



**Senate Legal and Constitutional Affairs Committee Inquiry into Migration
Amendment (Regaining Control over Australia's Protection Obligations) Bill
2013**

Anti-Slavery Australia Submission

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Submission to the Senate Legal and Constitutional Affairs Committee

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

Introduction

Anti-Slavery Australia at the University of Technology, Sydney welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 (the Bill).

Anti-Slavery Australia is a specialist law, research and policy centre dedicated to the prevention of human trafficking, slavery and slavery-like practices and includes a law and migration practice providing free legal advice and representation to men, women and children who have been trafficked or enslaved in Australia.

The Bill intends to repeal the amendments made by the Migration Amendment (Complementary Protection) Bill 2012 which had the effect of introducing life-protecting safeguards into the operation of the *Migration Act 1958* (Cth) (the Act). Anti-Slavery Australia does not support the Bill.

Current legislative scheme

In our decade of providing legal advice and representation to people who have experienced human trafficking and slavery in Australia, we have found that the unique experience of this vulnerable group limits the class of visas that are available to them. In some cases, protection visas have been granted to non-citizens who have experienced trafficking and slavery in that they are 'a non-citizen in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol' (Section 36(2)(a)). The Refugee Review Tribunal (RRT) has considered cases where applicants had been trafficked to Australia and forced to work in slavery-like conditions over a period of months. The Tribunal found that the applicants had a well-founded fear of persecution if returned to their home country, based on their membership of a particular social group to which Australia owes protection obligations.¹

¹ N03/47757 [2004] RRTA 355; VXAJ v MIMIA [2006] FMCA 234.



However, many people who have experienced trafficking and slavery in Australia do not fit the criterion for a protection visa as persons to whom Australia has protection obligations under the Refugees Convention. Victims of human trafficking and slavery have often experienced serious harm such as physical and psychological abuse, many have had their movement and finances monitored and controlled, they may have received threats of violence towards themselves and their families who are often known to their traffickers, and have a real fear of further violence if returned to their country of origin.

The existing complementary protection legislative scheme provides for the establishment of measures to ensure that Australia meets international obligations arising through ratification of key international instruments - the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,² the International Covenant on Civil and Political Rights,³ and the Convention on the Rights of the Child.⁴ Since its introduction there have been 57 visa grants through the effects of the provisions.⁵

Section 36(2A) of the Act provides for five grounds of complementary protection:

(2A) A non-citizen will suffer **significant harm** if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

Anti-Slavery Australia Case illustrating the vital importance of complementary protection

Anti-Slavery Australia has direct experience of the benefit of the current complementary protection provisions for a woman trafficked to Australia. After an earlier refusal of her application for a protection visa by the minister's delegate the woman sought independent review of the decision to refuse the visa. In a decision made in 2012, the RRT was satisfied that the applicant met the complementary protection criterion under s36(2)(aa) of the Act, but not satisfied that the applicant met the refugee criterion under s36(2)(a). In the decision, the Tribunal found that the applicant had a real risk of significant harm from her

² Entered into force for Australia 7 September 1989.

³ Entered into force for Australia 13 November 1980, in full 28 January 1993.

⁴ Entered into force for Australia 16 January 1991.

⁵ Law Council of Australia, *Proposed Reforms – Complementary Protection Provisions*, MS#1307, 6 December 2013.



trafficker in the form of arbitrary deprivation of life, or cruel or inhuman treatment or punishment. The Tribunal also found that there was a real risk of significant harm from the applicant's father in the form of cruel or inhuman treatment or punishment. The Tribunal further applied s36(2B) finding that the applicant had no options for relocation, there was no reduction in the finding of a 'real risk' through protection from authorities, and that the applicant's real risk was faced by her personally and was not faced by the population generally.

Trafficking visa framework

The Migration Regulations 1994 does provide for the trafficking visa framework for people who have been identified as trafficked or enslaved. While 45 days visa support and protection is available for any person in this class, extended protection is only available to those who participate in the criminal justice process. The framework consists of a Bridging F visa (BVF), a Criminal Justice Stay visa (CJSV), and a Witness Protection (Trafficking) (Permanent) visa (WPTPV). The length of time spent on a CJSV is dependent on the length of the criminal investigation and any subsequent prosecution.⁶ This has the added effect of delaying family reunification, and limiting access to social support. While some people who have experienced trafficking and slavery may be granted a visa through the trafficking visa framework, others may be unable to participate in law enforcement processes and yet experience fear for their personal safety or life and the safety of family members if returned to their country of origin.⁷

The repeal of complementary protection will have significant consequences for those who have suffered serious harm through human trafficking and slavery.

No clear alternative provided in the Bill

While the Minister's intention is not to resile from or limit Australia's international human rights obligations, we have grave reservations about the decision to repeal the current scheme and replace it with an 'administrative process'.

Under the current system, decision makers must consider a claim for a protection visa under s36 of the Act, which encompasses both protection obligations under the Refugees Convention and complementary protection, that there is a real risk that the applicant will

⁶ Report of the Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response 1 July 2011 – 30 June 2012*, 2012.

⁷ See also, Anti-Slavery Australia submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like Conditions and People Trafficking*, 9 October 2012.



suffer significant harm if removed from Australia to a receiving country. This system provides for decision makers to assess both criteria at the same stage of the decision making process.

A return to reliance on the Minister's discretion for consideration of complementary protection provisions requires, for instance, individuals to make a claim for protection on refugee grounds in the Act, and on a refusal, have the claim reviewed at the RRT. On refusal at the RRT the individual is eligible to request that the Minister exercises his or her discretionary powers through the ministerial intervention powers set out in section 417. The Minister may also exercise his or her discretionary powers to substitute a more favourable decision for those handed down at the Migration Review Tribunal and Administrative Appeals Tribunal. These powers are set out in sections 351, 391, 454, and 501J. For those in detention, the Minister may use his or her discretionary powers to grant a visa under s195A. These powers are non-compellable and non-reviewable.

Attachment A to the Explanatory Memorandum to the Bill makes reference to the Minister's discretionary powers under sections 195A, 351, 391, 417, 454, and 501J of the Act, and states that when the Bill has passed a similar administrative process will be re-established. The Bill and Explanatory Memorandum do not outline how a new administrative system will operate, or provide for an alternative administrative system.

In 2004 the Senate Select Committee on Ministerial Discretion in Migration Matters considered the purpose, strengths and weaknesses of the Minister's discretionary powers under sections 351 and 417 of the Act. Ministerial intervention provides an important safeguard in the immigration decision making process, providing a 'safety net' for those who do not meet the requirements under migration laws.⁸ As such, ministerial discretion should be reserved for unique and exceptional circumstances that fall outside of a substantive legislative scheme.

Conclusion

The repeal of complementary protection under s36(2)(aa) of the Act may have unintended consequences for the vulnerable few to whom Australia owes protection 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. These vulnerable few include those who have suffered serious harm through the consequences of human trafficking and slavery in Australia.

⁸ Report of the Senate Select Committee on Ministerial Discretion in Migration Matters, March 2004, paragraph 5.2.



Without a clear explanation of the administrative process that will replace the legislative scheme of complementary protection, Anti-Slavery Australia does not support this Bill.