Legal Aid
NEW SOUTH WALES

Migration Amendment (Complementary Protection) 2009

Submission on behalf of

Legal Aid NSW and Victoria Legal Aid

to the

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

A. Background to Victoria Legal Aid (VLA) and Legal Aid NSW and their Migration Services

Victoria Legal Aid (VLA) and Legal Aid NSW are independent statutory bodies. VLA was established under the *Legal Aid Act 1978 (VIC)* and Legal Aid NSW was established under the *Legal Aid Commission Act 1979 (NSW).*

VLA and Legal Aid NSW provide legal services to socially and economically disadvantaged people. VLA and Legal Aid NSW have, for a number of years, provided legal advice and assistance on migration law through the Immigration Advice and Application Assistance Scheme ("**IAAAS**") established by the Department of Immigration and Citizenship ("**DIAC**"). Legal assistance is provided to asylum seekers in the community and in detention for visa applications lodged with the DIAC and review applications to the Refugee Review Tribunal ("**RRT**") and the Migration Review Tribunal ("**MRT**"). VLA and Legal Aid NSW also conduct migration matters in the Federal Magistrates Court, Federal Court and High Court and may assist clients to make requests to the Minister for Immigration and Citizenship (the Minister) for discretionary intervention on humanitarian and public interest grounds under sections 417 and 351 of the *Migration Act 1958*.

VLA and Legal Aid NSW have also provided assistance through the Community Care Pilot ("**CCP**"), which is in the process of transitioning to an ongoing program called the

Community Assistance and Support ("**CAS**") Program. The CCP was established in 2006 in response to recommendations made in the Palmer and Comrie Reports, with the aim of providing assistance to particularly vulnerable and high need clients. Legal Aid NSW and VLA were the only services in their respective States contracted to provide legal services as part of the pilot scheme.

B. Overview

VLA and Legal Aid NSW welcome the opportunity to comment on the *Migration Amendment (Complementary Protection) Bill 2009* ("**the Bill**"). This submission addresses a selected number of issues that places the interest of clients as the central platform for national and state policy formulation and decision making.

VLA and Legal Aid NSW strongly support the introduction of a formal complementary protection system into Australian law. The following aspects of the Bill are particularly commended:

(a) The proposed system involves assessing complementary protection claims in the same way as claims made under the *Convention relating to the Status of Refugees* and the *Protocol Relating to the Status of Refugees* ("**refugee claims**"), including with respect to review rights. Legal Aid NSW and VLA consider that this will promote rigour, fairness, transparency and consistency in decision making. Legal Aid NSW and VLA further consider that it will promote efficiency, since applicants will no longer be required to lodge a visa application, followed by an appeal to a Tribunal, purely so that their complementary protection claims can be considered by the Minister.

(b) Those people found to be owed complementary protection obligations are to be granted the same rights and status as recognised refugees, through the grant of a protection visa. Legal Aid NSW and VLA consider this to be an extremely positive step in terms of compliance with human rights standards and Australia's international obligations. System efficiencies would be enhanced, since any disparities in treatment could be appealed.

Overall, the proposed amendments represent an extremely positive change to Australian law that better reflects Australia's strong endorsement and commitment to protecting those at risk of suffering serious abuses of their human rights.

VLA and Legal Aid NSW however identify a number of difficulties with the way in which the Bill proposes to implement Australia's international obligations. Training and continual

review of the quality of decision making are vital to ensure the proper implementation of the complementary protection regime. Our recommendations in relation to particular aspects of the Bill are set out below.

1. Achieving the purpose of the Bill

1.1 Implementation of Australia's international obligations

The Explanatory Memorandum states that the Bill amends the Migration Act *'to provide relevant tests and definitions for identifying a non – refoulement obligation in determining whether a person is eligible for a protection visa on complementary protection grounds'.*

Given this stated purpose, it is of some concern that provisions which purport to implement Australia's obligations under the International Covenant on Civil and Political Rights (**ICCPR**) and Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), and the Convention on the Rights of the Child (**CROC**) appear to adopt language which differs in parts from the Conventions. In particular, we note that the definitions of torture, cruel or inhuman treatment or punishment, and degrading treatment or punishment set out in the new subsection 5(1) of the Bill do not appear to directly follow the language used in the relevant international Conventions or the accepted international interpretation of those Conventions. Some aspects of the definitions, including the requirement to demonstrate intention as an element of cruel and inhuman treatment, appear to impose a higher standard than that which exists in international law.

