The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Complementary Protection) Bill 2009 [Provisions]

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Senator Concetta Fierravanti-Wells, LP, NSW

Secretariat

Mr Peter Hallahan	Secretary
Mr Tim Watling	Principal Research Officer
Ms Cassimah Mackay	Executive Assistant

Suite S1. 61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

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3.19 The committee recommends that proposed paragraph 36(2)(aa) at Item 11 of Schedule 1, and all related paragraphs where the same words are used, be amended by omitting the words 'irreparably harmed' and replacing them with the words 'subject to serious harm'.

Recommendation 2

3.27 The committee recommends that the effect of proposed paragraph 36(2B)(c) be reviewed with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country.

Recommendation 3

3.32 The committee recommends that proposed paragraph 36(2A)(b) be amended to substitute 'and it will be carried out' with 'and it is likely to be carried out'.

Recommendation 4

3.47 The committee recommends that subject to recommendations 1 to 3, the Bill be passed.

CHAPTER 1
INTRODUCTION

1.1 On 9 September 2009, the Senate referred the Migration Amendment (Complementary Protection) Bill 2009 to the Senate Legislation Committee on Legal and Constitutional Affairs, for inquiry and report by 16 October 2009.

1.2 The Bill was introduced in the House of Representatives on 9 September 2009 by the Hon. Laurie Ferguson M.P., Parliamentary Secretary for Multicultural Affairs and Settlement Services. The Bill seeks to amend the Migration Act 1958 to better meet Australia's human rights obligations with respect to non-refoulement under international law. A key aspect of the Bill is the reduction in reliance on Ministerial Intervention powers with respect to non-citizens seeking protection in Australia from the risk of harm overseas.

1.3 Non-refoulement is a principle in international refugee law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened through persecution, torture, death or cruel, inhuman or degrading treatment.

1.4 Australia is party to a number of relevant United Nations conventions in relation to non-refoulement, including:

- the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (the refugees convention) to which Australia became a party in 1954 and 1973 respectively;
- the 1966 International Covenant on Civil and Political Rights (ICCPR), to which Australia became a party in 1980;
- the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Australia became a party in 1989; and
- the 1989 Convention on the Rights of the Child (CROC) to which Australia became a party in 1990.[1]

1.5 Currently, asylum seekers may apply for a protection visa, and their applications are decided through a transparent process that incorporates principles of natural justice. Applications for a protection visa are first considered by an officer of the Department of Immigration and Citizenship acting as the minister’s delegate. A decision is taken and written reasons for the decision provided. Applicants who are unsuccessful can seek independent merits review by the Refugee Review Tribunal (RRT), or the Administrative Appeals Tribunal (AAT) for applications refused on the

1 Second Reading Speech, Hon. Laurie Ferguson M.P, House Hansard, 9 September 2009.

basis of exclusion or character issues. The relevant tribunal must also provide written reasons for its decision.

1.6 However, the Migration Act does not currently permit claims that may engage Australia's non-refoulement obligations under treaties, other than the refugees convention, to be considered in the protection visa process. This bill addresses that anomaly by permitting *all claims* that may engage Australia's non-refoulement obligations to be considered under a single integrated protection visa application process. It ensures that all people who may be owed Australia's protection have access to the same transparent, reviewable and procedurally robust decision-making framework that is currently available to applicants who make claims under the refugees convention.

1.7 Even where immigration officers or the Refugee Review Tribunal might consider that the applicant's circumstances engage a non-refoulement obligation, they are currently unable to grant a visa, because these obligations are not reflected in the visa criteria. Some applicants understand at the outset that their claims fall under human rights treaties other than the refugees convention, but are forced through the protection visa process because that is the only route to ministerial intervention, where their claims can be considered.

1.8 The protection from return in situations that engage non-refoulement obligations under the CAT, ICCPR and CROC is known as 'complementary protection', in the sense that it is complementary to the protection owed to refugees under the refugees convention.

Rationale for complementary protection legislation

1.9 The Second Reading Speech discloses the rationale for introducing complementary protection into the Migration Act as being based on the need to be consistent in the consideration of whether a person would face arbitrary deprivation of his or her life, or be tortured. At present, Ministerial intervention powers provide the only course of action to assist such people, unless they are covered by the refugees convention.[2]

1.10 While the powers enable the minister to grant a visa if the minister considers it is in the public interest to do so, including cases in which non-refoulement obligations are owed under international law, the Government argues that reliance on the ministerial intervention powers brings with it several disadvantages. These include:

- decisions may only be made by the minister personally;
- no-one can compel the minister to exercise the powers;
- there is no specific requirement to provide natural justice;
- there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of decisions by the minister;

2 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

1.11 Moreover, the current process is widely considered to be inefficient and unnecessarily burdensome on all parties. The Department summed this up neatly in their submission:

> The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.[3]

1.12 During the Second Reading Speech, Mr Ferguson argued:

> While there can be no doubt that ministers take very seriously their obligations to consider whether a visa should be granted to meet Australia's human rights obligations, the very nature of ministerial intervention powers is such that they do not provide a sufficient guarantee of fairness and integrity for decisions in which a person's life may be in the balance.[4]

1.13 The Government points to arguments from both domestic and international bodies for the need for changes to be made to better address complementary protection claims. Mr Ferguson's Second Reading Speech noted the following:

> The Refugee Council of Australia and other organisations with firsthand experience of the shortcomings of Australia's current arrangements have also been tireless advocates for the introduction of a system of complementary protection. Internationally, this reform has the strong support of the United Nations High Commissioner for Refugees (UNHCR) and is consistent with a number of conclusions by the state membership of UNHCR's Executive Committee. It has also been recommended by other key international human rights bodies.
>
> The United Nations Committee against Torture recommended, most recently in May 2008, that Australia adopt a system of complementary protection, ensuring that the minister's discretionary powers are no longer solely relied on to meet Australia's non-refoulement obligations under human rights treaties. In addition, the United Nations Human Rights Committee recommended, in May 2009, that Australia should take urgent and adequate measures, including legislative measures, to ensure that

3 Department of Immigration and Citizenship, submission 16, p. 2.

4 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

> 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.[5]

1.14 Mr Ferguson also noted that:

> Australia is almost alone among modern Western democracies in not having a formal system of complementary protection in place. Many European and North American countries already have established complementary protection arrangements. The New Zealand government already has a bill before their parliament to introduce complementary protection. This bill brings Australia into line with what is now recognised as international best practice in meeting core human rights obligations.[6]

Conduct of the inquiry

1.15 The committee advertised the inquiry in *The Australian* newspaper on 23 September 2009, and invited submissions by 28 September 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 70 organisations and individuals inviting submissions.

