

# Senate Legal and Constitutional Affairs Committee

## An inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

### Submission

#### The Australian Churches Refugee Taskforce

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#### **AustralianChurches** RefugeeTaskforce

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## Introduction

The Australian Churches Refugee Taskforce ('the Taskforce') is an initiative of the National Council of Churches in Australia ('NCCA') and came together in early 2013. It is comprised of 17 Senior members of clergy, eight churches and three ecumenical bodies. It has 321 entities as network members.

The NCCA and its members have been involved with the issue of a complementary protection for well over a decade. In the early 2000s the NCCA worked alongside the Refugee Council of Australia and Amnesty International to draft a complementary protection model. It was a significant contribution towards improving the fairness and effectiveness of the then deficient process.<sup>i</sup>

The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (the Bill) seeks to over turn the current complementary protection regime. This regime was the culmination of several years considered work and has had less than two years in which to be tested. As such, the Taskforce is deeply concerned about the Bill and we ask that the Parliament reject the legislation in its current form, for the reasons set out below.

We first address the specifics of the Bill and the proposed changes, followed by broader comment about the general direction of this area of asylum seeker and refugee policy.

### 1. The proposed changes in the Bill

In his Second Reading speech, the Minister for Immigration and Border Protection set out some broad justifications for the Bill, including that the current complementary protection regime.<sup>ii</sup>

- Creates "a product" for people smugglers;
- Allows granting of protection visas;
- Enables people who have committed serious crimes to engage protection obligations;
- Is complex, convoluted, difficult to apply, and leads to inconsistent outcomes;
- Courts are extending the reach of the treaties, and expanding the threshold test ("reasonable chance") this is too broad; and
- Ministerial power can deal more flexibly and constructively with individual cases than with codified criterion.

We support the position put forward by the Kaldor Centre for International Refugee Law, which is endorsed by 21 distinguished professors of law and experts in this field. This submission, and related articles, largely rebuts many of the assertions made by the Minister and raises serious concern with the Bill, including that:<sup>iii</sup>

- Although the treaties do not prescribe how States must give effect to obligations, the proposals contained in the Bill would be inconsistent and contrary to our international legal obligations;
- The non-compellable and non-reviewable 'public interest' power of the Immigration Minister is an insufficient mechanism. It lacks transparency, accountability and procedural fairness;
- The Ministerial discretion is also inefficient and would create considerable bureaucratic inefficiencies;

- The proposed changes risk *refoulement* and exposure to significant harm;
- It is misleading to imply that criminals will benefit from complementary protection, as character and security checks, including criminal checks, are conducted before a visa is granted;
- The number of visas granted on complementary protection grounds is small and there is no evidence it creates a “product” for people smugglers; and
- Family unity is not guaranteed in the discretionary process.

We would add in addition to the observations made by the Kaldor Centre the following comments:

***Lack of evidence & justification for change***

Overall, it is not clear, nor equivocal that the case has been made that the complementary protection system needs such a radical overhaul. The Minister describes the current provisions as *‘complicated, convoluted, difficult for decision-makers to apply, and ... leading to inconsistent outcomes.’*

We note, however, that the current model was informed by years of work - by multiple Parliamentary inquiries, and recommendations from a range of expert bodies, both domestic and international, and civil society including the churches and NCCA. It addressed a system that was clearly considered by stakeholders, including the Minister of the time, to be cumbersome, risky and failing to achieve its objectives.

The current regime has only been in operation since March 2012, a trifling time in terms of the lifecycles of legislative instruments. Where is the evaluation or analysis of the existing process — the evidence that the current provisions are in fact as “complicated” and “convoluted” as suggested? What comparison has been carried out of its effectiveness, fairness and consistency, compared to what is now being proposed?

In fact, as we highlight below, it is unlikely that any comparison of the two regimes could be relied upon, unless the guidelines determining the nature of the replacement mechanisms have been well developed and clearly communicated.

The risks of *refoulement* and, subsequently, to human life, will inevitably increase if the Government presses forward with vaguely described procedures, quickly implemented in an environment of rapid change, uninformed by the work of experts, and with minimal safeguards for either the decision-maker or the person seeking protection.