VLA and Legal Aid NSW are concerned that this will create ambiguity when the Australian legislation is interpreted in light of international jurisprudence. We consider that the body of existing international jurisprudence is a valuable and persuasive interpretative tool which should be drawn upon by Australian decision makers. We question the need for these terms to be codified in such detail, or at all. It would be clearly undesirable for Australia to codify these concepts in a way which leads to a divergence from international human rights standards, or which is likely to lead to such divergence over time.

Recommendation 1: That the detailed codification be removed and reliance placed instead on the language of the Conventions and existing international human rights jurisprudence.

1.2 Operation of the new complementary protection regime

It is vital that decision makers receive adequate training in relation to the concepts introduced by the Bill and are thoroughly versed on the international jurisprudence. Australian research[1] emphasises the need for rigorous decision making methodologies that rely on independent evidence, an open minded and fully informed approach when making decisions in this area. It is equally vital that decision makers are adequately trained in the area of mental health. VLA and Legal Aid NSW are concerned that many asylum seekers are refused as a result of adverse credibility findings and that decision makers often find the applicant's evidence implausible without citing any independent evidence to support this finding.[2]

"Adverse credibility findings" are often based on inconsistencies in the applicant's submissions and/or delay in revealing aspects of their claims. In some instances, inconsistencies or delays can be a result of past trauma or a mental illness such as Post Traumatic Stress Disorder or depression, but psychological evidence is often attributed little weight by decision makers.[3] Perhaps even more worrying is the reliance by decision makers on the applicants' demeanour and presentation during an interview or hearing. In *Kathiresan v Minister for Immigration and Multicultural Affairs*[4], Gray J considered the RRT's assessment of an applicant's demeanour and noted that in a cross cultural context where the applicant speaks through an interpreter, comes from a culture with unfamiliar norms of verbal and non-verbal expression, is in a subordinate position to the Member and may have been subject to abuse and torture by authorities in his or her country, it is all too easy for the "subtle influence of demeanour" to "become a cloak, which conceals an unintended but nonetheless decisive bias".[5]

It is also worth noting the number of cases in the courts in which apprehended bias has been successfully argued by applicants. There have been at least 24 cases since February 2003 where a court has found that a member has displayed a "lack of impartiality" which amounted to "a complaint of an apprehension of predisposition, tendency or propensity towards a given result".[6] In the recent decision of *NAOX and SZFSG v Minister for Immigration and Citizenship*[7], Spencer J not only found apprehended bias in that the facts

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[1] Coffey, G, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 *International Journal of Refugee Law* 377.

[2] Ibid at 390. The author found that 58% of the cases he studied indicated that some of the claims of the applicant were implausible based on no independent evidence.

[3] Ibid, 388 - 390

[4] *Kathiresan v Minister for Immigration and Multicultural Affairs* (unreported, FCA, Gray J, 4 March 1998, 6)

[5] Cited in Coffey, G, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 *International Journal of Refugee Law* 377, 387

[6] *NADH v Minister for Immigration & Multicultural and Indigenous Affairs* [2004] FCAFC 328.

[7] [2009] FCA 1056 (18 September 2009) (Spender J.) allowing appeal from Federal Magistrates Court

had been moulded by the Tribunal to support a particular conclusion, but also criticised the Tribunal for attempting "to insulate the finding from judicial examination, because it was expressed as being based on credibility."[8]

This highlights another serious impediment to justice namely that once adverse credibility findings have been made, they are very difficult to appeal and they can have serious ramifications for applicants requesting Ministerial Intervention. Given that decision makers' jurisdiction will be widened with these amendments to include other *non-refoulement* obligations, it is crucial that decision makers are impartial and do not place an unreasonable evidentiary burden on applicants, thereby minimising the intended impact of the Bill.

Recommendation 2: That comprehensive training on complementary protection, coupled with ongoing training in relation to the assessment of evidence and credibility, be provided to all relevant decision makers.

1.3 Availability of legal assistance

There is currently no provision for legal aid to be granted to applicants seeking complementary protection. Adequate legal assistance is vital to the effective administration of the new complementary protection regime.

Recommendation 3: That the availability of legal assistance be improved through:

1. Amendment of the IAAAS contracts to enable legal services to be provided to applicants for complementary protection;

2. Removal of the restrictions in the Commonwealth Funding Guidelines for Legal Aid Commissions, which currently allow a grant of aid to be made only in very limited types of migration matters; and

3. Adequate additional funding to enable these legal services to be provided.

[8] ibid

2. The new s36(2)(aa) test

The new s.36(2)(aa) would require applicants for complementary protection to demonstrate that there are **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. The Explanatory Memorandum to the Bill indicates that this test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31[9].

