HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT
(COMPLEMENTARY
PROTECTION) BILL 2011

Second Reading

SPEECH

Thursday, 24 February 2011

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr BOWEN (McMahon—Minister for Immigration and Citizenship) (9.16 am)—I move:

That this bill be now read a second time.

The Migration Amendment (Complementary Protection) Bill 2011 amends the Migration Act to eliminate a significant administrative hole in our protection visa application process.

Under the Migration Act, as it currently stands, only those people fleeing persecution for one of the five reasons outlined in the Convention Relating to the Status of Refugees—race, religion, nationality, social group or political opinion—are eligible to receive a protection visa through the usual process.

Applicants who fall outside these categories are not considered refugees and, consequently, their applications must be rejected by the Department of Immigration and Citizenship and also by the Refugee Review Tribunal.

But some of these people are fleeing significant harm—be they women fleeing so called ‘honour killings’ or, in some certain circumstances depending on the nation, people fleeing persecution on the basis of their sexual preference.

These people can fall outside the categories recognised by our current protection visa process.

So their applications will be rejected at first instance—and again at review—even where Australia’s non-refoulement obligations and other international treaties ensure that we cannot and will not send them back to their countries of origin.

These treaties are the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC).

Protection from return in situations that engage our non-refoulement obligations under these treaties is known as ‘complementary protection’, in the sense that it is complementary to the protection given under the refugees convention.

Under the current system, these people, who have often fled their countries in fear of their lives, must go through our administrative processes knowing they are going to be rejected.

But at present we make them go through a process of applying, failing, seeking review and failing again, just so they are then able to apply to the minister for personal intervention.

As things stand, the decision to grant a visa in such cases may only be made by the minister personally. The minister cannot be compelled to exercise this power; there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of the minister’s decisions.

As a result, as you can understand, the current lengthy process is very time consuming and extremely stressful.

So what this bill does is align our protection visa process with our existing international obligations and practices.

In 2009, a previous bill, the Migration Amendment (Complementary Protection) Bill 2009, was introduced into parliament and was considered by the Senate Legal and Constitutional Affairs Committee. That bill lapsed when parliament was prorogued for the 2010 election.

The present bill is based on the 2009 bill and incorporates certain changes to address matters raised in the report by the Senate Legal and Constitutional Affairs Committee.
The introduction of complementary protection into Australia’s protection visa process is supported by domestic and international stakeholders. It has been recommended by the Australian Human Rights Commission and several parliamentary committees.

The 2009 bill received positive feedback from external stakeholders including the United Nations High Commissioner for Refugees (UNHCR), the Refugee Council of Australia and leading academics.

The bill also brings Australia into line with many like-minded countries, including New Zealand, Canada, the United States of America and many European countries.

Let me briefly run through some key aspects of the bill.

Protection visa applicants will continue to have their claims first considered against the refugees convention related criteria set out in Australia’s migration legislation.

Applicants who are found not to be refugees under the refugees convention will have their claims considered under the new complementary protection criteria.

This approach recognises the primacy of the refugees convention as an international protection instrument and is supported by the UNHCR.

The bill establishes new criteria for the grant of a protection visa in circumstances that engage Australia’s non-refoulement obligations under human rights treaties other than the refugees convention.

Australia will not return a person to a place where there is a real risk that a person will suffer particular types of significant harm contained in the relevant human rights treaties, namely:

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

The prohibitions of these types of harm are found in articles 6 and 7 of the ICCPR and in the Second Optional Protocol to the ICCPR.

Non-refoulement obligations may also be implied under the CROC, to the extent that the CROC contains obligations in the same terms as the ICCPR. In addition, an express non-refoulement obligation in relation to torture is contained in article 3 of the CAT.

The bill defines many of these concepts to assist assessing officers to interpret and implement these international obligations.

These definitions will enable Australia to meet its non-refoulement obligations, without expanding the relevant concepts in a way that goes beyond current international interpretations.

Non-refoulement obligations are not engaged in every case in which a person claims that they will suffer some type of harm if returned to another country.

In each case, there must be substantial grounds for believing that, as a necessary and foreseeable consequence of being returned, there is a real risk that a person will suffer significant harm.

The risk of significant harm must go beyond mere theory or suspicion to give rise to a non-refoulement obligation.

A real risk of significant harm has been found in instances where there is a personal or direct risk to the specific person. This is as opposed to a general risk faced by the population of the country that is not faced personally by
the person claiming protection. A personal or direct risk can be found in instances where the significant harm is faced by a broad group, so long as that harm is personally faced by the person seeking protection.

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 within their own country to access protection, then international protection is not required.

Similarly, Australia’s protection will 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 significant harm occurring.

Australia’s protection will also be unnecessary if the person can safely relocate to another country where they have a right of entry and residence.

This legal threshold for Australia’s non-refoulement obligations to be engaged is reflected in the bill.

The bill 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 refugees convention, Australia’s non-refoulement obligations under the ICCPR, the CAT and the CROC 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. The bill is specifically designed to ensure Australia does not become a safe haven for persons who have committed war crimes or others of serious character concern.

For this reason, specific provisions have been included 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; or
- where there are grounds for considering that the applicant is a danger to Australia’s security or to the Australian community.

These provisions mirror the existing exclusion provisions under articles 1F and 33(2) of the refugees convention which apply to refugee claims.

By incorporating these exclusion provisions into the Migration Act, 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.

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.

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

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

Where a person’s protection visa application has been refused, including on the new complementary protection grounds, that person will be able to seek independent merits review of the decision within the existing merits review framework.

There are a range of consequential amendments throughout the Migration Act that are to be inserted by the bill.

Amendments to the Migration Regulations 1994 will also be required to complete implementation of complementary protection in the protection visa subclass.

Moreover, once this bill comes into effect, assessments under the protection obligations determination process for offshore entry persons will also take into account complementary protection.
The Gillard government is proud to introduce this bill, which will provide a protection visa decision-making process that is more efficient, transparent and accountable.

It does so by enabling claims raising Australia’s protection obligations under the refugees convention, and claims raising Australia’s non-refoulement obligations under the ICCPR, the CAT or the CROC, to be considered under a single integrated and timely protection visa process.

Australia has a long and proud tradition as a protector of human rights and this bill presents us with the opportunity to continue in this tradition.

I urge everyone in this place to support it.

Debate (on motion by Mr Pyne) adjourned.