***No replacement mechanism***

The current Bill does not clearly establish the regime that is to replace the current one. The Minister asserts that *‘determining the appropriate mechanism for considering complementary protection claims is a separate issue.’*

We suggest otherwise, that, as noted above, the seriousness of consequences associated with these decisions requires a more considered approach from Parliament. We submit that it would be a dereliction of duties were Parliament to allow the revocation of such a relatively small yet important regime, without giving proper scrutiny as to what may replace it.

### ***The Minister as decision maker?***

The suggestion that the “replacement mechanism” may be a reversion to the discretionary power of the Minister is of significant concern to the Taskforce. A former Immigration Minister said of this power:

In a general sense I have formed the view that I have too much power. The act is unlike any act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm.<sup>iv</sup>

It is well accepted that it is appropriate and necessary for the Minister to maintain discretion on humanitarian grounds or special issues, for exceptional and unique circumstances perhaps not contemplated by existing law. But our complementary obligations under international law are clear and compelling. Not only was Ministerial discretion previously demonstrated to be an insufficient mechanism, but, in the current context, it is wholly inadequate for this task.

To the longstanding legal arguments made elsewhere we add the following observation — the context in which the Minister would be making such decisions has also changed. In particular, factors such as our changing relationships with other nation states (including source countries); heightened public awareness of asylum seeker issues, within a debased public discourse; and the enormous expansion in the numbers of people in Australia still awaiting processing of their protection claims, many thousands more than existed during the previous period. In addition, the Minister also deals on a day-to-day basis with internal and structural challenges; related to the culture and capability of the Department,<sup>v</sup> and expanding and complex new portfolio and ministerial responsibilities.

Ministerial decision making cannot be isolated from such a socio-political environment, and its associated pressures and constraints. We suggest that under such circumstances, the ability of any individual to make fair, impartial and correct decisions *in every case* must be severely challenged.

Moreover a mechanism that relies on a single individual “playing God” does not assist or safeguard the Minister himself. Rather, it exposes him to bearing sole responsibility for his decisions, regardless of the pressures and demands that might result on occasion in poor or hasty decision-making.

A more robust system, such as that which currently exists, includes safeguards to support wise and fair decision-making, and offers protections for both asylum seeker and the Minister.

## 2. Our Dignity as Australians and Australia as a nation

Dignity: the state or quality of being worthy of honour or respect.

*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

Opening statement of the Universal Declaration of Human Rights

*And the king will answer them, 'Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.'* Mathew 25: 40

There are myriad and rapid changes taking place in refugee policy in Australia. An overarching concern of the Taskforce is that of our inalienable human dignity; not just of those who come to our shores seeking our protection, but also what our response to the challenges of displaced peoples in our modern era means for us as individual Australians and as a nation of peoples. As Pope John Paul II, amongst many others, observed — a society will be judged on the basis of how it treats its weakest.

There is a decided lack of truth telling in the discourse surrounding refugees and asylum seekers. It is evident in the language that is being used, the selective and distorted representations of fact, and in the growing secrecy of government and its apparatus, such that:

“An untruthful portrayal of asylum seekers has become our truth. In our Pocket Universe those fleeing torture and persecution have become self-interested opportunists, illegally invading our generous nation, swarming over our borders and swamping our communities. By seeking to jump the queue, they have affronted our sense of fair play.”<sup>vi</sup>

This lack of truth telling is being starkly reflected back at us. We read, for example, the recent reports by the UNHCR about Manus Island and Nauru<sup>vii</sup>, which detailed “harsh physical conditions” not meeting international standards; the lack of a “fair and efficient system for assessing refugee claims”; and the lack of “safe and humane conditions”. We note the contents of a letter composed by doctors working for the International Health and Medical Services (IHMS) on Christmas Island outlining, amongst many issues, the jeopardising of child safety and inadequacy of antenatal care putting pregnant women and their children “at unnecessary risk of harm.”<sup>viii</sup>

And we see ourselves portrayed on the international stage in the recent report by Human Rights Watch, which describes our government as “hell-bent on using cruel policies to deter asylum seekers, even at the expense of the country’s international reputation”.<sup>ix</sup>

As Reverend Professor Andrew Dutney has observed “[s]omehow it has come to suit us to treat this particular group of vulnerable ‘others’ as we would never want to be treated ourselves”.<sup>x</sup>

Pope Francis recently spoke to a similar point, in his visit to Lampedusa:

“Today no one in the world feels responsible for this; we have lost the sense of fraternal responsibility ...

