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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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Canberra ACT 2600
By email: legcon.sen@aph.gov.au

28 September 2008

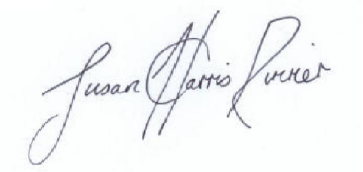
Dear Inquiry Secretary

Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Committee.

We stand ready to give evidence at a hearing if required.

Kind regards



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Australian Lawyers for Human Rights

Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the
Migration Amendment (Complementary Protection) Bill 2009

Introduction

1. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make a submission on the Migration Amendment (Complementary Protection) Bill 2009. The Bill amends the *Migration Act 1958* to better adhere to Australia's obligations under international human rights law, particularly through the introduction of complementary protection arrangements for those most at risk from human rights abuses. ALHR commends this aim, and seeks to ensure through the comments made in this submission that the drafting of the Bill properly reflects this aim.
2. The Bill proposes to introduce complementary protection arrangements to allow all claims that may engage Australia's non-refoulement obligations to be considered under a single Protection visa application process, with access to the same decision-making framework as is currently available to applicants who make claims under the Refugees Convention. ALHR agrees with a single process, with certain caveats as elaborated below.
3. The Bill also provides tests and definitions for identifying a non-refoulement obligation, and criteria for the grant of a protection visa when a person is found not to be owed obligations under the Refugee Convention. ALHR has some concerns with some of the tests under the Bill, discussed below.
4. ALHR is encouraged that the Bill applies to offshore persons, but notes that the processing guidelines in use in excised territories such as Christmas Island are still not public documents, which lack legal stature.

5. ALHR supports the Bill and urges the Committee to recommend its adoption, albeit with certain crucial amendments as elaborated below.

6. ALHR supports the submission of Jane McAdam to this inquiry as the recognised legal expert on complementary protection.

About ALHR

7. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

8. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 lawyers, with active National, State and Territory committees.

9. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

About Complementary Protection

10. The term 'complementary protection' was first introduced in the 1990s.[1] It refers to the situation in which a person enters another country, cannot be protected under the United Nations Convention on the Status of Refugees[2] and the 1967 Protocol Relating to the Status of Refugees, but is owed protection under another international treaty. The protection they receive is 'complementary' to the protection provided under the Refugee Convention. The basis for the protection obligation is the principle of non-refoulement in international law.

1 McAdam, J, Complementary Protection in International Refugee Law (2007), 23

2 Article 33, *Convention Relating to the Status of Refugees* opened for signature July 28, 1951, 189 UNTS 150, (entered into force April 22, 1954).

11. Australia is a signatory to the Convention Against Torture (CAT),[3] the[4] Convention on the Rights of the Child (CROC) and the International[5] Covenant on Civil and Political Rights (ICCPR). Non-refoulement is an[6] important element that underpins the protections established by these international laws, and it is fundamental to the operation of the Refugee Convention. The non-refoulement principle generates a legal obligation for Australia not to return, in any manner whatsoever, people seeking protection under those treaties to countries where they may face persecution.

12. A complementary protection system would protect stateless persons, people whose human rights have been grossly violated for reasons not recognised in the Refugee Convention, and people who would be subjected to torture if they returned to their country.

13. A number of other developed countries, which are also signatories to the CAT, CROC and ICCPR have introduced complementary protection procedures to meet their legal obligations.[7] Some of those procedures run concurrently when officials are determining whether someone is a refugee, while other countries only examine whether a complementary protection obligation arises after a person has been refused refugee status. However, so long as there is a procedural mechanism through which people can claim protection, then a State is making an attempt to satisfy its obligations under international law.

Development of Complementary Protection in Australia

3 Article 3, *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).
4 Article 3, *Convention on the Rights of the Child* (opened for signature 20 November 1989, (entered into force 2 September 1990).
5 Article 7, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).
6 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law,* 3rd edn (2007), 248.
7 EU States, Canada, New Zealand.

which [9]

9 *Migration Act 1958* (Cth), hereafter 'Migration Act'

people can apply to the Immigration Department for protection under the CAT, the ICCPR or the CROC. Currently, the only way a person who is not a refugee can receive protection from non-refoulement is if Australia's Immigration Minister exercises his or her discretion in section 417 of the Migration Act to use their executive power to give the person a visa, legalising their presence in Australia. However, this discretion can only be exercised once the person seeking protection has exhausted all other avenues in Australia's refugee recognition system.

