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Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Senate, Parliament of Australia
Parliament House
CANBERRA ACT 2600
by email: legcon.sen@aph.gov.au

20 December 2013

Dear Ms Dunstone,

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

Thankyou for your invitation to make a submission to the inquiry into the above named Bill. I will confine my submission to two issues arising from the Bill, both of which suggest that its drafters may not have learnt as much as possible from recent migration litigation.

1. The use of an administrative rather than statutory process for complementary protection

The explanatory memorandum states that the Bill is intended to transfer consideration of similar to that used before the current legislative regime was enacted. There are two reasons why I doubt whether legislation can, or should, be used to achieve that goal.

(A) The alternative arrangements are not explained

The current statutory arrangements are criticised in the Minister's speech as 'complicated, convoluted, difficult for decision-makers to apply, and...leading to inconsistent outcomes.' Such statements and the Bill itself imply that a superior administrative process can, and perhaps has, been drafted. That possibility is difficult to accept because neither the Bill nor its related materials provide any explanation of the administrative process to be used. If that administrative process is clearly superior to an existing legislative one, it should be easy to explain why that is so to the Senate and the public prior to the repeal of the legislative regime. Unless and until that is done, there is no basis upon which the Senate can scrutinse the soundness of this key assumption of the Bill.

Providing information about the proposed new arrangements would not be onerous. One can fairly assume that the Department of Immigration and Border Protection has drafted administrative procedures. How else could it have informed the Minister that those processes would be simpler and more effective? If so, why has it not been released?

(B) Can the process be removed from the Migration Act?

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The Bill will not remove decisions about complementary protection issues entirely from the *Migration Act* because a crucial element of the process – the Minister's exceptional powers – will remain in the Act. The Bill would therefore remove only one part of the decision making process for complementary protection issues. The proposed use of administrative rather than legislative mechanisms proceeds on the dubious assumption that the two can be neatly separated. The High Court suggested otherwise in the *Offshore Processing case* (*Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41; 243 CLR 319). That case made clear that administrative and statutory processes are interwoven, particularly when the former informs the latter. The Court confirmed that key aspect of the *Offshore Processing case* recently in *Plaintiff M76-2013 v Minister for Immigration and Citizenship* [2013] HCA 53 (12 December 2013).

These and other decisions also hint that, if the Bill is intended to minimise litigation or preclude judicial consideration of complementary protection issues by removing much about them from the *Migration Act*, it is unlikely to do so. Like many previous legislative measures which have sought to remove migration decision from review by the courts, this Bill may simply have the opposite effect and cause more litigation about technical issues.

2. *Reliance on the Minister's personal and non-compellable powers*

The explanatory memorandum and second reading speech state that the Bill is intended to allow claims of complementary protection to be resolved by exercise, or non-exercise, of the Minister's personal and non-compellable powers under the *Migration Act* 1958. This aspect of the Bill is no doubt informed by the decision of the High Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2011] HCA 31; 246 CLR 636. That case held that the Minister's exceptional powers were not subject to any duty to observe the requirements of natural justice.

It would be wrong to assume that this central finding in *Plaintiff S10/2011* would apply to the regime envisaged by this Bill. In *Plaintiff S10/2011* the High Court emphasised that its ruling depended heavily on the wider context in which the issue arose. For example, Chief Justice French and Justice Kiefel explained that natural justice did not apply to the Minister's exceptional powers because, among other things, the powers granted the "Minister a degree of flexibility allowing him or her to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements" elsewhere in the *Migration Act* 1958 (at 246 CLR 636, 648 [30]). Justices Gummow, Hayne, Crennan and Bell similarly noted that each applicant in the case at hand was able to apply for a visa under other provisions of the *Migration Act* 1958 (at 246 CLR 636, 667-8 [99]). These and other remarks made by the High Court make clear it was heavily influenced by the opportunities applicants had to ventilate precisely the same issues they sought to raise again with the Minister.

A small but crucial difference would arise under the regime envisaged by this Bill because the issue of non-refoulement may not be fully considered under other statutory processes of the Act. If so, their resolution by exercise (or non-exercise) of the Minister's exceptional powers applications may not benefit from the reasoning in *Plaintiff S10/2011*. Importantly, the High Court did not hold in *Plaintiff 210/2011* that the Minister's exceptional powers would <u>always</u> be exempt from a duty to observe the requirements of natural justice, only that they were not in each case before the court. The approach of the courts to the Minister's exceptional powers in this new context cannot be predicted. In my view, nothing in the reasoning of *Plaintiff S10/2011* precludes the High Court from holding that the exceptional powers of the Minister are, within the particular regime proposed by this Bill, subject to a duty to observe the rules of natural justice.

If the Committee has any questions about my comments on the Bill, it is most welcome to call upon me for further comment.

Yours sincerely,

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