HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

Second Reading

SPEECH

Wednesday, 9 September 2009

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr LAURIE FERGUSON (Reid—Parliamentary Secretary for Multicultural Affairs and Settlement Services) (9.15 am)—I move:

That this bill be now read a second time.

The Rudd Labor government is committed to promoting sound, transparent and independent immigration decision making that reflects principles of natural justice and provides access to independent review.

Consistent with this commitment, the Migration Amendment (Complementary Protection) Bill 2009 amends the Migration Act 1958 to introduce greater fairness, integrity and efficiency into Australia’s arrangements for meeting our human rights obligations under international law.

Australia has a long and proud tradition as a protector of human rights, and it is a reflection of this tradition that Australia is a party to the major United Nations human rights treaties. These include in particular:

- 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.

Successive governments have expressed an unequivocal commitment to upholding Australia’s obligations (known as non-refoulement obligations) under these treaties, to not return people to a country where they would be persecuted, killed, tortured, or subjected to cruel, inhuman or degrading treatment.

Australia already has in place a strong and effective mechanism for assessing claims under the refugees convention. It has served governments from both sides of politics very well. 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, or the Administrative Appeals Tribunal for applications refused on the basis of exclusion or character issues. The relevant tribunal must also provide written reasons for its decision.

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.

This 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.

The rationale for introducing complementary protection into the Migration Act is straightforward. It makes perfect sense to bring the same fairness and decision-making integrity to considering whether a person would face
arbitrary deprivation of his or her life, or be tortured, as to considering whether a person would face persecution under the refugees convention.

It is a statement of the obvious that the consequences of return may be no less grave for a person who would face torture than they would be for a person who is a refugee and would face persecution. Where the harm faced is serious enough to engage Australia’s non-refoulement obligations, fine legal distinctions about which human rights instrument the harm fits under should not determine whether a person is guaranteed natural justice, has access to independent merits review, or meets the criteria for grant of a protection visa.

The need for change is also manifest in the shortcomings of the current arrangements for considering complementary protection claims. Determinations as to whether a person would be killed, tortured, or subjected to cruel, inhuman or degrading treatment or punishment on return to another country, if not covered by the refugees convention, may currently only be considered by the Minister for Immigration and Citizenship under personal intervention powers.

These are extraordinary powers. Subject to certain prerequisites, the minister may grant a visa if the minister considers it is in the public interest to do so. This may include cases in which non-refoulement obligations are owed under international law. However, 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.

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.

Relying upon ministerial intervention powers to consider complementary protection claims is also administratively inefficient. Ministerial intervention powers are not enlivened until after a person has been refused a visa both by a delegate of the minister and on review by a 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 go through the entire visa process before their claims can be considered by the minister.

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.

The need for changes to better address complementary protection claims has been recognised by both domestic and international bodies charged with considering the issue. Domestically, the introduction of complementary protection has been recommended by the Australian Human Rights Commission and by several parliamentary committees including the:

• Senate Legal and Constitutional References Committee report A sanctuary under review: an examination of Australia’s refugee and humanitarian determination processes in June 2000;

• Senate Select Committee report on Ministerial Discretion in Migration Matters in March 2004; and

• Legal and Constitutional References Committee report on the administration and operation of the Migration Act 1958 in March 2006.

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 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.

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.

The case for the introduction of enhanced arrangements to meet our complementary protection obligations is compelling. I will turn now to the key aspects of the bill.

Protection claims under the refugees convention will continue to be considered first against the existing refugee criteria set out in the Migration Act. Only protection visa applicants who are found not to be refugees will have their claims considered under the new complementary protection criteria. This approach is strongly supported by the UNHCR, and recognises the primacy of the refugees convention as an international protection instrument.

The bill establishes new criteria for grant of a protection visa in circumstances that engage Australia’s non-refoulement obligations under human rights treaties other than the refugees convention. These obligations, express or implied, apply to particular types of irreparable harm contained in the relevant human rights treaties. These types of irreparable harm are specified in the bill, and are:

- arbitrary deprivation of life;
- having the death penalty imposed and carried out;
- being subjected to torture;
- being subjected to cruel or inhuman treatment or punishment; or
- being subjected to degrading treatment or punishment.

The prohibition on arbitrary deprivation of life is contained in article 6 of the ICCPR. A prohibition on torture, and cruel, inhuman or degrading treatment or punishment is contained in article 7 of that convention.

The United Nations Human Rights Committee, which is the body of independent experts responsible for monitoring the implementation by states parties of the ICCPR and its optional protocols, has made clear its view that countries are obliged not to return a person to a place where there is a real risk that these rights would be violated.

Parties to the Second Optional Protocol to the ICCPR (including Australia) are also obliged, under article 1, to take all necessary measures to abolish the death penalty for all persons within their jurisdiction. For countries that have abolished the death penalty (like Australia), there is an implied obligation not to expose a person to a real risk of its application.

The non-refoulement obligations noted above may also be implied under the CROC, to the extent that the CROC contains obligations in the same terms as the ICCPR.

An express non-refoulement obligation in relation to torture is contained in article 3 of the CAT.

The bill provides some definitions of these concepts to assist decision makers in interpreting and implementing these international obligations. These definitions will assist Australia to meet its non-refoulement obligations, without expanding the relevant concepts in a way that goes beyond interpretations of those obligations that are currently accepted internationally.
Non-refoulement obligations do not apply in every case in which a person claims that they will suffer some type of harm if removed to another country. In each case, there must be substantial grounds for believing that, as a necessary and foreseeable consequence of being removed, there is a real risk that a person will be irreparably harmed. A risk of harm must go beyond mere theory or suspicion to give rise to a non-refoulement obligation. According to the commentary of the United Nations Human Rights Committee, a real risk of harm is one where the harm is a necessary and foreseeable consequence of removal.

