Refugee Council of Australia

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Complementary Protection) Bill* 2009

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to the inquiry into the *Migration Amendment (Complementary Protection) Bill* 2009. We thank the Senate Standing Committee on Legal and Constitutional Affairs for its invitation to provide a submission to the inquiry, and appreciate the acknowledgement, within its approach, that the tight timeframe for delivery will curtail the comprehensiveness of submissions received. We have summarised below some key matters for the Committee's consideration, and would be very pleased to supplement our brief written submission through oral submissions.

RCOA is the national umbrella body for non-government organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 130 organisations. RCOA aims to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and other displaced persons by the Australian Government, other tiers of government in Australia and the general community.

Along with various other organisations and individual experts, RCOA has advocated over many years for the legislative enshrinement of a system of complementary protection in order to improve the fairness, integrity and efficiency of Australia's arrangements for honouring our existing human rights commitments – as stipulated under the *non-refoulement* provisions of treaties to which we are a party. We thank the Hon. Laurie Ferguson MP, Parliamentary Secretary for Multicultural Affairs and Settlement Services, for his recognition of our long-term efforts in this area, within the Second Reading Speech.

In the interests of brevity, we do not propose to reiterate within this submission the many concerns voiced by ourselves and others regarding the significant deficiencies, anomalies and, in some cases, devastating consequences of our current system for assessing and responding to protection claims falling outside the scope of the Refugee Convention – namely a complete reliance upon non-compellable, non-reviewable, non-transparent and non-delegable Ministerial powers to intervene in a person's matter in the public interest. Nor do we propose to reiterate our own and others' arguments for the introduction of complementary protection legislation. Many of these matters are set out within the Second Reading Speech. The speech also notes that Australia is virtually unique amongst Western democracies in not having a formal system of complementary protection, and identifies some previous Parliamentary Committees and other expert domestic and international bodies that have recommended that such a system be introduced.

RCOA strongly welcomes this important move to incorporate complementary protection into a robust legislative framework. As such, we urge the Committee to support passage of

Suite 4A6, 410 Elizabeth Street
Surry Hills NSW 2010 Australia
Phone: (02) 9211-9333 • Fax: (02) 9211-9288
info@refugeecouncil.org.au • Web: www.refugeecouncil.org.au
Incorporated in ACT • ABN 87 956 673 083

the Bill, while recommending that a couple of straightforward textual amendments be made, in order to ensure that it facilitates fulfilment of our existing human rights commitments and is aligned with internationally recognised best practice. In doing so, we emphasise the fact that the proposed amendments we put forward are fully encompassed within the scope of Australia's current international obligations and are solely intended to mitigate the perceived risk that the Bill, as currently worded, could inadvertently compromise Australia's honouring of those firm commitments.

As with our previous work in this area, we have engaged closely with our expert members and colleagues in preparing this submission. We understand that Associate Professor Jane McAdam (Faculty of Law, University of New South Wales, and currently Visiting Fellow at the University of Oxford), a renowned international expert in this field, will be making a submission to this Inquiry. We commend Associate Professor McAdam's extensive body of relevant work to the Committee and, on the basis of detailed recent discussions, fully endorse the substance of her submission to the Inquiry. We also endorse the submission of the Victorian Foundation for Survivors of Torture, a leading international practitioner in the treatment of torture and trauma survivors, and with which we have worked closely in developing our own submission.

The following observations and recommendations have been formulated with certain priorities in mind, including that the Bill:

- ensure Australia's compliance with our human rights commitments;
- set out a clear and simple definitional approach to complementary protection;
- afford maximum consistency of decision-making in first evaluating Australia's protection obligations under the Refugees Convention and then under the proposed scheme of complementary protection;
- adopt a standard of proof commensurate with the thresholds required by other state parties and treaty bodies, and appropriate to the extreme seriousness and consequence of the decisions to be made; and
- minimise the risk of placing Australia in breach of its international treaty obligations.

