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

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 4 December 2013
Status: Before Senate
PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2013
Response dated: 28 February 2014

Background

3.20 This bill proposes to repeal the complementary protection provisions in the *Migration Act 1958* to enable the government to reinstate administrative processes to deal with complementary protection claims.[1]

3.21 The complementary protection provisions in the Migration Act were introduced in 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). 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.

3.22 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. Applicants claiming complementary protection 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. 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.

3.23 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

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).

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.

Information sought by the committee

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

3.25 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

Committee's response

3.26 The committee thanks the Minister for his response.[2]

Rights engaged

3.27 The committee considered that the bill engaged the right to an effective remedy and non-refoulement obligations;[3] children and family rights;[4] the right not to be arbitrarily detained;[5] and the right to a fair hearing.[6]

3.28 The committee noted 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. The committee noted that this bill will remove that right 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.

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

3.30 The committee also noted 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-

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2 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 10-20.

3 Article 2(3) in conjunction with articles 6 and 7 of the ICCPR; article 3 of the CAT.

4 Articles 17 and 23 of the ICCPR; articles 3(1), 10, 20 and 22 of the Convention on the Rights of the Child (CRC).

5 Article 9 of the ICCPR.

6 Article 14(1) of the ICCPR.

refoulement obligations, and, consequently, generally satisfied Australia's obligation under article 2(3) of the ICCPR to progressively develop judicial remedies. The committee therefore considered that the proposal to repeal the complementary protection provisions could also be considered to be a retrogressive measure.

3.31 The committee further noted that the amendments constituted limitations on the rights of children and the family, the right not to be arbitrarily detained and the right to a fair hearing as well.

3.32 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) the measures are rationally connected to the objective; and (iii) the measures are proportionate to that objective. In addition, limitations on rights must have a clear legal basis and satisfy the quality of law test.

3.33 The committee has emphasised that any restriction on fundamental rights which is stated to be necessary to achieve a legitimate purpose must be supported by empirical or other evidence to demonstrate the factual basis of the concerns that are sought to be addressed, a reasoned account of why they are important objectives, and a process for monitoring the correctness of the assumption that the measures will contribute to achieving those objectives. The justification for such limitations should be accompanied by an explanation of why a less restrictive alternative would not be available. The committee has also underlined that the government bears the onus of demonstrating that a restriction is justifiable.

Legitimate objective

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

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain ... protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[7]

3.35 The Minister's response explains that the main objective of the bill is to give effect to the government's policy position that complementary protection claims are more appropriately considered through administrative processes:

> The key objective of this Bill is to give effect to the Government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more

7 *R v Oakes* [1986] 1 S.C.R. 103, 69.

> appropriately considered within an administrative mechanism for the purposes of the exercise of the Minister for Immigration and Border Protection's public interest powers.[8]

3.36 The Minister's response highlights two reasons for the government's policy position. The first relates to the government's view that the complementary protection framework can be exploited by people smugglers:

> This policy approach is being implemented as the Government considers that the current legislative framework for assessing complementary protection provides another product for people smugglers to sell. It is the Government's view that the current legislative complementary protection process creates a channel for asylum seekers to gain access to a permanent protection visa outcome, even where they are not found to be a refugee.[9]

3.37 The second reason is the government's long-standing opposition to complementary protection claims being considered as part of protection visa applications:

> The Coalition Government has always opposed the provision of complementary protection through the protection visa framework.[10]

3.38 The committee notes that, as at 31 January 2014, 75 protection visas (excluding dependants) had been granted on complementary protection grounds, since the commencement of the complementary protection provisions on 24 March 2012.[11] Of these 75 protection visa grants, 46 were granted to asylum seekers who arrived by boat.[12]

3.39 Assessing the compatibility of this bill involves an assessment of whether the asserted factual basis for repealing the complementary protection legislation is supported by evidence. The committee accepts that discouraging irregular maritime travel is a legitimate objective. However, on the basis of the material before it, the committee is unable to conclude that that concerns about the exploitation of the complementary protection framework by people smugglers are borne out by the small number of protection visas which have been granted on

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8 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

9 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

10 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

11 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

12 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

complementary protection grounds over the last two years, and of which only 46 relate to unauthorised maritime arrivals. Notably, this timeframe coincides with a period of unprecedented numbers of boat arrivals in Australia.

