AMNESTY INTERNATIONAL

LEGAL AND CONSTITUTIONAL COMMITTEE

Comments on the inquiry into

MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

September 2009

Submitted by

AMNESTY INTERNATIONAL AUSTRALIA

Contact: Dr Graham Thom
National Refugee Coordinator
Phone: (02) 8396 7643
Fax: (02) 8396 7677

1. EXECUTIVE SUMMARY

Amnesty International welcomes the introduction of the Migration Amendment (Complementary Protection) Bill 2009 ('the bill'). The organisation believes that the amendments to the 1958 Migration Act ('Migration Act') proposed in this bill will allow Australia to better fulfil its international obligations. In particular, its non-refoulement obligations prescribed in the *International Covenant on Civil and Political Rights*, the *Convention Against Torture* and the *Convention on the Rights of the Child*.

It is important to note that the introduction of a complementary protection regime does not constitute a dramatic shift in Government policy. The people who would be recognised under this legislation are already eligible for protection under Australian law, but are often not afforded protection due to the high scope for error in the current system. If passed, this bill will merely adjust the existing protection system to make it fairer, more thorough and more efficient.

As such, Amnesty International supports the introduction of a complementary protection system, and urges the Committee to support this bill.

However, Amnesty International is concerned that the current wording of the bill requires that complementary protection applicants must meet a higher threshold of harm in order to invoke Australia's non-refoulement obligations than is required by international law. The organisation is of the view that several key phrases within the bill should be amended in order to prevent problems of misinterpretation of the intent of the bill, and to ensure that the proposed legislation properly reflects international standards.

In addition, Amnesty International notes that the proposed model of complementary protection does not address the status of several groups of non-citizens in Australia. The organisation asks that more comprehensive mechanisms for recognition of these groups be developed, in order to improve the clarity and transparency of Australia's immigration system.

2. ABOUT AMNESTY INTERNATIONAL

Amnesty International is a worldwide movement of more than 2.7 million people across 150 countries working to promote and defend the observance of all human rights enshrined in the *Universal Declaration of Human Rights* and other international standards including the *Convention on the Status of Refugees* ('Refugee Convention'). Amnesty International undertakes research and action focused on preventing violations of human rights, including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

Protecting the rights of refugees, asylum seekers and others seeking international protection is an essential component of Amnesty International's global work. Amnesty International works to prevent human rights violations that cause people to flee their homes. At the same time, we oppose the forcible return of any individual to a country where it is probable that he or she would face serious human rights abuse.

3. BACKGROUND

Amnesty International has long called on the Australian Government to introduce a system of complementary protection. The organisation firmly believes that the existing protection regime is insufficient to uphold Australia's international obligations.

At present, asylum seekers in Australia are able to claim protection largely through the framework of the Refugee Convention. This Convention recognises the protection needs of people fleeing persecution as a result of their race, religion, ethnicity, political opinion or social group. The criteria outlined in this convention remain extremely relevant and it is crucial that Australia continues to recognise the Refugee Convention as the primary protection tool.

However, it has become increasingly evident that there are people with protection needs who are not covered by the scope of the Refugee Convention. As a result, there has been an international trend for states to implement a system of subsidiary protection to complement the Refugee Convention, generally referred to as complementary protection.

In its joint submission to the 2004 Inquiry into Ministerial Discretion in Migration Matters,[1] Amnesty International observed that Australia's current framework for protection, based almost exclusively on obligations under the Refugee Convention, fails to adequately recognise several groups in need of protection. These groups include people who:

- are stateless;
- come from a country enveloped in conflict;
- have been subject to gross violations of their human rights for non-Refugee Convention reasons;
- would face torture or cruel, inhuman or degrading treatment on their return to their country; or
- come from a country where the rule of law no longer applies.

As such, current legislation puts Australia at risk of contravening numerous international instruments to which it is party. Of particular concern is Australia's adherence to obligations prescribed in the following treaties:

- 1954 Convention Relating to the Status of Stateless Persons;
- 1961 Convention on the Reduction of Statelessness;
- 1984 Convention Against Torture;
- 1989 Convention on the Rights of the Child;
- 1966 International Covenant on Civil and Political Rights; and
- 1966 International Covenant on Economic, Cultural and Social Rights.

Introducing a system of complementary protection to recognise people with protection needs but who fall outside the scope of the Refugee Convention is crucial to ensure that Australia's domestic law reflects international human rights standards.

[1] Refugee Council of Australia, Amnesty International Australia, National Council of Churches in Australia, *'The Way Ahead' Submission to Inquiry into Ministerial Discretion in Migration Matters*, 2004

4. PROBLEMS WITH THE EXISTING SYSTEM

Under current legislation, the only avenue for an individual seeking protection outside the mandate of the Refugee Convention is through section 417 of the Migration Act. This provision allows applicants to request that the Minister for Immigration and Citizenship exercise his or her discretionary powers on humanitarian grounds and 'substitute a decision that is more favourable to the applicant' than the decision of the Refugee Review Tribunal (RRT).

