



VICTORIAN COUNCIL FOR CIVIL LIBERTIES

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Senate Legal and Constitutional Committee  
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Dear Committee Secretary,

### Migration Amendment (Complementary Protection) Bill 2009

We write in response to the reference of this Bill for inquiry. Liberty Victoria welcomes the introduction of the Bill, and commends the Government for its commitment to upholding Australia's non-refoulement obligations, and for its intention to introduce greater fairness, integrity and efficiency into Australia's migration program.

There are many recognised shortcomings in the Refugees Convention (1951) and this Bill goes some of the way to closing the gaps in current protection standards. By ensuring that Australia's practices do not breach non-refoulement obligations arising through the Convention Against Torture (CAT), Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR), Australia is taking steps towards international best practice in refugee and humanitarian protection policies.

Australian law has for many years contained a nod to complementary protection, in the form of ministerial discretions contained in the Migration Act. The most relevant of the discretions in this case is s417 of the Act, where an applicant whose claims under the Refugees Convention have been refused at the departmental level and at the Refugee Review Tribunal. At this point, the applicant can apply to the minister for consideration of the facts of his or her case on 'humanitarian grounds'. This has been an important safety net for people who have fallen through the cracks of the narrow definition of 'refugee'. However, it has been riddled with problems. Being a pure discretion, the exercise of s417 has been arbitrary, inconsistent, non compellable, non reviewable and shrouded in mystery. There has been no requirement for natural justice, nor are there reasons given in the case of a refusal.

In July 2008, Chris Evans expressed his unease with the task of 'playing God' in this manner, and indicated that there would be

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measures taken to reduce the arbitrariness of the exercise of his discretions. Unfortunately, since that time, the minister has not chosen to use his discretionary power generously and with a view to improving the lives of applicants. Instead, he has chosen to abrogate his powers through long delays and a very high refusal rate.

For this reason, particularly, Liberty Victoria welcomes the introduction of the Migration Amendment (Complementary Protection) Bill. We broadly support the bill's objectives, and applaud the step towards international best practice that it represents.

Despite the welcome step that this Bill represents, we find ourselves concerned about a number of issues, omissions and exclusions in the Bill. We believe that a complementary protection bill should have the aim of leaving no applicant to slip through the cracks in protection, if they have valid concerns about persecution or serious harm.

### **Protection in another country & in-country relocation**

The opportunity for applicants to avail themselves of protection in a country other than Australia has frequently been a reason for refusing protection. A common example of this is in the case of Afghan applicants, who may have spent many years as refugees in Pakistan or Iran. In recent times, the regimes in those countries have made concerted efforts to expel refugees back into Afghanistan, with no regard whatsoever as to the safety or feasibility of secure return. Those who remain in Iran or Pakistan are often subject to blatant discrimination, usually through denial of work rights, education and medical care.

It is clear that Afghan applicants are not able to live a life of dignity and freedom from the risk of refoulement in those circumstances. So, Liberty Victoria urges the government not to take historical factors into account, in terms of where the applicant may have lived previously, to determine whether he or she could avail him or herself of protection in a third country. Also, Liberty Victoria urges the government to assess the viability of protection in another country against a high standard of living; ie, will the applicant be able to obtain secure accommodation, will he or she have the right to work, access to medical care, and will children have access to schooling?

Further to this, application of the 'protection in another country' exemption should clearly take into account the possibility of chain refoulement. If there exists a risk that that country will refoule the applicant, then protection in Australia should be afforded.

In a similar vein is the argument that certain applicants would not longer be at risk of persecution in their home country if they could simply relocate to another geographical area within that country. While this may be true in a small number of cases, it is not a realistic solution for the vast majority of applicants who find themselves fleeing persecution.

If the government intends to refuse applicants on the basis that they may not be at risk if they relocate inside their own country, or that they may avail themselves of protection in a third country, this must be done with bona fide best intentions and a realistic understanding of the up to date experiences of refugees in those countries (not simply customary practices that may have been effective in the past, such as the experience of Afghans in Iran or Pakistan).

Liberty Victoria holds a fear that these mechanisms may be used as 'hand balling' solutions, placing people at risk, ultimately defeating the purpose of this bill and Australia's status as a signatory to a number of international conventions.

### **Exclusion of statelessness**

Liberty Victoria welcomes the statements made by the Minister that stateless people who are denied refugee status will not be left in the "too hard basket."<sup>1</sup> However, we remain concerned that the exclusion of statelessness from the complementary protection framework has the potential to lead to another *Al-Kateb*.<sup>2</sup> In concert with the continuance of a mandatory indefinite detention regime, the legislative framework still exists that allowed the High Court to decide that an innocent man could be kept in administrative immigration detention for the term of his natural life. Liberty Victoria is of the view that this decision remains one of the blackest marks on Australia's human rights record, and we are deeply concerned that there remains the legal capacity for it to be repeated.

Liberty Victoria maintains that legislative change is required to ensure that people held in administrative detention have a tangible prospect of release.

### **Reform of Refugee Review Tribunal Process & Merits Review Required**

Liberty Victoria remains deeply concerned about the operation of the Refugee Review Tribunal. It is unacceptable that such important life and death decisions are made by a single public servant who need not have a law degree and is not bound by the rules of evidence. This is a grave departure from the rule of law, and has led to countless unjust, inaccurate and life-threatening mistakes.

