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

1. Introduction – Refugee & Immigration Legal Centre Inc.

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 20 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS") and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 12 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Port Hedland, Curtin, Perth, Baxter, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 In the 2007-2008 financial year, RILC gave assistance to 3,227 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involved advice and/or full legal representation to review applicants at the Migration and Refugee Review

1 RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

2. Executive summary

2.1 RILC strongly welcomes the introduction of a procedure for the assessment, under ordinary legal process, of claims based on complementary protection needs. This procedure will provide far greater assurance than the current discretionary mechanism that such claims will be assessed under a fair, just and transparent process more likely to consistently ensure Australia complies with its obligations under International human rights law.

2.2 However, RILC submits that the Bill contains:

- a standard of proof for assessing complementary protection claims that is arguably higher and unnecessarily more complex than for the assessment of refugee-related claims; and
- grounds for complementary protection that are unnecessarily limited and restrictive; and
- an exclusion provision denying complementary protection to a category of persons for which there is no basis in International law.

2.2 **Accordingly, RILC recommends that:**

1. Clause 11 of the Bill be amended to:

- **remove the words "the Minister has substantial grounds for believing" and "as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country," and**
- **replace the words "irreparably harmed" with the words "subject to serious harm".**

2. Clause 13 of the Bill be amended to remove the words "and it will be carried

out" should be removed from proposed s 36(2A)(b).

3. Clause 8 of the Bill be amended to remove the words "for the purpose of" at (a) – (d) and that the words "for such purposes as" be inserted after the first use of the word "person" in the definition of "torture".

4. Clause 2 of the Bill be amended to remove the word "intentionally" at (a) – (c).

5. Clause 3 of the Bill be amended to remove the words ", and is intended to cause,".

6. Clause 3 of the Bill be amended to remove the words "which is unreasonable".

7. Clause 13 of the Bill be amended to add the words "(f) the non-citizen will be subjected to a violation of his or her rights under the CRC which is recognised by international law to engage an obligation of non-refoulement" at proposed paragraph s 36(2A).

8. Clause 13 of the Bill be amended to remove proposed section 36(2C).

3. Introduction

3.1 RILC welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Test Review Committee Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 ("the Inquiry").

3.2 The Migration Amendment (Complementary Protection) Bill 2009 ("the Bill") amends the *Migration Act 1958* (Cth) ("the Act") by introducing mechanisms for the proper consideration and assessment of claims that engage Australia's *non-refoulement* obligations under International laws other than the Convention relating to the Status of Refugees ("Refugee Convention"), such as the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Rights of the Child ("CRC") and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), (together "complementary protection claims").

3.3 RILC has advocated for many years for the need for the implementation of legislatively-enforceable protection for individuals facing harm in their home or receiving country where the limited protection of the Refugees Convention does not apply to them. The importance of complementary protection in relation to the many types of cases where protection cannot be provided under the Refugees Convention. In our experience, numerous examples of situations where people face grave abuses of human rights abuse in this context include:

- civil war where it is difficult to identify individual targeting of an individual for civil or political reasons;
- honour killings and other gender-related claims where the persecution occurs in a personal or domestic context; and
- trafficking in persons

3.4 The current sole mechanism for assessing whether Australia will provide

protection of this sort is the personal, discretionary, non-compellable and non-delegable process of requesting intervention by the Minister for Immigration and Citizenship. This process has generally been arbitrary, inconsistent and inadequate in ensuring the necessary safeguards provided by due legal process. In particular, RILC is aware of numerous cases where this process has, as a result of its unregulated and ad hoc nature, neither properly identified nor assessed circumstances where a person has faced a real risk of being arbitrarily deprived of their life or being subject to torture or cruel, inhuman and degrading treatment or punishment.

3.5 As a consequence, Australia has been placed in breach of its non-refoulement obligations under the ICCPR, CRC and CAT. In essence, the rights of many individuals facing gross violations of their human rights have been compromised or threatened due to a fundamentally flawed process for the assessment of complementary protection claims; a process governed by personal discretion that deviated radically from the ordinary standards of the Australian legal system under which serious questions of law are normally determined by a process governed by the rule of law. At its heart, the ordinary legal process contains minimum standards considered to be basic safeguards and prerequisites for ensuring fairness and transparency in decision making that the current discretionary process lacks.

