Additional Comments by Senator Sarah Hanson-Young

Introduction

1.1 The introduction of the *Migration Amendment (Complementary Protection) Bill 2009* will ensure that Australia's international human rights obligations are upheld in providing a more consistent, transparent, and efficient system for determining and resolving the situations of people in Australia who have obvious humanitarian reasons as to why they cannot be returned to their home country.

1.2 While the Greens are indeed supportive of the need to introduce a complementary protection scheme, to finally bring Australia in line with other Western countries in meeting our core human rights and protection obligations, under international law, beyond that of the Refugee Convention, we remain concerned that the Bill, in its current form, does not explicitly address all of the holes in our overall protection framework.

Section 36(2A)

1.3 The Greens are concerned that this proposed section 36(2A) does not explicitly enshrine all of Australia's non-refoulement obligations, as set out under Article 33 of the 1951 Geneva Convention.

1.4 In particular, we are concerned that the full scope of children's rights which engage Australia's protection obligations are not explicitly set out.

1.5 It is well known that international jurisprudence supports the extension of non-refoulement obligations based on the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the Convention for the Rights of the Child (CRC) beyond the grounds contained within the Bill.

1.6 While the explanatory memorandum refers to all three instruments, only the ICCPR seems to be explicitly referred to in the actual legislation before us.

Recommendation 1

1.7 Given many submissions, including that of the Australian Human Rights Commission, have identified the need for the Bill to explicitly reflect Australia's protection obligations under the CAT and the CRC, the Greens recommend that section 36(2A) be amended to include all of the rights in which Australia has non-refoulement obligations under international law.

Section 36(2)(aa)

1.8 Amnesty International argued in its submission that the wording contained within this section of the Bill "could lead to divergence and inconsistency in the

interpretation of the requirements for complementary protection, in particular the dual conditions of the risk being 'real' as well as 'necessary and foreseeable'".[1]

1.9 Concern was also raised throughout the submissions about the term 'irreparable harm' being used in way which seems to suggest that the Minister must not only believe that there is a real risk that a person may be subjected to torture or another specified violation of human rights, if they were to be returned to a country, but also that the violation will result in irreparable harm.

1.10 The usage of terms such as 'necessary and foreseeable' and 'irreparable harm' sets a threshold for protection that is much higher than that imposed by international human rights law, which only requires a 'real risk' of harm to be assessed.

1.11 By legislating for these additional protection requirements, the Government's Complementary Protection scheme imposes a higher burden on applicants than that which exists under international law.

Recommendation 2

1.12 The Greens recommend, as per the Human Rights Law Resource Centre's submission, that the phrases 'necessary and foreseeable' and 'irreparably harmed' be deleted from the Bill, to ensure that the application of the test would become much clearer, and more likely to result in more consistent and fair decision-making.

Protection from the Death Penalty

1.13 The Greens welcome, in particular, the inclusion of the risk of the death penalty being imposed as an eligibility criterion consistent with our obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights.

1.14 Yet, while this Bill provides for protection from the death penalty, the requirement that an applicant must not only have the death penalty imposed on him or her, but that it 'will be carried out', is an unnecessary inclusion and likely to impose practical difficulties in its application and interpretation.

1.15 Amnesty International highlight the absurdity in including this explicit definition in the proposed Bill, stating that "we are puzzled as to how a future eventuality – carrying out of an imposed death sentence – can be ascertained and evidenced in order to meet the threshold requirement."[2]

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[1] Amnesty International submission No.25 https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=00ea174e-b418-4df0-ad91-37af6637d7fd p.6

[2] Ibid p.4

Recommendation 3

1.16 Given the International Covenant on Civil and Political Rights, and its second optional protocol do not include the words "and it will be carried out" regarding the abolition of the death penalty, the Greens recommend that these words be deleted from Section 36(2A)(b), to avoid unnecessary ambiguity, and accurately reflect the language used in international law.

Exclusion Criteria

1.17 While the Greens accept the principle behind the Government's intention to exclude certain people from consideration for a Protection visa, our non-refoulement obligations prevent us from deporting a non-citizen if he or she would face a real risk of human rights abuse as outlined in section 36(2A).

1.18 Although the Government acknowledges within its Explanatory Memorandum that "although a person to whom Australia owes a non-refoulement obligations might not be granted a visa because of this exclusion provision, alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected,"[3] we are concerned that some individuals who face a very real risk of refoulement will be excluded based on a very strict reading of the provisions.

1.19 According to Liberty Victoria, an example of how this exclusion could work would be children who have been child soldiers. Their submission purports that "child soldiers are commonly abducted and forcibly recruited into armed forces where they experience very harsh treatment. Beatings and death at the hands of commanders is not uncommon."[4]

1.20 While the Government obviously has the ability to take a range of issues to ensure that the Australian public is not placed at risk by any migration decision, the Greens remain concerned about the vague reference to 'alternative case resolution'.

Recommendation 4

1.21 The Greens recommend that the Government reassess the exclusion criteria to ensure that any individual that faces a real risk of human rights abuse is not deported.

Offshore entry persons

1.22 The Greens are on the record about our opposition to the Government's ongoing commitment to the excision policy and the offshore processing regime, which essentially creates a two-tiered system whereby asylum seekers who arrive in excised territories have fewer legal safeguards than those that arrive on the mainland.

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[3] Explanatory Memorandum paragraph 64

[4] Liberty Victoria Submission p.4

1.23 The system of complementary protection, as provided for by this Bill, is subject to the limitations set out in section 46A of the Migration Act that excludes persons who arrive in an excised offshore place from making a valid application for a visa, unless the Minister determines that they should be entitled to make a visa application.

1.24 It should be noted that Australia's non-refoulement obligations are not altered by the manner in which a non-citizen arrives in Australia, or where they arrive.

Recommendation 5

1.25 The Greens recommend that Section 46A of the Migration Act be repealed.

Statelessness

1.26 While I acknowledge that the Parliamentary Secretary stated in his second reading speech that "The Government is acutely aware of past failures to resolve the status of stateless people in a timely manner…[and are] committed to exploring policy options that will ensure that those past failures are not repeated,"[5] the fact that we are a signatory to both the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, means that we have an obligation to develop mechanisms for recognising stateless people that come to Australia for protection.

Recommendation 6

1.27 Given the fact that many stateless people who reach Australia are left in a prolonged state of limbo, either in immigration detention, or in the community without a satisfactory resolution to their status, the Greens recommend that the Government must identify, as a priority, options for the resolution under the Migration Act, through enacting legislation that provides official recognition and protection for stateless people within Australia.

Senator Sarah Hanson-Young
Greens' Spokesperson for Immigration

[5] The Hon. Laurie Ferguson MP Second Reading Speech *Migration Amendment (Complementary Protection) Bill 2009*http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=;query=BillId_Phrase%3A%22r4197%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;querytype=;rec=0;resCount=