



Refugee Council
of Australia

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

RESPONSE TO THE *MIGRATION AMENDMENT (REGAINING CONTROL OVER AUSTRALIA'S PROTECTION OBLIGATIONS) BILL 2013*

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 170 organisations and 700 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee background communities and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*. RCOA and its members were closely involved in the development of Australia's complementary protection framework and warmly welcomed the passage of the *Migration Amendment (Complementary Protection) Act 2011* in March 2012. This statutory framework has provided an accountable and efficient process for providing protection to people towards whom Australia has obligations to under the Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

RCOA is therefore dismayed by the introduction of legislation to repeal the complementary protection provisions of the *Migration Act 1958*. The complementary protection framework was designed to remedy a number of serious flaws in Australia's processes for assessing complementary protection needs, namely the reliance on a discretionary and non-compellable Ministerial intervention mechanism and the inefficiency of the determination process. Returning to this system would reintroduce these flaws, undermining protection for people at risk of egregious human rights violations and increasing the risk of Australia breaching its international obligations.

We include in this submission a number of case studies, based on decisions published by the Refugee Review Tribunal, which provide examples of individuals who have been found to be owed protection under Australia's complementary protection framework.¹ We believe these case studies provide compelling evidence of the need to maintain a statutory framework for complementary protection. We also refer the Committee to documents previously published by RCOA on the issue of complementary protection, specifically our 2009 submission on the *Migration Amendment (Complementary Protection) Bill 2009*;² and our 2004 discussion paper, *Complementary Protection: The Way Ahead*,³ which both highlight the shortcomings of Australian practice prior to the introduction of the statutory complementary protection framework.

¹ These case studies are based on analyses compiled by Professor Jane McAdam and Fiona Chong of the Andrew and Renata Kaldor Centre for International Refugee Law, University of NSW, available at

http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf and
http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/australian_cp_successful_-_fc_26_10_13.pdf

² Available at <http://www.refugeecouncil.org.au/r/sub/0909-CP.pdf>

³ Available at <http://www.refugeecouncil.org.au/r/rpt/2004-CP.pdf>

1. An essential lifeline

- 1.1. For over 60 years, the Refugee Convention has provided an effective framework for protecting people who are forced to flee their homelands due to fear of persecution. The Refugee Convention is not, however – and was never intended to be – the sole mechanism for providing protection to people at risk of persecution or serious harm. The grounds on which a person can seek protection under the Refugee Convention are specific and restrictive, limited to persecution based on a person's race, religion, nationality, membership of a particular social group or political opinion. This excludes people fleeing persecution or serious mistreatment on other grounds, such as family violence (including so-called “honour crimes”), blood feuds and other revenge attacks, residence in highly insecure and dangerous environments, extortion attempts and other forms of torture or cruel, inhuman and degrading treatment based on non-Convention grounds.
- 1.2. Complementary protection provides an essential lifeline for these individuals who, while they may not be considered refugees under international law, are nonetheless in need of protection due to risk of torture or other forms of cruel, inhuman or degrading treatment or punishment. As complementary protection focuses on the *type* and *severity* of persecution or mistreatment, rather than the *grounds* on which a person may be persecuted or mistreated, it provides a broader and more flexible framework for protecting people at risk of serious violations of human rights on non-Convention grounds. At the same time, the stringent eligibility criteria for complementary protection, tightly circumscribed by elements of causation, ensure the integrity of the framework and guard against abuse (as discussed in further detail in paragraph 5.4)
- 1.3. Australia's complementary protection framework is an essential mechanism for ensuring compliance with our international human rights obligations. The Convention Against Torture (CAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 37 of the Convention on the Rights of the Child (CROC) all prohibit torture and cruel, inhuman or degrading treatment or punishment. The CAT also specifically prohibits states parties from returning people to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture. A robust complementary protection framework plays a vital role in ensuring that Australia adheres to these provisions.
- 1.4. Complementary protection plays a particularly significant role for women fleeing persecution or mistreatment related to their gender. This includes forms of mistreatment which are specific to women (such as female genital mutilation) or disproportionately affect women (such as family violence and “honour crimes”) but which don't fit easily within one of the five grounds for persecution stipulated by the Refugee Convention. It also allows for a broader assessment of the risks faced by a person due to their particular attributes, an important consideration for women given that they are often at higher risk of mistreatment due to their gender (as is often the case, for example, for women facing extortion or living in insecure environments).

