



Complementary protection for asylum seekers—overview of the international and Australian legal frameworks

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Executive summary

- There is no universally accepted definition of the term ‘complementary protection’. However, in general terms, it describes States’ obligations to non-refugees (that is those that do not satisfy the 1951 Refugee Convention definition) who are nonetheless in need of protection on the basis that they face serious violations of their human rights if returned to their country of origin.
- The precise scope of the principle remains unclear largely due to the evolving nature of international human rights law. It is widely acknowledged, however, that complementary protection principally stems from two treaty-based sources of international human rights law. Firstly, article 3 of the Convention Against Torture which expressly prohibits removal to another State where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Secondly, articles 6 and 7 of the International Covenant on Civil and Political Rights which preclude removal to torture or cruel, inhuman or degrading treatment or punishment or to a place where a person may be arbitrarily deprived of their life.
- Whether the principle more broadly encompasses protection from indiscriminate or generalized violence, natural disasters, or from statelessness depends upon numerous legal and non-legal considerations. These include a State’s protection obligations arising from the treaties to which they are a Party and such factors as a State’s burden sharing capacity and so forth.
- Most western countries have a system of complementary protection in place and Australia is arguably no exception, although it has not previously sought to label the protection it provides on humanitarian grounds as complementary protection. One reason for this may be that it has not incorporated the *non-refoulement* (non-return) obligations arising from various human rights treaties into domestic law which means it remains a purely discretionary matter. Nor has Australia created legally enforceable criteria against which such cases can be assessed and reviewed. Rather, for over twenty years, Australia has principally relied on the ministerial intervention process to attempt to satisfy its *non-refoulement* obligations notwithstanding mounting criticism of the process from several parliamentary inquiries, United Nations treaty monitoring bodies, refugee and human rights advocacy groups and most recently, the immigration minister himself.

- The main concerns about the existing process stem from the absence of enforceable protection-related treaty rights, the lack of transparency in the making of such decisions and the lengthy process involved in seeking protection on non-refugee Convention grounds. Such concerns are heightened by the extremely grave consequences that potentially flow from the making of ‘incorrect’ decisions, such as torture or even death. Though there are other national and international ‘safeguards’ in place to ensure that people in need of protection are not forcibly returned to serious harm, such mechanisms though persuasive have no meaningful ability to actually prevent removal. Another recurring concern stems from the absence of accurate and comprehensive data as neither the minister nor the immigration department appear to have precise figures on the number of occasions the discretionary powers have been exercised.
- There has been speculation whether there is complete compliance with Australia’s *non-refoulement* obligations and the adequacy of existing arrangements, especially in the absence of any merits or judicial review rights. This may have arisen from the absence of a statutory process, with all the fundamental legal principles that govern the making of such administrative decisions, coupled with the public’s loss of confidence in the immigration department over recent years (following the wrongful detention and improper deportation of Australian citizens or permanent residents).
- It is against this background that various Australia-specific complementary protection models have been advanced in the last decade. The models proposed by the Refugee Council of Australia, the Australian Democrats, and most recently by the immigration department have all envisaged the introduction of statutory criteria. There has been significant divergence in views, however, as to the desired content and scope of the complementary protection model to be introduced. For instance, whether it should be narrow and only include persons with treaty-based protection claims or broader to encapsulate non-treaty humanitarian-based protection claims arising for example from indiscriminate or generalized violence and so forth.
- The government has introduced legislation to legally entrench a formal system of complementary protection. In this context, another important element in this debate will undoubtedly be the threshold of harm that is required, and the government’s ability to retain some form of discretion vis-à-vis undesirable or undeserving people in the ‘public interest’. However, the extent to which it does so, will ultimately determine the degree to which Australia adheres to its international *non-refoulement* obligations.

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Selected abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CRC	Convention on the Rights of the Child (1989)
DIAC	Department of Immigration and Citizenship. For ease of reference, DIAC, DIMA (the then Department of Immigration and Multicultural Affairs) and DIMIA (the then Department of Immigration and Multicultural and Indigenous Affairs) will be referred to collectively as ‘the department’.
ECHR	European Convention on Human Rights
EXCOM	Executive Committee of the UNHCR
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
RCOA	Refugee Council of Australia
UDHR	Universal Declaration of Human Rights (1948)
UNCAT	United Nations Committee Against Torture
UNHCR	Office of the United Nations High Commissioner for Refugees
UNHCHR	Office of the United Nations High Commissioner for Human Rights

Introduction

The issue of Australia's *non-refoulement* (non-return) obligations under international human rights treaties has been discussed in no less than three federal parliamentary inquiries since 2000, all of which recommended, in one form or another, that Australia should consider introducing a formal system of complementary protection for asylum seekers.

This paper explores the principle of complementary protection and its operation both at the international and domestic levels. For ease of reference in what is a complex area of law, it has been divided into three parts. Part I examines the international legal framework of complementary protection, focussing on the meaning and development of the principle as well as its potential scope at international law (with reference to regional refugee instruments). Part II will examine the statutory and policy framework in the Australian context by examining existing procedures, policy, safeguards as well as complementary protection models that have been advanced over the last decade. At the outset it is important to note that this paper is in no way intended to be an exhaustive analysis of the principle of complementary protection, nor does it examine the complementary or subsidiary protection regimes being employed in individual States. Rather, it is designed to provide historical context and a brief overview of some of the legal issues that may arise as parliament considers whether to introduce a formal statutory system of complementary protection for asylum seekers.

Though there has not been a great deal written about 'complementary protection' *per se*, Associate Professor Jane McAdam's 2007 book entitled *Complementary Protection in International Refugee Law* was 'the first dedicated study on complementary protection' and provides a comprehensive analysis of the principle.¹ Part III also contains a non-exhaustive list of additional sources on *non-refoulement* and complementary protection, subsidiary protection under the European Union Qualification Directive, select United Nations materials as well as a list of relevant books.

Part I – legal framework in international law

What is complementary protection?

It is widely acknowledged that there is no internationally accepted definition of 'complementary protection'. The term is not a term of art defined in any international treaty or domestic legislation.² Notwithstanding, 'most western countries, including the Member

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1. J McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007.
 2. J McAdam, *Complementary Protection in International Refugee Law*, p. 40.

States of the European Union, Canada, and the United States, have a system of complementary protection in place'.³

Complementary protection (or complementary forms of protection) generally describes protection obligations that arise under various international human rights treaties. Such obligations are in addition to the protection obligations arising from the 1951 Convention relating to the Status of Refugees (read in conjunction with the 1967 Protocol relating to the Status of Refugees) (together, the 1951 Refugee Convention).⁴

Countries that have ratified the 1951 Refugee Convention have undertaken to provide protection to persons who are declared to be 'refugees' within the meaning of the Convention. Article 1A(2) defines a 'refugee' as any person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it...

However, as the Refugee Council of Australia (RCOA) asserts, not everyone in need of international protection will satisfy this definition of 'refugee'. For instance the 1951 Refugee Convention does not expressly provide protection for:

- people that are stateless (without nationality)
- people who come from a country engaged in civil war
- people who have been subjected to gross violations of their human rights for non-Convention reasons (that is not because of their race, religion, political opinion, etc)
- people who would face torture upon return to their country, and

3. GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, Oxford University Press, Oxford, 2007, third edition, p. 285, footnote 1. See also New Zealand's Immigration Bill 132-2 (2007) which was introduced into parliament on 8 August 2007. The text of the Bill (as at 14 April 2009) incorporating a codified complementary protection mechanism is available at: <http://www.legislation.govt.nz/bill/government/2007/0132-2/latest/versions.aspx>. See also *Attorney-General v Zaoui and Ors* (Zaoui No. 2) [2005] NZSC 38, paragraph 76, where the New Zealand Government accepted it is obliged to act in conformity with its obligations under articles 6(1) and 7 of the ICCPR and article 3 of the Convention against Torture.

4. J McAdam, 'Complementary Protection: Labor's point of departure', in *Inside Story*, 3 December 2008. The Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; The Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

- people who have fled a country where the rule of law and order no longer exists.⁵

Though the notion of complementary protection can be traced back to the first international attempts to regulate refugee movements by the League of Nations, it was not until more recently that the principle became more widely understood and accepted.⁶ That is not to say that individual States had not previously recognized persons in need of international protection for reasons falling outside the 1951 Refugee Convention and regularized their stay accordingly. Rather, it was not until the late 1980s that complementary protection, as an issue emerged as an agenda for discussion internationally, and not until the mid 1990s that the Office of the United Nations High Commissioner for Refugees (UNHCR) Executive Committee (ExCom), currently made up of 76 Member States including Australia, identified complementary protection ‘as a tool based on international *law* rather than a purely *ad hoc* domestic discretion’.⁷

In 2001, the first ‘supranational complementary protection regime’⁸ was officially proposed for the European Union which, three years later, led to the adoption of the Qualification Directive (discussed below).⁹ According to Goodwin-Gill (Professor of International Refugee Law in the University of Oxford) and McAdam, in their recent book *The Refugee in International Law* (‘Goodwin-Gill and McAdam’) the creation of this instrument was significant. Not only did it recognize some of the Member States’ *non-refoulement* obligations under international and regional law, it also formalized a legal status for some beneficiaries of that protection.¹⁰

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5. Refugee Council of Australia (RCOA), ‘Complementary Protection - A new model for Australia’ in UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, *Complementary Protection: Discussion Paper*, No. 2/2005, p. 9, viewed 16 February 2009, <http://www.unhcr.org.au/pdfs/Discussion22005.pdf>
 6. J McAdam, *Complementary Protection in International Refugee Law*, pp. 23–28.
 7. J McAdam, *Complementary Protection in International Refugee Law*, pp. 291–295.
 8. Supranational is defined as ‘overriding national sovereignty’ in Macquarie Dictionary, Macquarie Library, third edition, 1997, p. 2128.
 9. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>
 10. GS Goodwin-Gill and J McAdam, pp. 325–330. See further: J McAdam, *Complementary Protection in International Refugee Law*, ch. 2. For a comprehensive list of notable articles or studies on the Qualification Directive see: H Storey, ‘EU Refugee Qualification Directive: a Brave New World?’, *International Journal of Refugee Law*, March 2008, 20, at footnote 4. See also select list of materials on the EU Qualification Directive in Part III of this research paper.

In 2005 ExCom formally adopted a conclusion on international protection relating to complementary protection. Though conclusions are not binding they ‘constitute expressions of opinion which are broadly representative of the views of the international community’.¹¹ The conclusion, adopted by consensus, relevantly stated:

The Executive Committee *encourages* the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol.¹²

Consistent with the sentiment of this conclusion, UNHCR now views complementary protection as a ‘positive and pragmatic response’ to certain international protection needs not covered by the 1951 Refugee Convention.¹³

According to Goodwin-Gill and McAdam, the principle of complementary protection involves States’ *non-refoulement* obligations under international law:

The term ‘complementary protection’ describes States’ protection obligations arising from international legal instruments and custom that complement – or supplement – the 1951 Refugee Convention. It is, in effect, a shorthand term for the widened scope of *non-refoulement* under international law.¹⁴

The principle of *non-refoulement*

The principle of *non-refoulement* is the cornerstone of international refugee protection and is expressed unequivocally in article 33(1) of the 1951 Refugee Convention which prohibits a State from expelling or returning a refugee in any manner whatsoever to territories where his/her life or freedom would be threatened for a Convention reason.¹⁵ Significantly, the prohibition is not without limitation.¹⁶ An important exception is contained in article 33(2)

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11. UN High Commissioner for Refugees (UNHCR) Executive Committee, ‘Conclusions on International Protection’, viewed 16 December 2008, <http://www.unhcr.org/excom/3bb1cb676.html>
 12. UNHCR, Executive Committee, Conclusion No. 103 (LVI) 2005 Provision on International Protection Including through Complementary Forms of Protection’, viewed 16 December 2008, <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf>
 13. UNHCR, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, p. 3, UNHCR Refworld, viewed 16 December 2008, <http://www.unhcr.org/refworld/docid/479df7472.html>
 14. GS Goodwin-Gill and J McAdam, p. 285.
 15. On the question of whether ‘refugees’ in article 1 are the same as those intended to be covered by article 33 see analysis by P Weis and Australian jurisprudence discussed in JC Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 304–305.
 16. Note also that articles 1D, 1E and 1F contain what are generally described as ‘exclusion clauses’ which provide that the 1951 Refugee Convention does not apply to certain prescribed

which states that the prohibition does not apply to refugees who may be reasonably regarded ‘as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particularly serious crime¹⁷, constitutes a danger to the community of that country’.¹⁸

There remains persistent disagreement amongst scholars as to whether the prohibition requires actual admission into a country or whether it permits denial of entry at the ‘frontier’. It is clear however that the prohibition applies to refugees (those formally recognized as such) as well as asylum seekers, at least initially, for otherwise the international protection regime would be fundamentally compromised.¹⁹ The prohibition applies irrespective of an asylum seeker’s legal status or mode of arrival, and though the principle does not create a right to any particular solution,²⁰ where denial of entry might result in the return of a person (either directly or indirectly) to a place where they may face persecution it is generally agreed that it ‘implies at least temporary admission to determine an individual’s status’.²¹ Professor James C Hathaway (‘Hathaway’), eminent legal scholar in the field of international refugee law and currently Dean of the University of Melbourne’s Law School, terms this a ‘de facto duty’ to

persons such as people who have committed a war crime, or a crime against humanity, or a serious non-political crime etc (article 1F).