“In this world of globalization we have fallen into a globalization of indifference. We are accustomed to the suffering of others, it doesn’t concern us, it’s none of our business.”<sup>xi</sup>

This is not trite sentiment, unconcerned with the realities of the challenges we face; just as civil society and faith-based organisations do not seek transparency of Government action towards asylum seekers out of “sport” or some “idle curiosity”.<sup>xii</sup>

This “globalization of indifference” goes to the heart of the story we tell each other about the kind of nation we are, and it shapes our relationships with each other and towards the world. It can both expand and limit what our nation could be.

Our claim upon the ‘state or quality of being worthy of honour or respect’ slips yet further as each new story emerges: of asylum seekers miscarrying their unborn;<sup>xiii</sup> of children locked up or unable to attend school;<sup>xiv</sup> of families split apart or denied reunification;<sup>xv</sup> of mental anguish driving people, including unaccompanied children, to acts of self harm and attempted suicide;<sup>xvi</sup> of sexual assaults and rapes in detention centres;<sup>xvii</sup> and of boats being turned back under false pretence and threat.<sup>xviii</sup>

The proposed changes to the Bill will wind back a more transparent and fair system, and potentially replace it with an opaque and unaccountable discretionary power, putting more people at increased risk of *refoulement*. How long will it be before their stories join those above?

Continuing to treat those who seek asylum as deserving of less than full human dignity not only “crush[es] the souls of detainees”, but it reflects upon and shapes our own human dignity; it points to “a neglected, enfeebled, imperilled Australian soul,”<sup>xix</sup> and marks the diminishment of us all as a nation of peoples.

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<sup>i</sup> *Complementary Protection: The Way Ahead*, January 2004, is attached at Appendix A  
NCCA (2007), *Fact Sheet: Introducing the Complementary Protection Model*, is attached at Appendix B. Both papers can also be downloaded at:

[http://unifys.com/nccalinks/actforpeace/about\\_us/protect\\_refugees/issues/complementary\\_protection.html](http://unifys.com/nccalinks/actforpeace/about_us/protect_refugees/issues/complementary_protection.html). See further a record of the involvement of the churches in this policy area at:

[http://unifys.com/nccalinks/actforpeace/about\\_us/protect\\_refugees/papers\\_and\\_submissions.html](http://unifys.com/nccalinks/actforpeace/about_us/protect_refugees/papers_and_submissions.html)

<sup>ii</sup> Minister for Immigration and Border Protection, Second Reading speech, The Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013, House of Representatives Hansard, Wednesday, 4 December 2013, Page: 1521

<sup>iii</sup> Kaldor Centre for International Law submission available at: <http://www.kaldorcentre.unsw.edu.au/>; and ABC online article ‘Playing God on asylum seekers is unacceptable’, available at <http://www.abc.net.au/news/2013-12-05/mcadam-playing-god-on-asylum-seekers-is-unacceptable/5137794>

<sup>iv</sup> C Evans (Minister for Immigration and Citizenship), Additional Senate Estimates, 19 February 2008, p. 31, quoted in *Complementary protection for asylum seekers overview of the international and Australian legal framework*, Parliamentary Library Research Paper no. 7 2009–10, 30 September 2009 found at:

[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0910/10rp07#ftn130](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0910/10rp07#ftn130)

<sup>v</sup> See for instance the Australian Public Service Commission, *Capability Review* of the then Department of Immigration and Citizenship, July 2012.

<sup>vi</sup> The Very Reverend Dr Peter Catt, *Politicians bending reality on refugees: church leader*, The Brisbane Times, 16 August 2013, found at: <http://www.brisbanetimes.com.au/federal-politics/political-opinion/politicians-bending-reality-on-refugees-church-leader-20130816-2s0rb.html>

<sup>vii</sup> See the UNHCR website: [http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=351:men-women-and-children-suffering-from-harsh-physical-conditions-and-legal-shortcomings-at-pacific-island-asylum-centres-unhcr-reports&catid=35:news-a-media&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351:men-women-and-children-suffering-from-harsh-physical-conditions-and-legal-shortcomings-at-pacific-island-asylum-centres-unhcr-reports&catid=35:news-a-media&Itemid=63)

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<sup>viii</sup> The full letter is available at The Guardian website:

<http://www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full> .