We note and accept that the Bill sets out arrangements which retain the primacy of the Refugees Convention, while allowing 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. We also accept that the Bill sets out to mirror various limitation, exclusion and third country provisions in Convention jurisprudence and in the Migration Act 1958 (C'th) in the arrangements it sets out for complementary protection.

Standard of proof

It is the unanimous view of the various experts with whom we have consulted that the standard of proof for complementary protection that is currently set out in section 36(2)(aa) is significantly more restrictive than that which is adopted in other country jurisdictions and may:

(a) betray a misinterpretation of General Comment 31 (paragraph 12) of the Human Rights Committee; and
(b) expose Australia to potential breaches of our international human rights commitments.

Concerns centre upon use of the phrase “irreparable harm”, which appears to be treated as a ‘term of art’, imposing a distinct threshold requirement. That is, as currently worded, the language of s36(2)(aa) suggests that the Minister must not only believe that there is a real risk that a person may be subject to torture or other specified violation of human rights if returned to a country, but also that the torture or other violation risked will result in irreparable harm.

The Explanatory Memorandum (paragraph 51) states:

> *In each case and in order for an applicant to meet the criteria in paragraph 36(2)(aa), there must be substantial grounds for believing that, as a necessary and foreseeable consequence of a non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed. This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 in assessing a non-refoulement obligation under the Covenant. Australia’s non-refoulement obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will be irreparably harmed.*

We share the view of our colleagues that this betrays a misinterpretation of Article 3 of the Convention Against Torture (which makes no mention of “irreparable harm”) and of General Comment (GC) 31 of the Human Rights Committee (HRC), which is generally understood as having deployed the phrase as a shorthand guide, rather than envisaging that it be adopted as an additional threshold requirement.

Eminent academic and lawyer Professor James Hathaway (also Dean of the Melbourne Law School) observes:

> *“[Treatment of] 'irreparable harm' as a term of art … poses the real risk of a decontextualised interpretation, with the permanence of the harm rather than the gravity of same being the relevant threshold. Australia could easily find itself in breach of international law as a result….[T]he European Union uses the phrase "serious harm" (with examples) as the operative subsidiary protection threshold. This has the distinct advantage of focusing on **gravity** of harm as the focus of concern even while providing the open-ended flexibility that the HRC seems to have intended to approve via GC 31.”*[1]

Professor Hathaway’s comments are reinforced by the following advice from Professor Sir Nigel Rodley, a former UN Special Rapporteur on Torture and presently a Member of the Human Rights Committee. Speaking on his own behalf (with consent to cite provided), Professor Rodley states:

> *I think it should be self-evident that paragraph 12 of General Comment 31 (for which I was the Committee's Rapporteur during its consideration of the text) speaks of irreparable harm to indicate that not all human rights violations will necessarily entail an obligation not to expose a person to them by returning them to the country in question. Thus, the articles referred to in GC 31 are those, violations of which automatically involve irreparable harm, namely, arts 6 and 7 [of the International Covenant on Civil and Political Rights]. And these are mentioned as examples ('such as'); they're not necessarily the only articles violation of which might under certain circumstances entail irreparable harm.* [2]

[1] Email to RCOA President, John Gibson, of 18 September 2009

[2] Email to RCOA President, John Gibson, of 22 September 2009

Further to all the above, Associate Professor McAdam sets out her concern that section 36(2)(aa) establishes a complex standard of proof that combines multiple tests, also including "necessary and foreseeable consequence". She writes:

> *It is an amalgam of thresholds that were meant to explain each other, **not** be used as cumulative tests. Accordingly, the standard of proof needs to be made much simpler, otherwise (a) it will cause substantial confusion for decision-makers; (b) it will likely lead to inconsistency in decision-making; (c) it will impose a much higher test than is required in any other jurisdiction or under international human rights law; and (d) this will risk Australia exposing people to refoulement.* [3]

In light of the strength and consistency of the reservations articulated by key experts (including others uncited) regarding the extremely restrictive and unprecedented standard of proof set out for complementary protection in s36(2)(aa), and following further discussions regarding textual amendments, we strongly recommend that the language of this section be simplified, with the express purpose of mitigating the risks set out above.

