CHAPTER 1
INTRODUCTION

1.1 On 9 September 2009, the Senate referred the Migration Amendment (Complementary Protection) Bill 2009 to the Senate Legislation Committee on Legal and Constitutional Affairs, for inquiry and report by 16 October 2009.

1.2 The Bill was introduced in the House of Representatives on 9 September 2009 by the Hon. Laurie Ferguson M.P., Parliamentary Secretary for Multicultural Affairs and Settlement Services. The Bill seeks to amend the Migration Act 1958 to better meet Australia's human rights obligations with respect to non-refoulement under international law. A key aspect of the Bill is the reduction in reliance on Ministerial Intervention powers with respect to non-citizens seeking protection in Australia from the risk of harm overseas.

1.3 Non-refoulement is a principle in international refugee law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened through persecution, torture, death or cruel, inhuman or degrading treatment.

1.4 Australia is party to a number of relevant United Nations conventions in relation to non-refoulement, including:

- the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (the refugees convention) to which Australia became a party in 1954 and 1973 respectively;
- the 1966 International Covenant on Civil and Political Rights (ICCPR), to which Australia became a party in 1980;
- the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Australia became a party in 1989; and
- the 1989 Convention on the Rights of the Child (CROC) to which Australia became a party in 1990.[1]

1.5 Currently, asylum seekers may apply for a protection visa, and their applications are decided through a transparent process that incorporates principles of natural justice. Applications for a protection visa are first considered by an officer of the Department of Immigration and Citizenship acting as the minister’s delegate. A decision is taken and written reasons for the decision provided. Applicants who are unsuccessful can seek independent merits review by the Refugee Review Tribunal (RRT), or the Administrative Appeals Tribunal (AAT) for applications refused on the

1 Second Reading Speech, Hon. Laurie Ferguson M.P, House Hansard, 9 September 2009.

basis of exclusion or character issues. The relevant tribunal must also provide written reasons for its decision.

1.6 However, the Migration Act does not currently permit claims that may engage Australia's non-refoulement obligations under treaties, other than the refugees convention, to be considered in the protection visa process. This bill addresses that anomaly by permitting *all claims* that may engage Australia's non-refoulement obligations to be considered under a single integrated protection visa application process. It 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.

1.7 Even where immigration officers or the Refugee Review Tribunal might consider that the applicant's circumstances engage a non-refoulement obligation, they are currently unable to grant a visa, because these obligations are not reflected in the visa criteria. Some applicants understand at the outset that their claims fall under human rights treaties other than the refugees convention, but are forced through the protection visa process because that is the only route to ministerial intervention, where their claims can be considered.

1.8 The protection from return in situations that engage non-refoulement obligations under the CAT, ICCPR and CROC is known as 'complementary protection', in the sense that it is complementary to the protection owed to refugees under the refugees convention.

Rationale for complementary protection legislation

1.9 The Second Reading Speech discloses the rationale for introducing complementary protection into the Migration Act as being based on the need to be consistent in the consideration of whether a person would face arbitrary deprivation of his or her life, or be tortured. At present, Ministerial intervention powers provide the only course of action to assist such people, unless they are covered by the refugees convention.[2]

1.10 While the powers enable the minister to grant a visa if the minister considers it is in the public interest to do so, including cases in which non-refoulement obligations are owed under international law, the Government argues that reliance on the ministerial intervention powers brings with it several disadvantages. These include:

- decisions may only be made by the minister personally;
- no-one can compel the minister to exercise the powers;
- there is no specific requirement to provide natural justice;
- there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of decisions by the minister;

2 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

1.11 Moreover, the current process is widely considered to be inefficient and unnecessarily burdensome on all parties. The Department summed this up neatly in their submission:

> The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.[3]

1.12 During the Second Reading Speech, Mr Ferguson argued:

> While there can be no doubt that ministers take very seriously their obligations to consider whether a visa should be granted to meet Australia's human rights obligations, the very nature of ministerial intervention powers is such that they do not provide a sufficient guarantee of fairness and integrity for decisions in which a person's life may be in the balance.[4]

1.13 The Government points to arguments from both domestic and international bodies for the need for changes to be made to better address complementary protection claims. Mr Ferguson's Second Reading Speech noted the following:

> The Refugee Council of Australia and other organisations with firsthand experience of the shortcomings of Australia's current arrangements have also been tireless advocates for the introduction of a system of complementary protection. Internationally, this reform has the strong support of the United Nations High Commissioner for Refugees (UNHCR) and is consistent with a number of conclusions by the state membership of UNHCR's Executive Committee. It has also been recommended by other key international human rights bodies.
>
> The United Nations Committee against Torture recommended, most recently in May 2008, that Australia adopt a system of complementary protection, ensuring that the minister's discretionary powers are no longer solely relied on to meet Australia's non-refoulement obligations under human rights treaties. In addition, the United Nations Human Rights Committee recommended, in May 2009, that Australia should take urgent and adequate measures, including legislative measures, to ensure that

3 Department of Immigration and Citizenship, submission 16, p. 2.

4 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

> nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.[5]

1.14 Mr Ferguson also noted that:

> Australia is almost alone among modern Western democracies in not having a formal system of complementary protection in place. Many European and North American countries already have established complementary protection arrangements. The New Zealand government already has a bill before their parliament to introduce complementary protection. This bill brings Australia into line with what is now recognised as international best practice in meeting core human rights obligations.[6]

Conduct of the inquiry

1.15 The committee advertised the inquiry in *The Australian* newspaper on 23 September 2009, and invited submissions by 28 September 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 70 organisations and individuals inviting submissions.

1.16 The committee received 35 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

Acknowledgement

1.17 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.18 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard and page numbers may vary between the proof and the official Hansard transcript.

5 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.

6 Second Reading Speech, Hon. Laurie Ferguson M.P, *House Hansard*, 9 September 2009.