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Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs

30 September 2009

Human Rights and Equal Opportunity Commission
ABN 47 996 232 602

Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2001

GPO Box 5218
Sydney NSW 2001

General enquiries 1300 369 711
Complaints infoline 1300 656 419
TTY 1800 620 241
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 (Complementary Protection Bill).
2. The Commission is Australia's national human rights institution.
3. The Commission commends the Australian Government on the introduction of the Complementary Protection Bill. The Commission has on a number of occasions recommended the introduction of a legislated complementary protection system for people who do not meet the definition of refugee, but nonetheless face serious harm if returned to their country of origin.[1]

2 Summary

4. The Commission submits that the Committee recommend the Bill be passed, subject to a number of amendments to better protect human rights.
5. The Commission welcomes many of the changes to the law proposed by the Bill including:
   - the enactment of a complementary protection regime in the *Migration Act 1958* (Cth) (Migration Act); and
   - the conferral of a visa with the same conditions and entitlements to complementary protection recipients as that conferred on refugees within the meaning of the Refugees Convention.
6. The Commission is nevertheless of the view that certain provisions of the Complementary Protection Bill should be amended to fully implement Australia's international human rights obligations. These include:
   - removal of 'irreparable harm' from the test in section 36(2)(aa);
   - deletion of the words 'and it will be carried out' from section 36(2A)(b); and
   - amendment of section 36(2A) to cover any act which would constitute a breach of the ICCPR or CRC and would result in serious harm.
7. The Commission is concerned that the Bill does not adequately protect:
   - individuals who arrive in excised offshore places; or
   - individuals who are stateless.

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[1] Human Rights and Equal Opportunity Commission. Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia 4 August 2008 at http://humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html, Human Rights and Equal Opportunity Commission. Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters 27 August 2003 at http://www.humanrights.gov.au/legal/submissions/migration_matters.html

3 Recommendations

Recommendation 1: Subject to amendments recommended in this submission, the Complementary Protection Bill should be passed at the earliest opportunity.

Recommendation 2: The requirement that applicants must face a risk of 'irreparable harm' should be deleted from the Bill.

Recommendation 3: The words 'and it will be carried out' in subsection 36(2A)(b) should be deleted.

Recommendation 4: The Bill should be amended to provide that Australia has protection obligations where a non-citizen would suffer serious harm because of a breach of his or her rights under the ICCPR.

Recommendation 5: The Bill should be amended to provide that Australia has protection obligations where a child would suffer serious harm because of a breach of his or her rights under the CRC.

Recommendation 6: Section 46A of the Migration Act should be repealed.

Recommendation 7: The Government should identify options for the resolution under the Migration Act of claims by people who are stateless.

4 The need for a system of complementary protection

8. Australia has binding international obligations to protect people who do not fall within the definition of refugee under the Refugee Convention, but who nonetheless must be protected from refoulement (return) under the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

9. The Commission has, during the course of its work, come into contact with a number of people who have had difficulty meeting the Convention definition of refugee, and yet have compelling cases for protection which may be met by a complementary protection system. These include such cases as:

- women who are at risk of domestic violence if returned to their countries where, for various reasons, they cannot seek adequate protection from the authorities
- witnesses of crime who have been threatened with death or physical injury by criminal elements in countries where those criminal elements operate with impunity

- people who face the death penalty in their country of origin although they have already served a sentence for the crime in Australia.

10. Several examples of cases were also included in the Senate Legal and Constitutional References Committee 2000 report, *A Sanctuary under*

Review: An Examination of Australia's Refugee and Humanitarian Determination Processes.[2]

11. The European Union, Canada and New Zealand have or are soon to legislate to enact a complementary protection regime[3].

12. In contrast Australia currently has no effective system of protection for such people. Instead, their claims can only be considered after they have had their claims for refugee status rejected. They must then seek personal intervention by the Minister for Immigration and Citizenship under section 417 of the Migration Act for a grant of a visa on public interest grounds. Although the Minister may consider Australia's international human rights obligations, his or her decisions in these cases are non-compellable and non-reviewable. The Minister is also not obliged to give reasons for his or her decisions, which means that the decisions lack transparency, accountability and consistency.

