The Right to Protection and the Obligation of Non-Refoulement

Submission to the Senate Legal and Constitutional Affairs Committee regarding the *Migration Amendment (Complementary Protection) Bill 2009*

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

Contents

1. Introduction and Summary of Concerns and Recommendations

1. On 10 September 2009 the Senate referred the *Migration Amendment (Complementary Protection) Bill 2009* (the **Bill**) to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

2. The Human Rights Law Resource Centre (**HRLRC**) congratulates the Government for putting forward the Bill. The proposed amendments are an important step towards the recognition of Australia's non-refoulement obligations under international human rights law.

3. However, while the Bill will significantly improve and strengthen Australia's current complementary protection regime, the HRLRC has identified four key concerns with specific aspects of the Bill; namely, that the Bill:

   (a) sets out a list of grounds upon which Australia will grant protection obligations which is narrower than the grounds for protection under international law;

   (b) requires that risks be 'necessary and foreseeable' and constitute 'irreparable harm', in a manner that does not accurately reflect the position under international human rights law;

   (c) imposes a requirement of intent in the definition of cruel, inhuman or degrading treatment; and

   (d) excludes protection for certain classes of people, despite the absolute and non-derogable nature of Australia's protection obligations and the relevant provisions of the *International Covenant on Civil and Political Rights* and the *Convention against Torture*.

4. The HRLRC also notes and endorses the separate issues and concerns regarding the Bill set out in the submission by Liberty Victoria.

5. The HRLRC submission provides a brief overview of the basis of Australia's non-refoulement obligations under international law and discusses each of the concerns listed above. In light of these concerns, the HRLRC makes the following recommendations:

Recommendation 1:

Section 36(2A) should be amended to read as follows:

"(2A) The matters are that:

(a) the non-citizen will be subject to a violation of Article 3 of the Convention against Torture;

(b) the non-citizen will be subject to a violation of Articles 6 or 7 of the International Covenant on Civil and Political Rights;

(c) the non-citizen will be subject to a violation of the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty;

(d) the non-citizen will be subject to a violation of Article 6 or 37 of the Convention on the Rights of the Child;

(e) the non-citizen will be subject to a flagrant denial of justice contrary to Article 14 of the International Covenant on Civil and Political Rights; or

(f) the non-citizen will be subject to a violation of human rights under the treaties to which Australia is a party and which is recognised by international law to engage an obligation of non-refoulement."

Recommendation 2:

The phrases 'necessary and foreseeable' and 'irreparably harmed' should be deleted from section 36(2)(aa) and the consequential amendments to sections 36(2)(2b), 36(4)(b) and 36(5A)(b).

Recommendation 3:

The requirement of intent contained in the section 5(1) definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' should be removed.

Recommendation 4:

Section 36(2C) of the Bill should be deleted. Complementary protection should be available to all people who are at risk of torture, cruel, inhuman or degrading treatment if removed from Australia.

2. Australia's Obligation of Non-Refoulement

6. Australia's international protection obligations extend beyond those imposed by the *Convention Relating to the Status of Refugees* (**Refugee Convention**)[1] and include non-refoulement obligations contained in the:

   (a) International Covenant on Civil and Political Rights (**ICCPR**);[2]

   (b) the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (**Optional Protocol on the Abolition of the Death Penalty**);[3]

   (c) the Convention on the Rights of the Child (**CRC**);[4] and

   (d) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**).[5]

7. Australia has ratified each of these instruments but has, to date, failed to introduce adequate legislative measures to ensure compliance with its non-refoulement obligations. This failure has been the subject of comment and concern by UN treaty bodies. The obligation of non-refoulement is also a principle of customary international human rights law.

8. In 2008, the Committee Against Torture noted in their Concluding Observations on Australia that:[6]

> The Committee is concerned that the prohibition of non-refoulement is not enshrined in the State party's legislation as an express and non-derogable provision, which may also result in practices contrary to the Convention. The Committee also notes with concern that some flaws

[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976).

[3] *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 29 ILM 1464 (entered into force 11 July 1991).

[4] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

[5] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[6] Committee Against Torture, *Concluding Observations: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), [15].

> related to the non-refoulement obligations under the Convention may depend on the exclusive use of the Minister's discretionary powers thereto...