1.16 The committee received 35 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

Acknowledgement

1.17 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.18 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard and page numbers may vary between the proof and the official Hansard transcript.

5 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

6 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

CHAPTER 2
PROVISIONS

2.1 Item 2 of Schedule 1 seeks to insert into the Act a definition of 'cruel or inhuman treatment or punishment' as being an act or omission by which:

- severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person:
    - for the purpose of obtaining from the person or from a third person information or a confession; or
    - for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
    - for the purpose of intimidating or coercing the person or a third person; or
    - for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); or
    - for any reason based on discrimination that is inconsistent with the Articles of the Covenant on Civil and Political Rights [the Covenant]; or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person for any other reason so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

2.2 However, it does not include an act or omission:

- that is not inconsistent with Article 7 of the Covenant; or
- arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

2.3 The purpose of expressly stating what ‘cruel or inhuman treatment or punishment’ does not include is to confine the meaning of ‘cruel or inhuman treatment or punishment’ to circumstances that engage a non-refoulement obligation. The purpose of this amendment is to provide a definition of ‘cruel or inhuman treatment or punishment’ derived from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant, which is relevant when considering whether a non-citizen, or a member of the same family unit of the non-citizen, is a person in Australia to whom the Minister is satisfied Australia has a non-refoulement obligation.[1]

2.4 Item 3 would define degrading treatment or punishment as an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. It

1 Explanatory Memorandum, p. 4.

does not include an act or omission that is not inconsistent with Article 7 of the Covenant or that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

2.5 Items 6 and 7 define serious offence, in Australia and overseas respectively. The definition would catch crimes that are violent, drug-related, involve damage to property, the penalty for which is at least 3 years imprisonment under the law of the Australian Capital Territory. In the case of a serious Australian offence, offences relating to immigration detention are included within the definition.

2.6 Item 8 would define torture act or omission by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person:

- for the purpose of obtaining from the person or from a third person information or a confession; or
- for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- for the purpose of intimidating or coercing the person or a third person; or
- for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- for any reason based on discrimination that is inconsistent with the Articles of the Covenant.

2.7 However, the definition does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant. For the purposes of this definition, the act or omission is not limited to one that is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity as is required under Article 1, paragraph 1 of the CAT. Torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity.

2.8 Item 11 would insert a new criterion for a protection visa that the applicant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has 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 following matters, listed at proposed subsection 36(2A) :

- the non citizen will be arbitrarily deprived of his or her life; or
- the non citizen will have the death penalty imposed on him or her and it will be carried out; or
- the non citizen will be subjected to torture; or

- the non citizen will be subjected to cruel or inhuman treatment or punishment; or
- the non citizen will be subjected to degrading treatment or punishment.

2.9 The Bill does not make provision for the grant of a protection visa merely on the basis of statelessness; successful applicants must satisfy the government of their status as refugees or that they face a consequence listed at 36(2A) to succeed.

2.10 Item 12 would extend the opportunity to remain in Australia to a family member of a successful applicant for a protection visa provided for under the amendments at Item 11.

2.11 There is taken not to be a real risk that a non citizen will be irreparably harmed in a country because of a matter mentioned in subsection 2A if the Minister is satisfied, under proposed subsection 36(2B), that:

- it would be reasonable for the non citizen to relocate to an area of the country where there would not be a real risk that the non citizen will be irreparably harmed because of a matter mentioned in that subsection; or
- the non citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non citizen would be irreparably harmed because of a matter mentioned in that subsection; or
- the real risk is one faced by the population of the country generally and is not faced by the non citizen personally.

2.12 According to the Explanatory Memorandum, Australia's non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. A real risk of harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. The purpose of new subsection 36(2B) is to ensure Australia's non-refoulement obligations are applied and implemented consistently with international law.[2]

2.13 Furthermore, proposed subsection 36(2C) provides that a non citizen is taken not to satisfy the criterion necessary for a claim under the provisions of the Bill if the Minister has serious reasons for considering, at proposed paragraph 36(2C)(a) and (b) that:

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

2 Explanatory Memorandum, p. 10.

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

the Minister considers, on reasonable grounds, that:

- the non citizen is a danger to Australia's security; or
- 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.

2.14 In such cases the Minister will retain solely responsible for deciding whether the person may remain temporarily or permanently in Australia.[3]

2.15 These provisions would provide the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

2.16 Item 14 would amend arrangements, reflected in subsection 36(3), in respect of protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

2.17 While subsection 36(3) would remain in place, new subsection 36(4) would provide that subsection 36(3) does not apply in relation to a country in respect of which:

- the non citizen in question has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
- the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen choosing to go to another country, there would be a real risk that the non-citizen would be irreparably harmed as a result.

2.18 Substitute subsections 36(5) and (5A) would exclude the application of 36(3) in circumstances where the person (of the Minister) has a well-founded fear that the country to which the person might have taken refuge would return the person to their country of origin.