13. One of the effects of the current system of Ministerial discretion in these cases is the possibility of prolonged immigration detention, which may lead to breaches of article 9(1) of the ICCPR. To get to the stage at which exercise of the Minister's section 417 discretion may be considered, asylum seekers must first make an application for a refugee protection visa and apply for review of that decision. It is not until they have exhausted that process that they can be considered by the Minister under section 417. Once they reach the section 417 stage, the process can take months. Overall, the process can take years.

14. This is particularly inefficient as it requires people who fear harm if returned to their country of nationality, but who do not fall within the definition of refugee, to frame their claim as one for refugee status so that their real claim can be assessed at the end of that process. This means that resources are expended and costs incurred in assessing claims that may be unmeritorious as refugee claims, but are compelling as claims for the protection of human rights.

15. The Commission has previously recommended that the Australian Government should introduce a legislated system of complementary protection which incorporates the following features:

- clear criteria setting out when a person should be protected from refoulement
- procedures that protect against errors in applying that criteria (due process)

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[2] Senate Legal and Constitutional References Committee. *A Sanctuary under Review. An Examination of Australia's Refugee and Humanitarian Determination Processes.* June 2000

[3] In addition, the United States has codified its obligation not to return a non-citizen where there is a risk of torture. See McAdam, J Complementary Protection: Labor's Point of Departure. http://inside.org.au/complementary-protection/ (viewed 25 September 2009)

- mechanisms to implement Australia's protection obligations for those who meet the criteria (visas).

Therefore, the Commission welcomes the Complementary Protection Bill, which includes these key features.

Recommendation 1: Subject to amendments recommended in this submission, the Complementary Protection Bill should be passed at the earliest opportunity**.**

5 The test for harm

16. The proposed section 36(2)(aa) of the Migration Act provides that to be eligible for complementary protection an individual must be:

- a non-citizen in Australia
- who is not owed protection obligations under the Refugee Convention
- to whom the Minister is satisfied that 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 matter mentioned in subsection (2A).

17. The explanatory memorandum to the Bill notes that the ICCPR and the CAT require a high threshold for non-refoulement obligations to be engaged and cites the United Nations Human Rights Committee General Comment 31 as the origin of the 'irreparable harm' test.[4] The Commission agrees that international jurisprudence suggests that a risk of serious harm is required before a non-refoulement obligation is engaged. However, the Commission considers that the test imposed in section 36(2)(aa) is not the correct test.

18. The statement in paragraph 12 of General Comment 31 uses the term 'irreparable harm' as a shorthand way of referencing the serious harms contemplated by Articles 6 and 7 of the ICCPR. It should not be understood as a discrete requirement. The former United Nations Human Rights Committee's Rapporteur, Sir Nigel Rodley, has supported this interpretation, saying:

> 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

[4] Explanatory Memorandum Migration Amendment (Complementary Protection) Bill 2009 (Cth) para 51.

> violations will necessarily entail an obligation not to expose a person to them by returning them to the country in question.[5]

19. The requirement for an applicant to be at risk of irreparable harm could lead to unintended results. For example, it might be argued that some forms of torture such as removal of fingernails or use of electric shock batons will not cause irreparable harm to the applicant as required by section 36(2)(aa). The Act should not allow for such an approach. The apprehension of such forms of torture would certainly engage Australia's protection obligations under CAT, which the Bill intends to import into domestic law.

20. The Commission considers that a more appropriate reference to the level of harm required to engage a non-refoulement obligation is found in General Comment 1 of the United Nations Committee against Torture. In this comment the Committee states:

> Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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...[6]

21. The Commission notes that the standard of proof for complementary protection in the European Union is that 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin... would face a real risk of suffering serious harm as defined in Article 15'.[7] A similar test is imported into section 36(2)(aa) with the requirement that applicants for protection are required to face 'real risk' of the kind of harm outlined in section 36(2A) of the Bill. Accordingly, the removal of the requirement for irreparable harm would more closely align section 36 (2)(aa) with other tests applied under international law.

22. Accordingly, the test contained in section 36(2)(aa) should refer to:

- a non-citizen in Australia

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[5] Email from Sir Nigel Rodley to John Gibson of the Refugee Council of Australia dated 22 September 2009.

