BRIEFING NOTE FOR PARLIAMENTARIANS
Migration Amendment (Complementary Protection) Bill 2011

2 March 2011

Extending protection to people at risk of torture and other serious human rights violations

We are a group of refugee law academics, lawyers and non-governmental organizations working with refugees in Australia. We welcome the re-introduction into the Australian Parliament of a Bill on complementary protection. This Bill will extend protection to people facing a risk of torture or other serious human rights violations in their countries of origin. It will provide a faster, fairer and more transparent system than the current discretionary one.

However, we believe there are a number of important amendments that still need to be made to the Bill for it to function effectively, and to ensure that it does not impose far higher tests for protection than are required under international law. We request that you support and advocate for these changes in Parliament.

Background

1. In September 2009, the Government introduced the Migration Amendment (Complementary Protection) Bill 2009 to extend protection to people who are not refugees but who face a real risk of torture or cruel, inhuman or degrading treatment or punishment if returned home, or would be exposed to the death penalty or other arbitrary deprivation of life.

2. The Bill was evaluated by the Senate Legal and Constitutional Affairs Legislation Committee in September 2009 and reported on within the space of five weeks. A number of recommendations for amendments were made. Progress on the Bill then stalled.

3. The Bill lapsed at the prorogation of the Parliament. The Minister for Immigration and Citizenship indicated that the Government intended to re-introduce the legislation before the end of 2010 (*The Age*, 22 September 2010).

4. On 24 February 2011, the Migration Amendment (Complementary Protection) Bill 2011 was introduced into Parliament. It has been altered to reflect some of the changes that were recommended by the Senate Committee and in other submissions made to the Minister for Immigration, which we welcome. However, there remain some significant omissions which require redress if the Bill is to fulfil its objectives.

5. The Bill is intended to bring Australian law into line with Australia's international obligations under human rights treaties. It also better aligns Australian legislation with comparable provisions in the European Union, Canada, the United States and New Zealand.

6. Currently, there is no mechanism in Australia for individuals to have claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment assessed, except via the 'public interest' power of the Minister for Immigration and Citizenship under section 417 of the Migration Act 1958 (Cth). The Ministerial intervention process is wholly discretionary, non-reviewable and inefficient. It is not transparent or subject to procedural fairness considerations. The changes proposed by the Bill would entrench Australia's non-return obligations in law and provide for all claims to be considered efficiently in one fair and transparent process.

7. While we strongly welcome legislation on complementary protection, we retain concerns about a number of provisions as presently drafted. These concerns were outlined in detail in our various submissions to the Senate Inquiry in 2009 and should be referred to for more extensive analysis.[1]

8. We recommend the following amendments to the Bill.

Threshold requirements: section 36(2)(aa)

9. As the Senate Committee noted, the majority of submissions criticized the complexity of the threshold requirements and the difficulty in meeting them (para 3.9). The Senate Committee said it was 'persuaded that the current wording of the bill is too restrictive' (para 3.18), but then went on only to remove the 'irreparable harm' requirement. We submit that a more substantial amendment is needed.

10. The problem with this section is that it sets a much higher threshold standard than is required in international or comparative law. This is because the section combines a number of independent threshold tests (intended to explain each other, not be read together) into a single, cumulative test. This renders it confusing and inconsistent with comparable standards in other jurisdictions.

11. The threshold requirements need to be simplified, otherwise they are likely to:

    (a) cause substantial confusion for decision-makers;
    (b) lead to inconsistency in decision-making;
    (c) impose a much higher threshold than is required in any other jurisdiction or under international human rights law; and
    (d) risk exposing people to *refoulement*, contrary to Australia's international obligations; and
    (e) lead to more complaints to the international treaty monitoring bodies.

12. We **recommend** that the provision be reworded as follows:

    (2) A criterion for a protection visa is that the applicant for the visa is:

[1] For a detailed international law analysis of the points below, see in particular Submission No 21 by Associate Professor Jane McAdam and Submission No 9 by Dr Michelle Foster and Jason Pobjoy to the Senate Legal and Constitutional Affairs Legislation Committee Report on the Migration Amendment (Complementary Protection) Bill (October 2009).

(aa) 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 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 *subject to significant harm, as defined* ~~irreparably harmed because of a matter mentioned~~ in subsection (2A), if removed from Australia;

Cruel, inhuman or degrading treatment or punishment: sections 36(2A)(c), (d), (e)

13. It is unclear why the Bill separates out 'cruel or inhuman treatment or punishment' from 'degrading treatment or punishment'. The standard approach internationally—and in other Australian federal legislation (eg the Criminal Code)—is to regard these forms of harm as part of a sliding scale of ill-treatment, with torture the most severe manifestation. In other words, the distinction is one of degree. Courts and tribunals are therefore generally content to find that a violation falls somewhere within the range of proscribed harms, without needing to determine precisely which it is. Indeed, the UN Human Rights Committee considers it undesirable 'to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied' (General Comment 20, para 4).