3.40 The committee notes that repealing the complementary protection legislation in order to achieve a policy position without further evidence that such a position is based on legitimate objectives is unlikely to meet the threshold requirement for objectives to be of sufficient importance to warrant restricting fundamental rights.

Other reasons

3.41 The committee notes that in his second reading speech, the Minister provided additional reasons for the bill, including that:

- the current statutory framework for complementary protection is 'complicated, convoluted, difficult for decision-makers to apply, and is leading to inconsistent outcomes'; and
- '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'.

3.42 The committee sought further information from the Minister as to the bases for these views.

3.43 The Minister's response states that:

> The complementary protection legislation has only been in place since March 2012. In that time a number of interpretative issues have arisen both in how the department and the RRT interpret the complementary protection provisions. This has been further exacerbated by the way the courts have essentially broadened the scope of Australia's non-refoulement obligations beyond what the Government intended. …
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> The Full Federal Court in SZQRB found that the decision-maker had been applying the wrong risk threshold test and that it should be a lower threshold. The original intention when the complementary protection provisions commenced was that the test to be applied was the 'more likely than not' threshold which is interpreted as more than a 50 percent chance of suffering significant harm. This is higher than the test that the Court has determined must be applied - the 'real chance' threshold test, which is the test used in the Refugees Convention context, and which can be satisfied where the chance of harm occurring is as low as 10 percent.[13]

13 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 10.

3.44 In *Minister for Immigration and Citizenship v SZQRB*,[14] the Full Court of the Federal Court of Australia held that the 'real risk' test for assessing whether a person was owed complementary protection was equivalent to the 'real chance' test which was used for assessing refugee protection claims.[15] The Court rejected the submission that 'real risk' was a higher threshold which required that the possibility of harm be 'more likely than not' (that is, on the balance of probabilities). The High Court of Australia has described a 'real chance' in the context of refugee assessments as a substantial chance, which is distinct from a remote or far-fetched possibility but it may be well below a 50 per cent chance.[16]

3.45 The committee notes the Minister's view that the approach taken by the Australian courts 'extend[s] well beyond what was intended by the human rights treaties'. However, it is not apparent to the committee that the current position under the ICCPR and the CAT is significantly different to the test adopted by the Australian courts. For example, in a recent decision by the UN Human Rights Committee (HRC), several members of that committee took the opportunity to clarify the HRC's current approach to the 'real risk' test, noting that the HRC's early formulations of the test which focused on whether violations of article 7 (or 6) of the ICCPR would take place upon removal was too strict (and could be contrasted with the broader approach that was adopted under the CAT):

> The degree of certainty suggested by [the HRC's] early Views contrasts with the standard set forth in Article 3 of the [CAT], which prohibits sending a person to 'another State where there are substantial grounds for believing that he would be *in danger of* being subjected to torture' (emphasis added). The focus on danger, or risk, has characterized the approach of both the Committee against Torture and the European Court of Human Rights to the question of return to torture.
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> Article 7 [of the ICCPR] requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. … The phrasings have varied, and the Committee continues to refer on occasion to a 'necessary and foreseeable consequence' of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.
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> In its submissions on the present Communication, the State party has … described the relevant issue as whether the necessary and foreseeable consequence of the deportation would be the killing or torture of the

14 [2013] FCAFC 33.

15 Per Lander and Gordon JJ at [240] – [246].

16 *Chan v MIEA* (1989) 169 CLR 379.

> authors. That is not the proper inquiry. The question should be whether the necessary and foreseeable consequence of the deportation would be a real risk of the killing or torture of the authors.[17]

3.46 The committee notes that the approach taken in comparable jurisdictions varies. For example, in the United Kingdom, complementary protection claims are assessed in accordance with the 'real chance' test,[18] similar to refugee assessments and is consistent with the approach adopted under the European Convention on Human Rights.[19] A similar approach is taken in New Zealand.[20] Other jurisdictions such as Canada apply a higher standard based on the balance of probabilities for assessing complementary protection claims.[21]

3.47 Noting the seriousness of the threats faced by both categories of individuals, the Minister has not explained the basis for adopting a stricter test for assessing complementary protection claims than is applied to refugee protection assessments. The committee considers that it would be desirable to align both tests. In the committee's view the adoption of a stricter test than that which is applied by the Australian courts (which is consistent with the test applied by the HRC and the UN Committee against Torture under the ICCPR and the CAT) would appear to be incompatible with Australia's obligations under those conventions.