3.4 Consequently, RILC strongly welcomes the Bill's introduction of a law-based framework for the assessment of complementary protection claims. However, RILC is concerned that the Bill in its current form does not accurately reflect International law and jurisprudence in relation to complementary protection issues and, as a consequence, runs the risk of not properly implementing Australia's non-refoulement obligations under International law.

3.5 In particular, RILC has the following key concerns in relation to the Bill:

- the standard of proof for assessing complementary protection claims is arguably higher and unnecessarily more complex than for the assessment of claims made under the Refugee Convention ("refugee-related claims");
- the grounds for complementary protection are unnecessarily limited and restrictive; and
- it includes an exclusion provision denying complementary protection to a category of persons for which there is no basis in International law.

4. Standard of proof

4.1[2] RILC has a number of concerns relating to the test set out in the Bill for determining whether the Minister owes a person protection obligations arising from complementary protection claims. First, the test as set out at Clause 11 of the Bill conflates and unnecessarily duplicates a number of phrases that have been used in the International jurisprudence in this area to describe the same test. In particular, the use of the phrases "necessary and foreseeable consequence" and "irreparable harm" arguably create a threshold for assessing whether a person is in danger on their return to their home or receiving country that is higher than that required under International law. As a result, the test in its current form could allow the refoulement of persons from Australia in breach of Australia's complementary protection obligations under International law.

4.2 Secondly, we submit that it is unnecessary and potentially highly confusing for both visa applicants and decision makers that there be a significant difference between the threshold of test of what risk of harm a person may face in relation to refugee-related claims and complementary protection claims. The assessment of protection need is a highly complex area of law and, given the grave risk of harm a person may face if their claims for protection are incorrectly denied, it is crucial that decision makers have clear guidance and practically applicable

2 We note and refer to the submission to the Inquiry by Associate Professor Jane McAdam on this issue (Submission to the Inquiry into the Migration Amendment (Complementary Protection) Bill 2009, Associate Professor Jane McAdam, Submission No. 21 at paragraph 24).

criteria to complete these assessments. By establishing a significant distinction between the two tests of risk of harm, the test in its current form runs a grave risk of creating confusion and misunderstandings for both visa applicants and decision makers that result in protection claims not being properly assessed.

4.3 For this reason, we submit that the test in the Bill should be simplified so that it more accurately reflects International jurisprudence on this matter and is more closely aligned with the relevant test in relation to refugee-related claims.

Recommendation 1

We recommend that Clause 11 of the Bill be amended to:

- **remove the words "the Minister has substantial grounds for believing" and "as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country," and**
- **replace the words "irreparably harmed" with the words "subject to serious harm".**

5. Complementary protection grounds

5.1 The Bill sets out the grounds or "matters" because of which a person may be harmed as the basis of a complementary protection claim at proposed s 36(2A) in Clause 13. RILC believes the matters set out at proposed s 36(2A) do not accurately reflect International law in this area in certain significant respects.

carried out is more effectively assessed when determining the risk of the harm occurring rather than being a separate legislative requirement. Accordingly, we

submit the words "and it will be carried out" should be removed from proposed s 36(2A)(b).

Recommendation 2

We recommend that Clause 13 of the Bill be amended to remove the words "and it will be carried out" should be removed from proposed s 36(2A)(b).

5.3 Secondly, the reference to "torture" at proposed s 36(2A)(c) is defined at Clause 8 in a way that is unnecessarily more restrictive than the definition of "torture" in Article of 1 of the CAT. The definition at Clause 8 restricts torture to acts or omissions conducted for specifically listed purposes. The definition in the CAT lists the same purposes as, in effect, *examples* of purposes that could make the act or omission amount to torture; it does not preclude other purposes not listed as being equivalent to those purposes in the way that the definition in Clause 8 does. Again, where the consequences of the definition of torture excluding harm that is otherwise severe pain or suffering intentionally inflicted is that a person may be forced to return to face that harm, we submit it is crucial the definition be broad enough to clearly allow for the inclusion of acts or omissions committed for purposes analogous to those set out at Clause 8 in its current form. Accordingly, we submit Clause 8 should be amended to remove the words "for the purpose of" at (a) – (d) and that the words "for such purposes as" – the wording used in the CAT - be inserted after the first use of the word "person" in the definition.