A request to the Minister under section 417 can only be submitted after the refugee appeal process is exhausted. As a result, the current system forces people who are in need of protection for non-Refugee Convention reasons to participate in several lengthy, expensive and often traumatising stages of the refugee status determination system, even if it is clear from the beginning of the process that their only chance of success is at the last stage.

This system is especially concerning due to the fact that individuals with genuine non-Refugee Convention protection claims are not only forced to waste time applying to the RRT, but then forced to pay the Australian Government $1400 when the RRT (which only assesses claims based on the Refugee Convention) inevitably rejects their application.

Additionally, the mandate of the Ministerial powers is inadequate in providing an appropriate level of assessment for non-Refugee Convention protection claims. Section 417 provides that the Minister's powers are non-compellable, non-reviewable and non-delegable. As such, the decision to intervene in a case on section 417 grounds rests entirely in the Minister's discretion and there is no recourse to a merits or judicial review. The purpose of these powers is to provide a safety net for exceptional cases. It should not serve as the only resort for people at risk of protection as defined in major international treaties.

The current reliance on Ministerial intervention powers has resulted in a lack of transparency, accountability and efficiency as well as causing unnecessary hardship for asylum seekers. The high potential for error in this system places Australia at risk of breaching its non-refoulement obligations. A system of complementary protection is needed to address the gap in Australia's protection regime.

5. MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

In principle, Amnesty International welcomes the proposed amendments to the Migration Act. The introduction of a system of complementary protection would constitute an important step in bringing Australia into line with international human rights standards. In particular, the organisation supports the recognition of Australia's non-refoulement obligations under the *International Covenant on Civil and Political Rights* (ICCPR), as well as the *Convention Against Torture* (CAT) and the *Convention on the Rights of the Child* (CROC).

5.1 Non-refoulement obligations

5.1.1 Inclusion of CAT and CROC

Amnesty International believes that it is important for the ICCRP, CAT and CROC to be clearly identified in the legislation. Currently, the explanatory memorandum refers to all three instruments, however only the ICCPR is explicitly referred to in the bill.

If Australia is to adhere to its non-refoulement obligations under all three treaties, it is important to explicitly refer to each treaty in the text of the bill. It is evident that the threshold for the assessment of harm is different under each instrument, and Amnesty International believes that the non-refoulement provisions of CAT and CROC have a broader scope than ICCPR. As such, in referring only to ICCRP the bill does not necessarily encompass situations that arise under CAT or CROC.

This view is guided by the UNHCR's analysis of the scope of the application of each one of these instruments to beneficiaries of complementary protection and threshold differences. In particular, the UNHCR instructs that:

- CAT provides that when examining "whether an individual is at personal risk of being subjected to torture… [t]he standard of proof is higher than mere suspicion but lower than merely probable."[2]; and
- CROC provides that "authorities are under an obligation to look at the child's best interests as a 'primary consideration', and thus significant weight must be placed on this factor compared to other legitimate interests, such as immigration control."[3]

Amnesty International believes that when a single procedure is used for determining the protection status of an individual, the widest possible scope of international instruments should be adopted. As such, the organisation considers that the bill does not clearly reflect Australia's non-refoulement obligations under CAT and CROC and falls short of providing an effective model of complementary protection.

This aspect of the analysis of the bill has been confirmed by the Refugee and Migrant Rights Team at the International Secretariat, Amnesty International's global headquarters.

Amnesty International recommends that CAT and CROC be explicitly referred to in the bill.

5.1.2 Standard of proof

Amnesty International believes that the wording of certain passages of the bill misconstrues the intention of the Government as outlined in the explanatory memorandum and second reading speech. In particular, there is concern that the language of the bill sets a higher threshold for non-refoulement than provided in the international human rights law.

[2] UNHCR, Paragraph 55, Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection"), Ruma Mandal, PPLA/2005/02, 20-24, June 2005

[3] UNHCR, Paragraph 60, Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection"), Ruma Mandal, PPLA/2005/02, 20-24, June 2005

Amnesty International is concerned that paragraph 36(2)(a)(aa) requires that an applicant's risk of harm must conform to a higher standard of proof than that required by international law. The two-fold requirement of the applicant being subject to a human rights violation as outlined in section 2(A) as well as being 'irreparably harmed' as a result of the violation, constitutes a narrowing of the criteria for non-refoulement set out in international law. Amnesty International understands that in the UN documents that have informed this passage, that is, CAT, ICCPR and the United Nations Human Rights Committee General Comment 31, 'irreparably harmed' is used in lieu of torture, cruel or inhuman treatment , and not as an additional threshold.

