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Online submission

Submission to the Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

The St Vincent de Paul Society (the Society) is a respected lay Catholic charitable organisation, working in 149 countries around the world. In Australia, we operate in every state and territory, with more than 50,000 members, volunteers, and employees. Our people are deeply committed to social assistance and social justice, and we run a wide variety of programs around the country. Our work seeks to provide help for those who are marginalised by structures of exclusion and injustice, and our programs target (among other groups) people who are homeless and insecurely housed, migrants and asylum seekers, people living with mental illness, and people experiencing poverty.

The Senate Standing Committee on Legal and Constitutional Affairs has invited input on the Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 ('The Bill'). The Society has consulted widely, and we welcome the opportunity to contribute this written submission.

1. Executive Summary

The Society is strongly opposed to these amendments. They remove a range of legislated human rights currently held by asylum seekers who risk significant harm if they are sent to another country. This includes the right to a visa, the right to appeal a decision, and the right not to be sent to one's country of citizenship where there is a real risk that the country will then send the person on to a third country that will violate their human rights.

Removing these rights from legislation, and placing them at the discretion of a Minister, poses several problems. First, simply, it means that there is no longer a right under Australian law not to be deported to a country in which a person will face significant harm (as defined by complementary protection). Secondly, it places a great deal of power into the hands of one Minister, in a fashion that is not at all transparent, and is not reviewable. This threatens the rule of law. Finally, we are concerned by several comments of Minister Morrison regarding the focus in complementary protection reform on how people arrive here, or whether they have broken the law in their home country. Neither of these considerations is relevant to whether we have a duty to offer them protection from serious harm.

2. The Society is strongly opposed to the amendments

The Society is opposed to the core change of the Bill, which is to remove the complementary protection regime from the *Migration Act 1958* (Cth) ('the Act'). The amendment will mean that protection visas will no longer be granted under the Act for people who will suffer significant harm if returned to their country of citizenship,[1] unless those people also meet one of the other tests in the Act. It will also mean that family members of people who would have received a protection visa due to risk of significant harm upon return will no longer be able to access protection visas under the Act.[2]

[1] The Bill, Schedule 1, item 4.
[2] The Bill, Schedule 1, item 6.

The Society is also opposed to the consequential amendments. The Society is strongly opposed to the repeal of subsection 36(5A). This subsection protects people from being sent to their country of citizenship if there is a risk that the person will then be passed on to a third country, where the person is at risk of significant harm in that third country.

The Society is also opposed to the amendment of subsection 36(4).[3] By removing subsection (b), the government no longer has legally enforceable protection obligations to people who have not already sought protection in another country, even though there may be risk of significant harm to them in that country, where this harm is based on something other than a subsection (a) criterion (limited to race, religion, nationality, membership of a particular social group or political opinion). There are many characteristics that do not fit within this category, including gender, or sexual orientation. For example, amending this subsection seems to mean that Australia could now deny a gay man from Iraq protection on the basis that he did not seek protection in Iran or Malaysia, despite the fact that gay people face enormous discrimination and criminal penalties there (corporal punishment, or execution in the case of Iran).[4]

The definition of 'significant harm' has also been removed from the Act, along with definitions of cruel, inhumane, or degrading treatment and punishment, and torture.[5] The Society is opposed to removing these terms from the Act. We believe that it is helpful to the community to have a clear, legislated standard of harm that people are at risk of suffering, so that we as a community can better understand just what the risks are for those on protection visas.

Consequentially also, the right of appeal of all these decisions has been lost.[6] This is particularly concerning for people who have recently appealed a complementary protection finding: their application will no longer be reviewed against the complementary protection criteria,[7] so it seems it must fail. People are also barred from making another application for a protection visa if they have been rejected once.[8] However, we note Dr Groves's suggestion that this amendment may in fact result in more work for the courts, on technical review grounds, even if appeals are not allowed to the RRT or AAT.[9] It may also mean the individuals who are rejected are more likely to use their right under the ICCPR's Optional Protocol to complain to the UN Human Rights Committee. These results may not have been intended by the current amendment.

