

Introduction

We are a group of 21 academics in Australia who specialize in refugee law.

On 4 December 2013, the government introduced the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 which seeks to repeal the complementary protection provisions in the Migration Act 1958 (Cth).

This briefing note explains why repealing complementary protection would be inconsistent with Australia's international legal obligations and would create considerable bureaucratic inefficiencies.

Background

Since 24 March 2012, asylum seekers processed in Australia have been able to claim protection on broader grounds than those contained in the Refugee Convention, reflecting certain of Australia's obligations under international human rights law.

A refugee is someone with a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.

Applicants for a protection visa now have their claims assessed not only against this definition, but also against complementary protection criteria.

Thus, pursuant to section 36(2) of the Migration Act 1958 (Cth), Australia is not permitted to remove people to countries where they face a real risk of one or more of the following:

- arbitrary deprivation of life
- the death penalty
- torture
- cruel or inhuman treatment or punishment
- degrading treatment or punishment.¹

Section 36(2B) sets out three exceptions, stating that there is no 'real risk' of significant harm if the applicant can safely relocate to another part of the country; if an authority within the country can provide protection; or if the risk is faced by the population generally and not by the non-citizen personally.

¹ These obligations arise pursuant to Australia's obligations under the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), arts 6, 7; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'), art 3; Convention on the Rights of the Child, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'). The Act defines these some of these terms more narrowly than they are understood in international human rights law, an aspect that many of us critiqued in our submissions to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Migration Amendment (Complementary Protection) Bill 2009.

Section 36(2C) sets out exclusion clauses. These render an applicant ineligible for complementary protection if there are serious reasons for considering that he or she has:

- committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- committed a serious non-political crime before entering Australia; or
- been guilty of acts contrary to the purposes and principles of the UN.

These grounds for exclusion also apply to Convention refugees. However, exclusion from complementary protection is broader, and can also be denied if the Minister considers, on reasonable grounds, that the applicant is:

- a danger to Australia's security; or
- having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.²

Character and security checks, including criminal checks, are also conducted before any visa is granted.³ It is therefore misleading to imply, as the Immigration Minister has done, that criminals will benefit from complementary protection.⁴

Why do we have complementary protection in Australia?

Complementary protection was introduced by the Migration Amendment (Complementary Protection) Bill 2011 to give effect to certain of Australia's international obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

As noted in the Explanatory Memorandum to that bill,⁵ it responded to recommendations by national and international bodies, such as:

- Senate Legal and Constitutional References Committee report *A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000)
- Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004)
- Legal and Constitutional References Committee report *Administration and Operation of the Migration Act 1958* (March 2006)
- Australian Human Rights Commission
- UN Committee Against Torture

² Although such individuals are excluded from the grant of a protection visa, Australia is nonetheless precluded from removing them to a place where they would be at risk of significant harm.

³ Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (19 November 2013) 61 (Alison Larkins, Department of Immigration and Border Protection) http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/70373bf4-1745-474d-be50-7e04b2a90004/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_11_19_2105.pdf;fileType=application%2Fpdf#search=%22committees/estimate/70373bf4-1745-474d-be50-7e04b2a90004/0000%22 (accessed 5 December 2013).

⁴ 'We were having criminals and bikies who were claiming protection ... Now, our signatory status to important international conventions to protect people's human rights are not about protecting bikies and criminals.' The Minister was not able to point to cases of protection being granted to such people. See 'Politics wrap: December 4, 2013', *Sydney Morning Herald* (4 December 2013) <http://www.smh.com.au/federal-politics/the-pulse-live/politics-wrap-december-4-2013-20131204-2ypfl.html#ixzz2mYKZERPe> (accessed 5 December 2013).

⁵ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), 3. See also Executive Committee Conclusion 87 (1999), para f; Executive Commission Conclusion 89 (2000), recitals.

- UN Human Rights Committee
- Executive Committee of the UN High Commissioner for Refugees.

The introduction of complementary protection also aligned Australian law with comparable provisions in the 27 countries of the European Union (EU),⁶ Canada,⁷ the United States (US),⁸ New Zealand,⁹ Hong Kong¹⁰ and Mexico,¹¹ as well as the expanded refugee categories in the regional refugee systems of Latin America¹² and Africa.¹³

Complementary protection introduced greater efficiency, transparency and accountability into Australia's protection regime. Prior to March 2012, Australia was unable to guarantee that people who did not meet the refugee definition in the Refugee Convention, but who nonetheless faced serious human rights abuses if returned to their country of origin or habitual residence, would be granted protection.

This was because the only way to have claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment assessed was via the non-compellable and non-reviewable 'public interest' power of the Immigration Minister under section 417 of the Migration Act.