2.19 The provisions of this item incorporate into the Migration Act the principle that if a non-citizen can avail themselves of a right to enter and reside in a third country and in doing so they will not face a real risk of being irreparably harmed, then the non-citizen is not owed a non-refoulement obligation.

2.20 Item 16 would update subparagraph 91N(3)(a)(i) in line with the other amendments in the Bill, by substituting 'protection' for 'asylum', the effect of which

3 Department of Immigration and Citizenship, *submission* 16, p. 6.

would be to empower the Minister to declare that a country provides effective procedures for meeting claims for protection.

2.21 Items 25 and 27 relate to the disclosure of identifying information about an applicant for protection under the Refugee Convention to a country in respect of which the application is made, or a person or body who might disclose that information to such a country. Item 29 would authorise the disclosure of identifying information when an applicant has been found not to be owed an obligation under the relevant provisions.

2.22 Items 30, 32 and 33 would provide for the review of a decision not to grant (or under Item 31, cancel) a protection visa by the Refugee Review Tribunal (RRT), except where the decision to refuse the visa was made after consideration by the Minister that the applicant may have committed certain serious crimes, may be a danger to Australia's security, or having been convicted of a serious crime, is a danger to the community. Such decisions may, however, be reviewable by the Administrative Appeals Tribunal (AAT).

CHAPTER 3
ISSUES

3.1 This Bill seeks to address gaps in the existing framework for processing applications for protection under the Refugee Convention and other associated pieces of international law to which Australia is party, a course of action recommended by the Legal and Constitutional Affairs References Committee on several occasions in the past and also by the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004.[1] The need for complementary protection legislation was expounded on in the second reading speech for the Bill:

> Complementary protection will cover circumstances in which a person may currently be refused a protection visa because the reason for the persecution or harm on return is not for one of the specified reasons in the refugee convention—that is not on the basis of race, religion, nationality, membership of a particular social group or political opinion. For example, it is not certain that a girl who would face a real risk of female genital mutilation would always be covered by the refugee convention, whereas she would be covered under complementary protection. Women at risk of so-called honour killings can also potentially fall through gaps in the refugee convention definition. In some countries victims of rape are executed along with, or rather than, their attackers. Again, depending on the circumstances, this situation may not be covered under the refugee convention.[2]

3.2 However, as pointed out by Associate Professor Jane McAdam, complementary protection does not supplant or compete with the Refugee Convention. By its very nature, it is *complementary* to refugee status determination done in accordance with the Refugee Convention. Complementary protection grounds are only considered following a comprehensive evaluation of the applicant's claim against the Refugee Convention definition, and a finding that the applicant is not a refugee.[3]

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1 See, for example, Senate Legal and Constitutional References Committee report *A sanctuary under review: an examination of Australia's refugee and humanitarian determination processes*, June 2000; Senate Select Committee report on Ministerial Discretion in Migration Matters, March 2004; and Legal and Constitutional References Committee report on the administration and operation of the *Migration Act 1958* in March 2006.

2 Hon. Laurie Ferguson MP, Second reading speech, *House Hansard*, 9 September 2009.

3 Associate Professor Jane McAdam, *submission* 21, p. 6.

3.3 Strong support was received for the direction of the Bill from submitters[4], particularly its central aim of reducing the need for the use of Ministerial intervention powers in respect of the Migration Act.[5]

3.4 In addition to improving administrative efficiency, Mr Andrew Bartlett pointed to his experience with refugee law during his time as Senator for Queensland. Mr Bartlett identified other benefits deriving from a move to a codified form of complementary protection in Australian law. These included the enhanced effectiveness and integrity of the Migration Agent profession; greater certainty and quicker resolution for applicants and those assisting them; and an improvement in the public perception of the integrity of government ministers.[6]

3.5 The Department of Immigration and Citizenship (the Department) agreed with Mr Bartlett in respect the Bill's impact on administrative arrangements:

> The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugee Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate of the Minister and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claims can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.[7]

3.6 While going on to commend the underlying premises of the Bill as 'sound as principled' Associate Professor Jane McAdam reflected on the Bill in the following terms:

> In my view, the Bill makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and

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4 See, for example, Amnesty International, *submission* 25; Social Issues Executive of the Anglican Church Diocese of Sydney, *submission* 14; Federation of Ethnic Communities' Councils of Australia (FECCA), *submission* 7; Refugee Council of Australia, *submission* 10; Jesuit Refugee Service Australia, *submission* 13; Sydney Centre for International Law, *submission* 23; Liberty Victoria, *submission* 6; Human Rights Law Resource Centre, *submission* 5; Law Institute of Victoria, *submission* 26.

5 See, for example, Professor Mary Crock, *submission* 28, p. 1; Companion House, *submission* 8, p. 1; Amnesty International, *submission* 25, p. 4.

6 Mr Andrew Bartlett, *Submission* 11, p. 3.

7 Department of Immigration and Citizenship, *submission* 16, p. 2.

> comparative law, formulates them in a manner that risks marginalising an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-makers at a time when harmonisation is being sought. It invites decision-makers to 'reinvent the wheel', rather than encouraging them to draw on the jurisprudence that has been developed around these human rights principles internationally. Since the purpose of the Bill is to implement Australia's international human rights obligations based on the expanded principle of non-refoulement, it seems only sensible and appropriate that Australian legislation reflect the language and interpretation of these obligations as closely as possible.[8]

3.7 Associate Professor McAdam was not alone in her conclusion that aspects of the Bill were sub-optimal. Submitters such as the Refugee Advice and Casework Service (RACS) and the Immigration Advice and Rights Centre (IARC), which submitted jointly, considered that the Bill represented a valuable step forward but fell short of meeting Australia's obligations.[9] Some of the matters raised by submitters are discussed below.

Burden of Proof

3.8 The proposed test to be met by an applicant for protection would require the Minister to have *substantial grounds* for believing that, as a *necessary and foreseeable consequence* of being removed, there would be a *real risk* of *irreparable harm* because of matter listed in subsection 36(2A).

