the RRT.

2.6 Item 18 repeals and replaces paragraphs 500(1)(c). These are consequential amendments as a result of the repeal of section 36(2)(c) by Item 6. Section 501 of the Migration Act deals with decisions which are reviewable by the Administrative Appeals Tribunal (AAT). Decisions relating to applications for protection visas for family members of individuals seeking complementary protection are currently reviewable in the AAT.

2.7 Item 20 sets out the application of the amendments. This item provides that the amendments would apply to any application for a protection visa made after the commencement of this Bill, or any application made prior to the commencement of this Bill, where there has been no primary decision made on that application.

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).
>
> 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:
>
> - 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.

Chapter 4

Committee view

4.1 This chapter discusses the committee's view on the Bill.

4.2 The committee notes the concerns of submitters and witnesses that the Bill may risk Australia's protection obligations under international law, may lead to errors and introduce inefficiency. The committee acknowledges that a number of submitters and witnesses hold the view that it is not possible to design a non-statutory scheme that would be sufficient to address these concerns.

4.3 However, in light of the additional information provided by the department the committee is of the view that most concerns of submitters have now been addressed.

4.4 If the Bill is passed, the department would put in place administrative arrangements that largely mirror the current statutory process. The primary decision maker considering refugee claims would also consider complementary protection claims. Procedural fairness would be afforded with applicants given the opportunity to comment on country information used by the department and attend an interview where necessary. Applicants and their advisors would have clarity around the process and the assessment criteria with the department making publicly available guidance material and other supporting documentation.

4.5 Under the administrative arrangements proposed by the department, the assessment of whether or not Australia owes an individual protection would be made by the department following a rigorous and fair assessment process. The committee is satisfied that with these processes in place, Australia's obligations under international law would be upheld.

4.6 Once the department has assessed that an individual is owed protection, the minister would have the discretion under the Bill to determine what type of visa should be issued to that individual. Under this Bill, the minister would have the flexibility to deal appropriately with individual circumstances. That is, if the threat of harm is temporary, a temporary protection visa may be issued. The committee is of the view that greater flexibility is required in *how* Australia protects those who require complementary protection and that this Bill would provide that flexibility.

4.7 The committee also accept the statutory scheme for assessing complementary protection claims established by the previous government created another product for people smugglers to sell. The committee is of the view that this Bill takes that product off the shelves.

4.8 On balance, the committee believes that the Bill should be passed—subject to Recommendation 1—so as to give the Department of Immigration and Border Protection control over Australia's protection obligations

Recommendation 2

4.9 The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendation.

Senator the Hon Ian Macdonald

Chair

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.

Dissenting Report By Senator Sarah Hanson-Young

Introduction

1.1 The Australian Greens strongly disagree with the findings of the majority report. The conclusions drawn in the report do not properly reflect the evidence taken by the committee and fail to acknowledge the legitimate concerns that were raised in the majority of submissions.

1.2 The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 seeks to remove the criterion for the granting of a protection visa on the grounds of complementary protection and hand the decision making power back to the Minister for Immigration and Border Protection. The amendments proposed by this Bill are contrary to Australia's international human rights obligations and remove certainty and due process from the protection assessment process.

1.3 The overwhelming majority of submissions made to the committee on this Bill were not supportive of the proposed change and concluded that the Bill should not proceed.

1.4 The Australian Greens do not support the Bill as it is just another step by the government to limit the protection avenues for people who are in genuine need of Australia's assistance. The proposed amendments risk violating our international obligations, place individuals, particularly vulnerable women, at an increased risk of being returned to significant harm, are inefficient, inadequate and do not afford procedural fairness.

The Bill risk violating Australia's international obligations

1.5 The Bill proposes to remove complementary protection provisions from the Migration Act 1958 and instead implement a process of ministerial discretion to determine a person's claim for protection.

1.6 As noted by the majority of submitters to the committee, ministerial discretion risks violation of Australia's international human rights obligations, in particular, Australia's non-refoulement obligations engaged under the International Covenant on Civil and Political Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty, the Convention on the Rights of the Child, and the Convention Against Torture and Other Cruel and Degrading Treatment or Punishment.