There is concern that the wording of paragraph 36(2)(a)(aa) could lead to divergence and inconsistency in the interpretation of the requirements for complementary protection, in particular the dual conditions of the risk being 'real' as well as ''necessary and foreseeable'. Amnesty International believes that this issue could be resolved by bringing the wording into line with existing international human rights law and jurisprudence, and addressing the issue raised in section 5.1.1 of this document.

These concerns are shared and endorsed by numerous organisations and individuals who are actively engaged with these issues. [4]

Amnesty International recommends that paragraph 36(2)(a)(aa) be amended to ensure consistency with international human rights law, specifically;

- **the terms 'necessary and foreseeable' be removed; and**
- **the phrase 'irreparably harmed because of a matter mentioned in subsection (2A)' is replaced with 'subject to serious harm as defined in subsection (2A)'.**

5.2 Death penalty

Amnesty International welcomes the inclusion of the risk of the death penalty being imposed as a criterion of eligibility for complementary protection. The organisation commends the Government's acknowledgement of its obligations under the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aimed at the abolition of the death penalty.

However, the requirement that an applicant must not only have the death penalty imposed on him or her but also that it 'will be carried out' is an unnecessary qualification that could lead to problems of interpretation. Removing this condition would avoid ambiguity, and reflect the language used in international law.

Amnesty International recommends that the phrase 'and will be carried out' be removed from subsection 36(2A)(b).

[4] Including: The Refugee Council of Australia; Victorian Foundation for Survivors of Torture; Dr Jane McAdam, Associate Professor of Law, University of NSW; James Hathaway, Dean of Melbourne Law School; and Sir Nigel Rodley, member of the UN Human Rights Committee and former UN Special Rapporteur on Torture

5.3 Exclusion criteria

Amnesty International accepts the principle behind the proposed subsection 36(2)(2C) which excludes certain people from consideration for a Protection visa. The organisation acknowledges that Australia's non-refoulement obligations allow the Government to disqualify applicants from eligibility for protection if there is evidence that they have committed a serious crime.

However, Amnesty International would like to highlight that Australia's non-refoulement obligations cannot be avoided. Although applicants may be deemed ineligible for a Protection visa under section 36(2)(2C), Australia remains prohibited from deporting a non-citizen if he or she would face a real risk of human rights abuse as outlined in 36(2A). Amnesty International acknowledges that paragraph 64 of the explanatory memorandum stipulates this group will be provided with 'alternative case resolution solutions'. The organisation recommends that these solutions be transparent and in line with human rights standards.

In addition, Amnesty International encourages the Government to ensure that the decision to exclude an applicant from complementary protection under paragraph 36(2)(2C), is made on the merits of each individual case and not external political considerations.

Amnesty International recommends that the Government develop procedures to deal with exclusion clause cases in a transparent and accountable manner.

5.4 Generalised violence

Amnesty International recognises that Australia is not obliged by international law to offer protection to people fleeing situations of generalised violence. However, although this group is to be excluded from the proposed complementary protection system, it must be acknowledged that in some circumstances it is inhumane and impractical to return non-citizens to their country of origin. As such, there must be measures enacted to recognise these people in Australian legislation.

Furthermore, Amnesty International believes that the wording of section, 36(2B)(c), should be revised in order to avoid misinterpretation. Amnesty International understands that the intention of the section is to exclude a person from a Protection visa if their risk of experiencing violence is no higher than the majority of residents of their country of origin. However, there are concerns that the current wording provides grounds to argue for the ineligibility of certain applicants in a manner that would be against the overall spirit of the bill.

The requirement that the risk faced must not be 'faced by the population of the country generally' may provide, for example, for an applicant fleeing domestic violence to be excluded from protection on the grounds that the applicant originates from a country where domestic violence is widespread and where perpetrators are not generally brought to justice.

Additionally, the stipulation that the risk must be 'faced by the non-citizen personally' has the potential to exclude, for example, applicants who have not been directly threatened with female genital mutilation but due to their age and gender, face a probable risk that they will be subjected to the practice upon return.

Amnesty International recommends that the Government:

- **develop a mechanism to recognise people fleeing general violence; and**
- **amend the wording of section 36(2B)(c) to ensure that it cannot be interpreted to exclude people in need of protection.**

5.5 Statelessness

Amnesty International remains concerned with the treatment of stateless people by the Australian Government. The organisation acknowledges that this group of people often do not fit within the protection criteria and that statelessness alone is not grounds for the grant of a Protection visa.