[6] Committee Against Torture, *General Comment No. 1 - Implementation of article 3 of the Convention in the context of article 22 A/53/44, annex IX* (1997) paras 6 and 7. At http://www.unhchr.ch/tbs/doc.nsf/0/13719f169a8a4ff78025672b0050eba1?Opendocument (viewed 20 September 2009)

[7] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Article 2(e) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML (viewed 28 September 2009)

- who is not owed protection obligations under the Refugee Convention
- to whom the Minister is satisfied that 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 face a harm of the kind mentioned in subsection (2A).

23. Simplifying the test in section 36(2)(aa) by removing the requirement relating to irreparable harm will also make the test easier to apply for decision-makers. This is likely to result in more consistent and fair decision-making.

Recommendation 2: The requirement that applicants must face a risk of 'irreparable harm' should be deleted from the Bill

6 Protection from death penalty

24. The proposed section 36(2A) provides that the Minister may grant a visa on complementary protection grounds where he or she believes that there is a real risk that the non-citizen will be irreparably harmed because the non-citizen will 'have the death penalty imposed on him or her and it will be carried out'.

25. The Commission recommends that the words 'and it will be carried out' in subsection 36(2A)(b) be deleted. These additional words are unnecessary and are likely to present practical difficulties in implementation. For example, it is unclear how a decision maker would satisfy himself or herself that the death penalty will be carried out in a particular case. Short of a country having a record of never carrying out the death penalty, it is submitted that a decision maker could never be satisfied that the death penalty would not be carried out. Statistically some countries may tend to delay executions or may only carry out a small number of executions that are ordered. However, statistics cannot predict with certainty what will occur in a given case.

26. It should also be noted that these words are not used in the ICCPR or in the second optional protocol to the ICCPR regarding the abolition of the death penalty.

27. For these reasons, the Commission considers that the words 'and it will be carried out' should be deleted from section 36(2A)(b).

Recommendation 3: The words 'and it will be carried out' in subsection 36(2A)(b) should be deleted.

7 Limited scope of protection

28. The proposed section 36(2A) provides that the Minister may grant a visa on complementary protection grounds where he or she believes that there is a

real risk that a non-citizen will be irreparably harmed because the non-citizen will:

- be arbitrarily deprived of his or her life; or
- have the death penalty imposed on him or her and it will be carried out; or
- be subjected to torture; or
- be subjected to cruel or inhuman treatment or punishment; or
- be subjected to degrading treatment or punishment.

29. The obligation not to return someone at risk of death, torture or cruel, inhuman or degrading treatment or punishment is well established in international law.[8] The Commission supports the extension of protection to people on these grounds, which cover some of the most significant examples of serious harm.

30. However, the Committee should be aware that international jurisprudence supports the extension of non-refoulement obligations based on the ICCPR and CRC beyond the grounds contained in the Bill.

7.1 ICCPR rights

31. In its General Comments the UN Human Rights Committee (the Committee) has considered which articles of the ICCPR may give rise to an obligation not to return a non-citizen.

32. In General Comment 31 the Committee states:

> Moreover, the article 2 obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as* that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[9] (emphasis added)

33. Whilst General Comment 15 states:

> ….in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-

[8] *Kindler v Canada*, No. 470/1991, § 15.3, *Judge v Canada*, No. 829/1998, § 10.4.
[9] Human Rights Committee*, General Comment No.31 - [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004) para 12. At http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument

> discrimination, prohibition of inhuman treatment and respect for family life arise.[10]

34. These General Comments indicate that an obligation not to refoule could arise from any article of the ICCPR. Nowak also considers that the prohibition of refoulement which has been recognised in respect of article 6 of the ICCPR might, in principle, be applicable to all ICCPR rights.[11]

35. The Committee outlined its views on a State Party's *non-refoulement* obligations under the ICCPR in *Kindler v Canada*:

> if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or the very purpose of the handing over.[12]

36. The Committee has emphasised that the threshold to be met for a non-refoulement obligation will only be available in the most serious cases. However the Commission is of the view that there is no reason why any of the human rights in the ICCPR should be excluded from the possibility of such an obligation arising if that threshold is met.

Recommendation 4: The Bill should be amended to provide that Australia has protection obligations where a non-citizen would suffer serious harm because of a breach of his or her rights under the ICCPR.

