Dissenting Report By Senator Sarah Hanson-Young

Introduction

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

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

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

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

The Bill risk violating Australia's international obligations

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

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

1.7 The Refugee and Immigration Legal Centre states that:

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

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

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

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

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

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

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

Ministerial discretion is inadequate and does not afford procedural fairness

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

1.12 As stated by Refugee Advice and Casework Service:

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

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

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

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

[3] *Submission 2*, p. 3

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

[5] *Submission 21*, p. 5

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

1.15 As argued by the UNHCR:

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

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

The amendments are inefficient

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

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

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

1.20 The Refugee and Immigration Legal Centre submitted that:

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

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

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

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[6] *Submission 21,* p. 3

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

[8] *Submission 22,* p. 5

[9] *Submission 15,* p. 4

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

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

Conclusion

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

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

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

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

Recommendation 1

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

Senator Sarah Hanson-Young
Australian Greens

[10] *Submission 4*, p. 5