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

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 4 December 2013

Summary of committee concerns

1.174 The committee seeks further information to determine whether the proposed repeal of existing complementary protection legislation with a view to reinstating discretionary administrative processes is compatible with human rights.

Overview

1.175 This bill seeks to repeal the complementary protection provisions in the *Migration Act 1958*. Those provisions were introduced by the *Migration Amendment (Complementary Protection) Act 2011*, with effect from 24 March 2012, to provide a statutory basis for implementing Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1] Non-refoulement obligations under these treaties require Australia not to return people, including those who do not fall within the Refugee Convention definition of a 'refugee', to a country where there is a real risk that they would face torture or other serious forms of harm, such as arbitrary deprivation of life; the death penalty; or cruel, inhuman or degrading treatment or punishment. These are absolute rights and may not be subject to any limitations.

1.176 As a result of the 2012 changes, claims raising Australia's non-refoulement obligations under the ICCPR and the CAT are considered as part of the primary protection visa assessment framework. Therefore, a protection visa may be granted on the basis that the applicant is a refugee as defined in the Refugee Convention or on the basis that non-refoulement obligations under the CAT and the ICCPR are owed to the person.[2] This approach utilises a single, unified process for assessing protection claims, where applicants first have their claims considered against the Refugee Convention criteria and then, if not found to be refugees, against the complementary protection criteria. Applicants claiming complementary protection

1 The term 'complementary protection' refers to protection against refoulement (removal), which is additional to that provided by the 1951 Refugee Convention as amended by the 1967 Protocol (Refugee Convention).

2 The criteria for a protection visa are set out in s 36 of the *Migration Act 1958* and Part 866 of Schedule 2 to the *Migration Regulations 1994*. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

have equivalent rights to independent merits review as those seeking protection under the Refugee Convention. A protection visa will be granted if the person is owed non-refoulement obligations and other visa requirements are met.[3] If a person is granted a protection visa on complementary protection grounds, their family members are also eligible to receive protection visas, if they are part of the same application.

1.177 Prior to the 2012 changes, the Minister's personal and non-compellable intervention powers to grant a visa, predominantly on humanitarian grounds under section 417 of the Migration Act, provided the only option for people who engaged Australia's non-refoulement obligations under the ICCPR or CAT but who did not meet the refugee criteria (and were therefore not eligible for a protection visa). The Minister's discretionary powers were enlivened only at the end of the refugee determination process and after the person had exhausted merits review.

1.178 This bill proposes to remove 'complementary protection' as a ground for the grant of a protection visa. The explanatory memorandum states that the amendments are intended 'to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application'[4] and for 'Australia's non-refoulement obligations under the CAT and the ICCPR [to] be considered through an administrative process, as was the case prior to March 2012'.[5] The bill does not include guidance on the nature, scope or operation of the administrative process that is intended to replace the current statutory scheme.

1.179 The amendments proposed in the bill will apply prospectively to new protection visa applications as well as to current applications where a decision has not been finalised. This includes decisions which are under review or which have been reviewed and remitted to the original decision-maker.[6]

Consideration by other committees

1.180 On 5 December 2013 the bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry. The inquiry has received over 25 submissions from individuals and organisations. All the submissions, with the exception of the submission by the Department of Immigration and Border Protection, opposed the bill and expressed strong concerns at the proposal to revert to an administrative process for dealing with complementary protection claims. The Senate Legal and Constitutional Affairs Legislation Committee is due to report its findings on 3 March 2014.

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3 Statement of compatibility, p 1.

4 Explanatory memorandum, p 1.

5 Explanatory memorandum, p 1.

6 See items 20 and 21 of the bill and explanatory memorandum, pp 11-13.

1.181 The Senate Standing Committee for the Scrutiny of Bills considered the bill in its *Alert Digest No 9 of 2013*, published on 11 December 2013. That committee raised a number of concerns about the bill, which are discussed further below.[7]

Compatibility with human rights

Statement of compatibility

1.182 The bill is accompanied by a statement of compatibility that addresses the issue of whether the proposed repeal of the complementary protection provisions in the Migration Act is consistent with the Australia's non-refoulement obligations under the ICCPR and CAT.

