Migration amendments

By Geraldine Collins

The federal government has introduced the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill* 2013 (the Bill) which will amend the *Migration Act* 1958 (the Act) by removing 'complementary protection' as a means of obtaining a protection visa.

The 1951 Convention and 1967 Protocol relating to the Status of Refugees provide the definition of a refugee. Under the Act, a person who satisfies this definition is entitled to the granting of a protection visa (s36).

Complementary protection is a type of safeguard for those who do not satisfy the definition of a refugee but who cannot be returned to their home country, as there is a real risk of suffering a certain type of harm, thus invoking Australia's international *non-refoulement* (non-return) obligations.

These obligations stem from the 1951 Refugees Convention and other international human rights conventions, to which Australia became a party in the 1980s and 1990, such as:

- the *International Covenant on Civil and Political Rights* (ICCPR) and its *Second Optional Protocol aiming at the abolition of the death penalty*; and
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

Non-refoulement obligations can be activated where there are substantial grounds to believe that a necessary and foreseeable consequence of being removed from Australia is a real risk that the person will suffer significant harm.

'Significant harm' is where a person will be subjected to:

- arbitrary deprivation of his or her life;
- the death penalty;
- torture;
- cruel or inhuman treatment or punishment; and
- degrading treatment or punishment.

The complementary protection framework was inserted into the Act in March 2012. Previously, Australia met its *non-refoulement* obligations via a ministerial intervention process, following an unsuccessful application for protection to the department and the Refugee Review Tribunal.

The former government integrated the assessment of complementary protection claims into the legislative structure. Refugee and complementary protection claims were considered as part of one cohesive process designed to increase the speed with which a claim for protection was completed. The process was efficient and transparent.

The current government has declared that it is not appropriate for complementary protection to be considered as part of a protection visa application. Australia's *non-refoulement* obligations will be deliberated through an administrative process. The Minister for Immigration and Border Protection may exercise his/her personal and non-compellable intervention power available under the Act, if satisfied that Australia's *non-refoulement* obligations are involved.

The government claims that the Bill is not intended to diminish Australia's international responsibilities, but the very title of the Bill provides a hint as to its true objectives.

The return to an administrative process is a completely discretionary power. The minister cannot be compelled to exercise it.

The government has justified the Bill on the grounds that the current system has been abused, and has been accessed by people who have committed serious criminal offences. Debunking these assertions are the facts that the Immigration Department's figures (as at September 2013) state that 55 of 1,200 protection visas granted since March 2012 are within the complementary protection category. Those who had committed serious crimes were excluded from complementary protection. Undoubtedly, these visas provide an important safeguard in the provision of protection to specific people at risk.

The ICCPR prohibits arbitrary or unlawful interference with a family and entitles one to legal protection from such interference. The family unit is entitled to protection by society and the state. Currently, the Act permits a protection visa to be granted to the family members of a visa applicant who has satisfied the *non-refoulement* obligations. The new Bill does not expressly provide an opportunity for members of the family unit to be granted protection visas when one member of the family has triggered Australia's *non-refoulement* obligations. Therefore, a person may be granted complementary protection through the administrative intervention power of the minister, but their family is not guaranteed any such protection.

A person who is not a refugee by definition, but who is facing the death penalty or torture if returned to his/her homeland, will be unable to seek a protection visa under the Act.

The repeal of the complementary protection provisions appears to be yet another indication that the government is seeking to conduct the increasingly sensitive and controversial immigration portfolio behind closed doors. ■

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