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This edition provides an update of recent and interesting international legal developments affecting Australia and distinctive contributions made by Australia to contemporary international legal issues during November 2009.

## Prohibition against Torture – Proposed Complementary Protection Regime

(summary prepared by Jamine Morris and Peter Anagnostou)

### Protection for Grace Gichuhi

On 22 September 2009, the Sydney Morning Herald Article reported a story titled 'Ordered from Australia to face mutilation' by Yuko Narushima. The article addressed the case of Grace Gichuhi, a 22 year-old women who was fearing deportation to Kenya, where she will purportedly be genitally mutilated by circumcision by the Mungiki sect, including members of her family. It was reported that Ms Gichuhi arrived in Australia in July 2008 on tourist visas for World Youth Day. She lodged protection claims with the Immigration Department which were refused. A spokesman from the Department of Immigration reportedly stated that Ms Gichuhi did not meet refugee criteria.

### The Migration Amendment (complementary protection) Bill 2009

If new legislation introduced to Parliament called the Migration Amendment (complementary protection) Bill 2009 ("the Bill") is passed, people in a situation such as Miss Gichuhi may be afforded protection in Australia. Currently, Australia is one of the only developed countries who do not have a complementary protection process in place. For example, Canada and the European Union already have systems of complementary protection in place. Complementary protection refers to legal mechanisms for protecting people who fail to meet the definition of a refugee under the 1951 UN Convention Relating to the Status of Refugees. Under the UN Convention Relating to the Status of Refugees, a refugee is someone who faces persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. Under the current system, there is no clear process for people who may face persecution, torture or death on other grounds – other than to seek the intervention of the Immigration Minister after all other avenues have failed.

Australia has clear obligations not to return a person seeking protection to a place where their lives or safety could be threatened (non-refoulement) through a number of the international treaties that Australia signed such as the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention), the UN Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child. Australia adheres to the Refugee Convention obligations of non-refoulement through the current protection visa process however the proposed Complementary Protection Bill will ensure that Australia will fulfil the non-refoulement obligations of all of these international treaties.

In September 2009, the Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Migration Amendment (Complementary Protection) Bill 2009. They found that complementary protection is the protection owed by a State that falls outside the scope of the Refugee Convention. Complementary protection obligations are found in the non-refoulement provisions of various human rights treaties, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Bill provides for a protection visa to be granted to a person where there is a real risk that he or she will:

- be arbitrarily deprived of his or her life; or
- have the death penalty imposed on him or her and it will be carried out; or
- be subjected to torture; or
- be subjected to cruel or inhuman treatment or punishment; or
- be subjected to degrading treatment or punishment.

Enactment of the Bill would be an important step towards the recognition of Australia's non-refoulement obligations. To date, these obligations have received insufficient legislative protection.

The Migration Amendment (Complementary Protection) Bill 2009 is set to be debated in one of the next Parliamentary sittings. While the Greens and Senator Xenophon have publicly indicated support for the Bill, the Coalition has indicated that they will oppose the Bill. Senator Fielding has not yet publicly declared his position on the Bill. On 19 October 2009, the Senate Committee released a report noting no significant changes to the provisions concerning refugee protection. While this Bill is still yet to be debated in parliament, unless Senator Fielding supports the Bill or a Coalition Senator votes against the position of their party, the Bill will not be passed and Australia will continue to return people seeking protection, including survivors of trafficking, to situations of danger or even death.

Submissions to the Senate Legal and Constitutional Affairs Committee regarding the Migration Amendment (Complementary Protection) Bill 2009

Submissions relating to the Bill have been made by individuals and organisations including the Refugee Council of Australia, Legal Aid NSW and Victoria, the Department of Immigration and Citizenship, the Law Council of Australia, Oxfam Australia, the United Nations High Commissioner for Refugees ("UNHCR"), the Sydney Centre for International Law, Amnesty International, the Law Institute of Victoria ("LIV"), the Human Rights Law Research Centre ("HRLRC") and the Australian Human Rights Commission. A summary of the submissions by LIV, HRLRC and UNHCR are set out below.