1.183 The statement argues that the bill is compatible with these obligations because it 'does not seek to resile from or limit Australia's non-refoulement obligations'.[8] Instead, the bill 'seeks to move the assessment of these obligations from being considered as part of the protection visa assessment process under the [Migration] Act to a separate administrative process.'[9]

1.184 The statement contends that the bill is compatible with Australia's non-refoulement obligations on the basis of the following claims:

- The non-refoulement obligations under the ICCPR and the CAT do not need to be assessed as part of the protection visa assessment process and are a matter for the government 'to attend to in other ways';[10] and that the form of the administrative arrangements in place to support Australia in meeting its obligations is a matter for the government. [11]
- A similar administrative process to that which existed prior to March 2012 will be re-established to assess Australia's non-refoulement obligations, 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 Migration Act; and accordingly, anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.[12]

1.185 The statement makes similar claims with regard to the compatibility of the bill with the rights of the family and children. The statement notes that the proposed amendments will mean that membership of the family unit of a person in respect of

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7 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, pp 27-32.

8 Statement of compatibility, p 2.

9 Statement of compatibility, p 2.

10 Statement of compatibility, p 1.

11 Statement of compatibility, p 2.

12 Statement of compatibility, p 2.

whom Australia has non-refoulement obligations will no longer expressly provide an avenue to visa grant for a family member to also remain in Australia. However, the statement argues that:

> as was the practice under the administrative process previously in existence, it is intended that family unity and the best interests of children will continue to be taken into account as part of the new administrative process that will be re-established when this bill is passed and members of the same family unit of a person in respect of whom Australia has non-refoulement obligations will continue to be permitted to remain in Australia.[13]

1.186 Neither the statement of compatibility nor the explanatory memorandum provides any further information or detail as to the administrative arrangements that are to be re-instated or how these administrative powers will operate. As noted above, the bill is also silent on these issues. Nor does the explanatory memorandum or statement of compatibility explain why some of those to whom Australia owes non-refoulement obligations have access to a procedure which includes merits review and judicial review, while others will not have access to such protections as a result of the bill. The statement of compatibility nevertheless concludes that the bill is compatible with human rights because 'Australia's human rights obligations will continue to be met through administrative processes'.[14]

1.187 While the committee welcomes the government's commitment to adhere to its human rights obligations, the information provided in the statement of compatibility does not demonstrate that these amendments are in fact compatible with human rights. The committee considers that the proposed amendments potentially involve serious limitations on human rights and regrets that the explanations provided in the statement of compatibility essentially comprise a series of unsupported assertions about the government's intentions to continue to meet its human rights obligations through administrative processes. The committee's concerns are set out below.

Committee view on compatibility

1.188 The committee considers that in addition to the rights mentioned in the statement of compatibility (non-refoulement and children/family rights), the proposal to repeal the statutory framework for granting complementary protection and to revert to a purely administrative process also engages the right to an effective remedy in article 2 of the ICCPR, the right not to be arbitrarily detained in article 9 of the ICCPR, and the right to a fair hearing in article 14(1) of the ICCPR.

13 Statement of compatibility, p 3.

14 Statement of compatibility, p 3.

Non-refoulement obligations and the right to an effective remedy

1.189 As noted in the statement of compatibility, Australia has obligations under the ICCPR and the CAT not to send a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations. There are clear obligations under article 7 of the ICCPR and article 3 of the CAT, not to return or send a person to a country where there is a real risk that they will be subjected to torture or cruel, inhuman or degrading treatment. Obligations also arise under article 6 of the ICCPR to not return or send a person to a country where they are at real risk of the death penalty or arbitrary deprivation of life. The committee is not aware of any disagreement with the view that these obligations should always be met.