3.48 Even if such an option is not taken up by the government, it is not clear why any unintended consequences could not be addressed through legislative refinement of the current framework by either simplifying and/or clarifying the correct test to be applied. The Minister's response states that:

> Whilst consideration was given to amending the complementary protection legislation, it has always been the policy position of this Government that it is not appropriate for complementary protection to be considered as part of the protection visa legislative framework. Therefore, this bill seeks to remove the complementary protection criteria from the [Migration Act].[22] …
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> The policy shift by the Government to assess non-refoulement obligations on complementary protection grounds through the Minister exercising his or her intervention powers to grant the most appropriate visa ensures that

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17 UN Human Rights Committee, *Pillai v Canada*, (1763/08), 25th March 2011, pp 21-22 (Individual opinion by committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L. Neuman, Mr.Michael O'Flaherty and Sir Nigel Rodley).

18 *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49.

19 *Chahal v United Kingdom* (1996) 23 EHRR 413.

20 *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012).

21 *Li v Canada (Minister of Citizenship and Immigration* [2005] FCJ No. 1934.

22 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 10.

> decisions are made dependent upon the individual circumstances of the case, not just Australia's non-refoulement obligations and a level of risk determined by the court. [23]

3.49 The response does not explain what options were considered to amend the legislation or why they were considered unsuitable. The committee considers that repealing the legislative framework for complementary protection in order to revert to discretionary administrative processes is a serious step, not least because it diminishes full and transparent scrutiny before the Parliament and the courts of potentially rights-restricting measures and actions. The committee considers that it is incumbent on the government to explain any alternatives that were considered and the reasons for dismissing them in favour of repealing the legislation in its entirety. Simply stating that it is the government's policy position is not a sufficient response.

Rational connection

3.50 A measure will be rationally connected to its objective if it is 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.

3.51 The Minister's response states that:

> The repeal of the statutory complementary protection framework allows the Government to restore what it considers to be the most appropriate mechanism for considering complementary protection claims in a way that significantly reduces the risk of the framework being exploited. …
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> This amendment will allow the Minister to exercise his or her intervention powers 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 and the unique circumstances of the individual case.[24]

3.52 A consequence of repealing the complementary protection framework is that everyone with complementary protection claims, regardless of whether their arrival in Australia was authorised or not, will be dealt with through administrative processes. The committee notes that this outcome would appear to go beyond one of the stated reasons of the repeal, namely to prevent the complementary protection framework from being exploited by people smugglers.

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23 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 11.

24 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 14-15.

3.53 In his second reading speech, the Minister stated 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'. The Minister's response, however, clarifies that the Minister already has the ability to deal with unique cases under the present system.[25] The committee notes that this outcome therefore is not dependent on the complementary protection legislation being repealed.

3.54 The committee accepts that the bill will achieve the government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more appropriately considered within administrative processes. However, as set out above, the committee is not satisfied that the Minister has provided relevant and sufficient reasons to meet the threshold requirements for demonstrating that these objectives are legitimate.

Proportionality

3.55 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.

3.56 A proportionality assessment includes consideration of whether there are less restrictive means of achieving the aim, in other words, there should be no alternatives or less intrusive options available. The inclusion of adequate safeguards will also be an important 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.

3.57 As the committee noted in its earlier comments on this bill, 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. 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

25 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

> 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.[26]

3.58 The UN Human Rights Committee has similarly emphasised that the requirement to provide effective remedies in domestic law is an integral component of satisfying non-refoulement obligations under the ICCPR.[27] In particular, there should be an opportunity for effective and independent review of a decision to remove and the absence of such review may amount to a breach of non-refoulement obligations.[28]

3.59 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.

3.60 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) of the ICCPR]; it follows that States parties are obligated to place priority on judicial remedies.'[29]

3.61 The committee appreciates the further information provided in the Minister's response regarding the administrative processes that are proposed to be implemented to deal with complementary protection claims. The response acknowledges that merits review will not be available for any non-refoulement

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26 *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, UN Doc. 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).