1.7 The Refugee and Immigration Legal Centre states that:

> …the proposed shift from a statutory process to a non-statutory process where the ultimate decision is vested with the Minister, without any avenue for merits review, will lead to individuals who have sought to engage Australia's protection obligations being exposed to a higher risk of serious human rights violations including, torture, cruelty, inhuman or degrading

> treatment or punishment, the death penalty, and arbitrary deprivation of life.[1]

1.8 Of particular concern is the affect that these changes will have on women and the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) asylum seekers. The Coalition Against Trafficking in Women Australia notes that:

> …the proposed changes are especially harmful to women because persecution on the basis of gender has not traditionally considered grounds for refugee status. Women and girls who are victims of gendered cultural practices, such as female genital mutilation, 'honour' killings, and forced/arranged marriages, are left exposed by the proposed changes to the Act, which repeal the very protection category designed to address such harms…[2]

and leaves the determination of their claim for protection to the Minister of the day.

1.9 Similarly, Rainbow Communities Tasmania state that by 'removing a codified basis to have claims considered against the complementary criteria means that Australia cannot guarantee that LGBTI asylum seekers will be protected from removal to significant harm.'[3]

1.10 Australia's non-refoulment obligations are absolute and non-derogable and it is vital that they be retained as part of a statutory process. The Minister will single-handedly be responsible for determining the fate of vulnerable women fleeing honour killings and forced marriages. Under this system the Minister cannot guarantee that a person will not be returned to a situation where they are at real risk of significant harm.

Ministerial discretion is inadequate and does not afford procedural fairness

1.11 The Bill proposes to revert to an administrative process whereby the Minister of the day may use his or her discretionary powers if satisfied that Australia's non-refoulment obligations will be engaged. This discretionary power is extremely dangerous particularly when the Minister is not required to justify their decision and there is no presence of a merits review.

1.12 As stated by Refugee Advice and Casework Service:

> the Minister's power under section 417 [of the Migration Act 1958] is discretionary and does not establish any duty on the Minister to consider whether or not to afford a person protection on complementary grounds.[4]

1.13 The Human Rights Law Centre submitted that, 'the Minister will not be obliged to intervene and afford a person protection, even when a person has clearly demonstrated they are at risk of being sent back to significant harm.'[5]

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[1] *Submission 22*, p. 4.

[2] *Submission 6*, p. 2.

[3] *Submission 2*, p. 3

[4] *Submission 15*, p. 4.

[5] *Submission 21*, p. 5

1.14 Furthermore, ministerial intervention is non-compellable, non-delegable and non-reviewable. As stated by the Human Rights Law Centre 'the non-reviewability of the Minister's discretion means that there will be no process in place to correct incorrect decisions and prevent people from being wrongfully returned to harm.'[6]

1.15 As argued by the UNHCR:

> …by limiting consideration of complementary protection to an administrative process, a person's access to procedural fairness and due process is significantly undermined, as he or she does not have the legislative basis to seek to have the Minister consider grounds for complementary protection and has no right to appeal any decision rejecting protection on complementary grounds.[7]

1.16 The Australian Greens believe that the removal of a statutory process of determination will compromise existing procedural and legal safeguards, including access to merit review. These changes will have significant consequences for all persons involved and will increase the risk of returning individuals to situations where they could endure significant harm.

The amendments are inefficient

1.17 One of the key reasons the complementary protection criterion was introduced to the protection visa framework was to enhance efficiency.

1.18 The bill proposes a return to a process where people with complementary protection needs must undergo a refugee status determination despite it being clear from the outset that their claim does not meet the criteria as defined by the Refugee Convention.

1.19 As experienced by many of the submitters, including the Asylum Seeker Resource Centre, the previous process was unnecessarily drawn out and inefficient and had devastating consequences for applicants who were awaiting their status determination, particularly those languishing in indefinite detention.

1.20 The Refugee and Immigration Legal Centre submitted that:

> …it would be entirely reasonable to expect an applicant that has prima facie claims for protection under the non-refugee criteria to wait anywhere between 18 months to 3 years to have their claims for protection finally determined.[8]

1.21 In the Refugee Advice and Casework Services experience some of their clients waited up to six years for a final determination of their case by the Minister.[9]

1.22 Professor McAdam et al from University of New South Wales noted that:

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[6] *Submission 21,* p. 3

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

[8] *Submission 22,* p. 5

[9] *Submission 15,* p. 4

> the former Immigration Minister Chris Evans, who originally sought to introduce complementary protection, regarded ministerial discretion as an incredible waste of ministerial time, with over 2,000 requests received each year. The system was also described by Parliament as 'inefficient and time consuming' adding 'stress to the applicants' and causing 'excessive uncertainty and delay'.[10]

1.23 A return to this system would be extremely inefficient and enforce further human suffering on applicants, particularly those enduring long term immigration detention.