As explained below, this is a lengthy and inefficient process. Despite the government's arguments to the contrary in the Explanatory Memorandum to the 2013 Bill,¹⁴ it is an insufficient mechanism to comply with Australia's international legal obligations of non-return.

Who receives complementary protection?

Between 24 March 2012 and 19 November 2013, a total of 55 protection visas were granted on the complementary protection grounds.¹⁵ This represents a tiny proportion of the thousands of protection visas granted during the same period.¹⁶

⁶ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, arts 2(e), 15 ('Qualification Directive'); Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9, arts 2(f), 15.

⁷ Immigration and Refugee Protection Act, SC 2001, c 27, s 97.

⁸ Immigration and Nationality Act, 8 CFR §§ 208.16, 208.17 (1952) (CAT-based protection only).

⁹ Immigration Act 2009 (NZ) ss 130, 131.

¹⁰ CAT-based protection only; refugee status determination is conducted by UNHCR. See also Kelley Loper, 'Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong' (2010) 22 *International Journal of Refugee Law* 404.

¹¹ Decreto por el que se expide la Ley sobre Refugiados y Protección Complementaria y se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población [Law on Refugees and Complementary Protection] (December 2010) http://www.dof.gob.mx/nota_detalle.php?codigo=5175823&fecha=27/01/2011 (accessed 2 December 2013). Mexico is the first country in Latin America to grant complementary protection: 'UNHCR Welcomes Breakthrough Mexico Legislation on Protection' (10 December 2010) <http://www.unhcr.org/4d025a8a6.html> (accessed 2 December 2013).

¹² Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc. 10, rev 1, 190–93.

¹³ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

¹⁴ Explanatory Memorandum, Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 1.

¹⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (19 November 2013) 61 (Alison Larkins, Department of Immigration and Border Protection). As at 31 October 2013, a total of 83 cases had been remitted from the Refugee Review Tribunal (RRT) to the Immigration Department with a recommendation that a protection visa be granted on complementary protection grounds. Of these, 41 were people who had arrived by

In many of the cases, the harm feared was considered to amount to persecution, but the applicant was not a 'refugee' because the persecution was not for reasons of his or her race, religion, nationality, political opinion or membership of a particular social group (which is what the refugee definition requires).

The majority of cases involved inter-personal disputes such as:

- extortion attempts
- blood feuds
- honour killings
- domestic violence
- revenge.

There were also cases of people at risk of harm from:

- the conflict in Syria (based on their particular location)
- travel on dangerous roads in Afghanistan.

This kind of caseload is very similar to that of other jurisdictions around the world.

To date, the RRT has published 35 of the 'successful' complementary cases. A detailed report examining these is available here:

http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf.¹⁷

Summaries of all the published successful and unsuccessful complementary protection decisions by the RRT is available here:

<http://www.kaldorcentre.unsw.edu.au/node/125>.¹⁸

Why does it matter if the complementary protection provisions are repealed?

Exposure to significant harm

If the provisions are repealed, there is a real risk that individuals will be exposed to very serious human rights violations, including torture or death.

Contrary to our international legal obligations

Removing a codified basis to have claims considered against the complementary protection criteria means that Australia cannot guarantee that people will be protected from removal to significant harm. As noted below, the proposed alternative – Ministerial discretion – is

boat: Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (19 November 2013) 6 (Kay Ransome, Principal Member of the RRT).

¹⁶ Between July 2013 and September 2013, a total of 1,200 protection visas were granted: Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (19 November 2013) 56 (Alison Larkins, Department of Immigration and Border Protection). 7,504 protection visas were granted in 2012–13 and 7,041 were granted in 2011–12: Department of Immigration and Citizenship, *Annual Report 2012–13*, 127.

¹⁷ Only about 40 per cent of RRT decisions are made public. They are decisions considered by the Principal Member to be of 'particular interest', and which represent a broad cross section of claims based on such factors as the country of reference, the outcome of the review, whether there is detailed consideration of legal principles, and whether the factual circumstances are complex or unusual: Amanda MacDonald, 'Refugee Protection and the RRT' (UNSW, 2 April 2013) 7 fn 5 [http://www.mrt-rrt.gov.au/getattachment/Information-for/Community-\(General-public\)/Community-speeches-and-presentations/P-C-2012-04-PU-speech-UNSWLawClassPresentationDPM.pdf.aspx](http://www.mrt-rrt.gov.au/getattachment/Information-for/Community-(General-public)/Community-speeches-and-presentations/P-C-2012-04-PU-speech-UNSWLawClassPresentationDPM.pdf.aspx) (accessed 2 December 2013).

¹⁸ Any refugee case also involves consideration of the complementary protection criteria.

insufficient to meet the absolute and non-derogable requirement in international human rights law that Australia will not expose people to a real risk of torture, cruel, inhuman or degrading treatment or punishment, the death penalty, or arbitrary deprivation of life.