(a) Law Institute of Victoria, September 2009:

**Detention:** LIV welcomed the changes to mandatory detention in the Bill, which provides that detention will be mandatory only if certain criteria are met. However, LIV are concerned that the proposed changes will not result in changes to detention practice. LIV have stated that the Bill will not remove provision for indefinite detention in the Migration Act, and that there continues to be no judicial oversight of the lawfulness and merits of a person's immigration detention.

**Visa Eligibility:** LIV propose that protection visa applicants should be able to elect a primary set of criteria — refugee or complementary — without risking any penalty for that choice in the decision-making process. They seek clarification from the government about whether this proposal will be implemented in policy or Guidelines.

**Exclusion of statelessness:** LIV have stated that the Bill does not provide express protection for 'stateless persons' in the new complementary protection regime. Under the 1954 Convention relating to the Status of Stateless Persons, which Australia has ratified, a stateless person is "a person who is not considered as a national by any State under the operation of its law".

**Ineligibility criteria:** LIV note that proposed ss.36(2C) of the Bill provides Ministerial discretion in relation to assessment of "serious reasons" whether a person is a security risk "on reasonable grounds". They therefore consider that it is imperative that specific guidance is provided around the proposed ambiguous approach to resolving the status of persons to whom Australia owes non-refoulement obligations who are found ineligible for a protection visa contrary to obligations in international law.

**Evidentiary thresholds:** LIV is concerned about the framing of the evidentiary thresholds that the Bill imposes on decision-makers for the purposes of determining whether a person is entitled to a protection visa under proposed s.36(2)(aa). Proposed ss.36(2)(aa) provides that the Minister must be satisfied that there are "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 irreparably harmed because of a matter

mentioned in subsection (2A)". The phrase "substantial grounds" is not defined in the Bill. The LIV proposes that decision-makers should therefore be specifically referred to international jurisprudence and general comments of the Human Rights Committee and Committee against Torture in relation to interpretation of "substantial grounds".

(b) Human Rights Law Research Centre, September 2009:

The HRLRC's submission argues that, while the Bill will significantly improve and strengthen Australia's complimentary protection regime, there are a number of issues which should be addressed before the Bill is passed into law. In particular, as currently drafted, the Bill:

- sets out a list of grounds upon which Australia will grant protection obligations which is narrower than the grounds for protection under international law;
- requires that risks be 'necessary and foreseeable' and constitute 'irreparable harm', in a manner that does not accurately reflect the position under international human rights law;
- inappropriately imposes a requirement of intent in the definition of cruel, inhuman or degrading treatment; and
- excludes protection for certain classes of people, despite the absolute and non-derogable nature of Australia's protection obligations.

The HRLRC submission provides a brief overview of the basis of Australia's non-refoulement obligations under international law and discusses and makes recommendations regarding each of the concerns listed above.

(c) United Nations High Commissioner for Refugees: September 2009:

UNHCR welcomed the codification of Australia's non-refoulement obligations and the proposal to introduce a single procedure for the grant of protection visas by which an assessment is made, firstly to determine eligibility for refugee status, and secondly for complementary protection needs. UNHCR however set out the following recommendations for changes to the Bill:

- "UNHCR recommends the removal of the test of 'irreparable harm'... as such test has no basis in international law or jurisprudence.
- UNHCR recommends that the concept of 'effective protection elsewhere' relating to refugee (and potentially complementary protection) applications should not form part of the determination process.
- UNHCR considers it preferable for a proper analysis an assessment of any internal flight and relocation alternative to evolve through jurisprudence rather than through specific legislative provision.
- UNHCR recommends that further consideration is afforded to what kind of immigration status and associated rights should be granted to persons in need of international protection who have been denied substantive (protection) visas on character grounds.
- UNHCR recommends that the determination of an offshore entry person's needs for refugee and complementary protection are codified in legislation or, in the absence of such legislation, that RSA Procedures Manual and Independent Merit Review Guidelines contain specific reference to the need to consider complementary protection as part of a single determination procedure and following consideration of refugee status..."

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