3.9 The great majority of submitters criticise the complexity of the test and/or the difficulty in meeting it.[10] The proposed requirement that a person be at risk of 'irreparable harm' drew particular criticism. Companion House regarded the requirement as significantly stricter than what was called for under international law, and considered it could serve to exclude those deserving protection.

3.10 The Human Rights Law Research Centre (HRLRC) contended that Australia's non-refoulement obligation in relation to children attaches to a broader range of rights under the CROC than is currently reflected in the proposed s 36(2A). The HRLRC stated that the Committee on the Rights of the Child has interpreted Articles 6 and 37 – at a minimum – to require that:

> …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…

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8 Associate Professor Jane McAdam, *submission* 21, p. 4.

9 IARC/RACS, *submission* 24, pp 2, 10.

10 See, for example, Australian Human Rights Commission, *submission* 32, pp 6–7; Companion House, *submission* 30, p. 1; Refugee Council of Australia, *submission* 10, p. 2; Amnesty International, *submission* 25, p. 5.

> 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.[11]

3.11 The HRLRC submitted that Article 6 of CROC protects children's right to life. Article 37 of the CROC 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. The HRLRC were of the view that 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.[12]

3.12 The Victorian Foundation for Survivors of Torture (Foundation House) took issue with the invocation in the Explanatory Memorandum that the proposed requirement for 'irreparable harm' is consistent with the relevant provision in the CAT and the ICCPR. Foundation House submit that:

> That is incorrect. As detailed above, the CAT quite plainly does not impose a test of irreparable harm. With respect to the ICCPR…it is apparent [in the paragraph referred to in the EM that] the Human Rights Committee uses the phrase 'irreparable harm' as shorthand for the harm caused by violations of articles 6 and 7, not as an additional threshold before the obligation not to remove a person from their territory is engaged.[13]

3.13 This criticism was echoed by the Refugee Council of Australia, who submitted that it had received advice from Sir Nigel Rodley, a former UN Special Rapporteur on Torture and current member of the Human Rights Committee, that the proposed requirement regarding 'irreparable harm' was derived from a misinterpretation of the Committee's comment, on which the EM draws.[14] The United Nations High Commissioner for refugees called for the removal of the 'irreparable harm' requirement, submitting that 'such a test has no basis in international law or jurisprudence'.[15]

3.14 Associate Professor Jane McAdam reflected the view of many submitters when she said that:

> The problem with the very convoluted test currently set out in [proposed paragraph] 36(2)(aa) of the Bill is that it combines…the international and regional tests *plus* additional ones drawn from various other human rights documents such as 'necessary and foreseeable consequence' and 'irreparable harm')…it is an amalgam of thresholds that were meant to explain each other, *not* to be used as cumulative tests. This makes it confusing,

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11 Human Rights Law Resource Centre, *Submission* 5, pp 6-7.

12 Human Rights Law Resource Centre, *Submission* 5, p. 7.

13 *Submission* 4, p. 4.

14 *Submission* 10, p. 3.

15 United Nations High Commissioner for Refugees (UNHCR), *submission* 20, p. 7.

> unworkable and inconsistent with comparable standards in other jurisdictions. Accordingly, the standard of proof needs to be made much simpler, otherwise it is likely to:
>
> - Cause substantial confusion for decision-makers;
> - Lead to inconsistency in decision-making;
> - Impose a much higher test than is required in any other jurisdiction or under international human rights law; and
> - Risk exposing people to refoulement, contrary to Australia's international obligations.[16]

3.15 As an example, Associate Professor McAdam cites commentary from the United Nations Human Rights Committee in respect of 'irreparable harm', and concludes that:

> It is clear…that the notion of 'irreparable harm' is regarded as inherent in the treatment proscribed by Articles 6 and 7 [of the] ICCPR because of its very nature…irreparable harm is synonymous with, or inherent in, the very nature of harm prohibited by these provisions.[17]

3.16 Associate Professor McAdam goes onto recommend that proposed paragraph 36(2)(aa) refer to a 'real risk that the non-citizen will be subject to serious harm, as defined in subsection (2A)'.

3.17 A number of other submitters also preferred this approach. The Public Interest Law Clearing House (PILCH) also called for a single test based on a real risk of harm[18], while the joint submission of the Immigration Advice and Rights Centre (IARC) and the Refugee Advice and Casework Service (RACS) called for the test to be a 'real risk that the non-citizen will be subject to a matter mentioned in subsection 2A'.[19] The same or similar suggestions were made by submitters including Professor Mary Crock[20], Sydney Centre for International Law[21], and the Human Rights Law Resource Centre.[22]

3.18 The committee is persuaded that the current wording of the bill is too restrictive and therefore recommends that the irreparable harm requirement be removed.

Recommendation 1

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16 Associate Professor Jane McAdam, *submission* 21, pp 11–12. See also, for example, the Human Rights Law Resource Centre, *submission* 5, p. 8; Professor Mary Crock, *submission* 28, p. 3; IARC/RACS, *submission* 24, p. 7.

17 Associate Professor Jane McAdam, *submission* 21, p. 16.

18 PILCH, *submission* 15, p. 8.

19 IARC/RACS, *submission* 24, p. 5.

20 *Submission* 28, p. 3.

21 *Submission* 23, p. 1.

22 *Submission* 5, p. 8.

3.19 The committee recommends that proposed paragraph 36(2)(aa) at Item 11 of Schedule 1, and all related paragraphs where the same words are used, be amended by omitting the words 'irreparably harmed' and replacing them with the words 'subject to serious harm'.