17. Section 91U of the Migration Act prescribes crimes which are to be regarded as ‘particularly serious crimes’ for this purpose such as an offence (in Australia or overseas) involving violence against a person; or a serious drug offence; or an offence involving serious damage to property etcetera punishable by imprisonment for life, or a term not less than three years.
18. It has been argued that the drafters of the 1951 Refugee Convention envisaged that only serious crimes such as rape, homicide, armed robbery, and arson could lead to exemption from the prohibition: JC Hathaway & CJ Harvey, ‘Framing refugee protection in the new world disorder’, *Cornell Journal of International Law*, vol. 34, 2001, p. 292. Note that GS Goodwin-Gill and J McAdam at pp. 243–244 query whether the broadened principle of *non-refoulement* renders article 33(2) largely redundant because ‘a person who fears persecution’ also necessarily also fears at least inhuman or degrading treatment or punishment, if not torture’.
19. GS Goodwin-Gill and J McAdam, ch. 5. Goodwin-Gill assert ‘State practice has broadened the scope of article 33 ... the duty of *non-refoulement* extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition: GS Goodwin-Gill, ‘*Non-Refoulement* and the New Asylum Seekers’, pp. 389–390. See also: Penelope Mathew, ‘International Association of Refugee Law Judges Conference - Address - Legal Issues concerning Interception’, *Georgetown Immigration Law Journal*, vol. 17, no. 221, 2002–2003.
20. GS Goodwin-Gill, ‘*Non-Refoulement* and the New Asylum Seekers’, *Immigration & Nationality Law Review*, 385, 1988, pp. 389–391.
21. GS Goodwin-Gill and J McAdam, p. 215.

admit the refugee ‘since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk’.²²

As mentioned, protection against *non-refoulement* is not confined to the 1951 Refugee Convention. In fact, the prohibition is expressed in a range of international (and regional) refugee, human rights, humanitarian, and extradition treaties and has been ‘repeatedly endorsed in a variety of international forums’.²³ It has also been widely described as a principle of customary international law, which means it is considered binding on all States irrespective of assent.²⁴ To this end, McAdam and Goodwin-Gill argue not only that the prohibition against *refoulement* to persecution (contained in article 33 of the 1951 Refugee Convention) has acquired such a status, the prohibition under human rights law now extends to encompass *non-refoulement* to torture. Whether non-return to cruel, inhuman or degrading treatment or punishment has similarly attained such a status is in their view ‘more contentious’.²⁵

22. JC Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 301.

23. GS Goodwin-Gill and J McAdam, p. 345, ch. 5. See also: A Duffy, ‘Expulsion to Face Torture? *Non-refoulement* in International Law’, *International Journal of Refugee Law*, 20, 2008, p. 384 who asserts that 90 per cent of the world’s sovereign States are a party to a treaty which prohibits *non-refoulement* in some shape or form. Or as Lauterpacht and Bethlehem note, all but 19 UN member states ‘participate in some form or other conventional arrangement embodying *non-refoulement*’: E Lauterpacht and D Bethlehem ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’, in E Feller, V Türk and F Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, paragraph 210, also available at: <http://www.unhcr.org/refworld/docid/3b3702b15.html>

24. See further: E Lauterpacht and D Bethlehem, pp. 193–253; GS Goodwin-Gill and J McAdam, ch. 5. Note that JC Hathaway argues there is insufficient evidence to support the position that the principle has acquired the status of customary international law: James C Hathaway, *The Rights of Refugees under International Law*, pp. 363–370. Though his thesis is disputed in GS Goodwin-Gill and J McAdam, pp. 351–354. In this context it is important to note that in December 2001 States Parties to the 1951 Refugee Convention and/or Protocol noted ‘the continuing relevance of and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law’: UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002. Though as Hathaway notes at p. 364 in practice ‘most States of Asia and the Near East have routinely refused to be formally bound to avoid *refoulement*’. Though this debate appears somewhat academic, it is significant to note as there are some 45 States that have not acceded to either the 1951 Refugee Convention or its Protocol and a large number are in close geographical proximity to Australia.

25. GS Goodwin-Gill and J McAdam, pp.345–354.

A comprehensive opinion piece by Sir Elihu Lauterpacht QC and Daniel Bethlehem ('Lauterpacht and Bethlehem') suggests that a 'broad reading of the threat contemplated by Article 33(1) is warranted'.²⁶ To the extent that, (amongst other things):

It precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier that would have the effect of exposing refugees or asylum seekers to:

(i) a threat of persecution on account of race, religion, nationality, membership of a particular social group or political opinion;

(ii) **a real risk of torture or cruel, inhuman or degrading treatment or punishment;** or

(iii) a threat to life, physical integrity or liberty.²⁷ (Emphasis added).

They largely base their assertion on the expanded mandate of the UNHCR, on the humanitarian objectives of the 1951 Refugee Convention and 'on the fact that various regional human rights instruments are now understood to provide for more broadly applicable forms of protection against *refoulement*'.²⁸ However, according to Hathaway, 'this analysis is simply unsustainable as a matter of law'. In his view it would be a matter of concern if State parties to the 1951 Refugee Convention were required to implement duties that 'follow from other human rights conventions – even if States are not actually parties to those other accords'.²⁹

Scope of complementary protection

As a matter of international law, it is the home State that is primarily responsible for providing protection to its citizens. It is only when such protection is not available that international protection is invoked to protect the basic human rights that are seriously at risk.³⁰ Such situations may arise for a variety of reasons (in addition to persecution), such as indiscriminate or generalized violence, armed conflicts, natural or ecological disasters etcetera. Complementary protection is but one way in which the international community has responded to the protection needs arising from such situations.³¹

26. E Lauterpacht and D Bethlehem, pp. 89–128.

27. E Lauterpacht and D Bethlehem, p. 128.

28. JC Hathaway, *The Rights of Refugees under International Law*, p. 305.

29. JC Hathaway, *The Rights of Refugees under International Law*, p.307.

30. On the issue of whether protection in this sense involves 'internal protection' as is commonly understood or 'diplomatic protection' as in the protection accorded by States to their nationals abroad, see: A Fortin, 'The Meaning of 'Protection' in the Refugee Definition', *International Journal of Refugee Law*, 12, 2000, pp. 548–576.

31. UNHCR, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, June 2005. PPLA/2005/02, p. 7. See also the connection between

Goodwin-Gill and McAdam argue that complementary protection acquires legal force principally from two treaty-based sources of international human rights law. One is, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)³² which expressly prohibits removal to another State where there are substantial grounds for believing that a person would be in danger of being subjected to torture. The second is articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR)³³ which have been defined as precluding removal to torture or cruel, inhuman or degrading treatment or punishment; or to a place where a person may be arbitrarily deprived of their life.³⁴ These articles and other relevant international human rights law will be examined in further detail below.

1984 Convention Against Torture

Article 3 of CAT protects individuals from removal to ‘another State where there are substantial grounds for believing that [they] would be in danger of being subjected to torture’. This is a non-derogable provision, which means that no exceptional circumstances (such as war, political instability or any other public emergency) can be used as justification for torture.³⁵

‘Torture’ is expressly defined in article 1 of CAT as:

complementary protection and ‘the responsibility to protect’ (also known as R2P): E Feller, ‘The Responsibility to Protect: Closing the Gaps in the International Protection Regime’ in J McAdam (ed), *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, 2008, pp. 283–293. Other responses might include the provision of aid, diplomatic initiatives and peacekeeping.

32. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
33. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
34. G.S Goodwin-Gill and J McAdam, p. 296. McAdam also includes article 3 of the European Convention on Human Rights (ECHR) which prohibits removal to ‘torture or inhuman or degrading treatment or punishment’ for Member States of the Council of Europe, now also encompassed in the Qualification Directive. Note that McAdam argues that complementary protection is not necessarily only limited to these instruments. See also *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26 where the House of Lords found that any ECHR provision could give rise to a *non-refoulement* obligation. See further: J McAdam, *Complementary Protection in International Refugee Law*, p. 144. Note also that Lauterpacht and Bethlehem assert that with over 150 States party to at least one binding international instrument proscribing inhuman or degrading treatment or punishment, the prohibition has attained the status of customary international law: Lauterpacht and Bethlehem, paragraphs 222–229; GS Goodwin-Gill and J McAdam, ch. 6.
35. See further Article 2 of the Convention Against Torture.

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to this definition and the operation of article 3, the *non-refoulement* obligation under CAT is restricted in scope in the following way:

- only return to ‘torture’ (as opposed to other harm) is prohibited
- ‘torture’ only includes acts that are actually carried out by or tolerated by the State (as opposed to private individuals), and
- pain or suffering caused by ‘lawful sanctions’ are outside the scope of the definition of ‘torture’.³⁶

In addition, there must be ‘substantial grounds’ for believing that a person would be in danger of being subjected to torture.³⁷ Though the general human rights situation in the country is a relevant consideration ‘a consistent pattern of gross, flagrant or mass violations of human rights’ will not, by itself be sufficient.³⁸ The definition requires that the person fearing return must individually be at risk of torture if returned and is therefore quite narrow.³⁹

1966 International Covenant on Civil and Political Rights

Article 7 of ICCPR provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

36. GS Goodwin-Gill and J McAdam, pp. 302–303.

37. According to the UN Committee overseeing implementation of the CAT, ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture. They are to be assessed on grounds that go ‘beyond mere theory or suspicion’ or ‘a mere possibility of torture’, but the threat of torture does not have to be ‘highly probable’ or ‘highly likely to occur’: J McAdam, ‘The impact of the Standard of Proof on Complementary Protection Claims: Comparative Approaches in the European Union and Canada’, 2009, based on a paper presented at the *Critical Issues in International Refugee Law Research Workshop* at York University, Toronto, held on 1–2 May 2008, p. 19.

38. Article 3(2) Convention Against Torture.

39. GS Goodwin-Gill and J McAdam, p. 305.

Though this provision does not expressly prohibit *refoulement* to such ill-treatment, the UN Human Rights Committee has observed that States Parties to the ICCPR must not remove people in such circumstances.⁴⁰ In the view of the Committee:

The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control **entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant**, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed ...⁴¹ (Emphasis added).

‘Degrading, inhuman or cruel treatment’ is not defined in international law.⁴² However, the UN Human Rights Committee (HRC) publishes its interpretation of the content of human rights provisions, in the form of ‘General Comments’. With regard to article 7 it has observed (amongst other things) that:

The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual ... The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.⁴³

40. The UN agency that monitors implementation of the ICCPR by its State parties.

41. UN Human Rights Committee (HRC), General Comment No. 31, 26 May 2004, viewed 3 February 2009
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).
See also *GT v Australia*, Comm. No. 706/1996 (4 Nov. 1997), UN doc. CCPR/C/61/0/706/1996, paragraph 8.1 cited in GS Goodwin-Gill and J McAdam, p. 306 where the HRC stated ‘States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*’.

42. J Pirjola, ‘Shadows in Paradise – Exploring Non-Refoulement as an Open Concept’, *International Journal of Refugee Law* 19, 2007, p. 652.

43. HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, paragraph 9, viewed 3 February 2009,

Notwithstanding the absence of a list of the different types of punishment or treatment that will meet the threshold, the Committee has nonetheless found that the following amounts to ‘cruel and inhuman treatment’: implementation of the death penalty through gas asphyxiation, exceptionally severe conditions of detention (for example complete isolation, food deprivation) and abduction.⁴⁴

The Committee has further unequivocally stated:

The text of article 7 allows of no limitation ... no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons ...⁴⁵

Article 6 of ICCPR protects people’s inherent right to life. Under the EU Qualification Directive, this right finds expression in articles 2 and 15 (discussed further below) which provides that in order to qualify for subsidiary protection, there must be substantial grounds for believing that the person, if returned would face a real risk of suffering serious harm – which includes return to the death penalty or execution. Similarly, proposed clause 121 of New Zealand Government’s 2007 Immigration Bill (132-2) provides that ‘a person must be recognised as a ‘protected person’ under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life ... if deported from New Zealand’.⁴⁶

In *Judge v Canada*, the Human Rights Committee found that countries that have abolished the death penalty (in this case, Canada) have an obligation under article 6(1) to protect the right to life and importantly ‘may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out’.⁴⁷

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

44. See A Fabricotti, ‘The concept of inhuman or degrading treatment in international law and its application in asylum cases’, *International Journal of Refugee Law* 10, p. 649 cited in UNHCR, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, p. 22. See also jurisprudence of the European Court of Human Rights discussed in: J McAdam, *Complementary Protection in International Refugee Law*, pp.140–143.
45. HRC, CCPR General Comment No. 20: Article 7, paragraph 9.
46. For further information see the Bill homepage of the New Zealand Parliament website, available at: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm
47. *Judge v Canada*, Comm. No. 829/1998, UN doc. CCPR/C/78/D/829/1998, 5 August 2003, paragraph 10.4 cited in GS Goodwin-Gill and J McAdam, p. 297, footnote 85. See also article 1 of the Second Optional Protocol to the ICCPR which requires States to abolish the death penalty within their jurisdictions.

Article 1 of the Second Optional Protocol to the ICCPR requires States to abolish the death penalty within their jurisdictions, though some States have interpreted that as precluding them from returning a person to a country where they will face the death penalty.⁴⁸

For completeness, it is also worth noting that the principle of complementary protection may more broadly encompass persons in need of international protection for violation of other rights under ICCPR. According to Goodwin-Gill and McAdam, ‘the Human Rights Committee seems to have tacitly accepted that removing an individual to face a real risk of violation of any ICCPR right could constitute *refoulement*’⁴⁹ when it observed:

If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.⁵⁰

However, ICCPR rights will only give rise to a *non-refoulement* obligation where ‘there are substantial grounds for believing that there is a real risk of irreparable harm’.⁵¹ For practical purposes such a high benchmark would arguably not easily be met.

1989 Convention on the Rights of the Child

There has been relatively little written about the role the Convention on the Rights of the Child (CRC)⁵² has within the complementary protection debate.⁵³ However, it is widely recognized that the prohibition against returning a person to a place where they will be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’ in article 7 of the ICCPR can also be read into, or implied in article 37(a) of CRC which similarly states

48. GS Goodwin-Gill and J McAdam, p. 297, footnote 85.

49. GS Goodwin-Gill and J McAdam, p. 308.

50. *A.R.J. v Australia*, Communication No. 692/1996, UN doc. CCPR/C/60/D/692/1996, 11 August 1997, viewed 3 February 2009, <http://www.unhchr.ch/tbs/doc.nsf/0/0d43d458173115688025671b005d7147?Opendocument>. See also: *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26 where the House of Lords found that any ECHR provision could give rise to a *non-refoulement* obligation.

51. HRC, General Comment No. 31, as cited in J McAdam, *Complementary Protection in International Refugee Law*, p. 171.

52. Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

53. But see J McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection’, *International Journal of Children’s Rights*, 14, 2006, p. 251. See also J McAdam, *Complementary Protection in International Refugee Law*, ch. 5.

that ‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’.⁵⁴

In the context of determining eligibility for international protection, article 3 of the CRC is of paramount importance.⁵⁵ It provides that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration* (emphasis added)’. It has been argued that in the refugee determination context, the best interests principle should therefore apply not only when a child claims asylum in their own right, but also when a child is impacted by a parent’s application.⁵⁶

By intentionally making the best interests of the child ‘a’ rather than ‘the’ primary consideration, the CRC envisages that other considerations may be of relevance though the Committee on the Rights of the Child has noted that other policy considerations, such as those relating to migration control, can not override the best interests of the child:

Exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.⁵⁷

McAdam argues that the best interests principle, which allows no derogation, may not only require an easing of some of the stricter definitional requirements of article 1A(2) of the 1951 Refugee Convention, it might also constitute a complementary ground of protection in its own right, especially for children fleeing generalized violence:

The attributes that define children are immutable characteristics, whereas refugee definitions may change or develop over time. If a line is to be drawn, a child is foremost a child before he or she is a refugee, and protection needs must be assessed accordingly. It is therefore vital to the rights of child asylum-seekers not only in the context of the Refugee Convention, but

54. Article 6 also expressly provides that every child has the inherent right to life. Article 1 clarifies that a ‘child’ is ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.

55. J McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child’, p. 254.

56. J McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child’, p. 255.

57. Committee on the Rights of the Child (CRC), ‘General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005, paragraph 86.

also in the specific framework of the CRC, in an attempt to fill the gaps and achieve the best possible combination of protection measures available under international law.⁵⁸

1954 Convention relating to the Status of Stateless Persons

The 1954 Convention relating to the Status of Stateless Persons⁵⁹ governs the status and rights of persons who have been deprived of their nationality (stateless persons). It contains very similar rights to those accorded to refugees under the 1951 Refugee Convention but one significant difference is that it does not contain an explicit *non-refoulement* provision, as found in article 33 of the 1951 Refugee Convention. One reason for this is that it is not concerned with the provision of protection due to fear of persecution which is remedied by *non-refoulement*; rather it is concerned with legal status due to an absence of nationality and therefore national protection.⁶⁰

As a matter of international law, it has been argued that stateless persons who are not Convention refugees should not need to rely on the protection afforded by complementary protection mechanisms.⁶¹ Rather, their international protection is governed by both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness,⁶² the former containing an express provision prohibiting a State from expelling a Stateless person lawfully in their territory save on grounds of national security or public order.⁶³

However, McAdam has argued that complementary protection may nonetheless be an appropriate response ‘where there is no domestic means for a stateless person to obtain the status for which international law provides’.⁶⁴ This might be the case in countries which have

58. J McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child’, p. 269. See also: J McAdam, *Complementary Protection in International Refugee Law*, pp. 184–186 for a discussion on how the best interests principle operates in Sweden to potentially ‘mitigate’ the weight normally required for demonstrating a fear of harm if removed. Though note also concerns expressed therein that an overemphasis on the best interests principle may potentially lead some parents to see their child as an ‘entrance ticket’ to permanent residency.

59. Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 Jun. 1960) 360 UNTS 117.

60. J McAdam, *Complementary Protection in International Refugee Law*, p. 212.

61. J McAdam, *Complementary Protection in International Refugee Law*, p. 40, footnote 129.

62. Convention on the Reduction of Statelessness (adopted on 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

63. Article 31(1) 1951 Convention relating to the Status of Stateless Persons. On the issue of ‘lawful presence/stay’ in the refugee context, see JC Hathaway, *The Rights of Refugees under International Law*, ch. 3.1.

64. J McAdam, *Complementary Protection in International Refugee Law*, p. 40, footnote 129.

not ratified or implemented domestic legislation giving effect to these two international treaties.⁶⁵

Limitations on the principle

When examining the limitations on the principle, the source of the additional protection is of utmost importance as it is this legal obligation which prohibits removal. As McAdam explains, the obligation to grant protection to non-refugees may stem from international human rights treaties (as discussed above) or ‘from more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence’.⁶⁶ Its scope is therefore not clearly defined and nor are its boundaries restricted by such things as exclusion clauses. This theme will be explored further by reference to regional refugee instruments (of the African Union, Central America and European Union), and by reference to international human rights treaties and international standards of best practice as promoted by the United Nations.

Protection from indiscriminate or generalized violence⁶⁷

The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (‘OAU Convention’)⁶⁸ not only incorporates the 1951 Refugee Convention definition of ‘refugee’ contained in article 1A(2) but also expressly includes in the definition of ‘refugee’ persons who flee their home country due to serious disturbance of public order (amongst other things):

The term ‘refugee’ shall also apply to every person who, owing to **external aggression, occupation, foreign domination or events seriously disturbing public order** in either part or the whole of his country of origin or nationality, is compelled to leave his place of

65. Australia is a State Party to both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. For an analysis of whether Australian law adequately protects stateless persons see: C Richter, ‘Statelessness in Australian Refugee Law: The (Renewed) Case for Complementary Protection’, *University of Queensland Law Journal*, 32. 2005, available at: <http://www.austlii.edu.au/au/journals/UQLJ/2005/32.html>

66. J McAdam, *Complementary Protection in International Refugee Law*, p. 21.

67. UNHCR defines the term ‘indiscriminate’ or ‘generalized’ violence as ‘the exercise of force not targeted at a specific object or individual’. Therefore, ‘persons threatened by indiscriminate violence’ refers to ‘people outside their countries of origin (or in the case of stateless persons, outside their countries of habitual residence), who cannot return because there is a real risk that they would face threats to life, to physical integrity or freedom resulting from such violence’: UNHCR, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, p. 3.

68. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁶⁹ (Emphasis added).

Consequently, this broad definition of ‘refugee’ has meant that in this context, a system of complementary protection has not evolved in Africa as most States are a party to the 1969 OAU Convention.⁷⁰ Similarly, Central America’s 1984 Cartagena Declaration on Refugees recommends incorporation of ‘refugees’ who have fled their homeland because their lives, safety or freedom have been threatened by such things as generalized violence:

...the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their **country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**⁷¹ (Emphasis added).

In contrast, there have been a large number of complementary protection mechanisms utilized in Europe which led to the attempted harmonization of such mechanisms through the adoption amongst Member States of the EU Qualification Directive.⁷² Though the Preamble of the Directive asserts the primacy of the 1951 Refugee Convention by stating that it provides the ‘cornerstone of the international legal regime for the protection of refugees’, it also introduces the concept of ‘subsidiary protection’ which it essentially defines as international protection extended on the basis of ‘human rights instruments and practices existing in Member States’.⁷³

The Directive defines ‘a person eligible for subsidiary protection’ as:

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69. Article 1(2) of the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. See also the revised text of the 1966 Bangkok Principles on the Status and Treatment of Refugees which was adopted by the Asian-African Legal Consultative Organization in 2001 which incorporates a refugee definition similar to that in the OAU Refugee Convention.
 70. UNHCR, *Protection Mechanisms Outside of the 1951 Convention* (“Complementary Protection”), p. 31.
 71. Conclusion 3 of the 1984 Cartagena Declaration on Refugees adopted at a colloquium entitled ‘Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios’ held at Cartagena, Colombia from 19–22 November 1984.
 72. UNHCR, *Protection Mechanisms Outside of the 1951 Convention* (“Complementary Protection”), p. 31.
 73. Preambular paragraphs 3 and 25 of the Directive. McAdam argues that the term ‘subsidiary protection’ is not exactly the same as complementary protection. Rather, it is a ‘narrow form of complementary protection’ because it essentially creates a hierarchical protection structure whereby complementary protection is given an ‘intrinsically secondary role’: J McAdam, *Complementary Protection in International Refugee Law*, p. 49.

A third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would **face a real risk of suffering serious harm** as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (emphasis added).⁷⁴

Article 15 defines ‘serious harm’ as:

- (a) death penalty or execution;⁷⁵ or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;⁷⁶ or
- (c) **serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.** (Emphasis added).