Case Study 1: Family violence

Ms B was a Chinese citizen who had been harassed and assaulted by her first husband over a period of more than 20 years. She had been stabbed (resulting in six months' hospitalisation), strangled and raped by her husband and subjected to intermittent low-level harassment. Chinese authorities had failed to protect Ms B because her husband had connections with the police. Ms B was found not to be a refugee because the harm she had suffered was not based on any of the five grounds stipulated in the Refugee Convention nor had authorities withheld assistance for any of the reasons. However, she was found to be at risk of cruel, inhuman and degrading treatment should she return to China and was therefore entitled to Australia's protection on complementary grounds.

2. Inadequacy of Ministerial intervention

- 2.1. The Australian Government's proposed substitute for the current complementary protection framework – Ministerial intervention – does not, in RCOA's view, provide an adequate alternative to a statutory framework. In some circumstances, Ministerial intervention can play an important role in providing protection to people who have exhausted other avenues for

resolving their status but nonetheless have compelling reasons to remain in Australia. As part of a robust and multi-levelled decision-making framework, Ministerial intervention can provide an added safeguard against forcible return to persecution or mistreatment. On its own, however, it does not offer an adequate mechanism for assessing protection claims.

- 2.2. As the Australian Government itself acknowledges, the Minister's intervention powers are "personal and non-compellable". While people seeking protection can request the Minister to intervene in their cases, the Minister is under no obligation even to consider whether or not to act on these requests. When a decision is made to act on a request, the Minister has a high degree of discretion in determining whether or not a person should be granted permission to remain in Australia. Neither decisions made by the Minister regarding whether or not to exercise intervention powers, nor decisions made by the Minister when exercising these powers, are subject to any form of independent review. The Ministerial intervention process therefore does not meet basic standards of procedural fairness, as recently evidenced by the findings of the High Court in the case of *Minister for Immigration and Citizenship v SZQRB*.⁴
- 2.3. The shortcomings of Ministerial intervention become less significant when this process forms part of a more comprehensive, statutory decision-making framework. A person seeking protection as a refugee, for example, can have their case assessed on its merits by both a primary decision-maker and an independent reviewer before resorting to Ministerial intervention. This multi-levelled process is critical to ensuring accuracy and fairness in decision-making and provides a crucial safeguard against human error and breach of our essential obligation to prevent *refoulement*.
- 2.4. For a person seeking protection on complementary grounds, however, this multi-levelled process did not always have the same effect. Prior to the introduction of the complementary protection framework in March 2012, Australia's refugee status determination process was based only on the criteria set out in the Refugee Convention and did not include an assessment of complementary protection needs. An application lodged by a person seeking protection solely on complementary grounds would therefore be refused, not because it was without merit but because there were no criteria against which it could be meaningfully assessed. In effect, people seeking protection on complementary grounds relied solely on the discretionary, non-compellable and non-reviewable Ministerial intervention process. What were frequently life and death decisions lay with a single Minister, with no further avenues for review or appeal.
- 2.5. RCOA acknowledges the assurances provided by the Australian Government in the statement of compatibility with human rights accompanying this Bill that people found to engage Australia's protection obligations under the CAT and ICCPR will not be removed from Australia. However, we reject the assertion that non-statutory administrative procedures, in particular the exercise of the Minister's personal, non-compellable intervention powers, can effectively ensure adherence to these obligations, as the SZQRB decision illustrates.
- 2.6. The Australian Government is correct in saying that the CAT, ICCPR and CROC do not oblige states parties "to follow a particular process or to grant a particular type of visa to those people for whom non-*refoulement* obligations are engaged". These Conventions do, however, require states parties to implement measures which will ensure that their international obligations will be effectively upheld. Article 2 of the CAT requires states parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture". Article 2 of the ICCPR similarly requires states to "adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant", while Article 4 of the CROC requires states to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention".
- 2.7. While all three instruments acknowledge that a state party may take measures other than legislation to ensure adherence to their obligations, the clear implication of the

⁴ <http://www.austlii.edu.au/au/cases/cth/FCAFC/2013/33.html>

abovementioned provisions is that any alternative measures adopted should provide a degree of protection similar to that offered by legislation. It is difficult to see how a discretionary, non-compellable and non-reviewable Ministerial intervention process can satisfy this requirement.