Personal v. Generalised violence

3.20 Another key concern emanating from submissions was the distinction in the Bill between personal and generalised violence, and the intention of the Bill to disqualify applications on the basis of risk to a person not being personal. The Department submitted that people fleeing generalised violence or places of humanitarian concern do not engage a non-refoulement obligation and would not be eligible for grant of a Protection visa under the *Convention Relating to Status of Stateless Persons* (1954) and the *Convention on the Reduction of Statelessness* (1961) but that:

> In the past, Australia has used a number of alternative responses to specific humanitarian crises including temporary suspension of removals, generous consideration of visa extensions, and specific new temporary visas. These options will continue to be used on a case by case basis as an appropriate means of assisting people in generalised humanitarian need. [23]

3.21 Associate Professor Jane McAdam had this to say:

> This provision seems intended to 'close the floodgates'. It has no legal rationale, since international human rights law is not premised on exceptionality of treatment but proscribes any treatment that contravenes human rights treaty provisions. Indeed, a key purpose of human rights law is to improve national standards and not only the situation of the most disadvantaged in a society. At its most extreme, it could be argued that this provision would permit return even where a whole country were at risk of genocide, starvation or indiscriminate violence, which would run contrary to the fundamental aims and principles of human rights law.[24]

3.22 The Refugee Council of Australia pointed to an apparent anomaly between the Bill's wording and its stated intent when it submitted that:

> We are concerned that the current wording could potentially be interpreted to exclude certain categories of person whose claims may strongly warrant complementary protection. An example is that of women and girls of a certain age or other category (such as imminent marriage) who, within a particular country, as a sub-population face the threat of female genital mutilation. We note, however, that the Second Reading Speech specifically sets out that a girl who would face a real risk of genital mutilation would be

23 Department of Immigration and Citizenship, *submission* 16, p. 6.

24 Associate Professor Jane McAdam, *submission* 21, p. 35.

> covered under complementary protection (where she would not necessarily be covered under the Refugees Convention).[25]

3.23 Amnesty International took a similar view, submitting that:

> …the wording of section 36(2B)(c) should be revised in order to avoid misinterpretation…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.[26]

3.24 By way of resolution, the Refugee Council went on to suggest that it may be necessary to make it clear that the provision does not require that a person should be individually singled out or targeted before coming within the complementary protection scheme nor does it impose a higher threshold than is required for Convention-based protection.[27]

3.25 The IARC/RACS joint submission suggested the question should not go to how many people in a country are facing risk of violence, but rather their ability to relocate to another third place to find protection, as addressed by proposed paragraph 36(2B)(a). They also argued that, were the real risk not faced by the non-citizen personally, they would not satisfy the requirements of subsection 36(2A) and would be disqualified at that stage. With these matters in mind, IARC/RACS recommended the deletion of the proposed paragraph 36(2B)(c) altogether.[28]

3.26 While the committee has been unable to explore the likely implications of the IARC/RACS recommendation, it is of concern that more than one submitter expressed a view that the provisions as they stand may not serve to protect women fleeing mutilation or culturally accepted domestic violence.[29] The committee recommends that proposed paragraph 36(2B)(c) be revisited with a view to establishing categorically that it would not serve to exclude from protection non-citizens such as those described above.

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25 Refugee Council of Australia, *submission* 10, p. 5.

26 Amnesty International, *submission* 25, p. 7.

27 Refugee Council of Australia, *submission* 10, p. 5.

28 Immigration Advice and Rights Centre and Refugee Advice and Casework Service, *Submission* 24, p. 6.

29 See preceding discussion, Refugee Council of Australia, *submission* 10, p. 5 and Amnesty International, *submission* 25, p. 7.

Recommendation 2

3.27 The committee recommends that the effect of proposed paragraph 36(2B)(c) be reviewed with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country.

Death penalty

3.28 The Bill requires as one possible ground for a claim of protection that the 'non-citizen will have the death penalty imposed on him or her and it will be carried out'.

3.29 A number of submitters pointed out the apparent unworkability of the provision, querying how it is possible to know whether the death penalty will or will not be exacted in the future.[30]

3.30 The Department argued that the requirement 'is an essential aspect of that ground, and it is expected that claims relating to prison conditions on death row will be considered against the last three grounds', which are those relating to torture, cruel, inhuman or degrading treatment.[31]

3.31 Nonetheless, the committee is unconvinced by this argument, considering that its acceptance may draw into question the usefulness of the death penalty ground altogether. It could also cause problems for decision-makers and the judiciary in carrying out their duties, due to the difficulty in establishing categorically that a death sentence will be carried out. The committee recommends the test be amended to require that where the death penalty is imposed, it is 'likely' to be carried out.

Recommendation 3

3.32 The committee recommends that proposed paragraph 36(2A)(b) be amended to substitute 'and it will be carried out' with 'and it is likely to be carried out'.

'Cruel or inhuman treatment or punishment' and 'degrading treatment or punishment'

3.33 A submission received from Dr Michelle Foster and Jason Pobjoy expressed concern about the inclusion of an 'intention' requirement in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' in proposed subsection 5(1). The submitters contended that the imposition of this additional criterion is inconsistent with Australia's international human rights

30 See, for example, Refugee Council of Australia, *submission* 10, p. 4; IARC/RACS, *submission* 24, p. 8; Professor Mary Crock, *submission* 28, p. 3; Amnesty International, *submission* 25, p. 6.

