



Refugee Council of Australia

September 29, 2009

Open letter to Federal MPs and Senators

On September 7, the Federal Government introduced the Migration Amendment (Complementary Protection) Bill 2009 (the Bill) to amend the Migration Act 1958.

This Bill aims to ensure Australia meets its human rights obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture - CAT), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC). The Bill formalises existing decision making powers and processes, but enhances the fairness, transparency, efficiency of decision making for people who claim fear of specified harm if returned to their country of origin.

The Refugee Council of Australia strongly supports the passage of this Bill and welcomes the introduction of a fairer system of Complementary Protection in Australia. Put simply, this Bill represents a transfer of existing decision making powers from the Minister of Immigration personally to a formal administrative decision making model, allowing Australia to continue what it is already doing but in a much more efficient, cost-effective and lawful way. As the Bill represents a simple transfer of powers, it cannot be cast as a 'pull factor' attracting people to Australia.

Currently only the Minister for Immigration is able to assess applications from people with valid non-Refugee Convention reasons for not being returned to their country of origin. This non-compellable, non-reviewable power granted to the Minister for Immigration under Section 417 of the Migration Act states that the applicant's claims can only be considered after the person has been rejected by the preliminary and review stages of the refugee determination process before seeking personal intervention by the Minister for Immigration.

The Refugee Council of Australia is of the view that the transfer of decision making power to an administrative framework will safeguard people at risk of being returned to a country where they would be persecuted, killed, tortured or subjected to cruel, inhuman or degrading treatment, by ensuring claims are considered and (if necessary) reviewed by trained decision makers as part of the Protection Visa process.

The obligation upon a signatory State not to return a person to a country where they would be persecuted, killed, tortured, or subjected to cruel, inhuman or degrading treatment is known as non-refoulement obligation.

The current Ministerial process of assessing people's claims under Australia's non-refoulement obligations as set out in the CAT, CROC and ICCPR has a number of limitations, mainly:

- It is an inefficient use of resources and is unnecessarily expensive. Applicants who fall outside the jurisdiction of Refugee Convention but who have bona fide claims under the CAT, CROC or ICCPR must lodge a visa application which must be unsuccessful, and be

unsuccessful in an appeal of that decision before they have the right to apply to the Minister of Immigration to personally consider their claims. This process has significant cost implications for little gain.

- It places an unrealistic burden on the Minister for Immigration, requiring the Minister to personally consider matters that could more appropriately be dealt with by trained delegates.
- It lacks transparency and accountability. The Minister may intervene and grant a visa if the Minister deems it is in the public interest to do so. The grounds for this intervention are not legally binding and no reason is given for the decision. Further, as no legally binding criteria are employed, no avenue of review exists.

The Bill introducing Complementary Protection will benefit Australia in a number of ways. It will:

- bring Australia into line with international best practice, thus ensuring compliance with its obligations under the CAT, the ICCPR and the CROC;
- achieve consistency between Australia's policy with respect to off-shore and on-shore refugees;
- ensure necessary transparency, accountability and consistency in decision making;
- reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to be used for other exceptional cases for which the powers were originally intended;
- ensure that those entitled to Australia's protection receive it in a timely fashion and thus enhance their ability to become productive members of the Australian community.

We offer a case study of a woman who would in all likelihood qualify for Complementary Protection if this Bill were passed. Instead, she endured over four years of uncertainty while she advocated to the Minister for Immigration to grant her a visa.

The woman was a middle-aged hairdresser from a developing country. She was accused by a wealthy client, well-connected to police, of stealing a piece of jewellery. She denied the accusation. She was picked up by police and taken to a local police station where she was held for three days. She was interrogated and denied the accusations. Her family tried in vain to see her but were denied contact. She was beaten and raped by police whilst in custody. She was raped using a cricket wicket. When released she suffered severe mental and physical health complications and was hospitalised. Her case was reported in the media as she tried without success to exercise her rights to complain about her treatment. She was never charged but threats of harm from police and the wealthy client continued to escalate to the point where she fled the country in fear, to Australia. As she did not suffer persecution by reason of her race, nationality, political opinion, religion, ethnicity or social group, she was not successful in her application for protection under the Refugee Convention. An appeal to the Refugee Review Tribunal also failed. She had a great deal of evidence to demonstrate that it was highly likely that she would suffer either torture or inhumane and degrading treatment if she were returned to her country of origin. Her legal representatives in Australia received telephone calls from people purporting to be State officials seeking knowledge of her whereabouts. However her first application for an exercise of Ministerial discretion under Section 417 of the Migration Act failed. With the unwavering support of two Federal Coalition MPs from Queensland, this woman was eventually granted a permanent visa by the then Minister.

There are many who have experienced such protracted delays and associated hardships in the protection application and review process as they waited for the opportunity to seek Ministerial Intervention. This real-life example is but one that demonstrates a wider need for a single

integrated Protection Visa application process that permits all claims that engage Australia's non-refoulement obligations to be considered.

The Refugee Council of Australia urges you to pass the Migration Amendment (Complementary Protection) Bill 2009. The passage of this Bill will provide a safeguard for those requiring protection by providing a lawful and efficient administrative decision making framework for powers that currently exist. We would be happy to discuss this matter further with you or to supply additional information at your request.

Yours sincerely,

Paul Power
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Refugee Council of Australia