15. The use of Ministerial Discretion to provide complementary protection has waxed and waned in response to changing international and domestic political environments. When the Migration Act was originally drafted in the 1950s, there was strong bi–partisan support for including Ministerial discretion in the structure of Australia's immigration processes. Ministerial Discretion was originally conceived as a 'safety net' to ensure that the law remains just.[10] However the exercise of Ministerial Discretion has moved from providing an ad-hoc remedy to a de-facto humanitarian entry procedure with its own standards and rules,[11] which are subject to significant change in response to government policy.

16. For example, the late 1980s witnessed a strong political push in Australia [12]

for the scope of discretionary powers to be narrowed. The Migration Act

10 Kerry Carrington, *Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context*, (2003), 1.
11 Carrington, above, 1.
12 Barry York, *Australia and Refugees, 1901–2002: An Annotated Chronology Based on Official Sources*, (2003), 4.

was substantially reformed to limit the areas where Ministerial Discretion could operate, reducing the numbers of asylum seekers receiving protection. Yet the period 1996 to 2006 witnessed a strong growth in the[13] number of cases where Ministerial Discretion was exercised. The[14] discretionary mechanism was criticised in governmental reviews, [15] academic and practitioner commentary[16] for its lack of consistency and transparency because it was not clear who it would provide protection for, and in what circumstances.

13 Australian Lawyers for Human Rights, Refugee Law Kit 2003 (2003) ww.alhr.asn.au/refugeekit/downloads/fact_sheet1.pdf, Accessed 25/05/2008; Carrington, above n9, 10.

14 Senate Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters* (2004), Australian Senate, Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000).

15 Kinslor, J, 'Non-refoulement and torture: The adequacy of Australia's laws and practices in safeguarding asylum-seekers from torture' (2000) 8 *Australian Journal of Human Rights.*

16 Refugee Council of Australia. *Position Paper on Complementary Protection: Refugee Council of Australia* (2002).

ministerial discretion, and commissioned the Proust report into the appropriate use of ministerial intervention and discretionary powers. The Proust report endorsed and reiterated the Senate Select Committee's recommendation to establish a system for complementary protection other than under Ministerial discretion. This bill to establish a complementary protection system responds to the Proust recommendation. However,

Proust recommended a specialist tribunal which has not been accepted by this bill.

Comments on the Bill

18. ALHR supports the single decision making process, and that CP visa holders will receive the same rights as refugees.

19. However, ALHR notes that it is hard to assess several practice issues that this Bill raises without seeing what amendments are planned to Schedule 1 and 2 of the Migration Regulations, for example, criteria at time of application and decision. A list of questions for the Department to clarify some of these practice issues are set out below

Generalised violence

20. ALHR is dismayed that the Bill contains no protection from generalized or indiscriminate violence (unlike EU subsidiary protection).

ICCPR

21. We note that the Bill refers only to ICCPR. ICCPR has a broader definition of torture (no necessary link to officials) than CAT, plus the Committee has included CID in their non-refoulement jurisprudence. The test is also (partly) the ICCPR test ('necessary and foreseeable consequence'). However, the CAT and the CRC have their own specialized jurisprudence and should have been included in the Bill, at least as a note.

22. ALHR thinks that the grounds for complementary protection (CP) under this Bill have been framed in an unnecessarily complicated way. Not only do applicants have to satisfy the threshold set out for 'torture', 'cruel or inhuman treatment or punishment', or 'degrading treatment or punishment' (raising the question as to why try and codify these based on the torture

definition, and why separate them out?), but they also have to meet the very convoluted test under s 36(2)(aa). The similarly complicated and confusing drafting of Article 15(c) of the European Qualification Directive has led to confusion.

23. ALHR submits that s 36(2B)(c) is also problematic. How can you face the DP, 'torture' or CID and it not be imposed 'personally'?