The deficiency of the RRT is compounded by the lack of access to a robust merits review process following on from a bad decision at the Tribunal. These problems are firmly entrenched in Australia's current refugee determination process, and it is to Liberty Victoria's dismay that the complementary protection regime will be subject to the same limitations and defects.

### **Exclusion concerns - character issues & the non-derogability of human rights norms**

Liberty Victoria understands the practice of excluding some categories of persons from the international protection regime, pursuant to Article 1F of the Refugees Convention. However, Liberty Victoria is concerned that the proposed equivalent provision s36 (2C) will allow for the exclusion of some parties who may in fact be at risk of refoulement based on a strict reading of the exclusion provisions, and whose character issues are not sufficiently grave as to warrant exclusion.

### **s501 Cancellations**

In the view of Liberty Victoria, the current government has taken a very conservative approach to dealing with issues of character in migration. The most extreme examples of this arise in the cancellation of visas under s501 of the Act, where the holder of the visa came to Australia as an infant, neglected to take citizenship, committed a serious offence, and had their permanent visa cancelled. This is a typical situation under s501, and Liberty Victoria deplores the 'double punishment' mechanism that exists under s501.

Visa cancellation typically occurs very soon before the person is due to be released on parole (in one case, notification of cancellation happened 19 minutes before scheduled release from prison), when (by definition) the person has been found no longer to pose a threat to the community. Liberty Victoria is of the view that it is important to protect the community, but that after an 'absorbed person' has served a prison sentence and deemed eligible for parole, the person should not have their sentence extended to cancellation of the visa.

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<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, Wednesday 9 September 2009, 4 – 8, Laurie Ferguson MP

<sup>2</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562

This process has occurred in a number of cases where there are genuine refoulement concerns, and where proper regard has not been paid to the risk of persecution or serious harm to the returnee following cancellation of the visa and removal from Australia.

### **Child Soldiers**

A fascinating example of the unfair operation of this exclusion would be children who have been party to atrocities as child soldiers. Child soldiers have ordinarily participated in serious international crimes, technically precluding the possibility of refugee status under Article 1F of the Convention, and equivalent provisions such as the proposed s36 (2C). However the circumstances of child soldiers should not be compared to those of adults who have been involved in similar atrocities. Child soldiers are commonly abducted and forcibly recruited into armed forces<sup>3</sup> where they experience very harsh treatment. Beatings and death at the hands of commanders is not uncommon. Further, female child soldiers experience a high incidence of rape and sexual violence.<sup>4</sup> As such any power designed to prevent adult war criminals from finding safe harbour in Australia should not be used indiscriminately in relation to children, especially given the extremely high risk of re-recruitment into the armed force upon return to the country of origin.

The ministerial power to deny protection where there are serious reasons for believing that the applicant has committed one of the serious international crimes mentioned in the proposed s36(2C), should only be exercised after a hearing where the applicant is afforded natural justice and the opportunity to explore defences that would be available under law as if the purported war crime had been committed by a minor on Australian soil.

### **Non-derogability**

Article 33 (2) of the Refugee Convention allows refoulement if it can be proven that a person poses a risk to national security or to the community of the country of asylum, unless that refoulement would entail a risk of the person being subjected to torture or inhuman or degrading treatment or punishment. In those cases, refoulement is strictly and categorically prohibited. The prohibition of refoulement under Article 3 of the European Convention on Human Rights, Article 7 International Covenant on Civil and Political Rights and Article 3 Convention Against Torture is non-derogable. This means that no exceptions and no derogations are permitted whatsoever, even in the case of an alleged terrorist constituting a danger to the national security of a country.<sup>5</sup>

Clearly, in expanding the equivalent Article 1F provisions, Australia is allowing for derogation of the non-refoulement obligation. This obligation has been the subject of decades of thought, deliberation and debate, and international standard points to a non-derogable prohibition on refoulement. This bill, while making many steps forward, falls short of enshrining that non-derogability into law.

Subject to the reservations stipulated, Liberty Victoria welcomes the introduction of the Migration Amendment (Complementary Protection) Bill.

Further to this submission, Liberty Victoria wishes to endorse the submissions made by the Law Institute of Victoria and the Human Rights Law Resource Centre.

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<sup>3</sup> Human Rights Watch, *Children's Rights: Stop The Use Of Child Soldiers*, at <http://www.hrw.org/campaigns/crp/index.htm>

<sup>4</sup> Human Rights Watch, *DR Congo: Protect Children From Rape and Recruitment*, at <http://www.hrw.org/en/news/2008/12/16/dr-congo-protect-children-rape-and-recruitment>

<sup>5</sup> Bruin, Rene & Wouters, Kees 'Terrorism and the Non-derogability of Non-refoulement', *International Journal of Refugee Law* 2003 15(1):5-29; doi:10.1093/ijrl/15.1.5 Oxford University Press 2003, <http://ijrl.oxfordjournals.org/cgi/content/abstract/15/1/5>

Should you wish to discuss any aspect of this submission please feel free to contact Jessie Taylor at [Jessie.e.taylor@gmail.com](mailto:Jessie.e.taylor@gmail.com)

Yours faithfully

A handwritten signature in black ink, appearing to read "Michael Pearce". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Pearce".

**Michael Pearce SC**  
President