1.190 The ICCPR and the CAT do not impose an obligation to grant particular forms of visas to those to whom non-refoulement obligations are owed. However, the prohibitions on refoulement under these treaties, together with the general obligation on states to provide an effective remedy for human rights breaches under article 2 of the ICCPR, require the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations. In short, the right to an effective remedy is required for compliance with non-refoulement obligations under the CAT and the ICCPR.

1.191 A vital safeguard that goes towards ensuring the right to an effective remedy in the context of giving effect to non-refoulement obligations is the availability of effective, independent and impartial review of removal decisions prior to the removal or deportation of a person. Rigorous scrutiny of decisions involving non-refoulement obligations is required because of the irreversible nature of the harm that might occur. As the UN Committee against Torture has stated:

> The nature of refoulement is such … that an allegation of breach of [article 3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires … an opportunity for effective, independent and impartial review of the decision to expel or remove... The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[15]

1.192 The UN Human Rights Committee has similarly emphasised that the requirement to provide effective remedies in domestic law is an integral component

15 *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14).

of satisfying non-refoulement obligations under the ICCPR.[16] In particular, there should be an opportunity for effective and independent review of a decision to remove prior to removal and the absence of such review may amount to a breach of non-refoulement obligations.[17] Further, under article 2 of the ICCPR, states parties undertake that such a remedy is 'determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.'[18]

1.193 International and comparative human rights jurisprudence has identified various elements which are necessary to ensure the right to an effective remedy for non-refoulement decisions, including that:

- It must be effective in practice as well as in law;
- It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement;
- It must have automatic suspensive effect;
- The appeals process must include adequate procedural safeguards, such as sufficient time to lodge an appeal and access to legal representation and interpreters; and
- Decisions must be subject to substantive review by an independent and impartial body.

1.194 The leading commentary on the ICCPR states that 'decisions made solely by *political* and subordinate administrative *organs* (especially governments) do not constitute an effective remedy within the meaning of [article 2(3)(b)]; it follows that States parties are obligated to place priority on judicial remedies.'[19]

1.195 The committee notes that the Migration Act currently provides for a statutory right of independent merits review for a decision to refuse a protection visa on complementary protection grounds. This bill proposes to remove that right. This is because a consequence of removing the complementary protection criterion as a basis for a protection visa grant is that such review will no longer be available.[20]

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16 See, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

17 *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para 11.8.

18 Article 2(3)(b) of the ICCPR. See also, HRC, *Judge v. Canada*, 20 October 2003, No. 829/1998, para. 10.9 and HRC comments on 4th report of France CCPR/C/FRA/CO/4 (2008).

19 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), p 64. (footnotes omitted, emphasis in original).

20 See items 17 and 18 of Schedule 1 to the bill.

1.196 The committee considers that the removal of an existing statutory right for independent merits review of non-refoulement decisions represents a limitation on the right to an effective remedy, which is a necessary aspect of satisfying Australia's non-refoulement obligations.

1.197 The committee notes that the enactment of the complementary protection provisions in the Migration Act ensured the availability of review by an independent and impartial tribunal for decisions relating to Australia's non-refoulement obligations, and, consequently, generally satisfied Australia's obligation under article 2(3) of the ICCPR to progressively develop judicial remedies.[21] The proposal to repeal the complementary protection provisions may therefore also be considered to be a retrogressive measure.

1.198 The committee notes that the amendments also constitute limitations on the rights of children and the family, the right not to be arbitrarily detained and the right to a fair hearing.

1.199 The committee has consistently taken the view that in order to justify retrogressive measures or limitations on rights the government must demonstrate that (i) the measures are aimed at achieving a legitimate objective; (ii) there is a rational connection between the measures and the objective; and (iii) the measures are proportionate to that objective.[22] Limitations on rights must also have a clear legal basis and satisfy the quality of law test. The committee notes that the statement of compatibility does not address these issues or explain if the administrative arrangements which are intended to replace the current statutory framework will include provision for independent and impartial review of non-refoulement decisions.