14. However, the separate provisions in the Bill mean that Australian decision-makers will need to determine what kind of ill-treatment has been suffered and why. This imposes a higher level of scrutiny than is required under international and comparative human rights law. It risks shifting the focus of the inquiry away from recognition that the treatment is inhuman or degrading, and thus gives rise to a protection obligation, to a technical justification of which form it is. There is a risk that this will misplace the decision maker's focus on technicalities, rather than the human rights protection intended to be accorded. It will also increase the level of complexity in decision-making and reduce efficiency.

15. Contrary to the objectives set out in the Explanatory Memorandum, the Bill's lengthy definition of 'cruel and inhuman treatment or punishment' will *not* clarify the meaning of those terms. Rather, in the absence of legislative guidance that the definition is illustrative only, there is a significant chance that (in accordance with principles of statutory interpretation) decision-makers will seek to interpret the words in their context and will draw inferences from what is included as well as excluded from the definition.

16. We therefore **recommend** that 'cruel, inhuman or degrading treatment or punishment' form a single provision. Further, we **recommend** that the meaning of these terms be derived from the considerable international and comparative jurisprudence that exists, not defined in the Bill. This is the way that comparable provisions operate in legislation in the European Union, Canada and New Zealand, presumably because it enables better decision-making and enables domestic law to adapt to evolving human rights standards.

17. If this recommendation is adopted, it also requires the rewording of section 36(2A) as follows:

(2A) A non-citizen will suffer significant harm if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or
(b) the death penalty will be carried out on the non-citizen; or
(c) the non-citizen will be subjected to torture; or
(d) the non-citizen will be subjected to cruel, ~~or~~ inhuman, *or degrading* treatment or punishment~~; or~~
~~(e) the non-citizen will be subjected to degrading treatment or punishment~~.

Death penalty: section 36(2A)(b)

18. The revised Bill contains a curious amendment. The 2009 Bill stated that return was prohibited where 'the non-citizen will have the death penalty imposed on him or her and it will be carried out'. The 2011 Bill has deleted the reference to the death penalty being imposed, and only retained the requirement that it be carried out.

19. We believe that this is inappropriate. The present provision imposes a higher evidentiary burden than is required under international, EU and Canadian law by requiring not only that a person face a real risk of being subjected to the death penalty, but that the death penalty 'will be carried out'. Presumably, its purpose is to permit return to States that may impose but never carry out the death penalty. However, this would be better addressed by seeking reliable diplomatic assurances in such cases that a person will not be subjected to the death penalty if removed. Indeed, this already seems to be envisaged by section 36(2B)(b). (We note that diplomatic assurances are only appropriate from countries with a known practice of respecting them, and they are *never* appropriate in cases relating to torture.)

20. We **endorse** Recommendation 3 of the Senate Committee's report, which stated that the provision should be 'amended to substitute "and it will be carried out" with "and it is likely to be carried out".'

Intent: sections 36(2A)(c), (d), (e)

21. The Bill's requirement that 'cruel or inhuman treatment or punishment' be 'intentionally inflicted', and that 'degrading treatment or punishment' be 'intended to cause' extreme humiliation, imposes a higher test than international law and comparative jurisprudence. International and comparative jurisprudence consistently focuses on the *nature* of the alleged violation on the individual concerned, rather than the intention of the perpetrator. We **recommend** that the intent requirements be deleted.

General risk: section 36(2B)(c)

22. We strongly **recommend** that this provision makes clear that it does not require individuals to be targeted or singled out. Otherwise, it would be inconsistent with refugee law and human rights law and could result in people who need protection not being granted it. The Senate Committee recognized this in Recommendation 2. As the European Court of Human Rights has stated, in demonstrating a 'real risk' of inhuman or degrading treatment or punishment, an applicant does not have to establish 'further

special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk' (*Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para 148).

Excluded cases

23. The Explanatory Memorandum to the Bill notes that:

> In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a *non-refoulement* obligation, such a person will not be removed from Australia while the real risk of suffering significant harm continues, but will be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia's *non-refoulement* obligations; and the individual circumstances of their case. (para 90)

Such cases will need to be resolved in a timely manner that is consistent with Australia's human rights obligations. Leaving people in legal limbo is inconsistent with international human rights law. As the Senate Committee noted, it looked forward to learning further details about what form such case resolution solutions would take (para 3.39).

Stateless people

24. Statelessness is not included in the Bill as a complementary protection category. However, Australia has protection obligations to stateless persons under the two statelessness treaties. Some stateless persons will independently qualify as refugees or beneficiaries of complementary protection. However, some stateless persons will not, even though they may have substantially similar protection needs. The Government has undertaken to address this issue separately. We strongly **recommend** that it create a visa category for stateless persons in Australian law.

Evolution of protection over time

25. States' protection obligations are not fixed. As such, the Bill does not reflect the full range of human rights violations that may attract Australia's protection obligations. Over time, the legislation should evolve to respond to the 'living' nature of international human rights law and the additional complementary protection grounds that may emerge.

26. We would be happy to discuss these issues with you in more detail.

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