Though the first two paragraphs are based on obligations arising from CAT and the European Convention on Human Rights (ECHR) and its Protocols, the third paragraph (relating to indiscriminate violence) ‘cannot be traced to language found in a specific universal or regional human rights instrument. Instead, it has more of a link to the concepts found in the OAU Convention and the Cartagena Declaration in so far as these relate to situations of armed conflict’.⁷⁷

According to the UNHCR the scope of article 15(c) was narrowed during the drafting of the Directive to the point where the terminology eventually adopted ‘is not entirely clear’. In fact UNHCR emphasises that Member States may have difficulty reconciling the requirement that there be an ‘individual threat’ in a situation involving ‘indiscriminate violence’.⁷⁸

74. Article 2(e) of the Council Directive 2004/83/EC.

75. Article 1 of the Second Optional Protocol to the ICCPR contains a similar requirement. See further J McAdam, *Complementary Protection in International Refugee Law*, pp. 66–68.

76. The specific limitation requiring the ill-treatment to occur ‘in the country of origin’ may have been incorporated to ‘prevent claims based on a lack of resources - in particular, a lack of medical treatment - in the country to which return is contemplated’ and to overcome a claim of possible torture in a third country to which return is being contemplated though such persons would arguably be protected from *refoulement* by virtue of the ECHR and ICCPR: GS Goodwin-Gill and J McAdam, p. 326. See further J McAdam, *Complementary Protection in International Refugee Law*, pp. 68–70.

77. UNHCR, *Protection Mechanisms Outside of the 1951 Convention* (“Complementary Protection”), p. 18.

78. UNHCR, *UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, pp. 4–5. Note also that Preambular

However, as the European Court of Justice recently found, in assessing the link to the individual, the emphasis should not be on the individual nature of the threat but rather on the severity of the situation involving generalised (non-discriminatory) violence. Such violence would need to be so serious that a person within the ambit of that violence may be subject to a risk of serious harm to their person or life. Such an interpretation stemmed from the aim of the provision which is to ‘grant international protection to a person placed in a situation in which he is at risk of suffering a breach of one of his rights, which is one of the most fundamental (like the right to life, the right not to be tortured, and so on)’.⁷⁹ Importantly, in the Court’s opinion such a risk would need to be equivalent to ‘the risk run by those who may claim refugee status or the application of Article 15(a) or (b)’.⁸⁰

In summary, these three regional initiatives highlight a growing recognition of States providing protection from indiscriminate or generalized violence arising from general humanitarian principles. However, it must be remembered that people facing such threats, could in many circumstances, seek protection on the basis of existing international human rights treaties.

Protection on compassionate or practical grounds

Complementary protection should be clearly distinguished from protection provided by countries on purely compassionate or practical grounds, such as the granting of protection on the basis of a person’s age, medical condition, or family connections.⁸¹ Such grounds are broadly humanitarian in nature and generally have no legal basis related to complementary protection.

paragraph 26 states that ‘risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm’.

79. *Elgafaji v Staatssecretaris van Justitie* (9 September 2008) ECJ, paragraph 33.

80. *Elgafaji v Staatssecretaris van Justitie*, paragraph 34, See also J McAdam, ‘The impact of the Standard of Proof on Complementary Protection Claims. On the implementation of articles 15(a) and (b), see UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, p. 72 which notes ‘... it was expected that decision makers would only address Article 15(c) once it was clear that the alleged threat did not constitute treatment under (a) or (b). However, the review of decisions did not provide this clarity. It may be deduced from the decisions analysed that either decision makers do not necessarily exclude Articles 15(a) and (b) before considering Article 15(c) i.e. the grounds are not considered a hierarchy; and/or that some authorities apply a restrictive interpretation of Article 15(b) which may not be in line with the case-law of the European Court of Human Rights’.

81. UNHCR Executive Committee, ‘Conclusions on International Protection’, No. 103 (LVI) – 2005.

Protection for socio-economic reasons

According to McAdam ‘there is scant support for a right to remain in a State for socio-economic reasons or due to a severe paucity of resources in the country of origin, including in relation to medical care’.⁸² Though the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸³ to which Australia is a Party contains a variety of economic, social and cultural rights, they are not readily enforceable nor are there any specific protection mechanisms under international law for people fleeing violations of such rights.⁸⁴

Protection on the basis of natural or ecological disasters and climate change

There is no doubt that natural or ecological disasters such as the December 2004 tsunami may create a situation where peoples’ basic human rights are seriously at risk. In addition, it has been predicted that the likely impact of global warming will, over time result in increasing numbers of what are commonly known as ‘climate change refugees’. However, people forced to flee their homeland as a result of such circumstances alone will not normally satisfy the international legal definition of ‘refugee’, which requires the flight to be as a result of a well-founded fear of persecution due to race, religion, nationality, political opinion or membership of a particular social group. Therefore, according to McAdam, ‘the rights, entitlements and protection options for people displaced by climate change are uncertain in international law’.⁸⁵

Notwithstanding this, UNHCR is of the view that the return of individuals who have fled their country due to natural or ecological disasters ‘might in exceptional circumstances reach a level of severity amounting to inhuman treatment’ to give rise to protection from

82. J McAdam, *Complementary Protection in International Refugee Law*, p. 163. In the refugee determination context, see M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press, Cambridge, 2007; note exceptional cases such as *D v United Kingdom* (1997) 24 EHRR 425 involving the human rights obligations of the United Kingdom in respect of persons with HIV/AIDS, though this case has been strictly interpreted in subsequent cases such as *N v Secretary of State for the Home Department* [2005] 4 All ER 1017.

83. International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

84. J McAdam, *Complementary Protection in International Refugee Law*, p. 164. Though note McAdam’s analysis of the European Convention on Human Rights at pp. 163–171.

85. J McAdam ‘Climate Change ‘Refugees’ and International Law’, *NSW Bar Association*, 24 October 2007, p. 2. See also J McAdam and B Saul, ‘An insecure climate for human security? Climate-induced displacement and international law’, Working Paper 4, *Sydney Centre for International Law*, University of Sydney, viewed 14 April 2009, <http://www.law.usyd.edu.au/scil/pdf/SCIL%20WP%204%20Final.pdf>

refoulement under international human rights treaties.⁸⁶ However, the problem as McAdam sees it is not only do very few international human rights actually give rise to a protection obligation on the part of the receiving State (that is preventing a person's return) moreover, it is doubtful whether violations which are not inflicted by the State will give rise to a protection obligation at international law.⁸⁷

Though there is increasing consensus that an international protection regime to address the increasing number of people affected by environmental crisis is needed, it appears unlikely that the ambit of complementary protection at international law is presently wide enough to encapsulate such persons.⁸⁸

The issue of legal status

Persons in need of international protection that do not come within the ambit of the 1951 Refugee Convention have traditionally been granted various statuses by receiving States, ranging from 'B Status', 'subsidiary protection status', 'de facto status' and 'humanitarian status' just to name a few.⁸⁹ Such statuses typically attached different (and sometimes fewer) rights than those attached to Refugee Convention status. According to UNHCR, divergence in State practice in interpreting the 1951 Refugee Convention as well as a tendency by States to resort to these various alternative statuses for ease of determination has undeniably led to

86. To this end, UNHCR asserts that notwithstanding the absence of a legal obligation to do so, States respected their request for countries to suspend the return of people to areas affected by the December 2004 tsunami: UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, p. 6, UNHCR Refworld, viewed 14 April 2009, <http://www.unhcr.org/refworld/docid/47fd49d.html>. See also UN High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 14 August 2009, UNHCR Refworld, viewed 17 August 2009, <http://www.unhcr.org/refworld/docid/4a8e4f8b2.html>

87. J McAdam 'Climate Change 'Refugees' and International Law', *NSW Bar Association*, 24 October 2007, p. 9.

88. See further A Lopez, 'The Protection of Environmentally Displaced Persons in International Law', *Environmental Law*, 37, 2007; E Pigué, 'Climate change and forced migration', *UNHCR New Issues in Refugee Research*, No. 153, January 2008, viewed 15 February 2009, <http://www.unhcr.org/research/RESEARCH/47a316182.pdf>; S Castles, 'Environmental change and forced migration: making sense of the debate', *UNHCR New Issues in Refugee Research*, No. 70, October 2002, viewed 15 February 2009, <http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>; J Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', *New York University Environmental Law Journal*, 1997–1998; V Kolmannskog, 'Future Floods of Refugees. A Comment on Climate Change and Forced Migration', *Norwegian Refugee Council*, April 2008, viewed 15 February 2009, http://www.nrc.no/arch/_img/9268480.pdf

89. UNHCR, *Complementary Forms of Protection*, 1 April 2001, p. 1, UNHCR Refworld, viewed 19 April 2009, <http://www.unhcr.org/refworld/docid/3b20a7014.html>

persons who should be accorded refugee status instead being granted complementary forms of protection.⁹⁰ In addition, in many States this resulted in differing standards of treatment depending upon the type of status granted.⁹¹

For the purposes of attributing a legal status to the individual concerned (that is their rights and obligations within the receiving country), McAdam argues that the source of the international protection obligation is somewhat immaterial. She asserts that the 1951 Refugee Convention is a specialist human rights instrument capable of covering all individuals protected by the expanded scope of *non-refoulement*.⁹²

Refugee protection is a sub-set of human rights law, and since the Convention is a specialist human rights instrument, the conceptualization of protection that it embodies has necessarily been extended by developments in human rights law. By contrast to the universal human rights instruments, which are based on a more abstract and wide-ranging human rights ideal, the Convention is unique in creating a legal status for its beneficiaries, the components of which are non-derogable and tailored to the precarious legal position of non-citizens whose own country of origin is unable or unwilling to protect them. The rights contained in the Refugee Convention are not innately superior to those in the universal human rights instruments, being largely based on and extended by the latter; they are simply applied differently.⁹³

The UNHCR has similarly expressed the view that the 1951 Refugee Convention is a dynamic document which is not only informed by its object and purpose but also by developments in related areas of law which offer the possibility of extending the Convention to ‘persons in need of international protection outside [its] classical scope’.⁹⁴ However, Hathaway argues that Convention status must be ‘textually reserved’ for Convention refugees and that it would be unrealistic to expect governments to grant equal treatment to non-refugees.⁹⁵

90. UNHCR, *Complementary Forms of Protection*, pp. 1–2.

91. At a minimum, UNHCR advocates that States should provide beneficiaries of complementary protection with the basic civil, political, social and economic rights and ‘ensure the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the fundamental principle of family unity’: UNHCR, *Complementary Forms of Protection*, pp. 6–7.

92. J McAdam, *Complementary Protection in International Refugee Law*, ch. 6.

93. GS Goodwin-Gill and J McAdam, p. 331; J McAdam in *Complementary Protection in International Refugee Law*, states ‘the principle of non-discrimination in human rights law provides support for granting an identical status’, p. 220.

94. UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, p. 4.

95. As discussed in J McAdam, ‘What standard of protection is owed by New Zealand to those who must be allowed to stay?’ Conference Presentation at ‘Human Rights at the Frontier: The

On a practical level, difficulties may arise in granting the same legal status to beneficiaries of complementary protection as that of Convention refugees— which might include persons that are excluded from the latter for example for reason of being suspected of having engaged in serious criminal activity.⁹⁶ Though it is outside the scope of this paper to explore this issue in any great detail, it is clear that if such persons can not be removed, the State should seek to have them extradited, prosecuted or punished for the serious crimes they have committed.⁹⁷ If such mechanisms can not be engaged, McAdam argues such persons should instead be treated in accordance with minimum human rights standards based on international human rights norms.⁹⁸

Cessation of status

The 1951 Refugee Convention contains ‘cessation clauses’ which set out the conditions under which a refugee ceases to be a refugee. Such provisions ‘envisage an end to refugee status when international protection is no longer necessary’.⁹⁹

Article 1C of the 1951 Refugee Convention relevantly provides that:

This Convention shall cease to apply to any person falling under the terms of section A if:

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

New Immigration Act in International Perspective’, Conference organized by the Legal Research Foundation and the Faculty of Law, Auckland University, Auckland, 11 September 2008.