31 Department of Immigration and Citizenship, *submission* 16, p. 4.

obligations, and that it was difficult to ascertain the justification for the imposition of this additional hurdle.[32]

3.34 Associate Professor Jane McAdam queries the separation in the Bill of the two classes of treatment or punishment, preferring to consolidate the two classes of treatment as one ground under subsection 36(2A), and simplifying the definition of cruel or inhuman treatment or punishment. Associate Professor McAdam submitted that:

> It is unclear why the Bill separates out 'cruel or inhuman treatment or punishment' from 'degrading treatment or punishment'. The standard approach internationally is to regard these forms of harm as part of a sliding scale, or hierarchy, of ill-treatment, with torture the most severe manifestation. The distinction between torture and inhuman treatment is often one of degree. Courts and tribunals are therefore generally content to find that a violation falls somewhere within the range of proscribed harms, without needing to determine precisely which it is. Indeed, the UN Human Rights Committee considers it undesirable 'to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'. For that reason, the Human Rights Committee commonly fails to determine precisely which aspect of article 7 ICCPR has been violated, and there is accordingly very little jurisprudence from that body about the nature of each type of harm.[33]

3.35 The committee notes that the Department of Immigration and Citizenship has submitted that the exhaustive definitions of treatment or punishment are intended to guide decision-makers and the Australian judiciary in interpreting and implementing these international law concepts:

> These definitions reflect the extent of Australia's non-refoulement obligations without expanding the concepts beyond interpretations currently accepted in international law and commentary.[34]

3.36 Because of the constrained circumstances of this short inquiry, the committee has not had the opportunity to investigate these definitional issues in any detail, but notes the Department's assertion that the definitions are consistent with current international law.

People eligible but for character concerns

3.37 Article 7 of ICCPR and Article 3 of CAT impose a non-derogable duty on signatories to observe non-refoulement obligations even in respect people for whom

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32 Dr Michelle Foster, Senior Lecturer and Director, Research Programme in International Refugee Law, Institute for International Law and the Humanities, Melbourne Law School; and Mr Jason Pobjoy, PhD candidate, Gonville and Caius College, University of Cambridge, *Submission* 9, pp 20-21.

33 Associate Professor Jane McAdam, *submission* 21, p. 24. See also, for example, IARC/RACS, *submission* 24, p. 5.

34 Department of Immigration and Citizenship, *Submission* 16, p. 4.

the country of refuge harbours character concerns. Several submissions raised the proposed amendments in subsection 36(2C) and their inconsistency with these instruments.[35]

3.38 The explanatory memorandum notes that, in fulfilling its non-refoulement obligations, Australia is under no duty to grant any particular kind of visa to a person seeking protection about whom there are character concerns:

> It is intended that, although a person to whom Australia owes a non-refoulement obligation might not be granted a protection 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.[36]

3.39 The committee agrees that international obligations need to be balanced with security imperatives, and that the Government would appear to be adopting a fair and measured approach. Nonetheless, the committee looks forward to learning further details about what form 'alternative case resolution solutions' would take.

Terms of imprisonment to determine serious crime

3.40 IARC/RACS consider that the assessment of the seriousness of a person's criminal history by reference to the length of time they would be imprisoned if the same conviction were secured in Australia, is unfair. They submitted that:

> Including a quantifying figure regarding the maximum or fixed terms of imprisonment in the legislative definition removes the flexibility and scope for mitigation inherent in any criminal jurisdiction in determining 'seriousness' of offences. We submit there is no need to quantify a term of maximum or fixed sentence in defining whether or not a crime is a serious offence and that plain English and reasonable community standards should prevail to obviate the necessity to do so…[I]f the Department wants to provide guidance to decision makers on what length of sentence would generally be considered serious this can be done in policy. The inclusion of guiding quantifying figures in policy would allow flexibility in cases where there are mitigating circumstances that may not have been foreseen by the legislative drafters.[37]

3.41 Nonetheless, the level of certainty offered by the proposed amendment, and the degree of consistency in application stemming from it, appeal to the committee. A reliance on less definitive guideposts could serve to reduced consistency in the assessment of claims between applicants, and that is to be avoided.

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35 See, for example, Amnesty International, *submission* 25, p. 7; Sydney Centre for International Law, *submission* 23, p. 2; Liberty Victoria, *submission* 6, p. 3.

36 Explanatory memorandum, p. 10.

37 IARC/RACS, *submission* 24, p. 5.

Statelessness

3.42 The Bill does not provide for protection visas to be issued solely on the basis of statelessness. The Committee notes from its submission that the Department has been asked to explore 'possible policy options for the small cohort of people who are stateless but do not engage Australia's international protection obligations and cannot return to their country of former residence'[38]

3.43 The committee notes general acceptance of this position, and strong support for the implementation of new options to resolve the issue of statelessness while ensuring Australia fulfils its international obligations. For example, as noted by the Refugee Council of Australia:

> We note the decision, flagged some time ago, not to include coverage of statelessness within the matters encompassed by complementary protection. We accept the reasons for this decision – namely, that the Statelessness Conventions to which Australia is a party do not contain non-refoulement provisions and, as such, do not fall logically within a protection framework. We appreciate that stateless persons who also invoke Australia's non-refoulement obligations under another relevant treaty will be afforded protection. We welcome the assurance in the Second Reading Speech that other policy options will continue to be explored to ensure that stateless persons receive appropriate treatment.[39] [40]

Likely effect on numbers of visas granted

3.44 The Department submitted that it does not expect any 'significant increase' in visa grants as a result of the Bill as currently drafted. The Department explained that:

> Complementary protection is largely dependent on an assessment of the situation of the applicant's home country as well as a consideration of evidence as to whether the applicant is directly at risk of serious harm because of personal reasons. For this reason, there is little data available on a 'typical' complementary protection case and little data on which to make projections as to how many people may be granted Protection visas on complementary protection grounds. Past experience, however, indicates that the number of cases is low. In 2008–09, 606 visas were granted by the Minister using his section 417 power of which 55 visas were granted out of the Humanitarian Program. The Department estimates that less than half may have involved cases which raised non-refoulement issues.[41]

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38 Department of Immigration and Citizenship, *submission* 16, pp 5– 6.

39 Refugee Council of Australia, *submission* 10, p. 5

40 See also for example; IARC/RACS, *submission* 24, p. 3; Amnesty International, *submission* 25, p. 8. A notable exception to this sentiment was the Law Institute of Victoria, which submitted that statelessness alone should be grounds for protection – *submission* 26, p. 6.