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

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

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

decisions taken under these arrangements, but maintains that the combination of administrative processes and the availability of judicial review under the High Court's original jurisdiction will provide sufficient oversight:

> While the Minister cannot be compelled to exercise the public interest intervention powers, the actions of the Minister under the new administrative process will be subject to judicial review as the Minister is an Officer of the Commonwealth for the purposes of section 75(v) of the Constitution. Similarly, non-refoulement assessments by departmental officers are also subject to judicial review.
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> Further, as a result of the Federal Court decision in SZQRB, the removal power (and thus any potential for action leading to refoulement) under the Migration Act is not available until any claims for protection (including complementary protection) have been assessed according to law and in a procedurally fair manner.
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> The Government considers that the proposed administrative process combined with opportunities for judicial review will provide effective oversight mechanisms.[30]

3.62 The Minister's response maintains that 'the bill does not alter the content of Australia's obligations, but rather the process by which these obligations are assessed'.[31]

3.63 The committee notes that provision of 'independent, effective and impartial' review of non-refoulement decisions is an integral part of and a threshold requirement for complying with the non-refoulement obligations under the ICCPR and the CAT. While there is no obligation under these treaties to provide a particular type of visa for persons to whom Australia owes non-refoulement obligations, human rights law does require provision for an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. The absence of such provision means that the government's stated commitment not to remove anyone contrary to Australia's non-refoulement obligations cannot be guaranteed.

3.64 The committee retains its concerns that any availability of judicial review under the High Court's original jurisdiction is 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. Judicial review generally focuses on the process by which the decision is made, and is not concerned about the merits of the decision. The subject matter of the review is whether the decision

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30 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 16.

31 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 16.

was made in accordance with the law. In contrast, merits review considers all the evidence about the merits of a decision and decides whether or not a correct and preferable decision should be made.

3.65 The committee does not consider that the combination of administrative arrangements as proposed and judicial review are sufficient to satisfy the standards of 'independent, effective and impartial' review, required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT. The committee notes that the government has also not demonstrated why a less restrictive alternative that retains some form of right to independent merits review should not be available.

3.66 In light of the information before it, the committee is not able to conclude that the bill is compatible with the right to an effective remedy under article 2(3) of the ICCPR in conjunction with articles 6 and 7 of the ICCPR, and article 3 of the CAT. The committee notes that the amendments therefore risk being inconsistent with Australia's non-refoulement obligations under these treaties. The committee considers that the retention of some form of independent merits review of non-refoulement decisions is a minimum requirement to ensure the bill's compatibility with human rights.

Family and children's rights

3.67 The committee welcomes the Minister's assurances that 'members of the same family unit of a person in respect of whom Australia has non-refoulement obligations who would previously been eligible for a protection visa under the complementary protection framework will continue to be provided similar protections under any Ministerial intervention process'.[32] The committee, however, retains its concerns about the discretionary nature of the arrangements.

Prohibition against arbitrary detention

3.68 The committee notes that the proposed administrative processes appear to go some way towards addressing the inefficiencies of the previous administrative arrangements and may therefore reduce the risk of persons being detained for extended periods of time while their claims are processed.[33]

32 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 18.

33 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 18-19.

Right to a fair hearing

3.69 In light of the information provided in the Minister's response,[34] the committee makes no further comment on those aspects of the bill which relate to the right to a fair hearing.

34 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 19-20.

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

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 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 Complementary protection legislation has only been in place since March 2012. In that time a number of interpretative issues have arisen both in how the department and the RRT interpret the complementary protection provisions. This has been further exacerbated by the way the courts have essentially broadened the scope of Australia's non-refoulement obligations beyond what the Government intended.

Whilst consideration was given to amending the complementary protection legislation, it has always been the policy position of this Government that it is not appropriate for complementary protection to be considered as part of the Protection visa legislative framework. Therefore, this Bill seeks to remove the complementary protection criteria from the Migration Act 1958 (the Act).

- 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.

Following the commencement of the complementary protection legislation, a number of court decisions have changed the interpretation of Australia's complementary protection obligations to a more generous interpretation that was originally understood.