96. For further information, see UNHCR, *Selected Documents Relevant to National Security and Counter-Terrorism*, January 2008, viewed 23 January 2009, <http://www.unhcr.org/refworld/docid/4794c81c2.html>; R Haines, ‘National Security and *Non-Refoulement* in New Zealand: Commentary on *Zaoui v Attorney-General (No.2)*’ in J McAdam (ed) *Forced Migration, Human Rights and Security*, pp. 63–91.
97. See further J Rikhof, ‘War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context’, *International Journal of Refugee Law*, published online 28 August 2009; N Larsaeus, ‘The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection - The Unresolved Issue of Excluded Asylum Seekers’, *73 Nordic Journal of International Law*, 69, 2004; D MacGregor, ‘Bringing war criminals to justice in Australia: upholding international criminal law and the principle of non-refoulement’, *Alternative Law Journal*, 32(3), 2007.
98. J McAdam, *Complementary Protection in International Refugee Law*, pp. 234–245.
99. UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000, EC/50/SC/CRP.18, p. 4, UNHCR Refworld, viewed 9 February 2009, <http://www.unhcr.org/refworld/docid/47fdfb491a.html>

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality ...

According to the UNHCR, complementary protection, like protection under the 1951 Refugee Convention, ‘is not necessarily permanent in nature’ and therefore provision should be made, preferably in legislation for this possible eventuality.¹⁰⁰ Accordingly, in Conclusion No. 103 (LVI) – 2005 the Executive Committee:

Recommends that where it is appropriate to consider the ending of complementary forms of protection, States adopt criteria which are objective and clearly and publicly enunciated; and *notes* that the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may offer helpful guidance in this regard.¹⁰¹

In keeping with this recommendation, EU Qualification Directive expressly provides for the cessation of protection ‘when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required’. In determining whether this precondition is satisfied Member States must ‘have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm’.¹⁰²

Part II – statutory and policy framework in Australia

Development of complementary protection in Australia

In 2004 the Senate Committee inquiry into Ministerial Discretion in Migration Matters expressed concern that Australia remained one of the few countries of the developed world that did not have a system of complementary protection.¹⁰³ However, the former coalition government expressed the view that Australia already effectively had a system of complementary protection in place (though it did not previously seek to label it as such) as it provided temporary and permanent solutions to those in humanitarian need through the

100. UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, p. 4.

101. UNHCR Executive Committee, ‘Conclusions on International Protection’, No. 103 (LVI) – 2005.

102. Article 16 of Council Directive 2004/83/EC.

103. Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. 145, viewed 2 February 2009, http://www.aph.gov.au/Senate_minmig/report/index.htm

ministerial intervention powers and more broadly, special category humanitarian visas.¹⁰⁴ The development of these mechanisms will be discussed in further detail below.

Visas granted on humanitarian grounds

Though discretionary powers of decision-makers and/or the minister have existed in one form or another since the *Immigration Restriction Act 1901*, it was not until 1981 that section 6A was inserted into the *Migration Act 1958 (Cth)* (Migration Act) which created a statutory permanent onshore humanitarian visa system.¹⁰⁵ Section 6A of the Migration Act was designed to regulate the status of persons who entered Australia on a temporary basis (or with no permission at all) and encompassed not only persons claiming ‘territorial asylum’ but also those seeking to remain on the basis of humanitarian grounds. Paragraph 6A(1)(e) relevantly stated:

(1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say:

...

(e) he is the holder of a temporary entry permit which is in force and there are **strong compassionate or humanitarian grounds** for the grant of an entry permit to him (emphasis added).

However, such broad criteria arguably resulted not only in inconsistent decision-making but also left the decisions of the Department of Immigration (the department) open to extremely broad judicial scrutiny, the result of which ‘served to expand the scope of the paragraph well beyond the government’s original intention’.¹⁰⁶ Paragraph 6A(1)(e) was subsequently repealed with effect from 19 December 1989 and replaced with a visa decision making structure that was based on much more defined visa criteria in the legislation.¹⁰⁷

104. Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), ‘*Complementary Protection and Australian Practice*’ in UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, *Complementary Protection: Discussion Paper*, No.2/2005, p. 8, viewed 4 December 2008, <http://www.unhcr.org.au/pdfs/Discussion22005.pdf>. Note that Goodwin-Gill and McAdam argue that complementary protection does not currently exist in Australian domestic law: GS Goodwin-Gill and J McAdam, p. 221. See further J McAdam, *Complementary Protection in International Refugee Law*, pp. 131–134.

105. For further information on the history of ministerial discretion and the Migration Act, see K Carrington, *Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context*, Current Issues Brief, No. 3 2003–04, Parliamentary Library, Canberra, 15 September 2003, viewed 9 December 2008, <http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib03.htm>

106. DIMIA, Submission No. 24, Senate Select Committee on Ministerial Discretion in Migration Matters, 2004, p. 22.

107. DIMIA, Submission No. 24, p. 22.

To overcome any unjust consequences flowing from the imposition of a stricter regulatory regime, the minister was given discretion to determine that certain provisions of the Act should not apply or to make a ‘more favourable decision’.¹⁰⁸ Therefore, the minister’s discretionary power was retained as a ‘safety net’ to address circumstances which the legislation did not anticipate or where there were compelling, compassionate or humanitarian considerations.

According to the department, ‘the insertion of the ministerial discretion powers was developed in line with the views and analysis of the ARC [Administrative Review Council] and the CAAIP [Committee to Advise on Australia’s Immigration Policies], as well as having broad support from Parliamentarians and all Parties’.¹⁰⁹

However, as Dr Mary Crock, then Senior Lecturer in Law at the University of Sydney observed:

With one stroke of the legislative pen, the generic power to act with compassion and humanity was removed from mainstream decision making to be channelled ultimately into the hands of a single politician, the Minister for Immigration.¹¹⁰

Special category visas

The department has previously expressed the view that Australia provides appropriate solutions to those in humanitarian need in a variety of different ways.¹¹¹ In addition to ministerial intervention powers, Australia has ‘classes of visas which have been used to provide temporary haven for certain prescribed groups’:

For example, in 1999 Temporary Safe Haven visas were used to provide temporary residence to some 4 000 Kosovars who were brought to Australia for temporary protection

108. K Carrington, p. 5.

109. DIMIA, Submission No. 24, p. 26.

110. Dr Mary Crock, Submission no. 34, *Senate Select Committee on Ministerial Discretion in Migration Matters*, 2004, p. 2 cited in *Senate Select Committee on Ministerial Discretion in Migration Matters*, p. 141. Though note that the original Migration Legislation Amendment Bill 1989 which shifted any residual exercise of discretionary power to the Secretary of the Department of Immigration had to be withdrawn following its blockage in the Senate by the then Coalition opposition and the Australian Democrats who argued that the Bill went too far in removing Ministerial discretion: K Carrington, pp. 3–4.

111. Though this paper is primarily concerned with the complementary protection mechanisms available to persons in Australia, for completeness, there are also humanitarian visa classes available to persons who are offshore that provide protection on grounds broader than those set out under the 1951 Refugee Convention. For example, the Subclass 202 Global Special Humanitarian visa is available to persons who ‘are subject to substantial discrimination, amounting to gross violation of human rights in their home country’ that are no longer in their country of origin.

because they could not return home due to conflict. An equivalent ‘Safe Haven Visa’ was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999 ... In 1990 some 6 900 people were granted visas under a new visa category to allow certain people who were in Australia illegally prior to 19 December 1989 to apply to regularise their status. In November 1993, over 42 700 people from the People’s Republic of China, the former Yugoslavia, Sri Lanka and other countries were accommodated under three special visa categories. A further group of 7 200 people who did not meet the criteria for the November 1993 visas benefited from a further special initiative known as ‘Resolution of Status’ in June 1997.¹¹²

Though such an approach undoubtedly reduced the number of requests for the exercise of the minister’s intervention powers, such an approach failed to ensure on an individual basis that persons receiving special category visas had compelling circumstances that warranted the grant of visa. Nor did such an approach address the outcome of those that did not satisfy the criteria for the visa. Accordingly, there was a change in government policy from this broad group resolution approach to that of individual assessments. As a result there have been no other onshore special concession categories introduced since 1997.¹¹³

Though not a special category visa *per se*, the Return Pending Bridging visa which was introduced in 2004 (regularising stay for up to 18 months) has also been described as ‘a more recent initiative that could also be used as a form of complementary protection in certain circumstances where conditions in a country of origin made returns impracticable’.¹¹⁴

Ministerial intervention powers

In essence, the minister’s intervention powers ‘allow the Minister to exercise his or her judgement as to whether to overturn an outcome flowing from the Migration Act’:

The discretionary powers are integral features of the legal framework of the Act, providing a ‘safety net’ for the exercise of migration laws which are generally fair but may, in certain exceptional cases, lead to an unintended harsh result. The discretionary powers allow the Minister to make a decision or remove a requirement or bar to allow a more beneficial outcome for the applicant if this is in the public interest.¹¹⁵

The Commonwealth Ombudsman has also noted that the intervention powers are integral in the migration decision making process:

112. DIMIA, ‘Complementary Protection and Australian Practice’, p. 8.

113. DIMIA, Submission No. 24, pp. 44–45.

114. DIMIA, ‘Complementary Protection and Australian Practice’, p. 8. It is worth noting that such a status is arguably not granted on the basis of legal obligations arising from Australia’s international obligations but rather on the basis of practical obstacles preventing return and/or humanitarianism.

115. DIMIA, Submission No. 24, p. 14.

They play an important role in permitting or facilitating action that tempers the harsh, unpredictable or unintended effect that can arise occasionally in the administration of a heavily codified system of rules of the kind found in the Migration Act and Regulations. In an area such as migration decisionmaking, where the decisions can markedly affect the living situation not only of those about whom a decision is made, but also their relatives and accomplices in Australia, it is vital that a safety net scheme is preserved in some form or another.¹¹⁶

The department claims that in the absence of migration provisions regarding Australia's international obligations arising from such treaties as the CAT and ICCPR, the ministerial intervention powers 'under sections 351 or 417 of the Migration Act are used to enable Australia to meet those obligations in respect of individual applicants'.¹¹⁷ However, the precise number of such interventions (or more importantly, non-interventions), specifically for humanitarian reasons under such international treaties is not known.¹¹⁸

Notwithstanding, the department has noted that 'there is no indication that there are significant numbers of persons entitled to CAT, ICCPR or CRC protection against return who do not also meet the Refugee Convention definition of a refugee'.¹¹⁹ More recently, the minister similarly noted that 'people do need to understand that I think complementary protection is important and it will be a useful addition to the protections we offer. But I do want to stress, because I think some people think that there are thousands of people in the system who would be affected by this, that the numbers are relatively small in terms of the ministerial intervention requests I see'.¹²⁰

Basis for reform

In 2000, the then Senate Legal and Constitutional References Committee's inquiry into *Australia's Refugee and Humanitarian Determination Processes* considered amongst other things, 'the adequacy of a non-compellable, non-reviewable Ministerial discretion to ensure

116. Office of the Commonwealth Ombudsman, Submission No. 28, *Senate Select Committee on Ministerial Discretion in Migration Matters*, 2004, p. 5.

117. Senate Select Committee on Ministerial Discretion in Migration Matters, p. 129 citing DIMIA, Submission no. 24, p. 17. See also: DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), section 11, accessed using the Department's Legend database.

118. Senate Select Committee on Ministerial Discretion in Migration Matters, p. 130.

119. The (then) Department of Immigration, Multicultural and Indigenous Affairs, '*Complementary Protection and Australian Practice*', p. 8.

120. Senator the Hon. Chris Evans (Minister for Immigration and Citizenship), Senate Estimates Committee, 21 October 2008, p.123. See also Senator the Hon. Chris Evans, Senate Estimates Committee, 24 February 2009, p. 59.

that no person is forcibly returned to a country where they face torture or death'.¹²¹ In doing so, the Committee recognised 'the implicit concern in the terms of reference that the existing administrative procedure is inadequate' due to the 'lack of integration of CAT, CRC and the ICCPR within the refugee determination process prior to the triggering of ministerial discretion under section 417'.¹²² Though the Committee was of the view that the minister's discretionary powers were an appropriate means through which Australia could meet its international obligations under CAT and ICCPR¹²³ it nonetheless recommended that the government 'examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the *non-refoulement* obligations of the CAT and ICCPR into domestic law'.¹²⁴ In doing so it paid particular attention to people, particularly impacted by the existing arrangements, such as the case of the Chinese woman, identified only as Ms Z, which revealed the grave consequences that can arise due to the informal nature of the process. In brief, Ms Z was returned to China where she was forced to undergo an abortion whilst eight and a half months pregnant notwithstanding repeated verbal requests to be allowed to remain in Australia which were not recognised as section 417 requests.¹²⁵

In 2004, the Senate Select Committee on *Ministerial Discretion in Migration Matters* expressed concern that Australia did not have a system of complementary protection. The Committee stated that it was 'left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends'.¹²⁶ The Committee consequently recommended:

... that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.¹²⁷

121. Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An examination of Australia's refugee and humanitarian determination processes*, Commonwealth of Australia, Canberra, June 2000, p. 237, viewed 24 February 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/index.htm

122. Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 237.

123. Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 64.

124. Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 60.

125. For further information see: Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, ch. 9 ('the Case of the Chinese Woman'). See also ch. 7 ('the Case of Mr Se'); M Crock, 'A Sanctuary Under Review: Where to from here for Australia's Refugee and Humanitarian Program?', (2000) 23(3) *University of New South Wales Law Journal* 246.

126. Senate Select Committee on Ministerial Discretion in Migration Matters, Commonwealth of Australia, Canberra, p. 145, viewed 20 February 2009, http://www.aph.gov.au/Senate/committee/minmig_ctte/index.htm

127. Senate Select Committee on Ministerial Discretion in Migration Matters, p. 145.

The Senate Legal and Constitutional References Committee again examined the issue of complementary protection in 2006 when it conducted an inquiry into the *Administration and Operation of the Migration Act 1958*.¹²⁸ In acknowledging that some level of ministerial discretion is needed to give the system a degree of flexibility, the Committee specifically recommended that:

... the Migration Act be amended to introduce a system of ‘complementary protection’ for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be returned. Consideration of claims under the Refugee Convention and Australia’s other international human rights obligations should take place at the same time. A separate humanitarian stream should be established to process applicants whose claims are in this category, including a review process.¹²⁹

Though these recommendations were not subsequently implemented by the former Coalition Government, some two months after commencing in the role, the newly appointed immigration minister expressed concern over the scope of his discretionary powers under the Act:

In a general sense I have formed the view that I have too much power. The act is unlike any act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm.¹³⁰

An external review into ministerial powers was subsequently commissioned by the minister to examine amongst other things potential short and longer term directions for change. The report, released in July 2008, highlighted the use of the minister’s personal discretion to determine claims based on Australia’s international obligations and looked favourably on the 2004 model proposed by the Refugee Council of Australia (discussed below).¹³¹

128. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, Commonwealth of Australia, Canberra, March 2006, viewed 20 February 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/index.htm

129. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 150.

130. C Evans (Minister for Immigration and Citizenship), Additional Senate Estimates, 19 February 2008, p. 31.

131. Elizabeth Proust, ‘Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations’, 31 January 2008, p. 10, viewed 23 February 2009, <http://www.minister.immi.gov.au/media/media-releases/2008/proust-report.pdf>.

Existing policy framework

Development of administrative guidelines

The administrative guidelines that outline the circumstances in which the minister may consider it appropriate to exercise discretion have grown and evolved significantly over the years from a statement of broad humanitarian principles to what is now a comprehensive and detailed policy guideline. However, the essential content and scope of the power has arguably not significantly changed since 1999 rather, the language and format of the guidelines have developed somewhat.

Guidelines issued in 1990 focussed primarily on the exercise of discretion where the minister considered it broadly to be in the ‘public interest’ to do so. In December of the same year, Senator the Hon. Gerry Hand, then Minister for Immigration, Local Government and Ethnic Affairs articulated ‘principles’ to assist in the referral of cases to him for consideration. Though one such principle related to ‘compassionate circumstances’, the resultant harm was not that felt by the applicant:

[T]he applicant presents strong compassionate circumstances of such an order that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or lawful permanent resident aggrieved by the decision.¹³²

However, it was not until mid 1994 that guidelines were issued by Senator the Hon. Nick Bolkus (Senator Bolkus’ 1994 Guidelines) that specifically mentioned Australia’s commitment to protecting human rights (though no mention was made of specific international treaties). Relevantly, they stated:

In accordance with Australia’s commitment to protection of human rights and the dignity of the individual, it is in the public interest to **offer protection to those persons whose particular circumstances and personal characteristics provide them with a sound basis for expecting to face, individually, a significant threat to personal security, human rights or human dignity on return to their country of origin.**¹³³ (Emphasis added).

More specifically, these guidelines went on to say that it would be in the public interest to ensure that protection be offered to persons who fall into one of the following three categories:

- persons with Convention related claims in the past and continuing subjective fear
- persons likely to face treatment closely approximating persecution, and

132. DIMIA, Submission No. 24, Attachment 5.

133. DIMIA, Submission No. 24, Attachment 7.

- persons facing serious mistreatment which while not Convention related constituted persecution.¹³⁴

These guidelines remained in place until the Hon. Philip Ruddock MP issued revised guidelines on 4 May 1999 known as Migration Series Instruction 225 (MSI 225). Migration Series Instructions (or MSIs as they are collectively known) are by their own terms, simply ‘departmental policy instructions’ and within the hierarchy of departmental policy, one of the lowest.¹³⁵ MSI 225 largely borrows language used in Senator Bolkus’ 1994 Guidelines (especially with regard to persons who marginally fell outside the ambit of the 1951 Refugee Convention). However, it significantly expanded the scope of what might constitute ‘unique and exceptional’ circumstances with express reference to specific articles of international human rights treaties to which Australia is a Party, such as articles 1 and 3 of CAT, article 3 of CRC, and articles 7 and 23 of ICCPR. MSI 225 governed the exercise of ministerial discretion powers for some four years until it was replaced by MSI 386 in mid 2003.¹³⁶ In relation to the exercise of the ministerial intervention powers in cases exhibiting ‘unique and exceptional circumstances’ on humanitarian grounds based on international human rights treaties, the difference between MSI 225 and 386 is insignificant.

In December 2008 MSI 386 was replaced when Senator the Hon. Chris Evans issued Procedures Advice Manual 3 (PAM3): Act - Ministerial powers - Minister’s guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J).¹³⁷ Interestingly, under the revised guidelines, the circumstances in which the minister might consider it appropriate to intervene on the basis of Australia’s obligations under international human rights treaties remains substantially the same as it did under both MSI 225 and 386. Two notable exceptions are that the new revised guidelines provide that the minister will generally only consider requests for intervention from persons in the community (not in immigration detention) who are ‘lawfully’ in Australia (such as those that have applied for or been issued a visa).¹³⁸

134. DIMIA, Submission No. 24, Attachment 7.

135. As compared to Directions issued by the minister under section 499 of the Migration Act which are ‘policy instructions, albeit at the highest policy level’ and by law must be followed and be laid before each house of the parliament. ‘Policy and procedure guidance on aspects of migration law and policy not yet covered by PAM3 Act or Regulations policy instructions are in Migration Series Instructions (MSIs): DIAC, PAM3, Using PAM3 – Related policy instructions, paragraph 1.5.

136. Former Migration Series Instructions 386 and 387 are reproduced in the Senate Inquiry into Ministerial Discretion in Migration Matters, March 2004, Appendix 5, viewed 4 December 2008, http://www.aph.gov.au/senate_minmig/report/e05.pdf.

137. MSI 387 was also replaced on 5 December 2008 by DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers.

138. DIAC, PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), paragraph 11. Though note that ‘exceptions to this would be where a person has been assessed as engaging Australia’s *non-refoulement* obligations under ICCPR, CAT, or CROC or where a review tribunal has referred a case to the

Secondly, an additional category was included that may elevate a case to be ‘unique or exceptional’ that aimed broadly at persons who are stateless.¹³⁹ These revised guidelines will be discussed further below.

Scope of the current policy guidelines

There is currently no provision in the Migration Act or Migration Regulations 1994 (Migration Regulations) (or other Australian legislation) that directly and immediately enables a person to engage Australia’s protection obligations under CRC, ICCPR or CAT. Rather, under section 417 of the Migration Act, the minister has the power to substitute a decision of the Refugee Review Tribunal (RRT) with another decision that is more favourable to the applicant where it would be in the public interest to do so (discussed further below).¹⁴⁰ Consideration of Australia’s international obligations arising under these international human rights treaties may be relevant when the minister considers exercising his/her discretion under this provision though it is not obligatory.¹⁴¹ Moreover, the option to do so is not guided by legislative provisions that have been scrutinised by parliament. Rather, it is guided by departmental policy contained in:

- PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J) (**minister’s guidelines**), and
- PAM3: Act - Ministerial powers - Administration of ministerial powers (**Instructions**).¹⁴²

Importantly, these guidelines are not legally binding on the minister: they purposefully do not create legal ‘criteria’ to be satisfied, nor do they establish precedents, are not exhaustive in

department for the Minister’s consideration’: DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers.

139. ‘Where the Department has determined that the person, through circumstances beyond their control, is unable to be returned to their country/countries of citizenship or usual residence’: DIAC, PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers, paragraph 11.

140. The Minister may also substitute a more favourable decision for a decision of the Migration Review Tribunal (MRT) (section 351), a decision of the Administrative Appeals Tribunal (AAT) in relation to an MRT- reviewable decision (section 391), a decision of the AAT in relation to an RRT-reviewable decision (section 454); and may set aside an AAT protection visa decision and substitute another decision that is more favourable to the applicant in the review (section 501J).

141. ‘The following factors [CAT, ICCPR etc] *may* be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances (emphasis added)’: DIAC, PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers, paragraph 11.

142. These instructions are by their own terms designed to assist department officers in applying the Minister’s guidelines.

scope nor obligate the minister in any way to exercise his/her discretion, irrespective of the compelling nature of a particular case.¹⁴³ In addition, the decision by the minister not to exercise, or not to consider the exercise of the discretion conferred by section 417 of the Migration Act is not reviewable.¹⁴⁴

The instructions provide that the minister can only exercise his/her discretionary powers when an applicant has exhausted their merit review rights and consideration will not normally be given to matters that are still before the Courts. Further, the minister will generally only consider whether to exercise his/her discretion in cases that exhibit one or more ‘unique or exceptional circumstances’ (discussed below). However, the determining factor, if one can be elucidated, is that it must be in the ‘public interest’ for the minister to intervene.

Deciding what is in the ‘public interest’

The minister’s guidelines broadly state that ‘the public interest may be served through the Australian Government responding with care and compassion where an individual’s situation involves unique or exceptional circumstances’ and what is and what is not in the public interest is a matter for the minister to determine. In contrast, Senator Bolkus’ 1994 Guidelines expressly stated what the government perceived to be in the public interest, namely, ‘to offer protection to those persons whose particular circumstances and personal characteristics provide them with a sound basis for expecting to face, individually, a significant threat to personal security, human rights or human dignity on return to their country of origin’.¹⁴⁵

Unique or exceptional circumstances

The minister’s guidelines provide a list of factors that may be relevant, individually or cumulatively, in assessing whether a case meets this precondition. However, the list is broad ranging and covers circumstances not necessarily linked to Australia’s international obligations, for example, the length of time a person has been in Australia, their level of integration into the Australian community, and even their age, health and/or psychological state may be relevant factors.

In addition to these broader non-legal considerations, the list specifically mentions consideration of Australia’s obligations under international treaties, such as the CAT, CRC

143. It is also worth noting that the new revised guidelines have been elevated in the hierarchy of departmental policy, but PAM 3 guidelines are still not legally binding on a decision maker. See further *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24.

144. See further *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, viewed 3 March 2009, <http://www.austlii.edu.au/au/cases/cth/HCA/2003/1.html>

145. DIMIA, Submission No. 24, Attachment 7.

and ICCPR and more broadly, those whose particular circumstances take them marginally outside the ambit of the 1951 Refugee Convention.

Though the minister's guidelines do not create statutory 'criteria' to be satisfied, they are really the only official source that explains the circumstances in which the minister may consider it appropriate to intervene in cases that may engage Australia's international obligations. Accordingly, the guidance they provide with respect to the above treaties will be examined in further detail below.