Legitimate objective

1.200 A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting rights.

1.201 The statement of compatibility states that the purpose of the bill is to 'give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application'. However, neither the statement of compatibility nor the explanatory memorandum provide any indication of the basis for the government's position or explain why the government considers it necessary to attend to its non-refoulement obligations in other ways.

1.202 The Minister's second reading speech, however, put forward several reasons for the bill:

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21 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), p 64.

22 See Parliamentary Joint Committee on Human Rights, *Practice Note 1*.

- The current statutory framework for complementary protection is 'complicated, convoluted, difficult for decision-makers to apply, and is leading to inconsistent outcomes'.
- 'The court's [sic] interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties'.
- The current process is a 'lengthy' and 'costly and inefficient way to approach the issue given the small number of people who meet the complementary protection criterion', given that 'only 57 applications have satisfied the requirements for the grant of a protection visa on complementary protection grounds' since the provisions commenced in March 2012.
- There is no obligation 'to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged', particularly 'where people are of security or serious character concern and they do not meet the criteria for grant of a protection visa' [sic].
- Implementing Australia's non-refoulement obligations through the protection visa framework 'creates another statutory product for people smugglers to sell'.

1.203 The Minister argued that dealing with complementary protection claims through administrative processes would enable him:

- 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'; and
- to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia's non-refoulement obligations, but also Australia's broader humanitarian considerations.

1.204 The committee notes that the statement of compatibility and explanatory memorandum do not explain the rationale for the bill, and while the Minister's second reading speech outlines various reasons for repealing the legislation, these are made in the form of assertions without reference to any relevant supporting data or empirical evidence.

1.205 On the basis of the material provided, the committee considers that the government has not clearly demonstrated an objective basis for repealing the current provisions. The committee notes that the factors that were cited to support the introduction of the complementary protection provisions in the Migration Act are now being cited to inform its repeal.

1.206 Notably, during the passage of the complementary protection legislation, the Department of Immigration contended that the reforms were necessary because the then 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.[23]

1.207 The Department submitted that the introduction of complementary protection legislation would not take away from the Minister's ability to intervene in unique cases:

> Removing the necessity of considering complementary protection claims in the Ministerial intervention process will mean that the Minister's intervention power can be reserved for cases which raise unique and exceptional circumstances as originally contemplated when this power was created.[24]

1.208 The Department also suggested that it did not expect any 'significant increase' in visa grants as a result of the complementary protection legislation being implemented, stating that less than half of the 55 visas granted under the Humanitarian Program in the 2008-09 period may have involved cases which raised non-refoulement issues.[25]

1.209 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the bill's objectives, including how they are

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23 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 1.11.

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

25 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 3.44.

considered to be pressing and substantial. In particular, the committee requests the following information and would appreciate the provision of relevant and sufficient evidence in support of the answers:

- **The basis for considering that the current system is 'complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes' and why any such difficulties could not be addressed through legislative refinement of the scheme.**
- **The basis for considering that the courts have expanded the scope of the legislation, how this has adversely affected the implementation of the legislation, and why any unintended consequences could not be addressed through legislative refinement of the scheme.**
- **How the argument that the scope of the legislation has been expanded by the courts is consistent with the statement that only a small number of protection visas on complementary protection grounds have been granted.**
- **The basis for considering that the process is inefficient because of the small number of protection visas that have been granted, when it would appear that comparably small numbers of humanitarian visas were granted under the previous administrative arrangements.**
- **The basis for considering that administrative arrangements would be more efficient when it appears that they were previously removed for being inefficient, including the overall timeframes for resolving complementary protection claims under the current system compared to the previous arrangements.**
- **Whether applicants who meet the complementary protection criterion have to satisfy additional criteria, such as character and security checks, before being granted a protection visa.**
- **The number of protection visas that have been granted on complementary protection grounds to applicants who arrived by boat.**
- **Whether the Minister is able to exercise his intervention powers to grant relief in unique cases under the present system.**

Rational connection

1.210 The key issue here is whether the measures in question are likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if in fact the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

1.211 The committee notes that it is unable to assess whether the measures proposed in the bill are rationally connected to a legitimate objective without first obtaining a clearer understanding of the objectives of the bill.