The Full Federal Court in SZQRB found that the decision-maker had been applying the wrong risk threshold test and that it should be a lower threshold. The original intention when the complementary protection provisions commenced was that the test to be applied was the 'more likely than not' threshold which is interpreted as more than a 50 percent chance of suffering significant harm. This is higher than the test that the Court has determined must be applied – the 'real chance' threshold test, which is the test used in the Refugees Convention context, and which can be satisfied where the chance of harm occurring is as low as 10 percent.

The policy shift by the Government to assess non-refoulement obligations on complementary protection grounds through the Minister exercising his or her intervention powers to grant the most appropriate visa ensures that decisions are made dependent upon the individual circumstances of the case, not just Australia's non-refoulement obligations and a level of risk determined by the court.

- 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.

Whilst the Government acknowledges that to date only a small number of Protection visas have been granted on complementary protection grounds, the full impact of recent court decisions such as the Full Federal Court's judgment in SZQRB have not yet become evident.

The number of visa grants is also a separate operational issue to the Government's policy that it is not appropriate for complementary protection to be considered as part of the protection visa legislative framework.

- 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.

The Government acknowledges that the previous administrative arrangements in place, prior to the enactment of the complementary protection legislation, had some inefficiencies. A new administrative process is being developed to meet this Government's policy position and to ensure greater efficiency compared with the previous administrative process.

The previous administrative process was not undertaken within any specific timeframes nor was a person afforded procedural fairness as part of that assessment. The Government is not proposing to return to exactly the same administrative process following the passage of this Bill.

The new administrative process being developed will ensure that assessment of non refoulement claims and personal facts will be undertaken in a more efficient, comprehensive,

timely and procedurally fair manner in accordance with relevant law and in a procedurally fair manner.

Under the proposed new administrative process, a person will be referred for a departmental non-refoulement assessment in one of 3 circumstances:

1. during the course of assessing a detained applicant's protection visa application on refugee convention grounds, a primary decision maker identifies complementary protection issues that require further investigation;

2. the RRT refers a case to the department upon identifying complementary protection issues during the course of their review that require further investigation; or

3. where a person is raising complementary protection claims, or the department identifies complementary protection issues, during the course of removal proceedings and that person has not previously been through the Protection visa process.

This referral mechanism will ensure that rather than having to assess every case against the complementary protection criteria, regardless of whether a person's case has either identified or given rise to such issues, consideration will be limited to the significant yet small cohort that have been identified for immediate referral.

Under the new administrative process, clear timeframes for completing non-refoulement assessments will be put in place. These timeframes will differ dependent upon whether a person is in detention or lawfully in the community. Decision makers will prioritise detention cases in order to ensure such cases are finalised within a shorter timeframe.

It is the department's intention that in order to maintain efficiency and timeliness the same decision maker who undertook the person's primary refugee assessment will undertake the non-refoulement assessment. Where a person is found to engage Australia's non-refoulement obligations under the CAT or the ICCPR, the department will prioritise the case's referral to the Minister for his or her consideration.

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.

Regardless of whether complementary protection issues are considered as part of the current statutory framework or within an administrative process, character and security issues will be assessed.

However, under the proposed administrative process, where the Minister personally considers the use of his or her intervention powers under the Act, the Minister may exercise his ministerial discretion to grant a visa to a person irrespective of whether they meet the character and security requirements for the grant of a visa. This can occur if the Minister

considers, given the unique circumstances of the individual case, it is in the public interest to do so. In this circumstance, the Minister is also able to fully consider a variety of visa or other case resolution options.

The number of protection visas that have been granted on complementary protection grounds to applicants who arrived by boat.

As at 31 January 2014, 75 Protection visas (excluding dependants) have been granted on complementary protection grounds, since the commencement of the complementary protection provisions on 24 March 2012. Of these 75 Protection visa grants, 46 were granted to IMAs.

Whether the Minister is able to exercise his intervention powers to grant relief in unique cases under the present system.

Under the current system, the Minister is able to consider the exercise of his or her intervention powers under sections 48B, 195A and 417 of the Act. Generally, access to the exercise of these powers is available only to persons who have not established their right to a visa.

Following an RRT decision, a person may request the Minister to intervene in their case to make a more favourable decision using his or her power under section 417 of the Act. In these circumstances a person may believe they meet one or more of the unique or exceptional circumstances set out in the Minister's Guidelines.