24. The bill sets a threshold of harm that has to be established as 'irreparable damage. The explanatory memorandum suggests that this threshold is based on the position of the Human Rights Committee in its general comment 31 - I believe this view misinterprets the Committee's position and creates a significantly more onerous barrier than we are obligated to respect under the CAT etc.

Irreparable Harm

25. ALHR feels that the term 'irreparably harmed' should be struck from the Bill. The term occurs in UN Human Rights Committee General Comment 31 of 2004, para 12. We support the submissions of Foundation House on this matter. Professor Sarah Joseph states in a recent article 'Scope of Application of Human Rights Obligations' on this issue:

> However, a sending state is not responsible for every human rights violation that it might foreseeably expose a person to in another state. The case law thus far indicates that states cannot deport a person in circumstances where he or she foreseeably faces violations of the right to life or the right to be free from torture and other cruel, inhuman, and degrading treatment. But could a state also be held liable under the ICCPR if it deported a person to a state where he or she might face another human rights violation, such as racial discrimination or an unfair trial? Such a complaint was an aspect of *Judge v Canada*. In that case the complainant alleged, *inter alia*, that his [19]
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> extradition from Canada to the US would expose him to a breach of his right to appeal in criminal trials in Article 14(5) ICCPR. The majority did not address the issue. In a separate opinion, Mr Solari-Yrigoyen found a breach of Article 14(5). Mme Chanet, in another separate opinion, stated that it was 'less obvious' that states should be held liable for abuses of

19 CCPR/C/78/D/829/1998 (5 August 2002).

rights other than the rights to life and freedom from torture foreseeably perpetrated by other states. In General Comment 31, the Human Rights Committee described the obligation not to deport as arising when deportation would give rise to a 'real risk of irreparable harm, such as that [20]contemplated by articles 6 and 7 of the Covenant'. It seems doubtful that [21]many other human rights violations can be characterized as 'irreparable'. It is however assumed that the obligations would be more extensive if the sending state somehow colluded with the receiving state in bringing about violations of those other rights.

Derogations

26. ALHR is alarmed by the aspect of the Bill that would allow derogability from the absolute prohibition to return a person to torture under the CAT. The non-refoulement obligations under human rights law permit no exceptions, so exclusion clauses in the traditional sense cannot apply. That said, as noted in the second reading speech, Australia does not have to grant someone who meets the Article 1F or Article 33 criteria a protection visa, but it does mean Australia cannot remove them. What status do they get?

27. The Australian Government does not have an obligation to give a visa to an excluded person but there is no clear plan here for what would happen to a person so excluded that would not lead to indefinite and arbitrary detention, given that Australian migration law is so clearly linked to visa status. The official line in the past has been that the government will seek third countries which will take those screened out, or seek assurances from the country of origin. This leads to questions about the adequacy of assurances, especially when people are being sent back to countries where torture is systemic. ALHR oppose the derogability of the provision on the grounds that it undermines the *jus cogens* nature of the norm and that assurances are inherently unreliable. The exclusion clauses were

20 n 17, para. 12.
21 See, however, *R (Ullah) v Special Adjudicator* [2004] UKHL 26, where the UK House of Lords indicated that non-refoulement may apply to prevent exposure to very serious breaches of other rights, such as one's right to freedom of religion.

designed to deny people the status of 'refugee', not to allow for them to be sent back to face torture and death. That the House of Lords endorsed an assurance with respect to Algeria in *RB v SSHD* [2009] UKHL 10 was particularly worrying, and the Human Rights Committee is skeptical about such assurances. . If there is to be exclusion on these grounds, then the government needs to spell out exactly what mechanisms it is putting in place to avoid arbitrary detention that would breach the ICCPR. If it is assurances, then we need strong verifiable and transparent criteria, and a commitment to the prosecution of these crimes.

Internal Relocation

28. ALHR are concerned about issues regarding internal relocation. This has long been a weak and inconsistent area of refugee status determination in Australia. This Bill offers an opportunity to reform the decision-making procedures to allow for a more logical and consistent application of internal relocation alternative, in line with human rights standards.