<sup>ix</sup> Human Rights Watch (2014) World Report 2014: Australia. [www.hrw.org/world-report/2014/country-chapters/australia](http://www.hrw.org/world-report/2014/country-chapters/australia)

<sup>x</sup> Reverend Professor Andrew Dutney, *The Fear of others has corrupted the Australian Soul*, ABC online, 27 November 2012: <http://www.abc.net.au/religion/articles/2012/11/27/3642256.htm>

<sup>xi</sup> Transcript of speech available at: <http://www.news.va/en/news/pope-at-lampedusa-forgive-us-lord-for-indifferen-2>

<sup>xii</sup> Prime Minister Abbott recently stated that his "closed book" approach to border operations was aimed at preventing the issue becoming "sport for public discussion;" <http://www.theguardian.com/world/2014/jan/09/ony-abbott-secrecy-asylum-seekers-navy-tow-indonesia>

<sup>xiii</sup> In these instances, the miscarriages were accompanied by claims of poor medical treatment and/ or heightened risk due to the manner and nature of mandatory detention, with incidents reportedly occurring under both the previous and current Government. See for example: <http://www.smh.com.au/federal-politics/federal-election-2013/pregnant-women-sent-to-manus-despite-the-risks-20130729-2qv40.html>, and : <http://www.theguardian.com/world/2013/dec/23/woman-who-miscarried-on-christmas-island-told-lower-expectations>.

<sup>xiv</sup> For instance there have been reported issues in WA <http://www.abc.net.au/pm/content/2013/s3891106.htm>, on Christmas Island <http://www.theaustralian.com.au/national-affairs/policy/no-school-classes-for-asylum-children/story-fn9hm1gu-1226754575501#>; and the UNHCR noted in its report on Nauru concerns that children did not have 'adequate educational and recreational facilities' <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>

<sup>xv</sup> As happened in the well publicised case of Latifa and her newborn baby Ferouz. Of concerns also is the most recent directive for refugee family's to have the lowest priority in processing of family reunion visa applications, which alongside existing policies towards asylum seekers has created a set of policies that are decidedly anti-family and potentially in breach of international law: <http://www.theguardian.com/world/2014/jan/08/refugees-family-reunion-hopes-dashed>

<sup>xvi</sup> See for example recent reports: <http://www.dailymail.co.uk/news/article-2540323/Asylum-seekers-stitch-mouths-shut-tensions-rise-Christmas-Island.html>; <http://www.theguardian.com/world/2014/jan/14/lips-sewn-together-asylum-seekers>; <http://www.abc.net.au/news/2014-01-08/manus-island-guards-ridicule-asylum-seeker-after-self-harm-atte/5190024> and <http://www.theage.com.au/national/asylum-seeker-children-transferred-from-nauru-to-brisbane-after-health-fears-20131123-2y2q5.html>

<sup>xvii</sup> See for example: <http://www.sbs.com.au/dateline/story/about/id/601700/n/Manus-Whistleblower>, and more recently <http://www.theguardian.com/world/2014/jan/02/female-asylum-seeker-alleges-sexual-assault>

<sup>xviii</sup> See for example: <http://www.smh.com.au/federal-politics/political-news/african-asylum-seekers-say-australian-navy-inflicted-burns-kicked-them-20140122-317wa.html#ixzz2r5MhKI4m>; and Acting Prime Minister Warren Truss defends Navy amid claims asylum seekers beaten and burned, <http://www.abc.net.au/news/2014-01-22/australian-navy-accused-of-beating-burning-asylum-seekers/5211996>

<sup>xix</sup> Reverend Professor Andrew Dutney, *The Fear of others has corrupted the Australian Soul*, ABC online, 27 November 2012: <http://www.abc.net.au/religion/articles/2012/11/27/3642256.htm>