A real risk of harm has been found in instances where there is a personal or direct risk to the specific person, as opposed to a general risk faced by the whole population of the country. The risk must also be a real one that the person would face throughout the country. If a person can reasonably be expected to relocate to access protection within their own country, then international protection is not required. Australia’s protection will similarly not be necessary if the person can obtain protection from the authorities of their own country, such that there would not be a real risk of the harm occurring. Protection in Australia will also be unnecessary if the person can safely relocate to another country where they have right of entry and residence.

The legal threshold for Australia’s non-refoulement obligations to be engaged is reflected in the bill. The bill also contains provisions to ensure that only applicants who are in need of Australia’s protection will be eligible for a protection visa on complementary protection grounds.

Unlike obligations under the refugee convention, Australia’s non-refoulement obligations under the CAT and the ICCPR are absolute and cannot be derogated from. While Australia accepts that this is the position under international law, the government is committed to maintaining strong arrangements for protecting the Australian community and avoiding allowing Australia to become a safe haven for war criminals and others of serious character concern.

For this reason specific provision has been made in the bill to refuse the grant of a protection visa where there are grounds for considering that the applicant has committed war crimes, crimes against humanity, serious non-political crimes or other particularly serious crimes. These provisions are modelled on the existing exclusion provisions under articles 1F and 33(2) of the refugee convention, which apply in the current protection visa process when assessing a person’s refugee claims.

In incorporating exclusion provisions in the bill, Australia will be following general international practice, particularly in the European Union, where similar clauses have been incorporated into most countries’ respective legislative versions of complementary protection.

In the small number of instances where non-refoulement obligations would arise for persons who are excluded on security or serious character grounds, it is appropriate for determinations as to post-decision case management to remain with the minister personally.

International law does not impose an obligation on Australia to grant a particular type of visa to those people to whom non-refoulement obligations are owed. Rather, there is an obligation not to remove the person to a place where there is a real risk that they will be arbitrarily killed, subjected to the death penalty or subjected to torture or cruel, inhuman or degrading treatment or punishment.

In all circumstances, Australia is committed to meeting its non-refoulement obligations in a way that best protects the Australian community.

Visa applicants who engage Australia’s non-refoulement obligations on complementary protection grounds, and to whom the exclusion provisions do not apply, will be granted a protection visa with the same conditions and entitlements as applicants owed non-refoulement obligations under the refugee convention.

Where a person’s circumstances have been found not to engage a protection obligation either under the refugee convention or by virtue of the non-refoulement obligations in the CAT and the ICCPR, that person will be able to seek independent merits review of the decision within the existing merits review framework. Review of protection visa refusals is by the Refugee Review Tribunal except if the decision relates to matters of character or exclusion, in which case review is by the Administrative Appeals Tribunal.

There are a range of consequential amendments throughout the Migration Act to embed the non-refoulement concepts within the protection visa framework.
In addition to the proposed amendments in the bill, amendments to the Migration Regulations 1994 will be required. The regulations will reflect the criteria in the act and complete implementation of complementary protection in the protection visa subclass.

In early consultations with stakeholders, the Australian Human Rights Commission and non-government organisations expressed some reservations that Australia’s international obligations under the statelessness conventions were not expressly included in the proposed complementary protection arrangements. The protection visa framework will provide protection to stateless persons in cases where there is a real risk of harm on return that engages Australia’s non-refoulement obligations—this includes stateless persons who face a real risk of death, torture or cruel, inhuman or degrading treatment or punishment. In cases where no issue of harm on return arises, statelessness alone does not give rise to a protection need.

While the government has determined that grant of a protection visa is not an appropriate outcome where there is no risk of harm on return, it is committed to ensuring that other stateless cases are not left in the too-hard basket. The government is acutely aware of past failures to resolve the status of stateless people in a timely manner. The Minister for Immigration and Citizenship is committed to exploring policy options that will ensure that those past failures are not repeated.

As I have already observed, the policy arguments for introducing a system of complementary protection are overwhelming. We must remember, however, that complementary protection is not principally about policy, but about people—people at risk of the most serious forms of harm if returned to their home country. It is also about our values as a nation.

Complementary protection will cover circumstances in which a person may currently be refused a protection visa because the reason for the persecution or harm on return is not for one of the specified reasons in the refugee convention—that is not on the basis of race, religion, nationality, membership of a particular social group or political opinion.

For example, it is not certain that a girl who would face a real risk of female genital mutilation would always be covered by the refugee convention, whereas she would be covered under complementary protection. Women at risk of so-called honour killings can also potentially fall through gaps in the refugee convention definition. In some countries victims of rape are executed along with, or rather than, their attackers. Again, depending on the circumstances, this situation may not be covered under the refugee convention.

The Rudd Labor government is convinced that Australians would expect claims of this gravity; claims involving female genital mutilation, execution for victims of rape and so-called honour killings to be dealt with through a process that affords natural justice and access to independent merits review. Where such claims are accepted as true, Australians would expect a protection visa to be granted.

That is why we have introduced this bill: to establish a fair, transparent and robust system for considering just those sorts of complementary protection claims, to enhance the integrity of Australia’s arrangements for meeting its non-refoulement obligations and to better reflect our longstanding commitment to protecting those at risk of the most serious forms of human rights abuses.

Debate (on motion by Mr Haase) adjourned.