However, as a signatory to both the *Convention Relating to the Status of Stateless Persons* and the *Convention on the Reduction of Statelessness*, Australia has an obligation to develop a mechanism for recognising stateless people within Australia. This is especially pertinent due to Australia's continuing mandatory detention policy as current legislation allows for the indefinite detention of stateless people in Australia.[5]

The current use of the Removal Pending Bridging visa cannot be seen as a long term solution to the issue of stateless people in Australia. Restricting non-citizens to this visa, with no pathway to permanent residency is, at best, impractical. At worst, it is a violation of Australia's international obligations by denying stateless people several basic human rights including access to their family, the right to leave and return to a country and to effective nationality.

Amnesty International welcomes the announcement made in The Hon Laurie Ferguson's second reading speech that "the Government is committed to ensuring that…stateless cases are not left in the too-hard basket." The organisation urges the Government to follow through with this goal and develop a comprehensive status resolution mechanism for people in Australia who are established to be stateless.

Amnesty International recommends that the Government introduce legislation to recognise stateless people within Australia.

5.6 Economic, social and cultural rights

Amnesty International notes that this bill does not provide recognition for people seeking protection based on a real risk that if returned they will be deprived of the rights prescribed in the International Covenant on Economic, Cultural and Social Rights.

Although the Amnesty International understands that there is little precedent internationally for these rights to be recognised in a protection framework, the organisation believes that economic, social or cultural rights should not be valued lower than civil and political rights. The organisation encourages the Australia Government to evaluate protection options for this group who, in light of developments such as climate change displacement, will continue to need protection.

Amnesty International recommends that the Government develops a system of protection for people facing severe deprivation of their economic, cultural and/or social rights.

[5] Al-Kateb v Godwin[2004] HCA 37

5.7 Relationship between complementary protection and refugee protection mechanisms

Amnesty International supports the positioning of complementary protection in relation to Refugee Convention protection. The organisation acknowledges that the bill maintains the primacy of the Refugee Convention by stipulating that a Protection visa applicant will always have their claims assessed first against the criteria of the Convention and then, if rejected, placed on a complementary protection assessment pathway.

Although most protection applicants will continue to be recognised by the Refugee Convention, Amnesty International supports the structure of the proposed system in which people being assessed under each protection pathway will be entitled to identical merits review and access to the judicial system.

The organisation welcomes that the proposed model would grant all protection recipients equal status, irrespective of whether they were recognised under the Refugee Convention or the complementary protection system. This approach is in line with established systems of complementary protection throughout North America and Europe, and recognises that protection needs are equal.

Additionally, granting Protection visa holders with a single status is bureaucratically simpler, leading to a lower financial and administrative burden.

6. CONCLUSION

Amnesty International believes that overall, the proposed legislation would be of humanitarian benefit to all stakeholders and also have financial and administrative advantages. It is evident that if this amendment is implemented, the costs navigating a lengthy process to achieve protection for non-Refugee Convention reasons would be removed, and Australia's protection system would be fairer, more transparent and more robust.

Moreover, the emphasis on non-refoulement obligations would bring Australian domestic law closer into line with international legal obligations outlined in ICCPR, CAT and CROC.

Although Amnesty International believes that this bill is a positive step, the model of complementary protection proposed would not completely address the current holes in Australia's protection framework. In particular, people fleeing generalised violence, stateless people and people fleeing economic, social and cultural rights violations would still not be properly recognised under Australian law.

Amnesty International remains concerned that the criteria set out to identify eligibility for complementary protection on non-refoulement grounds, would establish a threshold significantly higher than international law dictates. In addition, certain phrases and wording used in the bill would invite issues of misinterpretation and possible lead to lengthy application processes and undue litigation.

Overall, Amnesty International is in favour of this bill being enacted into Australian legislation. However, to properly ensure that Australia’s immigration policy and legislation encourages fairness, integrity and efficiency, Amnesty International encourages to Government to implement the recommendations set out below.

7. RECOMMENDATIONS

1. Amnesty International recommends that the CAT and the CROC be directly acknowledged in the bill.

2. Amnesty International recommends that the wording of the legislation be amended to more closely reflect that of the relevant international law. In particular paragraph 36(2)(a)(aa) be revised so that:
   - the terms 'necessary and foreseeable' be removed; and
   - the phrase 'irreparably harmed because of a matter mentioned in subsection (2A)' is replaced with 'subject to serious harm as defined in subsection (2A)'.

3. Amnesty International recommends that the phrase 'and will be carried out' be removed from subsection 36(2A)(b).

4. Amnesty International recommends that the Government develop procedures to deal with exclusion criteria cases in a transparent and accountable manner.

5. Amnesty International recommends that the Government:
   - develop a mechanism to recognise people fleeing general violence; and
   - amend the wording of 36(2B)(c) to ensure that it cannot be interpreted to exclude people in need of protection.

6. Amnesty International recommends that the Government introduce legislation to recognise stateless people within Australia.

7. Amnesty International recommends that the Government develops a system of protection for people facing severe deprivation of their economic, cultural and/or social rights.