- 2.8. Indeed, in their most recent reports⁵ on Australia's compliance with the CAT and ICCPR respectively (conducted before the introduction of Australia's complementary protection framework), both the Committee Against Torture and the Human Rights Committee expressed concern that Australia had not incorporated its non-*refoulement* obligations into domestic law. The Committee Against Torture also expressed specific concern that protection against *refoulement* "may depend on the exclusive use of the Minister's discretionary powers".
- 2.9. Given the severity of the human rights violations to which people in need of protection on complementary grounds are at risk, RCOA shares the views of the Committee Against Torture and the Human Rights Committee that only a robust, statutory framework of status determination can ensure adherence to Australia's obligations to protect people within its jurisdiction from torture and other forms of cruel, inhuman and degrading treatment or punishment.

Case Study 2: Honour crimes

Ms C and Mr D were from Pakistan. Ms C was born into a traditional Pashtun family and betrothed from birth to her first cousin, who would inherit the position of head of the family upon the death of his father. She defied her family by travelling to Australia to marry Mr D instead of her cousin. Ms C was considered to have "shamed" her family by refusing to marry the man to whom she was betrothed and was at risk of being subjected to an honour killing. Mr D had also been threatened at gunpoint and beaten to the point of requiring hospitalisation by the man to whom Ms C had been betrothed. Ms C and Mr D were found not to be refugees because the harm they feared was based on personal motivations rather than on any of the five grounds stipulated in the Refugee Convention. However, it was found that Ms C was at risk of arbitrary deprivation of life and Mr D was at risk of significant harm should they return to Pakistan, therefore both were entitled to Australia's protection on complementary grounds.

3. Efficiency and flexibility

- 3.1. A key reason for the introduction of Australia's complementary protection framework was to enhance efficiency in the refugee status determination process. Prior to the introduction of this framework, people with complementary protection needs had no means of securing protection other than to undergo refugee status determination, even if it was clear from the outset that their claims did not meet the criteria set out in the Refugee Convention. As Ministerial intervention requests can only be lodged by people who have received a decision from a review tribunal, people seeking protection on complementary grounds had no option but to lodge an application for refugee status – despite the fact that their application were virtually guaranteed to fail – in order to gain access to Ministerial intervention. The result was an unnecessarily long and complicated assessment process which wasted significant time and resources and created considerable stress and anxiety for applicants.
- 3.2. The introduction of a complementary protection framework markedly improved this process by allowing for an assessment of complementary protection needs at the first instance. This ensured that decisions could be made far more efficiently and prevented time and resources from being wasted on assessing applications which were guaranteed to fail against refugee criteria alone. It also assisted in alleviating the anxiety of applicants who were compelled to undergo a needlessly lengthy, drawn-out process and face multiple rejections even if their claims were acknowledged as being genuine. The abolition of Australia's complementary protection framework and the return to the previous inefficient and illogical assessment process would unavoidably carry considerable financial and human costs.
- 3.3. RCOA challenges the Australian Government's assertion that the inclusion of a complementary protection assessment at the first instance is "a costly and inefficient way to approach the

⁵ Available through <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/AUIndex.aspx>

issue given the small number of people who meet the complementary protection criterion". Australia's complementary protection framework does not require decision-makers to conduct a comprehensive complementary protection assessment for every asylum seeker. Rather, it requires decision-makers to take complementary protection provisions into account when assessing claims. If a person is found by the decision-maker to be a refugee, the decision-maker is not required to also consider whether they meet the complementary protection criteria, as the recognition of refugee status alone is sufficient to engage Australia's protection obligations. In many cases, therefore, an assessment of complementary protection needs would not be required.