At any stage after a person has received a primary Protection visa decision refusal they may request the Minister to intervene under section 48B of the Act to lift the application bar and allow them to lodge a further Protection visa application where they have new claims, or there has been a significant change in circumstances, that would enhance the chance of them being successfully granted a Protection visa on either Refugees Convention or Complementary Protection grounds.

The Minister is also able to grant a visa using section 195A to a person who is in immigration detention if the Minister considers it in the public interest to do so.

In many cases, a person requesting the Minister to consider exercising his personal powers has already applied for a Protection visa, sought merits review and judicial review.

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.

- 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.

Objectives of the Bill

The key objective of this Bill is to give effect to the Government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more appropriately considered within an administrative mechanism for the purposes of the exercise of the Minister for Immigration and Border Protection's public interest powers.

This policy approach is being implemented as the Government considers that the current legislative framework for assessing complementary protection provides another product for people smugglers to sell. It is the Government's view that the current legislative complementary protection process creates a channel for asylum seekers to gain access to a permanent protection visa outcome, even where they are not found to be a refugee.

The Coalition Government has always opposed the provision of complementary protection through the protection visa framework.

How these objectives will be furthered through this Bill

The repeal of the statutory complementary protection framework allows the Government to restore what it considers to be the most appropriate mechanism for considering complementary protection claims in a way that significantly reduces the risk of the framework being exploited.

Australia's non-refoulement obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012. Where the Minister for Immigration and Border Protection is satisfied that the person engages Australia's non-refoulement obligations under the CAT and the ICCPR, it is then available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

This amendment will allow the Minister to exercise his or her intervention powers 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 and the unique circumstances of the individual case.

Safeguards

The Bill does not propose to resile from or limit Australia's non-refoulement obligations in any way, 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.

The Bill does not alter the content of Australia's obligations, but rather the process by which these obligations are assessed.

It is intended that the new administrative process assessing a person's complementary protection claims will be undertaken by qualified and experienced protection officers. These departmental officers will be guided by clear policy and procedural guidance when conducting non-refoulement assessments.

Under the new administrative process, the experienced protection officers will still be undertaking a non-refoulement assessment but doing so either immediately following the primary protection visa decision or RRT decision for detained applicants. Access to Ministerial intervention and pre-removal assessment processes will be maintained. There will, however be no consideration of complementary protection claims during merits review. Access to judicial review remains unaffected.

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.

The Bill does not limit the ability of applicants to seek merits review or judicial review in relation to a protection visa application based on Refugee Convention Grounds.

It is proposed that, under the new administrative process, as was the case prior to the enactment of complementary protection legislation, if the relevant review tribunal examining claims based on Refugees Convention grounds identify complementary protection issues during the course of its review of the case, the review tribunal will refer cases to the department for consideration of complementary protection claims for the purposes of the exercise of the Minister's intervention powers.

While the Minister cannot be compelled to exercise the public interest intervention powers, the actions of the Minister under the new administrative process will be subject to judicial review as the Minister is an Officer of the Commonwealth for the purposes of section 75(v) of the Constitution. Similarly, non-refoulement assessments by departmental officers are also subject to judicial review.

Further, as a result of the Federal Court decision in SZQRB, the removal power (and thus any potential for action leading to refoulment) under the Migration Act is not available until any claims for protection (including complementary protection) have been assessed according to law and in a procedurally fair manner.

The Government considers that the proposed administrative process combined with opportunities for judicial review will provide effective oversight mechanisms.

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.

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

The Government acknowledges that the previous administrative arrangements that were in place prior to the enactment of the complementary protection legislation in March 2012 had a number of shortcomings when considering non-refoulement obligations under the CAT and the ICCPR. However, should the Bill be passed the Government is not proposing to return to these same administrative arrangements. Rather, the new administrative process is being

developed to ensure that any complementary protection issues that are identified in the conduct of interviews or others will be immediately elevated

The proposed administrative process will include:

- A referral mechanism for primary protection visa decision-makers and the RRT to immediately refer cases (for clients in detention) which identify complementary protection issues during the course of the protection visa assessment on Refugees Convention grounds;
- A referral mechanism where substantive complementary protection issues have been identified at the removal stage regardless of whether a person has previously been through a Protection visa process
- Assessments of complementary protection claims by the same qualified and experienced departmental decision makers who undertake primary protection visa assessments;
- Procedural fairness requirements which afford the opportunity for a person to raise specific complementary protection claims, and to comment on any country information that is relevant, significant and adverse to the non-refoulement assessment finding;
- Timeframes for departmental officers to complete non-refoulement assessments which vary dependent upon whether a person is in immigration detention or lawfully in the community;
- Clear, detailed policy and procedural guidance for decision makers when making assessments;