The concept of a "real risk" or "real chance" test is a very familiar one in Australian refugee law[10]. However, other elements of the proposed test including "necessary and foreseeable consequence", "irreparable harm", and to a lesser extent even "substantial grounds" are comparatively untested concepts in Australian migration jurisprudence. It seems likely that the introduction of this test will result in litigation to test the scope and meaning of the new criteria.

The risk of test litigation is not, in itself, a basis for criticism of the proposed test. However, VLA and Legal Aid NSW question whether the degree of complication in the proposed test is necessary or consistent with Australia's international obligations. General Comment 31 does not contain any reference to a "necessary and foreseeable consequence". It refers to "substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the [ICCPR]". Some decisions of the United Nations Human Rights Committee appear to have either conflated the terms "real risk" and "necessary and foreseeable consequence" or to have used them interchangeably[11]. This approach appears to have been approved in the only Federal Court decision on the subject: *AB v MIAC*[12].

If the concepts of "necessary and foreseeable consequence" and "real risk" are indeed interchangeable, it is difficult to see how the inclusion of the words "necessary and foreseeable consequence" adds anything to the familiar "real risk" or "real chance" test. It is

[9] General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13,* cited at page 8 at [51] of the Explanatory Memorandum.

[10] See, for example, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

[11] See, for example, Communication No. 692/1996: Australia. 11/08/97, CCPR/C/60/D/692/1996 at [6.8]: "What is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant". See also Communication No. 470/1991: Canada. 18/11/93, CCPR/C/48/D/470/1991 at [14.1]: "Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant …"

[12] (2007) 96 ALD 53, per Tracey J at [29].

submitted that their inclusion is likely to lead to uncertainty and may set up additional, unintended "hurdles" for applicants to overcome.

Similarly, it is submitted that it is inappropriate and unnecessary to include any reference to "irreparable harm" in the s36(2)(aa) test. The use of the term "irreparable harm" in General Comment 31 does not create an additional element to be satisfied, but rather refers to violations such as torture as examples of harm which is inherently irreparable. In its current form, the Bill requires the applicant to be at risk of irreparable harm *because of* a matter specified in subsection 2A (eg. torture), suggesting that applicants must establish not only that they face a real risk of being tortured, but also that the torture will result in irreparable harm. It is submitted that this may present major interpretative and evidentiary challenges, as well as impose an additional requirement which does not exist in international law.

It is further submitted that even the reference to 'substantial grounds' is redundant and risks causing unnecessary confusion. The High Court of Australia has already found that a fear of suffering *Refugee Convention* related persecution is well founded if there is a real chance of that persecution occurring[13]; that is, when there is a real substantial basis for it[14]. Again, terms which have been used interchangeably are included in s36(2)(aa) in a way which implies that they are separate thresholds to be met by applicants, rather than different ways of articulating the same concept and legal test. If the 'substantial grounds' element is retained in s36(2)(aa), it is likely to create confusion about whether it does create a threshold which is additional to the 'real risk' test and if so, whether it imposes a higher standard of proof than that which applies to asylum seekers. This would appear to be inconsistent with the stated objectives of the Bill.

Recommendation 4: That the new s.36(2)(aa) test be simplified to require the Minister to be satisfied that there is a real risk that the applicant would suffer one or more of the harms described in subsection (2A) if the applicant is removed from Australia to a receiving country.

3. Stateless people

The Bill does not deal with the situation of stateless people in Australia who are not found to be owed protection obligations under the *Refugees Convention,* CAT or ICCPR. Stateless people who have been found to be ineligible for protection are nonetheless extremely

[13] *Chan Yee Kin v MIEA,* as above, per Mason CJ at 389, Toohey J at 406-7, Dawson J at 396-8, McHugh J at 428-9.
[14] *MIEA v Guo*, as above at 572.

vulnerable because, by definition, they do not have citizenship rights in any State. Under current Australian law, they can be detained indefinitely.[15]

The second reading speech acknowledges the need to deal with statelessness but notes that it will be dealt with via policy. VLA and Legal Aid NSW consider that it would be preferable for the rights of stateless people for protection be enshrined in legislation rather than dealt with through policy.

Recommendation 5: That stateless people be included in the groups of people who are eligible for complementary protection.

4. Mental health/subjective fear and return

The new provisions do not cover many of the matters currently included in the Minister's guidelines, including humanitarian concerns taking into account exceptional health and mental health vulnerability and subjective fear of return due to a torture history. It is not clear whether Ministerial discretion will be retained for these types of cases.