For completeness, asylum seekers who are taken to Christmas Island for processing and who are seeking protection on the basis of Australia's international obligations continue to have such claims assessed under a non-statutory process. However, the instrument governing this process does little more than name the international treaties to which assessing officers are to have regard if the person is found not to be a refugee.¹⁴⁶

1951 Convention relating to the Status of Refugees

The 1951 Refugee Convention has not been enacted as domestic law in Australia, apart from a reference in paragraph 36(2)(a) of the Migration Act which provides that 'a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol'. Therefore, provision in the minister's guidelines for consideration of those whose particular circumstances marginally take them outside the ambit of the 1951 Refugee Convention could be viewed as an expansion of Australia's commitment, albeit on a non-binding basis. Nonetheless, as will be shown, this is an ill-defined anomalous category which could, in certain circumstances, arguably undermine Australia's obligations under the 1951 Refugee Convention because people that should be recognized as 'refugees' may instead be granted a different, perhaps lesser domestic status under the ministerial intervention process, if at all.¹⁴⁷ This may also be the case in circumstances where refugee status has been refused on the basis of restrictive domestic statutory qualifications.¹⁴⁸

146. As at mid-2006 the Department of Immigration advised that protection assessments were being undertaken using 'Onshore Protection Interim Processing Advice (OPIPA) No.16: Refugee Status Assessment Procedures For Unauthorised Arrivals Seeking Asylum On Excised Offshore Places And Persons Taken To Declared Countries: Immigration and Multicultural Affairs Portfolio, Question Taken on Notice: Budget Estimates Hearing, 22 May 2006.

147. Note that if the minister *does* decide to intervene, a protection visa may not necessarily be granted. Rather, the minister decides 'the most appropriate visa to be granted': DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 18.

148. See for example subsection 36(3) (protection visas), section 91S (membership of a particular social group), section 91R (persecution), section 91D (safe third countries), section 46A (visa applications by offshore entry persons) etcetera. See also S Taylor, 'Australia's interpretation

The minister's guidelines provide that consideration should be given to whether the 'particular circumstances or personal characteristics of a person provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity on return to their country of origin'.¹⁴⁹ This precise language can not be traced to language found in any one specific universal or regional human rights instrument. Rather, it mirrors the language adopted by Senator Bolkus' 1994 Guidelines (as discussed above) though of course the right to personal security, human rights and human dignity are broad rights enunciated in the 1948 Universal Declaration of Human Rights (UDHR).

There are two significant limitations on this broad category:

- the threat must be linked to the 'particular circumstances or personal characteristics of the applicant', and
- there must be a sound basis for holding the belief that the threat exists (discussed further below).

Though this category does not appear to exclude threats arising in situations of armed conflict or indiscriminate violence, the requirement that the threat be linked in some way to the 'particular circumstances or personal characteristics of the applicant' suggests that a general (as opposed to individualised) threat from indiscriminate violence, no matter how serious, would not suffice.¹⁵⁰ However, without any further information it is difficult to say with any degree of certainty whether this analysis is correct. Ultimately, it would depend on whether the minister was inclined to give the category a broad or narrow interpretation.

The second category of cases that may potentially exhibit 'unique or exceptional circumstances' include 'circumstances where persons who have been or may be individually subjected to a systematic program of harassment or denial of basic rights available to others

of some elements of Article 1A(2) of the Refugee Convention', 16 *Sydney Law Review*, 32, 1994. Note also criticisms by Amnesty International that Australia is reluctant to expand the current definition of the Refugee Convention to take on board certain forms of gender persecution - such as female genital mutilation, honour killings, trafficking in certain countries, and domestic violence: Senate Select Committee on Ministerial Discretion in Migration Matters, p. 132, paragraph 8.27. For further information see L McKay, 'Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)', *Melbourne Journal of International Law*, 4, 2003; K Walker, 'Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia', (2007) *Melbourne University Law Review*, 35; A Dorevitch and M Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law', *Melbourne Journal of International Law*, 1, 2008.

149. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.
150. This conclusion is arguably supported by the requirement in the second category (discussed below) that a person must have been or may be individually subjected to mistreatment.

in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred or is not likely to occur for a Convention reason'.¹⁵¹

Again, the language used in this category comes from Senator Bolkus' 1994 Guidelines. The 'mistreatment' that must have been suffered or likely to be suffered upon return must involve a 'systematic program of harassment or denial of basic rights available to others in their country'. However, it is not clear what basic rights are being referred to. They could be international human rights or perhaps the basic rights (if any) contained in a State's constitution. The only clue given is an express geographic limitation which provides that such rights are only those that are 'available to others in their country'.¹⁵² However, this in itself raises additional uncertainties as the following example illustrates.

Australia is a Party to a host of international human rights treaties which contain a myriad of social, political, economic, social and cultural rights (see Appendix A). However, in the absence of enabling national domestic legislation, it would be difficult to argue that all (protection based) rights are directly enforceable domestically, and thereby 'available to all Australians'. Similarly, an Australian could not argue that they have been denied rights contained in any of the recently enacted Bills of Rights in some State and Territory jurisdictions, as these do not apply nationally, and even if one were to argue that they had been denied one of the express rights contained in the federal Constitution, it could equally be maintained that such rights are not available to others (such as aliens).¹⁵³ Even in this familiar context, it is difficult to ascertain with any degree of certainty what 'basic rights' are in fact available.

Another ambiguity stems from the requirement that the rights that are being protected must be available to others in their country. It is not clear whether such rights must be available in principle, in the sense that they are contained in domestic law or whether such rights must in practice be available to others in the country. These are two very different things and rarely are they likely to co-exist in countries whose nationals are seeking to benefit from inclusion within the minister's guidelines. For example, in Zimbabwe, the constitution provides for freedom of speech and of the press but that is not to say that this is so in practice as throughout 2008 'there were credible reports that CIO [Central Intelligence Organization]

151. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.

152. Senator the Hon. Nick Bolkus' 1994 guidelines expressly limited the rights to those 'available to other residents'.

153. Express rights in the Constitution include: the right to vote (s.41); trial by jury (s.80); freedom of religion (s.116); rights of out-of-state residents (s.117); right to review of government action (s. 75(v)); freedom of interstate trade (s.92); and acquisition of property on just terms s. 51(xxxi)). For further information see G Williams, *A Charter of Rights for Australia*, University of New South Wales Press, 2007, pp. 35–39.

agents and informers routinely monitored political and other meetings. Persons deemed critical of the government were frequently targeted for harassment, abduction, and torture'.¹⁵⁴

In addition, a case may come within this category if the mistreatment the person has suffered or is likely to suffer either does not amount to persecution under the 1951 Refugee Convention or has not or is not likely to occur for a Convention reason. The reference in this paragraph to Convention criteria creates some confusion because though the term 'persecution' has purposefully not been defined or clarified in the Convention¹⁵⁵ it has been qualified by a statutory meaning under section 91R of the Migration Act which is arguably more restrictive. For example, under paragraph 91R(1)(a) the Convention reason/s must be 'the essential and significant' reason or reasons for the persecution. Whether the minister is using domestic law (the jurisprudence surrounding which is complex and constantly evolving) or international law in this context is uncertain due to the non-statutory and non-transparent nature of the process.

In addition, it is not clear why harassment and denial of basic rights are the only types of mistreatment that are mentioned in the minister's guidelines. Nor is it clear why there must be a 'program' of harassment, which implies that there must be more than one incident. Not only is this somewhat at odds with the High Court's interpretation of persecution that a 'single act of oppression may suffice'¹⁵⁶ it also suggests that a higher standard of mistreatment applies for potential beneficiaries of complementary protection than for Convention refugees.¹⁵⁷

The third category of cases that may potentially exhibit 'unique or exceptional circumstances' includes 'persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees, and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person

154. U.S. Department of State, *2008 Country Reports on Human Rights Practices: Zimbabwe*, 25 February 2009, viewed 19 February 2009, <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119032.htm>

155. 'There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success': Office of the United Nations High Commissioner for Refugees, *Handbook on procedures and criteria for determining refugee status*, Re-edited January 1992, Geneva, p. 14, paragraph 51.

156. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412 at 449 as per McHugh J: 'Nor is it a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is "being persecuted" for the purposes of the Convention'.

157. See also J McAdam, *The impact of the Standard of Proof on Complementary Protection Claims*.

who has experienced torture or trauma and who is likely to experience further trauma if returned to their country’.¹⁵⁸

The RCOA has argued that persons falling within this category should actually be recognised as refugees. They base their assertion on an express exemption from the 1951 Refugee Convention cessation clauses contained in article 1C(5) which states in effect that the 1951 Refugee Convention shall not cease to apply ‘to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality’.¹⁵⁹

Another difficulty with this category lies with the threshold of harm potential beneficiaries are required to satisfy. Under the 1951 Refugee Convention, a person need only have a well-founded fear of persecution. However, the example provided in the minister’s guidelines that may come within this category is that of a person who has ‘actually experienced torture or trauma and who is likely to experience further trauma if returned to their country’. Not only does this appear to suggest that a higher standard of mistreatment or harm is required for potential beneficiaries of complementary protection than Convention Refugees, it also appears to contradict the overarching requirement that there must only be a significant threat to the person’s personal security, human rights or human dignity upon return.

Commentators have expressed diverging views as to the ‘standard of proof’ required in complementary protection cases.¹⁶⁰ There has also not been consistent State practice (such as in Canada, Germany, the United Kingdom, and Sweden) as to whether the standard of proof (in that context ‘substantial grounds’ or variations thereof) should be interpreted as requiring a higher, equal to, or lower standard than is required under the 1951 Refugee Convention (‘well-founded fear’).¹⁶¹ The United Kingdom has taken the view that different standards of proof are undesirable for a number of reasons including the effect on the individual but also on an adjudicator or tribunal who in order to do so would need to ‘indulge in mental

158. DIAC, PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers, paragraph 11.

159. RCOA, ‘Complementary Protection: The way ahead’, April 2004, p. 5 at footnote 11. See also article 1C(6) in similar terms relating to persons without nationality. See further D Milner, ‘Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention’, *International Journal of Refugee Law* 91, 2004; M O’Sullivan, ‘Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons From Australia’, *International Journal of Refugee Law* 20, 2008.

160. J McAdam, *The impact of the Standard of Proof on Complementary Protection Claims*: pp. 18–23.

161. J McAdam, *The impact of the Standard of Proof on Complementary Protection Claims*, pp. 18–23; UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*.

gymnastics’.¹⁶² Interestingly, under the minister’s guidelines, there are three standards of proof, depending upon the context.¹⁶³ There must be a ‘sound basis for believing’ that there is a significant threat to a person’s personal security, human rights or human dignity etc; there must be ‘substantial grounds for believing’ that a person may be in danger of being subject to torture etc; and there must be a ‘real risk’ of violation of rights under the ICCPR. In the absence of any transparency in the decision-making process it is impossible to say how such standards are being interpreted and whether they are being applied consistently.

Once a case has been identified as involving ‘unique or exceptional circumstances’, the minister’s guidelines state that ‘other relevant information’ (previously termed ‘possible adverse information’) may need to be considered. To this end, consideration should be given to amongst other things whether the person can enter and stay in another country or safely and reasonably relocate elsewhere within that country (analogous to what is commonly known as ‘safe third country’ and ‘internal flight alternative’ or ‘relocation principle’).¹⁶⁴ Though not expressed in the 1951 Refugee Convention, both principles are sometimes used by countries, when undertaking refugee status determination, to deny refugee status on the basis that such persons are not in need of international protection. Similar to the assessment of what constitutes ‘persecution’ (as discussed above), the assessment of whether a person can stay in a safe third country or can reasonably relocate within the country normally requires consideration of a number of complex and fluid factors and reference to extensive and up-to-date information on the situation within the country of origin (normally provided by specialist researchers). Again, the extent to which such analysis is undertaken by the department and/or minister is not known as such decisions are not objectively scrutinized or made publicly available.

1984 Convention Against Torture

The current minister’s guidelines provide that when deciding whether ‘unique or exceptional’ circumstances exist, it may be relevant to consider whether there are substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the CAT.¹⁶⁵ To this end, the minister’s guidelines highlight only two particular articles of the Convention (article 1 which simply defines

162. *Kacaj v SSHD* [2001] INLR. 354, para 10 cited in J McAdam, ‘The impact of the Standard of Proof on Complementary Protection Claims’, p. 20.

163. The author acknowledges that such terminology is not technically accurate in this context but is used here nonetheless to reflect the fact that there is clearly a standard to be satisfied in the mind of the departmental officer/minister.