7.2 Children's Rights

37. Article 3(1) of the CRC states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

38. This article is generally recognised to create a broad obligation to consider the interests of children in view of their particular vulnerability.

39. In its General Comment 6, the Committee on the Rights of the Child adopts a broader approach to non-refoulement than the Human Rights Committee:

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[10] Human Rights Committee, *General Comment 15: The Position of Aliens under the Covenant* (1986) para 5. At http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument
[11] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), 150.
[12] See n.8, Kindler

> …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 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. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.[13]

40. Goodwin-Gill and McAdam argue that the best interests of the child principle contained in article 3 of the CRC may provide a ground of protection for children fleeing generalised violence.[14]

41. The Commission is of the view that to best protect the rights of children, the Government should enact a comprehensive complementary protection regime specific to children in danger of serious harms.

Recommendation 5: The Bill should be amended to provide that Australia has protection obligations where a child would suffer serious harm because of a breach of his or her rights under the CRC.

8 Individuals unable to access complementary protection on equal terms

42. The Bill is a welcome development in increasing protection for a group of vulnerable people to whom Australia owes protection obligations. The second reading speech states that the Bill:

> . . .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[15]

43. However, contrary to this statement, the Bill will not in fact extend protection in the same way to *all* people to who may be owed Australia's protection.

8.1 Offshore entry persons

44. The Commission has previously raised concerns about the excision and offshore processing regime. It establishes a two-tiered system under which asylum seekers who arrive in excised offshore places have significantly

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[13] Committee on the Rights of the Child, *General Comment 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (1 September 2005), para 27. At http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2005.6.En?OpenDocument
[14] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed 2007), 324
[15] Commonwealth, Parliamentary Debates, House of Representatives, 9 September 2009, p4 (The Hon Laurie Ferguson MP, Parliamentary Secretary for Multicultural Affairs and Settlement Services)

fewer legal safeguards than asylum seekers on the mainland.[16] The Commission has recommended that the provisions of the Migration Act relating to excised offshore places should be repealed and that all people who make claims for asylum should have those claims processed through the refugee status determination system on the mainland.[17]

45. Section 46A of the Migration Act excludes persons who arrive in an excised offshore place from making a valid application for a visa, including a protection visa, unless the Minister exercises his discretion to allow them to do so. Under current Australian Government policy, these 'offshore entry persons' are detained on Christmas Island and are processed through a 'non-statutory' refugee status assessment process.

46. The system of complementary protection introduced by the Bill is subject to the limitation in section 46A. It will not be available to Offshore Entry Persons unless the Minister determines that they should be entitled to make a visa application.

47. The Complementary Protection Bill does nothing to alter the status quo. Offshore entry persons remain disadvantaged compared to onshore entry persons because of the method by which they entered Australia.

48. Australia's non-refoulement obligations are not altered by the manner in which a non-citizen arrives in Australia, or where in Australia they arrive.

49. By failing to extend the application of the legislated complementary protection system to people who arrive in excised offshore places as a matter of course, the Australian Government the two-tiered system currently in operation.

Recommendation 6: Section 46A of the Migration Act should be repealed

8.2 Stateless persons

50. Australia has obligations to people who are stateless under the *1954 Convention relating to the Status of Stateless Persons.* While the situation of stateless people does not necessarily fall within the scope of complementary protection, there is a need to provide an appropriate mechanism for assessing the claims of stateless people.

51. In some cases, people who are stateless may claim grounds for protection that will fit within the definition of refugee or the new complementary protection grounds. However, in other cases a stateless person may fall through the cracks of protection, despite the fact that they are unable to be sent back to their country of origin. Currently, such people may be left in a

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[16] See, for example Australian Human Rights Commission, *2008 Immigration Detention Report: Summary of observations following visits to Australia's immigration detention facilities* (2008), at http://www.humanrights.gov.au/human_rights/immigration/idc2008.html.
[17] Above, pp 71-72.

prolonged state of limbo, in immigration detention or in the community, without a satisfactory resolution to their case. The Commission is of the view that the law should be amended to account for individuals in this situation.

52. The Commission submits that the Committee should recommend that the Government identify options for the resolution under the Migration Act of claims by people who are stateless.

Recommendation 7: The Government should identify options for the resolution under the Migration Act of claims by people who are stateless.