29. There is no codification of a test for internal relocation in the Act, yet this one will only apply to those seeking CP. This leads to the possibility of two tests being developed in parallel. I think the test here is much higher than the judicially crafted one for RC51 applicants. Reasonability is fine, but risk of 'irreparable harm' because of a matter mentioned before (ie death, torture or CID) seems to set the bar very high. ALHR suggests that the tests be the same: if it is unreasonable to send someone facing persecution for a convention reason to another part of the country, it should be unreasonable to send back someone facing persecution but not for a convention reason. Why would we differentiate? It is surely not a 'floodgates' argument, and promises to confuse the RRT and to be tested in the courts.

RECOMMENDATIONS

30. ALHR believes the Bill should have gone further in terms of categories of protection, such as serious harm from generalized violence.

31. ALHR supports the Bill subject to some amendments, in particular reforms to the internal relocation test and the removal of the phrase 'irreparable damage'.

32. ALHR recommends the following list of questions for the Committee to put to the Department:

1. S36(2)(b) of the Migration Act currently provides for family members of a person granted a protection visa to also be granted a protection visa. This would presumably include children. However, if the person who would otherwise receive a protection visa is excluded under any of the provisions under ss36(2C), then the child may not be adequately protected from psychological or physical harm, in violation of Article 3 of the CROC. How does the Department intend to deal with these issues?

2. In s36(2)(aa) the amendment indicates that primacy is to be given to Refugee Status Determination in DIAC procedures. While the rationale for the primacy of the Refugee Convention is sound, one of the aims of the amendment was to increase 'administrative efficiency.'[22] It is unclear at what stage decision–makers would decide to assess someone against the criteria in s36(2A), and whether an individual's application for a protection visa will have to address both Complementary Protection and Refugee Status grounds for protection, or whether addressing one category only will be sufficient. How will the department cope with cases where an applicant only addresses Complementary Protection issues?

3. If an applicant's claim for protection under the Refugee Convention fails, will they be required to restate their case in relation to the Complementary Protection criteria in s36(2A), or will the decision-maker reassess the initial information given against the different criteria?

22 Second Reading Speech, p2

4. How does the Department plan to train and/or educate officers to analyse and apply Complementary Protection criteria to individual cases?

5. The Explanatory Memorandum notes in its Financial Impact Statement that 'the costs [of the amendment] will be met from within the existing resources of [DIAC]. If additional training is required to ensure officers are able to understand and apply the relevant international law, where will the funding for the additional training come from?

6. Does the Department intend to monitor the impact of Complementary Protection decisions on Immigration officer's caseloads, and their application of international law, after the introduction of the amendments? If so, how?

7. The amendment fails to introduce into the legislation any specific reference or definition in s5 of CROC, the CAT or the second optional protocol to the ICCPR. While the Explanatory Memoranda refers to the relevant provisions, the omission of specific reference to these legal instruments in the criterion in s36(2A) of the act itself means that narrow judicial interpretation may allow interpretation of the criterion without reference to the international instruments they were designed to implement. What are the reasons for the Department's decision not to explicitly include any of the treaties other than the ICCPR in the definitions section of the Amending Bill?

8. The definition of cruel and inhuman treatment or punishment in s5(1) does not, according to the Explanatory Memoranda, show that the definition is also derived from the CAT. Because the two treaties are interpreted differently with their own body of jurisprudence (given the *lex specialis* nature of the CAT, as opposed to the universal application of the ICCPR) the omission of a reference to CAT could lead to ambiguity when decision-makers interpret the definition. Will the Department consider re-drafting the Bill to avoid this potential ambiguity?

9. As the Explanatory Memoranda notes in s36(2C), Australia's obligations under the Covenant and the CAT are absolute. Can the 'alternative case resolution solutions' be more accurately identified to increase transparency in decision-making? Can the obligation to find an 'alternative case resolution solution' for individuals who are excluded from obtaining a protection visa under s36(2C) be included in the legislation, in order to satisfy Australia's non-refoulement obligations?

10. The relevant standard of proof for complementary protection in s36(2)(a) is 'a necessary and foreseeable consequence of removal.' Given the seriousness of the harm that applicants could be returned to, this may not be an appropriate standard of proof (as the standard is too high in comparison with the standard in the Refugee Convention). Could the standard of proof included in the amending bill be amended?

11. Will the Country of Origin Information Service's data collection methods also be changed to reflect the different criteria against which applicant's claims for protection will be tested?

12. What work is left for s417 other than humanitarian considerations?