- 3.4. RCOA notes the Australian Government's assertion that the Minister's personal intervention powers "have the advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex and who may be disadvantaged by a rigidly codified criterion". We do not accept that the current complementary protection framework is too "rigid" to deal flexibly and constructively with the majority of protection claims. The case studies included in this submission clearly demonstrate the successful application of current complementary protection provisions to a wide variety of cases, ranging from violence and insecurity for young women in Syria to extortion by paramilitary groups in Colombia to inadequate witness protection in Nepal.
- 3.5. Moreover, under the current framework, Ministerial intervention is still available to people seeking protection whose claims may not fit within the complementary protection criteria. Australia's complementary protection framework does not replace Ministerial intervention; rather, it provides a lawful, procedurally fair and more efficient process for assessing complementary protection needs and, in the vast majority of cases, is a sufficiently flexible and functional means of doing so.

Case Study 3: Revenge

Mr E was a citizen of Nepal who had provided information to police which led to the arrest and imprisonment of a number of drug dealers. He and his family were consequently subject to intimidation and threats, including threats against Mr E's life, by people involved in the drug trade. After the people who had been imprisoned on the basis of Mr E's evidence were released, he feared that he would be at even greater risk of harm. There is no witness protection program available in Nepal and the capacity of national authorities to protect Mr E and his family was diminished by limited resources and police corruption. Mr E's application did not raise any refugee claims and his application depended solely on complementary protection claims. He was found to be at risk of arbitrary deprivation of life should he return to Nepal and was therefore entitled to Australia's protection on complementary grounds.

4. Protection of family unity

- 4.1. Under the current complementary protection framework, if a person is granted a Protection Visa on complementary grounds, their family members are also granted Protection Visas. Should the framework be abolished, this guarantee will no longer exist. As a result, people granted protection on complementary grounds may be at risk of being separated from their family members.
- 4.2. RCOA welcomes the Australian Government's pledge to ensure that family members of people granted protection on complementary grounds will continue to be permitted to remain in Australia. However, we do not believe that this discretionary system provides an adequate substitute for a statutory guarantee. The adverse impacts of family separation on humanitarian entrants are among the most serious and consistently-raised concerns in RCOA's consultations with service providers and refugee communities and provide compelling evidence that family separation should be avoided wherever possible.⁶ We believe that the abolition of the statutory complementary protection framework would create an unnecessary risk of family separation.

⁶ For further information, see RCOA's 2012 discussion paper entitled *Humanitarian family reunion: The building block of good settlement*, available at <http://www.refugeecouncil.org.au/r/rpt/2012-Family.pdf>

Case Studies 4 and 5: Extortion

Mr F was a farmer from Colombia. He had refused to provide payments demanded from him by a paramilitary group and was attacked and tortured as a result. Mr F rebuilt his farm after the paramilitary group was demobilised; when the group reformed under a different name, however, he was again subject to extortion and intimidation, including threats against his life. Mr F was found not to be a refugee as he was at risk of harm due to revenge and extortion, not due to any of the five grounds stipulated in the Refugee Convention. However, he was found to be at risk of arbitrary deprivation of life and of torture, or cruel or inhuman treatment or punishment should he return to Colombia and was therefore entitled to Australia's protection on complementary grounds.

Ms G was from El Salvador. She had suffered extortion demands and threats of violence (including threats against her life) from a major street gang. Authorities in El Salvador were unable to provide effective protection due to inadequate law enforcement, corruption and equipment shortages. As a single female living with her elderly mother and with no adult male protection in her home, she was seen to be particularly vulnerable to harm. Ms G was not recognised as refugee because the harm feared was not due to any of the five grounds stipulated in the Refugee Convention. However, she was found to be at risk of cruel and inhuman treatment should she return to El Salvador and was therefore entitled to Australia's protection on complementary grounds.