1.212 The committee intends to write to the Minister for Immigration and Border Protection to request that when providing the information on the objectives of the bill it would be appreciated if an assessment is included as to whether and how the objectives identified are likely to be furthered through this bill.

Proportionate response

1.213 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse decision.

1.214 As already noted above, the effect of these provisions is that there will no longer be any statutory right of appeal to an independent tribunal for non-refoulement decisions. The government's stated intention to reinstate similar administrative arrangements to that which existed prior to the enactment of the statutory framework means that claims for complementary protection will be assessed:

- by the Minister exercising his personal and non-compellable 'public interest' powers under the Migration Act; or
- by departmental officers as part of pre-removal processes.

1.215 It is not clear whether the administrative processes would include provision for an effective hearing to evaluate the merits of a particular case of non-refoulement and whether such decisions would be subject to independent and effective review, as required by human rights standards.

1.216 The committee notes that the Scrutiny of Bills Committee expressed similar concerns about whether:

> … a purely administrative process [could] satisfactorily ensure that a person affected by an assessment in relation to complementary protection will have adequate merits review available to them and, in particular, there are no details about how it is proposed that the availability of merits review will be addressed in the administrative scheme envisaged … (such as during the 'pre-removal assessment procedures').[26]

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 29.

1.217 The Scrutiny of Bills Committee also noted that the availability of judicial review under the High Court's original jurisdiction was likely to be of limited value for challenging decisions made pursuant to the Minister's discretionary and non-compellable intervention powers under the Migration Act:

> … 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.
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> 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 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.[27]

1.218 The Scrutiny of Bills Committee noted 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.[28]

1.219 In putting forward these amendments, the government has argued that there is no obligation imposed on Australia to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged. The committee agrees that international human rights law does not require Australia to grant particular forms of visas to those to whom non-refoulement obligations are owed (provided that the relevant visa conditions are consistent with human rights requirements).

1.220 However, human rights law does require Australia to meet its non-refoulement obligations and complying with those obligations requires adopting processes that contain appropriate procedural and substantive safeguards, in particular, effective remedies in the form of independent, effective and impartial

27 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 30.

28 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 31.

review of non-refoulement decisions. The committee notes the absence of such remedies may lead to violations of Australia's non-refoulement obligations.

1.221 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **The justification for expunging the statutory review rights in their entirety and a reasoned explanation of why a less restrictive alternative that retained some form of express, statutory right of review would not be available.**
- **Whether the envisaged administrative arrangements will include provisions for independent, effective and impartial review of non-refoulement decisions; and if not, how it is considered that the amendments are consistent with the right to an effective remedy for non-refoulement decisions.**
- **Whether the administrative arrangements and their implementation will include adequate oversight mechanisms.**

Legal basis for restrictions

1.222 Human rights standards require that interferences with rights must have a clear basis in law. This means not only that there must be a domestic rule adopted as part of the standard legislative process (or an accepted rule of the common law), but that the law or rule in question must satisfy what is known as the 'quality of law' test. The effect of this is that any measures which interfere with human rights must be sufficiently certain and accessible to allow people to understand when the interference will be justified. The provision of a legal basis for measures which impact on rights is also an important guarantee of the rule of law.