9. The Committee recommended that:

> The State party should explicitly incorporate into domestic legislation, both at Federal and State/Territories levels, the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice. The State party should also implement the Committee's previous recommendations formulated during the consideration of the State party's second periodic report to adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister's discretionary powers to meet its non-refoulement obligations under the Convention.

10. Similarly, the Human Rights Committee (**HRC**) recommended earlier this year that Australia:[7]

> take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

11. The HRLRC congratulates the Government on its efforts to respond to these recommendations.

3. Concerns with the Bill

3.1 Matters within the scope of protection (s 36(2A))

12. Proposed s 36(2A) sets out the matters which are said to enliven Australia's complementary protection obligations. These are:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the non-citizen will have the death penalty imposed on him or her and it will be carried out; 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.

[7] Human Rights Committee*, Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [8].

13. The HRLRC is concerned that proposed s 36(2A) does not enshrine all of those rights which have, or may have, attendant non-refoulement obligations or reflect that the range and scope of those rights is evolving and not closed.

14. The HRLRC is further concerned that proposed s 36(2A) does not reflect the full scope of children's rights which engage Australia's protection obligations.

15. Each of the concerns outlined in paragraphs 12 and 13 above are discussed in further detail below.

(a) Rights violations entailing a non-refoulement obligation

16. Proposed s 36(2A) does not reflect the full range of rights violations which have, or may have, attendant non-refoulement obligations under international law.

17. While the scope of the principle of non-refoulement under international law has not been settled, the Human Rights Committee has left open the possibility that rights violations other than those arising under Articles 6 and 7 of the ICCPR will enliven non-refoulement obligations. For example, in General Comment 31, the HRC stated that States Parties' obligation not to extradite, deport, expel or otherwise remove a person from their territory state are enlivened where there are 'substantial grounds for believing that there is a real risk of irreparable harm, *such as* that contemplated by articles 6 and 7 of the Covenant'.[8]

18. While we are not aware of any decisions of the HRC under the First Optional Protocol to the ICCPR which have found the obligation of non-refoulement to be engaged in cases other than those arising under Articles 6 and 7, both the European Court of Human Rights and the United Kingdom House of Lords have found that the obligation may be engaged where expulsion would expose a person to a 'flagrant violation' of the right to a fair trial or a 'flagrant denial of justice'.[9] In *R v Special Adjudicator ex parte Ullah*, Lord Steyn wrote that 'It can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported article 6 may be engaged'.[10]

19. Further, both the House of Lords and the European Court recognise that, while ordinarily, the grounds for resisting expulsion will relate to violations of the right to life or the prohibition

[8] Human Rights Committee*, General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [12] (emphasis added).

[9] See, for example, *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, [9], [10], [24] (per Lord Bingham), [44] (per Lord Steyn); *EM (Lebanon) v Secretary of State* [2008] 3 WLR 931, [34] per Lord Bingham; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25.

[10] [2004] 2 AC 323, [41].

against torture or ill-treatment, other articles *may* provide a ground for resisting expulsion if there is a very strong case.[11] Thus, in *R v Special Adjudicator ex parte Ullah*,[12] the House of Lords accepted that a claim against expulsion engaging the obligation of non-refoulement may arise in respect of Articles 4 (the prohibition against slavery), 5 (the right to liberty and security of the person and freedom from arbitrary detention) and 6 (right to a fair hearing) of the *European Convention on Human Rights*.[13] Further, the House of Lords did not rule out the possibility of a claim under Article 8 (right to respect for private and family life) and Article 9 (right to freedom of thought, conscience and religion), although it did note that such cases would be exceptional.[14] This list is evolving and the HRLRC submits that the Bill should allow for Australian law to reflect and respond to this evolution.

(b) Children's rights

20. The narrowing of the scope of Australia's protection obligations is even more pronounced in the case of children. The non-refoulement obligation attaches to a broader range of rights under the CRC than is currently reflected in the proposed s 36(2A). The Committee on the Rights of the Child has interpreted Articles 6 and 37 – at a minimum – as entailing an obligation of non-refoulement:[15]

> …States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 and of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed…

[11] See, for example, *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, [24] where Lord Bingham stated 'While the Strasbourg jurisprudence does not preclude reliance on articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case.' See also *Soering v United Kingdom* (1989) 11 EHRR 439, [113].