5. Alleged abuse of the current complementary protection framework

- 5.1. RCOA challenges the claim that Australia's complementary protection framework has been subject to "widespread abuse",⁷ in particular by people with substantial criminal records. RCOA has been unable to source any evidence which suggests that complementary protection has been abused or that people with criminal records have been beneficiaries of complementary protection.
- 5.2. In the 20 months between March 2012 and November 2013, a total of 55 Protection Visas were granted on complementary grounds and 83 cases were remitted by the Refugee Review Tribunal with a direction that the applicant met the complementary protection criteria.⁸ To put these numbers into perspective, over 26,000 Protection Visa applications and refugee status determination requests were lodged during the 2012-13 financial year.⁹ With such small numbers of people being granted protection on complementary grounds, it is difficult to see how the alleged abuse of this framework (even if substantiated) could be described as "widespread".
- 5.3. Moreover, as with other permanent visas, the grant of a permanent Protection Visa is contingent upon the successful completion of security and character checks. Section 501 of the *Migration Act 1958* gives the Minister considerable discretionary powers to refuse the grant of any visa (including a Protection Visa grant) on character grounds, including in circumstances where the visa applicant has a substantial criminal record or is likely to engage in criminal conduct in Australia. In the event that a person with a substantial criminal record was found to be in need of protection on complementary grounds, it would be well within the Minister's powers to refuse that person a visa on the basis of their previous criminal conduct.
- 5.4. Additionally, all individuals seeking protection on complementary grounds must satisfy stringent criteria to be eligible for a visa grant. The applicant must demonstrate that there are "substantial grounds" for believing that they will suffer significant harm if returned to their country of origin (that is, they must present sound evidence to support their claim); that this harm will occur as a necessary and foreseeable consequence of their being removed from

⁷ Kenny, M. & Gordon M. (2013). "Australian Prime Minister Tony Abbott threatens tougher action on asylum seekers after losing parliamentary vote." *Sydney Morning Herald*, 4 December, <http://www.smh.com.au/federal-politics/political-news/australian-prime-minister-tony-abbott-threatens-tougher-action-on-asylum-seekers-after-losing-parliamentary-vote-20131203-2yotx.html#ixzz2mSBa9DOh>

⁸ Evidence provided at the Supplementary Budget Estimates hearing of the Senate Legal and Constitutional Affairs Legislation Committee on 19 November 2013 by Ms Alison Larkins (First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Border Protection) and Ms Kay Ransome (Principal Member, Migration Review Tribunal and Refugee Review Tribunal), http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/sup1314/index

⁹ <http://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>

Australia; and that this harm is of a sufficiently serious nature, involving arbitrary deprivation of life, subjection to the death penalty and/or subjection to torture or other forms of cruel, inhuman or degrading treatment or punishment. They must also demonstrate that they are unable to relocate to another area of their country of origin where they would not be at risk of harm; that they cannot obtain effective protection from the authorities of their country of origin; and that the risk of harm is one faced by them personally, not one faced by the population generally. These stringent criteria alone provide a considerable safeguard against abuse.

- 5.5. In the cases adjudicated under Australia's complementary protection framework to date, the granting of protection on complementary grounds has saved people from serious mistreatment and has often been the difference between life and death. In RCOA's view, it would be myopic and misguided to abolish this lifesaving framework due to concerns about isolated incidents of abuse which can easily be addressed through existing legislative provisions.
- 5.6. RCOA rejects the assertion that the introduction of Australia's complementary protection framework has added "another product to the people smugglers' shelf".¹⁰ RCOA has seen no evidence to suggest that the introduction of this framework has had any influence whatsoever on the number of asylum seekers arriving in Australia with the assistance of people smugglers. On the contrary, the small numbers of people granted protection on complementary grounds to date suggests that the introduction of this framework has had no impact on asylum seeker arrivals.

Case Study 6: Violence and insecurity

Ms H was a Syrian citizen from a town near the city of Homs. She feared returning to her country of origin because, as a Sunni Muslim, she may be perceived as an opponent of the Syrian Government. She also feared returning due to fighting between Government and rebel forces in her hometown. Her family members had been forced to flee the area and two of her neighbours had been killed. Ms H was married to an Australian citizen and was returning to Syria by herself to apply for a partner visa. As a young woman travelling alone in a country with high levels of violence and insecurity, she would be particularly vulnerable to harm. Given that Ms H had not been involved in political activities either in Syria or Australia, it was found that she was not at risk of persecution based on her political opinion and therefore was not a refugee. However, due to the continued hostilities in the Homs area, coupled with the added vulnerabilities stemming from Ms H's age and gender, she was found to be at risk of arbitrary deprivation of life should she return to Syria and was therefore entitled to Australia's protection on complementary grounds.

6. Recommendation

- 6.1. In light of the concerns outlined in this submission, RCOA believes that the abolition of Australia's statutory complementary protection framework would be a retrograde and ill-advised step. We strongly recommend that the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* not be passed.

¹⁰ Kenny & Gordon 2013.