1.223 In general terms, human rights law considers interferences with fundamental rights that are based solely on unfettered administrative discretion to be inconsistent with this requirement.[29] For example, the UN Human Rights Committee has noted:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[30]

1.224 The European Court of Human Rights has similarly stated that:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion to be granted to the executive to be

29 See M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2nd ed 2005), p 460, para 46.

30 Human Rights Committee, General Comment 27, (1999), para 15. See also Human Rights Committee, General Comment No 34 (2011), para 25.

> expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[31]

1.225 The committee notes that various shortcomings have been expressed with regard to the discretionary nature of the administrative arrangements that preceded the current statutory scheme, including that:

- decisions could only be made by the Minister personally;
- no-one could compel the Minister to exercise the powers;
- there was no specific requirement to provide natural justice;
- there was no requirement to provide reasons if the Minister does not exercise the power; and
- there was no merits review of decisions by the Minister.[32]

1.226 For these reasons, a 2000 report by the Senate Legal and Constitutional Affairs References Committee into the adequacy of those arrangements to meet Australia's non-refoulement obligations concluded that the nature of the ministerial intervention powers under the Migration Act meant that the powers *could* be used to meet Australia's non-refoulement obligations, but they were not sufficient to *ensure* compliance.[33]

1.227 Similarly, a 2004 Senate Select Committee on Ministerial Discretion in Migration Matters expressed concern that the discretionary process was an inadequate mechanism for offering protection from refoulement and the committee was not satisfied that the Minister's discretionary powers always enabled Australia to meet those obligations in respect of individual applicants.[34]

1.228 In 2008, the UN Committee against Torture recommended that Australia adopt a system of complementary protection, to ensure that the Minister's discretionary powers were no longer solely relied on to meet Australia's non-refoulement obligations.[35]

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31 *Gillan and Quinton v UK* (Application No 415/05, 12 January 2010) at para 77.

32 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 1.10.

33 Senate Legal and Constitutional Affairs References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes,* June 2000, para 2.77.

34 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, paras 8.86 and 8.88.

35 Committee against Torture, Concluding observations of the Committee against Torture - Australia, CAT/C/AUS/CO/3 (22 May 2008), para 15.

1.229 Noting that Australia's non-refoulement obligations are absolute and in light of the grave consequences for individuals that could result from removal of a person from Australia in violation of those obligations, the committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the government's intention to rely on purely discretionary administrative processes to uphold these obligations is adequate to satisfy the quality of law test.

Protection of the family/children's rights

1.230 Articles 17 and 23 of the ICCPR protect family rights. Article 17 of the ICCPR prohibits arbitrary interference with the family, while article 23 of the ICCPR affirms the right of families to protection by 'society and the State'.

1.231 Article 3(1) of the Convention on the Rights of the Child (CRC) requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child has stated that the best interests of the child principle requires:

> active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[36]

1.232 The CRC also requires that:

- applications for family reunification are dealt with in a positive, humane and expeditious manner;[37]
- unaccompanied children are provided with special protection and assistance;[38] and
- child asylum-seekers receive appropriate protection and humanitarian assistance.[39]

1.233 Currently, family members of a person who is granted a protection visa on complementary protection grounds have equivalent rights to be granted a protection visa as family members of a protection visa holder who meets the refugee criteria. A consequence of removing the complementary protection criterion as a basis for a protection visa grant is that this express guarantee of family unity will no longer be available.

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36 UN Committee on the Rights of the Child, *General Comment No. 5 (2003)*, para 12; *General comment No. 14 (2013)*.

37 Article 10 of the CRC.

38 Article 20 of the CRC.

39 Article 22 of the CRC.

1.234 As noted above, the statement of compatibility argues that the proposed amendments are compatible because 'it is intended that family unity and the best interests of children will continue to be taken into account as part of the new administrative process' and accordingly, members of the same family unit of a person owed non-refoulement obligations 'will continue to be permitted to remain in Australia'.[40]

1.235 The committee considers that the proposed removal of an existing statutory right for family members to remain in Australia constitutes a limitation on the right to a family life under the ICCPR and the CRC. The committee acknowledges the government's stated intention to meet its human rights obligations through administrative processes. However, assurances of intent do not in and of themselves represent appropriate or sufficient justification for measures that limit rights. As the committee has already noted, limitations on rights must be demonstrably aimed at legitimate objectives and be shown to be rationally and proportionately connected to those objectives.