Conclusion

1.24 The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 seeks to remove the criterion for the granting of a protection visa on the grounds of complementary protection and hand the decision making power back to the Minister for Immigration and Border Protection.

1.25 Under these proposed changes the Minister will single-handedly be responsible for determining the fate of vulnerable women fleeing honour killings and forced marriages. Under this system the Minister cannot guarantee that a person will not be returned to a situation where they are at real risk of significant harm.

1.26 It is clear that this Bill will further distance Australia from our obligations to provide protection to those in desperate need. The amendments proposed are inconsistent with Australia's international obligations, increase the risk of individuals being returned to countries where they are at genuine risk, do not afford procedural fairness and are inefficient.

1.27 The Australian Greens depart from the recommendation of the majority report and conclude that the Bill should not proceed on basis of the arguments outlined above.

Recommendation 1

1.28 Owing to the increased risk of individuals being returned to countries where they will face significant harm, in particular women who are victims of gender violence, the Australian Greens recommend that this Bill not proceed.

Senator Sarah Hanson-Young
Australian Greens

[10] *Submission 4*, p. 5

Appendix 1

Public submissions

1	Dr Matthew Groves, Faculty of Law, Monash University
2	Rainbow Communities Tasmania Inc.
3	Department of Immigration and Border Protection
4	Professor Jane McAdam et al
5	CASE for Refugees
6	Coalition Against Trafficking in Women Australia (CATWA)
7	Mr Michael Simmons
8	Anti-Slavery Australia
9	St Vincent de Paul Society
10	ACT Refugee Action Committee
11	Castan Centre for Human Rights Law
12	Refugee Council of Australia
13	Asylum Seeker Resource Centre
14	The Australian Churches Refugee Taskforce
15	Refugee Advice and Casework Service (RACS)
16	Immigration Advice and Rights Centre Inc. (iarc)
17	United Nations High Commissioner for Refugees
18	Ms Elizabeth Thompson
19	PB and B Immigration Lawyers
20	Australian Lawyers Alliance
21	Human Rights Law Centre
22	Refugee and Immigration Legal Centre Inc.
23	National Ethic Disability Alliance (NEDA)

24 Law Council of Australia

25 UnitingJustice Australia

26 The Victorian Foundation for Survivors of Torture

27 Australia Human Rights Commission

28 Amnesty International Australia

29 Confidential

30 The Migration Institute of Australia Limited

Appendix 2

Public hearings and witnesses

Friday 14 February 2013—Melbourne

BASHAM, Ms Jennifer, Policy Adviser, Australian Churches Refugee Taskforce

BURN, Associate Professor Jennifer, Director, Anti-Slavery Australia, University of Technology, Sydney

COLEMAN, Ms Misha Louise, Executive Officer, Australian Churches Refugee Taskforce

GROVES, Associate Professor Matthew Nathan, Private capacity

HANSON, Mr Gregory John, Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

HUGGINS, Right Reverend Bishop Philip, Member, Australian Churches Refugee Taskforce

KARAPANAGIOTIDIS, Mr Kon, Chief Executive Officer, Asylum Seeker Resource Centre

LARKINS, Ms Alison, First Assistant Secretary, Refugee Humanitarian and International Policy, Department of Immigration and Border Protection

MANNE, Mr David Thomas, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

McADAM, Professor Jane, Private capacity

MOULDS, Ms Sarah, Acting Co-Director, Criminal Law and Human Rights Division, Law Council of Australia

NICOLLE, Ms Sophie, Government Relations Adviser, Amnesty International Australia

PARKER, Ms Vicki, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection

PENOVIC, Ms Tania Sandra, Deputy Director, Castan Centre for Human Rights Law

SAUL, Professor Ben, Member, National Human Rights Committee, Law Council of Australia

THOM, Dr Graham, Refugee Coordinator, Amnesty International Australia 1

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

YANG, Reverend Mewon, Board Member, Australian Churches Refugee Taskforce

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Friday 14 February 2014

1 Law Council of Australia - answer to question taken on notice (received 14 February 2014)

2 Australian Human Rights Commission - answer to question taken on notice (received 7 March 2014)