Law Institute Victoria

Migration Amendment (Complementary Protection) Bill 2009

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

28 September 2009

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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the *Migration Amendment (Complementary Protection) Bill* 2009 (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 14,500 members. LIV members have experience in representing refugees and others seeking protection in Australia and the LIV has long been active in advocating for policy and law reform in this area through its Refugee Law Reform Committee.

General Comments

The LIV welcomes the introduction of a formal system of complementary protection, whereby people who do not meet the definition of "refugee" in the 1951 Refugee Convention,[1] but who are still in need of protection under international law, can apply for a protection visa in the first instance to the Department of Immigration and Citizenship (the Department).

The Senate Committee on Ministerial Discretion in Migration Matters in 2004 recommended that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under: the 1966 International Convention on Civil and Political Rights (ICCPR); the 1988 Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT); and the 1989 Convention on the Rights of the Child (CROC).[2] Under these Conventions, Australia has an obligation not to return persons to a country where they face a real risk of persecution, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment.

The complementary protection regime will ensure that people who engage Australia's non-refoulement obligations under the ICCPR, CAT and CROC will have access to the same reviewable decision-making framework that is currently available to applicants who make claims under the Refugee Convention.

Currently, those persons who are entitled to Australia's protection under ICCPR, CAT or CROC rely on exercise of ministerial discretion by the Minister for Immigration and Citizenship under s417 of the *Migration Act* 1958 (Cth) (Migration Act). The LIV welcomes the government's acknowledgement of the shortcomings of ministerial intervention as a means of giving effect to Australia's non-refoulement obligations. Ministerial discretion is non-compellable, non-reviewable and non-delegable and can be exercised only after a person has been refused a visa by the Department and on review by a tribunal. We agree with comments by Mr Laurie Ferguson in the second reading speech that the current process is administratively inefficient and does not provide for a sufficient guarantee of fairness and integrity.[3]

1 *Convention relating to the Status of Refugees* 1951, as amended by the *Protocol relating to the Status of Refugees* 1967.
2 Senate Committee on Ministerial Discretion in Migration Matters report, (2004) Recommendation 19.
3 Second reading speech, 9 September 2009, p5.

The government recognises that Australia is almost alone among modern Western democracies in not having a formal system of complementary protection.[4] We applaud the government for its action to remedy this shortcoming, which has been advocated by many international refugee and human rights organisations, including the United Nations High Commissioner for Refugees (UNHCR), the United Nations Committee against Torture and Human Rights Committee, the Refugee Council of Australia, the Law Council of Australia and the LIV.

The LIV emphasises the importance of maintaining equal rights and benefits for refugees and beneficiaries of complementary protection. We welcome the government's commitment to grant protection visas with the same conditions and entitlements to visa applicant's who engage Australia's non-refoulement obligations on either Refugee Convention or complementary protection grounds.

Specific comments on the Bill

While the LIV strongly supports the introduction of complementary protection grounds to the Migration Act, we do have some concerns about certain provisions in the Bill. We set out these concerns in the following.

Integrated approach to visa eligibility

The LIV welcomes the integrated approach to visa eligibility criteria proposed in the Bill, which amends s36 of the Migration Act. Applicants for a protection visa will be assessed against criteria in subs36 (2)(a) and (b) under the Refugee Convention and against proposed subs36(aa) and (c) on complementary protection grounds. We understand that protection visa applicants are not therefore required to choose a visa sub-category on making their application. This integrated approach should prevent visa applicants being penalised where they are mistaken in their visa application about which criteria they satisfy.

We are concerned, however, about the indication in the second reading speech that protection visa applications are to be considered first against existing refugee criteria and, only if they are found not to be refugees, will they be assessed against complementary protection criteria in proposed subs36(aa) and (c).[5]

The Explanatory Memorandum to the Bill indicates that:

> the purpose of the of new paragraph 36(2)(aa) is to provide a criterion for a protection visa on the basis of a non-refoulement obligation *if the Minister is not already satisfied* Australia has protection obligations under the Refugees Convention and the non-citizen is not ineligible for the grant of a protection visa as provided in new subsection 36(2C) (see item 13). This retains the primacy of the Refugees Convention and means that non-citizens found to be owed protection obligations under the Refugees Convention do not require further assessment of other non-refoulement obligations (emphasis added). [6]

4 Second reading speech, p5.
5 Second reading speech, p6.
6 Explanatory Memorandum, *Migration Amendment (Complementary Protection) Bill* 2009 [50].