Recommendation 3

We recommend that Clause 8 of the Bill be amended to remove the words "for the purpose of" at (a) – (d) and that the words "for such purposes as" be inserted after the first use of the word "person" in the definition of "torture".

5.4 Thirdly, we submit the reference to "cruel or inhuman treatment" at proposed s 36(2A)(d) and to "degrading treatment or punishment" at proposed s 36(2A)(e) are defined at Clauses 2 and 3 respectively in ways that again impose a higher test than that established in International law in this area. These definitions do so by requiring that the relevant act or omissions are *intended* to cause the harm set out in those definitions. There is no equivalent requirement under International law in relation to cruel, inhuman or degrading treatment. Imposing such a requirement is also inconsistent with the assessment of equivalent claims under the refugees Convention, again raising an unnecessary distinction between refugee-related and complementary protection claims.[4] Accordingly, we submit that Clauses 2 and 3 be amended to remove references to intention.

Recommendation 4

We recommend that Clause 2 of the Bill be amended to remove the word "intentionally" at (a) – (c).

Recommendation 5

We recommend that Clause 3 of the Bill be amended to remove the words ", and is intended to cause,".

5.6 Fourthly, we submit that the definition of "degrading treatment or punishment" at Clause 3 should not refer to extreme humiliation "which is unreasonable", as this formulation implies there may be circumstances where extreme humiliation *may* be reasonable, "a position at odds with human rights law and State practice".[5] Accordingly, we submit that Clause 3 be amended to remove the words "which is unreasonable".

Recommendation 6

We recommend that Clause 3 of the Bill be amended to remove the words "which is unreasonable".

4 Ibid at paragraphs 59 – 61.
5 Ibid at paragraph 84.

5.7 Finally, we submit that the matters set out at proposed section 36(2A) do not adequately address Australia's non-refoulement obligations under the CRC. The Human Rights Committee and the provisions of the CRC make clear that children have the right to be protected from a range of harm not limited to arbitrary deprivation of life, the death penalty, torture or cruel, inhuman or degrading treatment,[6] including, but not limited to, the right liberty, humane treatment in detention and prompt access to legal representation. None of these matters are addressed in the Bill in its current form. Accordingly, we submit Clause 13 should be amended to add the words "(f) the non-citizen will be subjected to a violation of his or her rights under the CRC which is recognised by international law to engage an obligation of non-refoulement" at proposed paragraph s 36(2A).

Recommendation 7

We recommend that Clause 13 of the Bill be amended to add the words "(f) the non-citizen will be subjected to a violation of his or her rights under the CRC which is recognised by international law to engage an obligation of non-refoulement" at proposed paragraph s 36(2A).

6. Exclusion from complementary protection

6.1 Proposed s 36(2C) in Clause 13 of the Bill excludes the grant of a protection visa in response to complementary protection claims where circumstances that are the equivalent of those set out in Articles 1F or 33 of the Refugees Convention apply to the applicant. The CAT and the relevant provisions of the ICCPR afford absolute protection from the deprivation of life, torture or cruel, inhuman or degrading treatment. The fact that Australia's non-refoulement obligations under the ICCPR and CAT are "absolute and can not be derogated from" is acknowledged by the Government in the Explanatory Memorandum to the Bill.[7]

6 See paragraphs 6 & 37, CRC and United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2006/6

7 At paragraph 64.

Establishing exclusion of this sort in relation to complementary protection claims is fundamentally in breach of Australia's obligations under International law.

6.2 We note the Explanatory Memorandum states "alternative case resolution solutions" will ensure that Australia meets its non-refoulement obligations. In the absence of any further clarification of what these "solutions" may be, it would appear this phrase refers to the current Ministerial discretion process that, as submitted above, has been shown to be arbitrary and inadequate for the assessment of complementary protection claims. The implementation of the assessment mechanism set out in the Bill represents a clear recognition of the inadequacy of current ministerial discretion assessment process. We submit that if the intention of the Bill is to establish a law-based assessment of complementary protection claims, then it is inconsistent with that intention and unjustifiable under International law to include the exclusion provisions of this Bill. Accordingly, we submit that Clause 13 be amended to remove proposed section 36(2C).

Recommendation 8

We recommend that Clause 13 of the Bill be amended to remove proposed section 36(2C).

Refugee and Immigration Legal Centre

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