3. The human rights issues

The explanatory memorandum and second reading speeches make it clear that, despite removing the legislated right to apply for complementary protection, the government is not seeking to turn away from Australia's human rights obligations. Instead, 'Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an

[3] The Bill, Schedule 1, item 8.
[4] See also Rainbow Communities Tasmania, submission to this Inquiry (1 January 2014).
[5] The Bill, Schedule 1, Item 1, 7.
[6] The Bill, Schedule 1, Items 17, 18, 19.
[7] Explanatory Memorandum, [82], and the Bill, Schedule 1, Item 21.
[8] The Bill, Schedule 1, Item 22.
[9] Associate Professor Dr Matthew Groves, Submission to this Inquiry (20 December 2013).

administrative processes',[10] which will see the Minister exercising their personal and non-compellable intervention powers to grant a visa.[11]

Despite this promise that human rights obligations will continue to be met, it has long been the position in Australia that international law is generally only a source of rights and duties if Parliament has enacted *legislation* incorporating those international standards into our domestic law.[12] It is not enough for the government to sign a treaty, and tell us it will meet its obligations, without legislation backing that up. Some other rights under the ICCPR have been incorporated into domestic legislation (eg anti-discrimination on race/ gender, some state Bills of Rights, and anti-vilification although this soon to be repealed).

However, like the other rights asylum seekers have, and the duties that the government owes to them, the right to complementary protection is only covered in the *Migration Act*. As such, removing complementary protection from the Act, and making it an executive discretion, means that people at risk of serious harm will no longer have a domestic legal right to complementary protection, and that the government no longer has a legal duty to provide it. This is an unconscionable position, and perhaps one not intended by the amendment.

4. Rule of Law concerns

The Society supports a clear, transparent, consistent process for determining complementary protection. This is in keeping with the rule of law – a philosophy that underpins our system of government, and is especially important in safeguarding fundamental rights and freedoms such as non-refoulement. Rule of law means that the rules that bind us, and bind our leaders, should be open, prospective, stable, and clear.[13] Our laws should be able to be reviewed by impartial appellate bodies, with fair process.[14]

In Minister Morrison's speech, he says that the current law is unclear and difficult to apply. If correct, this would provide a rule of law reason for amending it. However, the Minister has not provided any actual evidence that the current system isn't working. Neither has a real explanation been put forward as to what the new, administrative, system of determinations will look like, and why it will actually be an improvement on the old.[15] For example, will the new regime provide visas to family members of people who are granted complementary protection? Will it continue to cover people who risk harm not in the country they are sent to, but in a further country to which they might subsequently be extradited? What will the process be for people who are at risk of serious harm but have

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[10] Explanatory memorandum, page 2.
[11] Explanatory memorandum, page 2.
[12] In *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 447 (Sackville, North and Kenny JJ), citing *Dietrich v The Queen* (1992) 177 CLR 292, 305–6, 321, 348, 359–60; *Victoria v Commonwealth* (1996) 187 CLR 416, 480–2; and *Sinanovic v The Queen (1998) 154 ALR 702, 707; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[13] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (1979) 210.
[14] See, eg, Hon Sir Anthony Mason, 'The Tension Between Legislative Supremacy and Judicial Review' (2003) 77 *Australian Law Review* 803, 805.
[15] See, eg, Dr Groves, above n 9.

been found to have committed a criminal offence in their country of citizenship? The Act provides answers to these questions: the amendments take them away.

The amendment that the government is seeking means that the standard for complementary protection will become closed, unclear, and possibly unreviewable. It will be impossible to know how it is being applied, or if it is being applied correctly.[16] It is unclear whether the decision-making process will be bound by the requirements of natural justice,[17] which includes standards such as letting the applicant know what evidence will be brought against them, and giving them a fair chance to put their case. Without clear standards, Australians will just have to trust that the Minister for Immigration of the day knows the law inside out, and is applying it totally correctly in every case. It is obviously a very risky proposition to place so much power in the hands of one woman or man.