We note that there is no provision in the Bill which accords primacy to the Refugee Convention, or which directs a delegate to assess a protection visa applicant first against criteria under subs32(a). We seek clarification from the government about whether this proposal will be implemented in Policy or Guidelines.

The second reading speech indicates this approach is "strongly supported by the UNHCR" in recognition of the "primacy of the Refugees Convention as an international protection instrument".[7]

We submit that the UNHCR supports the primacy of the Refugee Convention because of a concern that the rights and benefits extended to beneficiaries of complementary protection in certain other jurisdictions are lesser than those available to refugees.[8] These concerns are not applicable to the Bill, which confers equal conditions and entitlements to protection visas on both refugee and complementary protection grounds.

The LIV is concerned that any stipulation that all applications should be assessed against the criteria for refugee protection first and assessed against complementary protection only if they fail to satisfy the refugee definition might lead to adverse credibility findings under refugee claims inappropriately affecting complementary protection claims. In light of the guarantee of equal conditions and entitlements for all protection visa holders, we propose that protection visa applicants should be able to elect a primary set of criteria – refugee or complementary – without risking any penalty for that choice in the decision-making process.

Exclusion of statelessness

The Bill does not provide express protection for "stateless persons" in the new complementary protection regime. Under the 1954 *Convention relating to the Status of Stateless Persons*, which Australia has ratified, a stateless person is "a person who is not considered as a national by any State under the operation of its law".[9]

Article 31 of the *Convention relating to the Status of Stateless Persons* protects stateless persons who are lawfully in the territory of a Contracting State from expulsion unless there are national security or public order grounds and the decision has been reached in accordance with due process of law.

The UNHCR has identified non-refugee stateless persons as a category of "persons of concern" who fall outside the Refugee Convention, in addition to those persons who are entitled to protection under ICCPR, CAT and CROC.[10]

UNHCR has further indicated that States need to adopt mechanisms for identifying statelessness in practice, and to ensure that stateless persons are provided legal status *in an appropriate country*.

Currently, stateless persons in Australia rely on ministerial intervention where they do not meet the definition of refugee, in the same way as those persons seeking protection on grounds of non-refoulement obligations under ICCPR, CAT and CROC. In the second reading speech, the government recognises "the past failures to resolve the status of

7 Second reading speech, p 6.
8 UNHCR, Observations on the European Commission Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step' (COM(2004)503 final; Annex SEC(2004)937, 15 July 2004).
9 *Convention relating to the Status of Stateless Persons*, art 1.
10 UNHCR, *Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion not*e EC/1992/SCP/CRP.5 (2 April 1992).

stateless people in a timely manner" and commits to ensure that stateless persons who face no risk of harm on return are not left in the "too hard basket".[11]

The LIV submits that contrary to the government view, complementary protection is an appropriate vehicle for identifying and providing legal status to stateless persons.

The LIV does not agree that "statelessness alone does not give rise to a protection need"[12] in the absence of an issue of harm on return. We note that the concept of "complementary protection" has no single, settled definition in international law (other countries use terms including "subsidiary protection" in the European Union, "de facto refugee status", "exceptional leave to remain'", "B status" and "humanitarian protection").[13] We consider that international "protection" for stateless people refers to an absence of the protection ordinarily conferred by a country on its nationals or citizens. A stateless person without such protection is by definition in need of protection by an appropriate State (although this need not necessarily be the State in whose territory that person is then located).

The LIV emphasises that ministerial discretion is not an appropriate means of addressing statelessness. We note in the second reading speech that the Minister is committed to exploring policy options to ensure that "past failures to resolve the status of stateless people in a timely manner" are not repeated. We emphasise that it is important that any policy proposal meet Australia's international law obligations.

The LIV recommends that the Bill be amended to provide protection for stateless persons. The LIV hopes to be consulted on any further consideration of policy options for stateless people.

Ineligibility criteria

The Bill provides in proposed subs36(2C) that a visa applicant is ineligible for a grant of a protection visa if the Minister has "serious reasons" for considering that the person has committed a crime against peace, a war crime or a crime against humanity, or the non-citizen committed a serious non-political crime before entering Australia; or, the non-citizen has been found guilty of acts contrary to the purposes and principles of the United Nations. A visa can also be refused if the Minister considers, on "reasonable grounds", that the person is a danger to Australia's security or the person, "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.