We consider that such an amendment will ensure that the laudable policy intention of the Bill is effectively realised and that decision makers are relieved of the unnecessary burden of applying multiple complex tests.

Recommendation 1

That s36(2)(aa) be amended to read:

> *A non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because, as a consequence of the non-citizen being removed form Australia to a receiving country, there is a real risk that the non-citizen will be subject to serious harm as defined in sub-section (2A).*

That sub-section (2A) be amended so as to stipulate that 'serious harm' means the content of that sub-section as currently set out.

That by way of consequential amendment the term "irreparable harm" also be removed from other sections of the Bill where it appears.

Imposition of the death penalty

Subsection 36(2A) sets out an exhaustive list of matters that are to be included in complementary protection. Subsection 36(2A)(b) reads: *the non-citizen will have the death penalty imposed on him or her and it will be carried out.* Associate Professor McAdam queries whether this means that the provision is not intended to *"encompass the so-called 'death row phenomenon' "* as discussed in the 1989 decision Soering v. the United Kingdom, application no. 14038/88 [4] Further to the reservation regarding the permissibility of Australia returning a person to face the prospect of an indefinite period on 'death row', 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.

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[3] Email to RCOA President, John Gibson, of 20 September 2009

[4] ibid and http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695496&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Recommendation 2

That the words "and it will be carried out" be deleted from s36(2A)(b).

Personal versus generalised violence

Sub-section 36(2B) of the Bill stipulates circumstances in which, notwithstanding applicability of a matter set out in s36(2A), a person will be deemed not to meet the test of "real risk" of 'irreparable harm' (under the current wording). S36(2B)(c) sets out that the real risk will not be met if *the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.*

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

While we accept that, by way of equivalence with the provisions of the Refugee Convention, this Bill does not intend to extend coverage to those who are victims of generalised violence 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.

Statelessness

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. We would be happy to continue to engage with government regarding the development of effective mechanisms for the fair and timely resolution of the immigration status of stateless persons who are not owed protection as such.

Conclusion

RCOA strongly reiterates its support for the legislative enshrinement of complementary protection. We note that the scheme outlined in the Bill is in line with principles enunciated in UNHCR's Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection[5] and similar principles in comparable jurisdictions and so evidences Australia's active commitment to international legal standards. We believe

[5] UNHCR ExCom Conclusions, 7 October 2005 - http://www.unhcr.org/excom/EXCOM/43576e292.html

that the straightforward amendments set out in recommendations 1 and 2 above will be key to ensuring delivery of a robust and efficient system, which:

- ensures Australia's compliance with our human rights commitments;
- sets out a clear and simple definitional approach to complementary protection;
- affords maximum consistency of decision-making in first evaluating Australia's protection obligations under the Refugees Convention and then under the proposed scheme of complementary protection;
- adopts a standard of proof commensurate with the thresholds required by other state parties and treaty bodies, and appropriate to the extreme seriousness and consequence of the decisions to be made; and
- minimises the risk of placing Australia in breach of its international treaty obligations.

Recommendation 3

RCOA respectfully urges the Committee to support passage of the Bill, incorporating the straightforward textual amendments set out in recommendations 1 and 2, in order to ensure delivery of a fair, robust and efficient system, which facilitates fulfilment of our existing human rights commitments and aligns with internationally recognised best practice.

Once again, we thank the Committee for the opportunity to participate in this inquiry and would be very pleased to supplement our brief written submission through oral submissions.

Paul Power
Chief Executive Officer
Refugee Council of Australia

28 September 2009