1.236 The committee notes that the right to a family life must also be guaranteed equally to all without discrimination, under article 2(1) (in conjunction with article 23) and article 26 of the ICCPR, and article 2(2) of the ICESCR in conjunction with article 10 of the ICESCR, as well as the CRC. The right to non-discrimination requires the demonstration of an objective and reasonable basis for any differential treatment of similarly situated persons, in this case between different categories of persons to whom Australia owes protection obligations (ie, under the Refugee Convention and the ICCPR/CAT).

1.237 The committee intends to write to the Minister for Immigration and Border Protection to seek further information as to:

- **whether removing the express guarantee for members of the family unit of a person who is owed non-refoulement obligations to remain in Australia is consistent with the right to equality and non-discrimination in article 2(1) of the ICCPR and article 26 of the ICCPR; and**
- **the manner in which the envisaged administrative arrangements will take into account family unity and the best interests of children, the prioritisation given to these matters and the likely timeframes involved.**

Prohibition against arbitrary detention

1.238 Article 9 of the ICCPR prohibits arbitrary arrest or detention. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability. In other words, the detention must be aimed at a legitimate objective and must be reasonable, necessary and proportionate to that objective.

40 Statement of compatibility, p 3.

1.239 In order for detention not to be arbitrary, it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to initial and periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified; be proportionate to the reason for the restriction; and be for the shortest time possible. Where the detention involves children, the CRC requires that children are detained only as a measure of last resort, and for the shortest appropriate period of time.[41] The CRC also requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'[42]

1.240 The Australian Human Rights Commission has previously noted that the timeframes involved under the previous administrative arrangements meant that people could be detained for extended periods in order to request the Minister's intervention at the end of a refugee determination and review process:

> One of the effects of the current system of Ministerial discretion in these cases is the possibility of prolonged immigration detention, which may lead to breaches of article 9(1) of the ICCPR. To get to the stage at which exercise of the Minister's section 417 discretion may be considered, asylum seekers must first make an application for a refugee protection visa and apply for review of that decision. It is not until they have exhausted that process that they can be considered by the Minister under section 417. Once they reach the section 417 stage, the process can take months. Overall, the process can take years.[43]

1.241 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the envisaged administrative arrangements that are intended to replace the current statutory scheme are compatible with the prohibition against arbitrary detention.

Right to a fair hearing

1.242 The right to a fair hearing is a fundamental part of the rule of law and the proper administration of justice. Article 14(1) of the ICCPR provides that all persons are equal before courts and tribunals and are entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.243 The amendments in the bill will apply to both new and existing protection visa applications which have not been finalised prior to the commencement of the amendments. This includes decisions which are currently under review or have been reviewed and remitted. The Scrutiny of Bills Committee noted that:

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41 Article 37(b) of the CRC.

42 Article 3(1) of the CRC.

43 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry on the Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, 30 March 2009, para 13.

> [A]n applicant for a protection visa may have succeeded in judicial review of such a decision (based on the old law), only to find that their claim will be defeated when remitted to the original decision-maker on the basis of the removal of visa criterion on which their original application relied.[44]

1.244 The committee notes that the right to a fair hearing in article 14(1) of the ICCPR may not generally apply to immigration decisions. However the issue here relates to the bill's impact on existing determinations which have arisen from the exercise of existing statutory rights of review. As such, the committee considers that the retrospective application of these provisions constitutes a limitation on article 14(1) of the ICCPR and requires adequate justification.

1.245 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the application of these amendments to decisions are either currently under review or which have been reviewed and remitted back to the department for finalisation is compatible with the right to a fair hearing.

44 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 32.