41 Department of Immigration and Citizenship, *submission* 16, p. 7.

Conclusion

3.45 As previously noted, the References committee has on several occasions in the past recommended the introduction of complementary protection legislation, as did the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004. Such legislation is premised on expectation by voters that such protections should be offered to deserving applicants, and as Mr Ferguson said in the Second Reading Speech:

> Where the harm faced is serious enough to engage Australia's non-refoulement obligations, fine legal distinctions about which human rights instrument the harm fits under should not determine whether a person is guaranteed natural justice, has access to independent merits review, or meets the criteria for grant of a protection visa.[42]

3.46 The committee is mindful that the community would expect claims of the type and gravity dealt with in this Bill to be dealt with through a process that affords natural justice and access to independent merits review. On the whole, the committee considers that this Bill achieves that outcome. The committee also notes the bill was widely supported by submitters, particularly in relation to its central aim of reducing the need for the use of Ministerial intervention powers. Subject to recommendations 1 to 3, the committee recommends the Bill be passed.

Recommendation 4

3.47 The committee recommends that subject to recommendations 1 to 3, the Bill be passed.

Senator Trish Crossin

Chair

42 Hon. Laurie Ferguson MP, Second reading speech, *House Hansard*, 9 September 2009.

Dissenting report by Liberal Senators

1.1 Liberal Senators wish to dissent from the majority recommendation that the Bill be passed.

1.2 The Bill is unnecessary, counterproductive and risks being represented as yet another softening of Australia's immigration laws that sends a clear message to people smugglers and unlawful non-citizens seeking entry that Australia is an easy target.

1.3 Liberal senators understand that there are always going to be some persons whose personal situations mean that they do not qualify under the refugees convention and who therefore cannot be considered in the protection visa process, even though a *non-refoulement* obligation should arguably arise. Recent cases reported in the press about women who may be subject to genital mutilation if they return to their home countries are prominent examples, and there are many other complex or one-off situations that may arise.

1.4 Liberal senators point out that where an individual does not meet the refugee convention criteria, but is clearly at serious risk, the minister has the power to exercise his or her discretion. This safeguard has been in place for decades and there is no evidence to suggest that it has been anything other than effective. It is a tried and proven system, which meets Australia's international obligations, and which protects those who are in genuine need of such protection.

1.5 Liberal senators further note that if the bill is passed, a departmental decision not to grant 'complementary protection' will be appealable. It seems that the lessons of the past have not been learned, as this will inevitably mean that decisions may take many months, if not years to be resolved if the initial decision is unfavourable and appealed. This exacerbates an already fraught situation.

1.6 Codifying a form of complementary protection is counterproductive in that it risks curtailing discretion otherwise available to help genuine refugees languishing in camps around the world.

1.7 Liberal Senators consider that the passage of this bill will encourage the lodging of a large number of new, non-refugee, protection applications and the making of false asylum claims.

Recommendation 1

1.8 Liberal senators recommend that the bill not proceed.

Senator Guy Barnett
Deputy Chair

Senator Mary Jo Fisher

Senator Concetta Fierravanti-Wells

Additional Comments by Senator Sarah Hanson-Young

Introduction

1.1 The introduction of the *Migration Amendment (Complementary Protection) Bill 2009* will ensure that Australia's international human rights obligations are upheld in providing a more consistent, transparent, and efficient system for determining and resolving the situations of people in Australia who have obvious humanitarian reasons as to why they cannot be returned to their home country.

1.2 While the Greens are indeed supportive of the need to introduce a complementary protection scheme, to finally bring Australia in line with other Western countries in meeting our core human rights and protection obligations, under international law, beyond that of the Refugee Convention, we remain concerned that the Bill, in its current form, does not explicitly address all of the holes in our overall protection framework.

Section 36(2A)

1.3 The Greens are concerned that this proposed section 36(2A) does not explicitly enshrine all of Australia's non-refoulement obligations, as set out under Article 33 of the 1951 Geneva Convention.

1.4 In particular, we are concerned that the full scope of children's rights which engage Australia's protection obligations are not explicitly set out.

1.5 It is well known that international jurisprudence supports the extension of non-refoulement obligations based on the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the Convention for the Rights of the Child (CRC) beyond the grounds contained within the Bill.

1.6 While the explanatory memorandum refers to all three instruments, only the ICCPR seems to be explicitly referred to in the actual legislation before us.

Recommendation 1

1.7 Given many submissions, including that of the Australian Human Rights Commission, have identified the need for the Bill to explicitly reflect Australia's protection obligations under the CAT and the CRC, the Greens recommend that section 36(2A) be amended to include all of the rights in which Australia has non-refoulement obligations under international law.

Section 36(2)(aa)

1.8 Amnesty International argued in its submission that the wording contained within this section of the Bill "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'".[1]

1.9 Concern was also raised throughout the submissions about the term 'irreparable harm' being used in way which seems to suggest that the Minister must not only believe that there is a real risk that a person may be subjected to torture or another specified violation of human rights, if they were to be returned to a country, but also that the violation will result in irreparable harm.

1.10 The usage of terms such as 'necessary and foreseeable' and 'irreparable harm' sets a threshold for protection that is much higher than that imposed by international human rights law, which only requires a 'real risk' of harm to be assessed.

1.11 By legislating for these additional protection requirements, the Government's Complementary Protection scheme imposes a higher burden on applicants than that which exists under international law.

Recommendation 2

1.12 The Greens recommend, as per the Human Rights Law Resource Centre's submission, that the phrases 'necessary and foreseeable' and 'irreparably harmed' be deleted from the Bill, to ensure that the application of the test would become much clearer, and more likely to result in more consistent and fair decision-making.