Recommendation 6: At a minimum, that Ministerial discretion be retained for these types of cases. In the future the complementary protection provisions should be expanded to incorporate these additional humanitarian grounds. When that occurs ministerial intervention powers should be retained to cater for rare and exceptional cases which are meritorious but don't fall within the codified regime.

5. Generalised harm

The effect of new subsection 36(2B)(c) is that a person who faces a real risk of suffering serious harm of the type set out in subsection 36(2A) must show that he or she faces that risk "personally", as opposed to a real risk faced by the population of the country generally. VLA and Legal Aid NSW consider this to be too restrictive. The relevant question should not be whether the applicant is more at risk than anyone else in his or her country, but whether the particular applicant faces a real risk of suffering serious harm of the type set out in subsection 36(2A). The restriction for situations of generalised harm places complementary

[15] *Al Kateb v Godwin [*2004] HCA 37

protection applicants in a less favourable position than asylum seekers, which seems to undermine the expressed intent of the legislation.

Recommendation 7: That subsection 36(2B)(c) be removed.

6. Character exclusion

The Bill introduces exclusion provisions on character grounds, based on Articles 1F and 33(2) of the *Refugees Convention.* However, Australia's *non-refoulement* obligations under the CAT and the ICCPR are absolute and cannot be derogated from. Removal of people who would otherwise be eligible for complementary protection on the basis of the exclusion provision would put Australia in breach of its international obligations.

The Explanatory Memorandum to the Bill relevantly states: '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 resolutions will be identified to ensure Australia meets its *non-refoulement* obligations and the Australian community is protected'. However, it is not clear what form these "alternative case resolutions" will take. Will these applicants continue to be required to seek Ministerial intervention, or will an alternative process be implemented? Will people in this category potentially be kept in detention indefinitely, or will they be granted visas? If they are to be granted visas, what kinds of visas will be open to them?

The current *Ministerial Direction No. 41: Visa refusal and cancellation under s501* directly states that the prohibition against *refoulement* under the ICCPR and CAT is absolute: there is no balancing of other factors if the removal of the person from Australia would amount to *refoulement* under the ICCPR or CAT[16]. In contrast, current guidelines for the exercise of the Minister's public interest powers state that Australia's non-*refoulement* obligations under the ICCPR or CAT *may* be a relevant factor for the Minister to consider in deciding whether a case is unique or exceptional, and therefore whether a case warrants Ministerial intervention. Continuing reliance on the Minister's public interest powers as the method of "alternative case resolution" therefore offers no concrete guarantee that Australia will meet its non-*refoulement* obligations to applicants who are excluded from complementary protection on character grounds.

[16] At [10.4.3].

The Bill offers no clear assurance that Australia will meet its non-*refoulement* obligations with respect to applicants who are excluded from protection on character grounds. It appears that there may be cases in which the Minister could decide not to intervene and therefore to *refoule* a person contrary to Australia's obligations under CAT and/or the ICCPR. In the absence of any clear indication of how these matters will be handled under the new complementary protection regime, this continues to be a matter of concern to VLA and Legal Aid NSW.

VLA and Legal Aid NSW recognise that these cases represent a particularly difficult category. Consideration of the particular mechanism that should be used, and the status that should be accorded to applicants in this category, is beyond the scope of this submission. However, it would be clearly preferable for applicants in this category to be accorded enforceable legal rights rather than to rely on a non-compellable Ministerial discretion.

Recommendation 8: That direct consideration be given to the mechanism that should be used and the status that should be accorded to applicants who are excluded from protection, but to whom Australia continues to owe *non-refoulement* obligations. It is preferable for this mechanism to be one which accords enforceable legal rights to applicants rather than relying on Ministerial discretion. At an absolute minimum, that Ministerial discretion to grant a visa be retained for this category of cases and that the guidelines be updated to reflect the absolute nature of Australia's *non-refoulement* obligations.

7. Transitional provisions

The Bill does not include transitional provisions. It is submitted that transitional provisions should be introduced to cover the situation of people whose protection visa applications have been finally determined, but who either have not requested Ministerial intervention or who are awaiting a decision from the Minister. Such people should be given the opportunity to apply for complementary protection without being subject to the bar set out in section 48 of the *Migration Act 1958.*

Recommendation 9: That transitional provisions be introduced to allow people whose protection visa applications have been finally determined, but have not received a decision in response to a request for Ministerial intervention, to apply for complementary protection.

Conclusion

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Sasha Lowes on sasha.lowes@legalaid.nsw.gov.au or telephone (02) 9219 5907.