Where a person is found to engage Australia's non-refoulement obligations under the CAT or the ICCPR the department will notify them of this outcome and that their case is being referred to the Minister for Immigration and Border Protection for consideration of the exercise of his non-compellable public interest powers. Despite the fact that the Minister's public interest powers are both personal and non-compellable, it is not the Government's intention to resile from its non-refoulement obligations in any way but rather determine the most appropriate visa outcome which suitably reflects the unique and wide ranging situations that arise in cases which have been found to engage these non-refoulement obligations.

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.

The Government remains committed to adhering to our international obligations and this Bill does not seek to alter this commitment in any way. The proposed new administrative process is not intended to discriminate between members of a family unit of a person who engages Australia's non-refoulement obligations under CAT and ICCPR and people who engage those obligations personally.

Article 26 of the ICCPR is a standalone right which will be breached if a person does not enjoy equality before the law or equal protection of the law with others, on the basis of discrimination on a prohibited ground (such as 'other status'). It prohibits arbitrary enforcement of laws and requires that objectively equal fact patterns be treated equally and objectively unequal fact patterns be treated differently. The Government accepts that article 26 is however subject to the principle of legitimate differential treatment.

Members of the same family unit of a person in respect of whom Australia has non-refoulement obligations who would previously been eligible for a Protection visa under the complementary protection framework will continue to be provided similar protections under any Ministerial intervention process. Where a person is found to engage Australia's non-refoulement obligations and referred for Ministerial intervention, as part of this process the department will take into account considerations such as to family unity and the best interests of the child. These considerations will play a key role in determining the type of recommendations put forward to the Minister concerning the most appropriate visa options to resolve a case.

Where children are involved in a case being considered for complementary protection under the new administrative process, these cases will be accorded increased priority.

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.

Under the new administrative process, a person in immigration detention will be immediately referred for a non-refoulement assessment where:

a) during the course of assessing an applicant's protection visa application on refugee convention grounds, a primary decision maker identifies complementary protection issues that require further investigation;

b) the RRT refers a case to the department upon identifying complementary protection issues during the course of their review that require further investigation; or

c) where a person is raising complementary protection claims, or the department identifies complementary protection issues, during the course of removal proceedings and that person has not previously been through the Protection visa process.

The proposed administrative process will escalate the cases of persons in immigration detention to the Minister's attention so prolonged detention will not occur as a result of introducing the administrative process.

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.

This Bill expresses a clear legislative intention for the amendments to apply to those non-citizens who made an application prior to this Act commencing. This overrides any rights that may have already been accrued by an applicant to have their application considered in accordance with the law that existed at the time they applied. However, it is not the Government's intention to disregard any issues raised in relation to the consideration of complementary protection criteria during the merits review or judicial review stages following the commencement of the amendments.

It is also the Government's intention to ensure that where the RRT was undertaking a review of a protection visa application at the time of commencement of these amendments, and the review raised concerns in relation to the primary decision's consideration of the complementary protection criteria, whilst the RRT's decision would have to be made without consideration of the complementary protection criteria, the RRT will be able to refer the case back to the department to revisit the non-refoulement assessment under the new administrative process.

There may also be some applicants who have sought judicial review of a decision not to grant a Protection visa, where that decision was made prior to the commencement of these amendments. In this case, this decision would have been "finally determined" which means that it would be outside the scope of these amendments. However, if the court determines that there has been jurisdictional error and the matter is remitted so that it can be considered according to law, the legal position is that there has never been a valid decision to refuse the

visa application, which means that the application has never been "finally determined". In these circumstances, the new law would apply to these applicants and any fresh assessment of the Protection visa application would have to be made without consideration of the complementary protection criteria. However, where a case is remitted back to the RRT following a jurisdictional error in relation to a complementary protection issue, it is intended that the RRT will be able to refer that case to the department for consideration of complementary protection should such claims be identified.