[12] [2004] 2 AC 323, [21] (per Lord Bingham), [41] – [47] (per Lord Steyn), [67] (per Lord Carswell).

[13] See also *Bankovic v Belgium* (2001) 11 BHRC 435, [68] (a decision of the Grand Chamber of the European Court of Human Rights in which the Court accepted the principle that Articles 5 and 6 of the European Convention may impose certain extra-territorial obligations); *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, 795 (in which it was accepted that a flagrant violation of Article 6 may engage the obligation of non-refoulement); and *Tomic v United Kingdom* [2003] ECHR 17837/03 (in which it was not ruled out that a violation of the prohibition against arbitrary detention may give rise to protection obligations).

[14] [2004] 2 AC 323, [21] (per Lord Bingham), [41] – [47] (per Lord Steyn), [67] (per Lord Carswell).

[15] United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2006/6.

> In the case that the requirements for granting refugee status under the 1951 Refugee Convention are not met, unaccompanied and separated children shall benefit from available forms of complementary protection to the extent determined by their protection needs.

21. Article 6 of CRC protects children's right to life. Article 37 of the CRC protects not only children's right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, but also their right to liberty, humane treatment in detention and prompt access to legal and other appropriate assistance when in detention.

22. The HRLRC submits that the Committee on the Rights of the Child's express recognition that the non-refoulement obligation is not limited to Articles 6 and 37 should be reflected in the Bill.

Recommendation 1:

Section 36(2A) should be amended to read as follows:

"(2A) The matters are that:

(a) the non-citizen will be subject to a violation of Article 3 of the Convention against Torture;

(b) the non-citizen will be subject to a violation of Articles 6 or 7 of the International Covenant on Civil and Political Rights;

(c) the non-citizen will be subject to a violation of the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty;

(d) the non-citizen will be subject to a violation of Article 6 or 37 of the Convention on the Rights of the Child;

(e) the non-citizen will be subject to a flagrant denial of justice contrary to Article 14 of the International Covenant on Civil and Political Rights; or

(f) the non-citizen will be subject to a violation of human rights under the treaties to which Australia is a party and which is recognised by international law to engage an obligation of non-refoulement."

3.2 Requirements of 'necessary and foreseeable risk' and 'irreparable harm' (s 36(2)(aa))

23. Proposed amendments to s 36(2)(aa) set out a series of requirements which must be met before Australia's complementary protection obligations are enlivened. Of particular concern are the requirements of:

(a) 'necessary and foreseeable risk'; and

(b) 'irreparable harm'.

24. These requirements set a threshold for protection that is much higher than that imposed by international human rights law, which requires only a 'real risk' of harm.[16]

25. While the HRC has used the terms 'necessary and foreseeable risk'[17] and 'irreparable harm'[18]; they have been used to explain or refer to those risks or harms that enliven the non-refoulement obligation and were not intended to constitute additional requirements.

26. The imposition of 'necessary and foreseeable risk' and 'irreparable harm' as additional requirements for protection imposes a higher burden on applicants for complementary protection than that which exists under international law and consequently places people at risk of refoulement.

Recommendation 2:

The phrases 'necessary and foreseeable' and 'irreparably harmed' should be deleted from section 36(2)(aa) and the consequential amendments to sections 36(2)(2b), 36(4)(b) and 36(5A)(b).