Ministerial discretion is inefficient

A key reason why complementary protection was introduced was to enhance efficiency.

By enabling decision makers to assess from the outset whether a person was at risk of one of the specified human rights violations, the complementary protection legislation put this assessment upfront, thus saving time and money, and also alleviating the human suffering associated with long periods of uncertainty (especially if in immigration detention).

The previous process – which the bill would reinstate – was that asylum seekers who did not meet the refugee definition, but risked significant harm, nevertheless had to lodge a refugee application, and proceed through all stages of review, before being eligible to appeal to the Minister to exercise his discretion (under section 417) to grant a visa.

Former Immigration Minister Chris Evans, who originally sought to introduce complementary protection, regarded the section 417 process as an incredible waste of ministerial time, with over 2,000 requests received each year.¹⁹ He also lamented that he was single-handedly ‘playing God’ with asylum seekers’ futures. The system was described in Parliament as ‘inefficient and time-consuming’, adding ‘stress to the applicants’, and causing ‘excessive uncertainty and delays’.²⁰ The process also suffered from allegations of political interference, favouritism and arbitrariness, inconsistent with basic principles of the rule of law.

The introduction of complementary protection created a transparent and functional process. Claims could be heard and disposed of more quickly, and Australia could demonstrate that it was implementing its international legal obligations.

Ministerial discretion does not guarantee that our international obligations will be met

The obligations to which complementary protection gives effect are absolute and cannot be derogated from under international law.²¹

The Ministerial intervention process is non-compellable,²² non-delegable²³ and non-reviewable.²⁴ This means that the Minister has no obligation to consider whether or not to exercise the discretionary power under section 417, and if he does choose to do so, then neither the decision relating to the exercise of the power, nor the ultimate decision, can be reviewed. It is not transparent or subject to procedural fairness considerations.

¹⁹ See Department of Immigration and Citizenship, *Annual Report 2010–11*, 123; Department of Immigration and Citizenship, *Annual Report 2012–13*, 129. Not all of these were protection requests, but the numbers show the very high volume of cases requiring personal consideration.

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives (11 May 2011) 3657 (Andrew Leigh); Commonwealth, *Parliamentary Debates*, House of Representatives (24 February 2011) 1357 (Chris Bowen).

²¹ Whereas the Refugee Convention permits exclusion on certain grounds, human rights law does not. While the Migration Act excludes certain individuals from the grant of a protection visa, as noted above, Australia is precluded from removing them to a place where they would be at risk of significant harm.

²² Migration Act 1958 (Cth), s 417(7).

²³ Migration Act 1958 (Cth), s 417(3).

²⁴ Migration Act 1958 (Cth), s 476(2) provides that ‘the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister’s power under ... section ... 417’.

By its very nature, a discretionary power like this cannot fully comply with Australia's protection obligations under international law. Although international treaties do not prescribe the form in which States are to give effect to their obligations, it is apparent that any provision that contains a non-compellable and non-reviewable discretion is at odds with Australia's duty to respect the principle of *non-refoulement* under international human rights law.

The number of visas granted on complementary protection grounds is small

The number of protection visas granted on complementary protection grounds is extremely low. According to the most recent figures from the Immigration Department, in September 2013, only 55 out of 1,200 protection visas granted onshore were on complementary protection grounds. It is therefore misleading to claim, as the Immigration Minister has, that the complementary protection system is open to 'widespread abuse' and adds 'another product to the people smugglers' shelf'.²⁵

For those 55 individuals, the protection visa was often the difference between life and death.

Family unity not guaranteed

Currently, if a person is granted protection on the complementary protection grounds, a protection visa is also granted to his or her family members. However, if the complementary protection provisions are repealed, this guarantee will also disappear. While the bill's Statement of Compatibility with Human Rights states that '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',²⁶ for the reasons expressed above, this discretionary process is insufficient to ensure that family unity will be maintained. It thus risks violating Australia's obligations under the ICCPR and the Convention on the Rights of the Child.²⁷

Conclusion

Repealing the complementary protection provisions will lead to considerable inefficiency and delay and risk violating Australia's *non-refoulement* obligations under international human rights law.

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²⁵ 'Scott Morrison Being "Mean for the Hell of It" to Asylum Seekers: Labor', *Sydney Morning Herald* (4 December 2013) <http://www.smh.com.au/federal-politics/political-news/scott-morrison-being-mean-for-the-hell-of-it-to-asylum-seekers-labor-20131204-2ypst.html#ixzz2mYK9E0OW> (accessed 5 December 2013).

²⁶ Statement of Compatibility with Human Rights, 3, Appendix A to Explanatory Memorandum, Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013.

²⁷ ICCPR, arts 17, 23; CRC, arts 3, 9, 10, 16, 20, 22.

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