These exclusionary provisions are based on the text of articles 1F and 33(2) of the Refugee Convention. The effect of arts 1F and 33(2) are that State parties do not have non-refoulement obligations in respect of these people.

In contrast, non-refoulement obligations are non-derogable under the CAT and the ICCPR. The second reading speech expressly states that Australia's non-refoulement obligations under CAT and ICCPR are absolute and cannot be derogated from. The Bill therefore breaches Australia's obligations under international law.

The LIV considers that the fact that other States may have acted contrary to their non-derogable obligations at international law does not cure Australia's proposal to do so.

11 Page 7.
12 Second reading speech, p7.
13 See Senate Committee on Ministerial Discretion in Migration Matters report, [8.55]

We note that proposed subs36(2C) provides ministerial discretion in relation to assessment of "serious reasons" whether a person is a security risk "on reasonable grounds". We therefore consider that it is imperative that specific guidance is provided around the proposed approach to resolving the status of persons to whom Australia owes non-refoulement obligations who are found ineligible for a protection visa contrary to obligations in international law.

'Serious crime' and 'particularly serious crime'

Proposed subs32(2C)(b)(ii) excludes eligibility for a person who, "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".

The LIV considers that this provision is ambiguous. It is unclear, for example, whether the provision deems a person to be a danger to the community if they have committed a "particularly serious crime", or whether conviction of a particularly serious crime is a necessary, but not sufficient, precondition to the Minister relying on the exception in subs32(2C)(b)(ii). We recommend that this be clarified.

Evidentiary thresholds

The LIV is concerned about the framing of the evidentiary thresholds that the Bill imposes on decision-makers for the purposes of determining whether a person is entitled to a protection visa under proposed s36(2)(aa).

Proposed subs36(2)(aa) provides that the Minister must be satisfied that there are "substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in subsection (2A)". The threshold of "substantial grounds" also appears in proposed subs36(5A)(b).

The non-refoulement obligation in the CAT, art 3 provides that a State Party shall not return a person to another State where there are "substantial grounds for believing that he would be in danger of being subjected to torture". In relation to the interpretation of "substantial grounds", the UN Committee against Torture has stated that:

> the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable...The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present.[14]

The prohibition on refoulement under CAT does not therefore require any risk of irreparable harm to the person. A substantial risk that a person will be subjected to torture is sufficient to meet the threshold. We therefore consider that it is inappropriate to require evidence of a real risk of irreparable harm for matters in relation to torture under proposed subs36(2A)(c).

The UN Human Rights Committee has articulated that non-refoulement obligations arising under the ICCPR entail an "obligation not to extradite, deport, expel or otherwise remove

[14] Committee against Torture, General Comment 1, General Comment No. 01: *Implementation of article 3 of the Convention in the context of article 22* , A/53/44 [6]–[7].

a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm."[15] We highlight that that consideration of irreparable harm will be necessary only for proposed subss36(2A)(d)-(e), (i.e. in relation to cruel, inhuman or degrading treatment or punishment).

The phrase "substantial grounds" is not defined in the Bill. We note that this evidentiary threshold is not one that is normally applied in an administrative law context. The LIV proposes that decision-makers should therefore be specifically referred to international jurisprudence and general comments of the Human Rights Committee and Committee against Torture in relation to interpretation of "substantial grounds". This might include reference to relevant information, which has been identified as pertinent by the Committee against Torture, such as:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the [applicant]?

(g) Are there factual inconsistencies in the claim of the [applicant]? If so, are they relevant?[16]

We note that the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* refers to the dangers in expecting the usual standards of evidence for refugees, who will normally not have direct evidence of their claims.[17] The Handbook states that:

> while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application… The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.

[15] Human Rights Committee, General Comment No. 31*, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* , CCPR/C/21/Rev.1/Add.13, [12].
[16] Committee against Torture, General Comment 1, above n 15, [8].
[17] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1.

We submit that these considerations will apply equally to applicants for complementary protection and we urge the government to issue guidelines for decision-makers in relation to the application of evidentiary thresholds.

Conclusion

The LIV urges the Legal and Constitutional Affairs Legislation Committee to support the Bill, subject to the amendments and comments set out in this submission. The LIV would welcome the opportunity to provide further oral evidence to the Committee, if public hearings are convened.