[16] See, for example, *EA v Switzerland* (Comm No 28/1995) UN Doc CAT/C/19/D/28/1995 (10 November 1997) para 11.5; *X, Y and Z v Sweden* (Comm No 61/1996) UN Doc CAT/C/20/D/61/1996 (6 May 1998) para 11.5; *IAO v Sweden* (Comm No 65/1997) UN Doc CAT/C/20/D/65/1997 (6 May 1998) para 14.5; *KN v Switzerland* (Comm No 94/1997) UN Doc CAT/C/20/D/94/1997 (19 May 1998) para 10.5; *ALN v Switzerland* (Comm No 90/1997) UN Doc CAT/C/20/D/90/1997 (19 May 1998) para 8.7; *JUA v Switzerland* (Comm No 100/1997) UN Doc CAT/C/21/D/100/1997 (10 November 1998) para 6.6; *SMR and MMR v Sweden* (Comm No 103/1998) UN Doc CAT/C/22/D/103/1998 (5 May 1999) para 9.7; *MBB v Sweden* (Comm No 104/1998) UN Doc CAT/C/22/D/104/1998 (5 May 1999) para 6.8; *KT v Switzerland* (Comm No 118/1998) UN Doc CAT/C/23/D/118/1998 (19 November 1999) para 6.5; *NM v Switzerland* (Comm No 116/1998) UN Doc CAT/C/24/D/116/1998 (9 May 2000) para 6.7; *SC v Denmark* (Comm No 143/1999) UN Doc CAT/C/24/D/143/1999 (10 May 2000) para 6.6; *HAD v Switzerland* (Comm No 126/1999) UN Doc CAT/C/24/D/126/1999 (10 May 2000) para 4.10; *US v Finland* (Comm No 197/2002) UN Doc CAT/C/30/D/197/2002 (1 May 2003) para 7.8.

[17] See *ARJ v Australia* (Comm No 692/1996), UN Doc CCPR/C/60/D/692/1996.

[18] Human Rights Committee, *The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [12].

3.3 Requirement of intent in the definition of cruel, inhuman or degrading treatment or punishment (proposed s 5(1))

27. Proposed s 5(1) includes an element of intent in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment'.

28. While the HRC has been reluctant to define those acts prohibited under Article 7 of the ICCPR, it is very clear that intent is not required for an act to constitute cruel, inhuman or degrading treatment or punishment.[19]

29. Again, the inclusion of an intent requirement in the definition of cruel, inhuman or degrading treatment or punishment places people at risk of refoulement.

> ***Recommendation 3:***
>
> The requirement of intent contained in the section 5(1) definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' should be removed.

3.4 Exclusions from the complementary protection mechanism (s 36(2C))

30. Proposed s 36(2C) provides that a non-citizen is taken not to satisfy the criterion required for the grant of a protection visa if:

    (a) the Minister has serious reasons for considering that:

        (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

        (ii) the non-citizen committed a serious non-political crime before entering Australia; or

        (iii) the non-citizen has been found guilty of acts contrary to the purposes and principles of the United Nations; or

[19] Human Rights Committee, *General Comment No 20: Article 7 Prohibition of Torture and Cruel Treatment or Punishment* (1992), [4]. See, for example, the discussion in Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd Edition, 2005) (**Joseph**), 209 – 211 which considers the case of *Rojas Garcia v Columbia* (687/96), where police raided the wrong house and negligently inflicted cruel, inhuman or degrading treatment.

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

31. Australia's non-refoulement obligations are absolute and non-derogable. The Committee Against Torture considered this issue in the case of *Tapia Paez v Sweden*,[20] and said:

> The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged [prior to seeking protection] cannot be a material consideration when making a determination under article 3 of the Convention [Against Torture].[21]

32. The Government acknowledges this position in the Explanatory Memoranda and states that:[22]

> Australia's non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Australia must, however, balance the delivery of its humanitarian program with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern. There is no obligation imposed on Australia to grant a particular form of visa to those to whom non-refoulement obligations are owed. It is intended that, although a person to whom Australia owes a non-refoulement obligation might not be granted a visa because of this exclusion provision, alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected.

33. The Explanatory Memorandum indicates that the Government's intention is to recognise and adhere to its non-refoulement obligation through a regime when a person is deemed to be a 'character of concern'. However, the legislation itself provides no guarantee that this will happen.

34. If Australia owes an obligation of non-refoulement, they must not return the person to whom to obligation is owed to the country of risk. If is, of course, open to the Government to take a

[20] *Tapia Paez v Sweden* (Comm No 39/1996), UN Doc CAT/C/18/D/39/1996.

[21] *Tapia Paez v Sweden* (Comm No 39/1996), UN Doc CAT/C/18/D/39/1996, [14.5]

[22] Explanatory Memorandum, [64].

range of measures to ensure that the Australian public is not placed at risk. However, the legislative regime should not leave open the possibility that such people will be denied Australia's protection.

Recommendation 4:

Section 36(2C) of the Bill should be deleted. Complementary protection should be available to all people who are at risk of torture, cruel, inhuman or degrading treatment if removed from Australia.