This reform adds to the Society's concern at the government's increasingly opaque approach to asylum seekers. For example, only last week (15 January 2014) Minister Morrison announced that he would stop briefing Australians on asylum seeker issues, briefings that had already been reduced to only once per week, and refused to comment on reports that asylum seekers are sewing their lips together.[18] Similarly, detention centres onshore – which give Australians a chance to visit and talk to asylum seekers – are being closed down, and asylum seekers moved offshore. Not being able to access detention centres and asylum seekers in detention onshore means that the Society, and other advocacy groups, will lose a significant part of their access to asylum seekers, and their information about what is happening in detention.

Australia is morally and legally bound to provide protection to people who come here fleeing danger of torture, death or other persecution at home. Removing complementary protection from the Act, and instead making the grant of a visa a Ministerial discretion, toys with real people's human rights. It alters the substance of these rights in Australia from being clear, open, and legislated, to something nebulous and behind-closed-doors. This is not the way that human rights should be. For these reasons, we believe that the amendment runs counter to the ethos of the rule of law, and counter to the liberal, rights-based values which make Australia the open, accepting, and compassionate country it is.

5. Government's Understanding of Complementary Protection

Finally, the Society is concerned by some of the Minister's comments relating to people who have received protection visas. The Minister stated that, under the current system, protection visas have been given to people who have committed serious crimes in their

[16] See Rainbow Communities Tasmania, above n 4, pages 3–4.
[17] Dr Groves, above n 9.
[18] http://www.abc.net.au/news/2014-01-14/scott-morrison-says-he-will-stop-holding-weekly-asylum-seeker-b/5200158.

home countries, or been associated with criminal gangs.[19] He also mentioned the fact that 50% of recipients arrived in Australia by boat, instead of on an aeroplane.[20]

It is very unclear to us why the Minister thinks that these features are at all relevant in the consideration of complementary protection. First, we would note that committing 'serious crimes' and being associated with 'criminal gangs' can be highly political or cultural: we would not want to return someone to face the death penalty due to the 'crime' of adultery, for example, or return someone who faces life imprisonment due to association with a pro-democracy political group. Secondly, it does not matter whether someone came to Australia by boat or by plane: if they are at risk of significant harm upon return then our legal and moral obligations make it totally clear that we must offer them protection.[21] If there is real evidence that some people are a significant risk to our community, then we need to have a conversation about what the humane solution is: the answer is most certainly not sending them back to face significant harm.

We sincerely hope that the Minister was not implying that people who have run afoul of a law or custom in their home country are unworthy of our protection from the serious harm they may suffer if they return.

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The Society has been very concerned about asylum seekers in Australia for some decades. Australia does much good for people fleeing persecution, and the St Vincent de Paul Society is proud to partner with government and many NGOs in this space. But the last few years have seen some increasingly cruel policies against people who come to Australia seeking help, many of which cause very real and documented suffering to human beings who have done absolutely nothing wrong. We see people living in Australia in abject poverty, who are not allowed to get jobs. We see people in detention centres, with increasingly severe mental illness. And we read stories about people who come here to our doorstep desperate for help, who we send back to the place they were fleeing, and who are subsequently tortured or killed by their own governments.

We believe that Australian government strategies and policy need to be grounded in our international legal duties, and our moral obligations to other human beings. We believe that the amendment proposed by this Bill reflects neither, and for that reason we strongly oppose it in its current form. If the government wishes to repeal a law that grants human rights, it needs to make a much better argument about why it is necessary to change the law, and why the alternative proposed will work better to protect the most vulnerable.

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[19] Second Reading Speech, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22%20Speaker_Phrase%3A%22morrison,%20scott,%20mp%22;rec=1.

[20] Second Reading Speech, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22%20Speaker_Phrase%3A%22morrison,%20scott,%20mp%22;rec=0.

21Eg *Case Of Al-Saadoon And Mufdhi v The United Kingdom*, European Court of Human Rights (Application no. 61498/08) (2 March 2010). In this case, the UK was prohibited from sending back someone accused of criminal offences in his home country, as those offences carried a possible death penalty. Sending him back would have been a breach of the man's human rights, and a breach of the UK's duties to protect his human rights.