Protection from the Death Penalty

1.13 The Greens welcome, in particular, the inclusion of the risk of the death penalty being imposed as an eligibility criterion consistent with our obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights.

1.14 Yet, while this Bill provides for protection from the death penalty, the requirement that an applicant must not only have the death penalty imposed on him or her, but that it 'will be carried out', is an unnecessary inclusion and likely to impose practical difficulties in its application and interpretation.

1.15 Amnesty International highlight the absurdity in including this explicit definition in the proposed Bill, stating that "we are puzzled as to how a future eventuality – carrying out of an imposed death sentence – can be ascertained and evidenced in order to meet the threshold requirement."[2]

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[1] Amnesty International submission No.25 https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=00ea174e-b418-4df0-ad91-37af6637d7fd p.6

[2] Ibid p.4

Recommendation 3

1.16 Given the International Covenant on Civil and Political Rights, and its second optional protocol do not include the words "and it will be carried out" regarding the abolition of the death penalty, the Greens recommend that these words be deleted from Section 36(2A)(b), to avoid unnecessary ambiguity, and accurately reflect the language used in international law.

Exclusion Criteria

1.17 While the Greens accept the principle behind the Government's intention to exclude certain people from consideration for a Protection visa, our non-refoulement obligations prevent us from deporting a non-citizen if he or she would face a real risk of human rights abuse as outlined in section 36(2A).

1.18 Although the Government acknowledges within its Explanatory Memorandum that "although a person to whom Australia owes a non-refoulement obligations 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,"[3] we are concerned that some individuals who face a very real risk of refoulement will be excluded based on a very strict reading of the provisions.

1.19 According to Liberty Victoria, an example of how this exclusion could work would be children who have been child soldiers. Their submission purports that "child soldiers are commonly abducted and forcibly recruited into armed forces where they experience very harsh treatment. Beatings and death at the hands of commanders is not uncommon."[4]

1.20 While the Government obviously has the ability to take a range of issues to ensure that the Australian public is not placed at risk by any migration decision, the Greens remain concerned about the vague reference to 'alternative case resolution'.

Recommendation 4

1.21 The Greens recommend that the Government reassess the exclusion criteria to ensure that any individual that faces a real risk of human rights abuse is not deported.

Offshore entry persons

1.22 The Greens are on the record about our opposition to the Government's ongoing commitment to the excision policy and the offshore processing regime, which essentially creates a two-tiered system whereby asylum seekers who arrive in excised territories have fewer legal safeguards than those that arrive on the mainland.

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[3] Explanatory Memorandum paragraph 64

[4] Liberty Victoria Submission p.4

1.23 The system of complementary protection, as provided for by this Bill, is subject to the limitations set out in section 46A of the Migration Act that excludes persons who arrive in an excised offshore place from making a valid application for a visa, unless the Minister determines that they should be entitled to make a visa application.

1.24 It should be noted that Australia's non-refoulement obligations are not altered by the manner in which a non-citizen arrives in Australia, or where they arrive.

Recommendation 5

1.25 The Greens recommend that Section 46A of the Migration Act be repealed.

Statelessness

1.26 While I acknowledge that the Parliamentary Secretary stated in his second reading speech that "The Government is acutely aware of past failures to resolve the status of stateless people in a timely manner…[and are] committed to exploring policy options that will ensure that those past failures are not repeated,"[5] the fact that we are a signatory to both the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, means that we have an obligation to develop mechanisms for recognising stateless people that come to Australia for protection.

Recommendation 6

1.27 Given the fact that many stateless people who reach Australia are left in a prolonged state of limbo, either in immigration detention, or in the community without a satisfactory resolution to their status, the Greens recommend that the Government must identify, as a priority, options for the resolution under the Migration Act, through enacting legislation that provides official recognition and protection for stateless people within Australia.

Senator Sarah Hanson-Young
Greens' Spokesperson for Immigration

[5] The Hon. Laurie Ferguson MP Second Reading Speech *Migration Amendment (Complementary Protection) Bill 2009*http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=;query=BillId_Phrase%3A%22r4197%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;querytype=;rec=0;resCount=

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Miss Alexandra Hutchison
2	Diocese of Parramatta
3	The National Ethnic and Multicultural Broadcasters' Council (NEMBC)
4	Victorian Foundation for Survivors of Torture
5	Human Rights Law Resource Centre
6	Liberty Victoria
7	Federation of Ethnic Communities Councils of Australia (FECCA)
8	Companion House Assisting Survivors of Torture and Trauma Inc.
9	Dr Michelle Foster and Mr Jason Pobjoy
10	Refugee Council of Australia
11	Mr Andrew Bartlett
12	Legal Aid NSW and Victoria Legal Aid
13	Jesuit Refugee Service Australia
14	Anglican Church Diocese of Sydney
15	Public Interest Law Clearing House (PILCH)
16	Department of Immigration and Citizenship
17	Law Council of Australia
18	Claude Mostowik
19	A Just Australia and Oxfam Australia
20	United Nations High Commissioner for Refugees (UNHCR)
21	Associate Professor Jane McAdam
22	UnitingJustice Australia
23	Sydney Centre for International Law, Faculty of Law, University of Sydney
24	Immigration Advice and Rights Centre
25	Amnesty International Australia
26	Law Institute of Victoria
27	Anti-Slavery Project, University of Technology, Sydney
28	Professor Mary Crock and Mr Daniel Ghezelbash

29	Australian Lawyers for Human Rights
30	Survivors of Torture and Trauma Assistance and Rehabilitation Service Inc
31	A Just Australia
32	Australian Human Rights Commission
33	Edmund Rice Centre
34	Ms Marilyn Shepherd
35	Victoria Legal Aid and Legal Aid NSW
36	Refugee and Immigration Legal Centre

ADDITIONAL INFORMATION RECEIVED

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

The committee did not hold any public hearings in relation to this inquiry.