SEPTEMBER 2009

UnitingJustice AUSTRALIA

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

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Introduction

UnitingJustice Australia, the justice and advocacy unit of the National Assembly of the Uniting Church in Australia, welcomes this opportunity to comment on the *Migration Amendment (Complementary Protection) Bill 2009.*

The Uniting Church in Australia seeks to bear witness to our Christian faith through our program of worship, service and advocacy. In the Christian tradition of providing hospitality to strangers and expressing in word and deed God's compassion and love for all who are uprooted and dispossessed, the Uniting Church in Australia has been providing services to asylum seekers and refugees in the community and in detention for many years. The Uniting Church provides direct services to refugees and asylum seekers through its network of congregations, employees, lay people and community service agencies. This experience has shown Uniting Church members and employees first hand the impact of the absence of complementary protection in Australia.

The Uniting Church advocates for a just response to the needs of people seeking Australia's protection that recognises Australia's responsibilities as a wealthy global citizen, upholds the human rights and safety of all people, and is based on just and humane treatment, including non-discriminatory practices and accountable transparent processes. We will continue to work for compassionate and just immigration policies, and it is in this spirit that we offer this submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Migration Amendment (Complementary Protection) Bill 2009.*

We are extremely supportive of this legislation and are very pleased to see efforts to implement a system of complementary protection in Australia. We believe that this legislation will give better consistency to a process that is already occurring through the Minister's intervention powers. It will ensure an improved and more humane process for those seeking protection on complementary protection grounds, assist us to ensure we meet our international obligations in this area and bring us into line with other developed countries such as Canada and the European Union which already have complementary protection in place.[1]

In this submission, we suggest amendments which we believe will make the decision-making process clearer and simpler, and ensure that the complementary protection legislation achieves the aim of supporting decision-makers to make clear and consistent decisions which uphold our international obligations.

The need for complementary protection

The Uniting Church has over many years called for a system of complementary protection to be introduced in Australia. We believe that the current system fails people in need of Australia's protection, and the lengthy process involved for people wishing to apply for asylum on complementary protection grounds has caused them significant emotional and financial hardship.

A system of complementary protection is a crucial mechanism for implementing Australia's non-refoulement obligations which fall outside the Refugee Convention, that is, under the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Rights of the Child. Applicants whose case is based on one of these other instruments, whose legitimate protection needs are widely acknowledged, are currently shunted through a system which does not address their needs. This process creates unnecessary duplication of work for the Department and an additional workload for the Refugee Review Tribunal.

Time and resources are wasted in a process that forces claimants to make false claims against Refugee Convention criteria and to then seek merits review, based on the same inappropriate criteria, of their claim. At the end of this lengthy and arduous process claimants are forced to seek

1 In Canada, changes to legislation in 2002 created a new class of "persons in need of protection" which encompasses claimants whose return to their home country would subject them personally to torture, or would constitute a risk to life, or a risk of cruel and unusual treatment or punishment. In terms of their entitlements, no distinction is made between individuals recognised as refugees and those recognised as persons in need of protection.

Ministerial intervention under the discretionary, non-compellable, nonreviewable powers granted by the Migration Act, which is the first procedural stage at which their humanitarian claims may be addressed. The Minister does not have to intervene, a court cannot compel the Minister to intervene, and the Minister does not have to give any reasons for not intervening. The Minister's intervention powers are an informal mechanism for complementary protection, however the lack of transparency in this process means there is no way to ensure Australia is meeting its complementary protection obligations.

Definition and language issues

The use of the term "irreparably harmed" in the new paragraph 36(2)(aa) builds the impression of permanent harm, which is not what is intended or what is appropriate under international law. It places the emphasis on the permanence of the harm rather than the relevance, creating "irreparable harm" as a requirement for protection.

We are concerned that this will establish a higher standard of proof for complementary protection than what is required under the Refugee Convention and an additional layer of scrutiny for decision-makers which may lead to confusion, difficulties and inconsistencies in interpretation. Applicants will have to meet the threshold for torture, and also for irreparable harm, which we do not believe is consistent with the international treaties and obligations this legislation is intended to implement.

We believe that the term "serious harm" may be more appropriate here, however it may be the case that a description of the nature of the harm is unnecessary, given that the harm is already described in subsection 2(A).

In addition, we are unclear on the meaning of the terms "real risk" and "as a necessary and foreseeable consequence" in paragraph 36(2)(aa). We believe that the removal of "real" in relation to the "risk" and "necessary and foreseeable" will improve simplicity and clarity in the decision-making process.

Recommendation: Paragraph 36(2)(aa) should be changed 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 the Minister has substantial grounds for believing that as a consequence of the non-citizen being removed from Australia to a receiving country the non-citizen will be subject to serious harm as defined in subsection 2(A).

The death penalty

The Uniting Church in Australia has a long history of opposition to the death penalty. We therefore welcome any policies which protect people at risk in this regard.

However, we believe that, in the new subsection 36(2A), the phrase "and it will be carried out" should be removed entirely from part (b) "the non-citizen will have the death penalty imposed on him or her and it will be carried out". We believe that there will be considerable difficultly in determining whether or not the death penalty, once imposed, will be carried out. Any person at risk of being sentenced with the death penalty should be given Australia's protection under complementary protection.

Recommendation: In the new subsection 36(2A), the phrase "and it will be carried out" should be removed entirely from part (b) "the non-citizen will have the death penalty imposed on him or her and it will be carried out".

Generalised risk

Subsection(2B), inserted through item 13 of the Bill, states that

> 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 that:
>
> …
>
> (c) 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 this clause may unintentionally exclude people from particular social groups that have not or are yet to be recognised as a social group under the Refugee Convention, including women and girls at risk of female genital mutilation, as the risks they face may be considered to be faced by the population of the country generally and not specific to a particular person.

Recommendation: This clause should be carefully reexamined to ensure that it does not unintentionally exclude members of a particular social group who are in need of complementary protection.

Conclusion

We believe that this legislation will give better consistency to a process that is already occurring through the Minister's intervention powers. It will ensure a better and more humane process for those seeking protection through complementary protection grounds, assist us to ensure we meet our international obligations in this area and bring us into line with other developed countries which already have complementary protection in place. The amendments we have suggested in this submission will make the decision-making process clearer and simpler, and ensure the complementary protection legislation achieves the aim of supporting decision-makers to make consistent decisions which uphold our international obligations. We strongly support this legislation and urge the Committee to support its passage through Parliament.