164. For further information see Refugee Review Tribunal ‘*Guide to Refugee Law in Australia*’ 2008, ch. 6, 9, viewed 26 February 2009, <http://www.mrt-rrt.gov.au/guideRefLaw.asp>.

165. DIAC, PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers, paragraph 11.

‘torture’ and article 3 which sets out State Parties *non-refoulement* obligations with respect to torture).

Further assistance is provided in the instructions which are designed to provide guidance to department staff in applying the minister’s guidelines. It confirms that a key element for determination under this category is ‘whether there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned’.¹⁶⁶

Significantly, the revised instructions add an express reference to guidance provided by the UN Committee Against Torture (General Comment 1 issued in 1996 on the implementation of article 3) which perhaps suggests that reference to obligations arising under CAT in the Minister’s guidelines will be interpreted in a manner that is consistent with international guidance/commentary.¹⁶⁷

However, though the revised instructions correctly state that the obligations under CAT are absolute and non-derogable, the minister’s guidelines nonetheless provide that if character issues are involved, such information should be brought to the minister’s attention. This arguably serves as a reminder that notwithstanding the compellability of a case and any potential breach of Australia’s international obligations under article 3 of CAT, which permits no exceptions to the prohibition of *non-refoulement* (even on character grounds) the minister’s discretion is not ultimately governed by Australia’s international obligations, but also what is personally considered to be in the Australian public interest.

Perhaps this is why the UN Committee Against Torture has repeatedly recommended that Australia explicitly incorporate into domestic legislation the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture, ‘and implement it in practice’.¹⁶⁸

1966 International Covenant on Civil and Political Rights

The minister’s guidelines provide that when assessing whether a case involves ‘unique or exceptional’ circumstances, consideration should be given as to whether circumstances exist

166. DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers, paragraph 15.2.

167. DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers, paragraph 15.2.

168. United Nations Committee Against Torture ‘Consideration of reports submitted by States Parties under Article 19 of the Convention: Australia’, CAT/C/AUS/CO/1, 15 May 2008, paragraph 15.

that may bring Australia's obligations as a signatory to the ICCPR into consideration.¹⁶⁹ Though the minister's guidelines highlight only three particular articles of the Convention (namely, article 6 (right to life), article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and article 23 (the family is the natural and fundamental unit of society and is entitled to protection)) they do not appear to restrict consideration of this treaty in its entirety for the purposes of assessing whether a particular case is 'unique or exceptional'.

Significantly, the revised instructions not only make reference to Australia's obligations arising from the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, they also make reference to the way the treaty has been interpreted by implied reference to the UN Human Rights Committee, which as previously noted perhaps suggests that reference to obligations arising under the ICCPR in the Minister's guidelines will be interpreted in a manner that is consistent with international guidance/commentary.¹⁷⁰

1989 Convention on the Rights of the Child

The minister's guidelines provide that when assessing whether a case involves 'unique or exceptional' circumstances, consideration should be given as to whether circumstances exist that may bring Australia's obligations as a signatory to the CRC into consideration.¹⁷¹ The only reference to the Convention is to article 3 which broadly provides that the best interests of the child must be a primary consideration in actions concerning children. A limitation in the minister's guidelines is that the best interests of the child must be 'balanced against other primary considerations'.¹⁷² No further information is given in the minister's guidelines as to what this might entail though the accompanying instructions provide that this 'may include: countervailing considerations, including the protection of the Australian community, and members of the community; and the expectations of the Australian community, including the integrity of the migration program, and that those without visas are expected to leave

169. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.

170. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.

171. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.

172. DIAC, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers, paragraph 11.

Australia'.¹⁷³ However, the extent to which such considerations are compatible with Australia's obligations under CRC is questionable (as discussed above).¹⁷⁴

The accompanying instructions for departmental officers (as opposed to the minister's guidelines that govern the making of the minister's decision), provide a little more insight into the Convention and what might be required. They correctly make reference to implicit obligations within the Convention that mean States Parties are prohibited from returning children to a country where they would be subject to cruel, inhuman or degrading treatment. They also refer to article 6 which recognises that every child has an inherent right to life. In fact the revised instructions go further and state that even if a case does *not* engage Australia's *non-refoulement* obligations, consideration should be given under other articles of CRC to address other 'humanitarian considerations'. Importantly, the revised instructions now also expressly include guidance for assessing requests involving unaccompanied minors where previously this was not the case.¹⁷⁵

However, it appears the onus is on departmental officers to conduct best interest assessments and to not necessarily refer cases to the minister that simply involve persons under the age of 18 years because 'unless there were other issues raised, [such cases] may be neither unique nor exceptional'. The extent to which such best interest assessments, particularly cases involving children that are found not to exhibit any 'unique or exceptional' circumstances, are in accordance with Australia's international obligations is not known.

Additional safeguards

Australian Human Rights Commission

In Australia 'treaties, including human rights instruments, are not self-executing and require legislative implementation to be effective in Australian law'.¹⁷⁶ Therefore, 'an individual

173. DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers, paragraph 15.3.

174. In this context it is important to note the current state of the law as set down in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) (1995) 128 ALR 353 which is that the best interests principle, insofar as it creates a legitimate expectation affords a procedural right only and does not compel a decision-maker to act in a particular way: J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child', pp. 265–266.

175. DIAC, PAM3: Act - Ministerial powers - Administration of ministerial powers, paragraph 15.2.

176. Attorney-General's Department, 'Common Core Document forming part of the reports of States Parties: Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights', June 2006, p. 15, viewed 13 December 2008, http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument; see also *Kioa v West* (1985) 159 CLR 550.

cannot complain in a domestic court about a breach of Australia's international human rights obligations unless the right has been incorporated into the domestic law'.¹⁷⁷ The government has traditionally taken the view that 'before Australia signs, ratifies or otherwise becomes bound by a treaty, the Australian Government satisfies itself that any legislation necessary to implement the treaty is in place'.¹⁷⁸

According to the government, 'an extensive human rights legislative framework exists in Australia at the federal level'.¹⁷⁹ However, though certain international human rights treaties appear as schedules to the Commonwealth's *Human Rights and Equal Opportunity Commission Act 1986*, such as the ICCPR and CRC 'this does not have the effect of making them part of Australian domestic law'.¹⁸⁰ Moreover, though the Australian Human Rights Commission has an individual complaint handling function in relation to human rights violations under select international human rights treaties it can only make recommendations of an advisory nature.¹⁸¹

This has led to criticism from the United Nations Human Rights Committee which has noted 'the duty to comply with Covenant obligations should be secured in domestic law' so that 'persons who claim that their rights have been violated should have an effective remedy under that law'.¹⁸² This view is shared by the United Nations Committee on the Rights of the

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177. United Nations International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: Australia*, 27 June 1994. HRI/CORE/1/Add.44, p. 41, viewed 15 December 2008, <http://www.unhcr.org/refworld/docid/3ae6ae1c0.html>. Though note that 'ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ... (footnotes omitted)': *Minister for Immigration and Ethnic Affairs v Teoh* (1995) (1995) 128 ALR 353 as per Mason CJ and Deane J.
178. Attorney-General's Department, 'Common Core Document', p. 15; Section 51(xxix) of the Australian Constitution empowers the Parliament to enact legislation that implements international agreements to which Australia is a party: *Commonwealth v Tasmania* (1983) 158 CLR 1.
179. Attorney-General's Department, 'Common Core Document', p. 15.
180. United Nations International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: Australia*, 27 June 1994. p. 42.
181. See sections 11 and 13 of the Human Rights and Equal Opportunity Commission Act 1986 (Cth).
182. United Nations Human Rights Committee, 'Concluding observations of the Human Rights Committee: Australia', 24 July 2000.

Child which has similarly recommended that Australia should ‘ensure that effective remedies will always be available in case of violation of the rights of the child’.¹⁸³

In addition, though the Australian Human Rights Commission is empowered to investigate complaints related to torture or other cruel, inhuman or degrading treatment arising from the ICCPR and CRC, the Convention Against Torture is not included in the Australian Human Rights Commission’s complaint handling jurisdiction. Accordingly, the United Nations Committee Against Torture has specifically recommended that Australia ‘consider strengthening and extending the mandate of the Australian Human Rights Commission by including the handling of complaints for violation of the Convention Against Torture’ and by giving adequate follow-up to their recommendations.¹⁸⁴

Individual complaints to United Nations treaty monitoring committees

An individual who claims that their rights under an international human rights treaty have been violated may bring a complaint (also known as a communication) before the relevant treaty committee, provided that the State has recognized the competence of the committee to receive such complaints.¹⁸⁵ Relevantly, Australia has agreed to individuals’ rights to make communications under the ICCPR and CAT.¹⁸⁶

Individuals within the jurisdiction and territory of the State may lodge a complaint, irrespective of their legal status. However, the main obstacle to admissibility is that the claimant must have ‘exhausted all domestic remedies’. This means that the State party is ‘provided with an opportunity to correct the human rights abuse at a domestic level before it is taken to the international sphere’.¹⁸⁷

183. United Nations Committee on the Rights of the Child, Concluding Observations: Australia’, CRC/C/15/Add.268, 20 October 2005, p. 3.

184. United Nations Committee Against Torture, ‘Concluding Observations of the Committee Against Torture: Australia’, CAT/C/AUS/CO/1, 15 May 2008, p. 4.

185. Complaints may also be brought by third parties on behalf of individuals provided they have given their written consent or where they are incapable of giving such consent.

186. Optional Protocol to the International Covenant on Civil and Political Rights and the Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment: Attorney-General’s Department, ‘Human Rights Communications’, viewed 16 December 2008, http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications.

187. Nick Poynder, ‘When all else fails: the practicalities of seeking protection of human rights under international treaties’, public lecture presented by the Castan Centre and Australian Lawyers for Human Rights, Melbourne, 28 April 2003, p. 3. For a further explanation of admissibility requirements see United Nations High Commissioner for Human Rights, Fact

As at 5 December 2008, there had been a total of 22 complaints lodged against Australia under the Convention Against Torture. Of these, only one was found to be inadmissible, ten had been discontinued, two were being reviewed and nine had proceeded to determination.¹⁸⁸ Importantly, only in the well-documented case of Mr Elmi who feared serious harm if forcibly returned to Somalia,¹⁸⁹ did the committee find Australia to be in violation of the Convention.¹⁹⁰

In contrast, as at 9 April 2008, there had been a total of 103 individual complaints lodged against Australia under the Optional Protocol to the ICCPR. Of these, 31 were found to be inadmissible, 28 had been discontinued, 14 were at the pre-admissible stage and 30 had proceeded to determination.¹⁹¹ In 24 cases the committee found Australia to have violated the ICCPR.

As a complaint may take years to be finalised, the committees may request a State party to ‘take such interim measures as the committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations’.¹⁹² Importantly though, such ‘interim measures’, or determinations by the committees are not enforceable. It is now the department’s policy that ‘if a complaint is made to a UN body, all removal arrangements for the person must cease’ (though this was not previously the case).¹⁹³

Sheet No.7 Communications Procedure, viewed 16 December 2008, <http://www.unhchr.ch/html/menu6/2/fs7.htm#partI>.

188. United Nations High Commissioner for Human Rights, ‘Statistical survey of individual complaints dealt with by the Committee against Torture under the procedure governed by article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, updated 5 December 2008, viewed 16 December 2008, <http://www2.ohchr.org/english/bodies/cat/stat3.htm>.
189. *Elmi v Australia* (No. 106/1998), 25 May 1999, UN Doc No. CAT/C/22/D/120/1998. For further information on this case see Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, ch. 7; M Crock, ‘A Sanctuary Under Review; J McAdam, ‘Complementary Protection: Labor’s point of departure’.
190. United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Views of the Committee on Communication No.120/1998, CAT/C/22/D/120/1998, 25 May 1999, viewed 16 December 2008, <http://www.unhchr.ch/tbs/doc.nsf/184758d9fcd7a2b1c12565a9004dc312/b054cbf1e34a6c278025679a003c37ec?OpenDocument>.
191. United Nations High Commissioner for Human Rights, ‘Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights’, updated 9 April 2008, viewed 16 December 2008, <http://www2.ohchr.org/english/bodies/hrc/stat2.htm>.
192. See UNCAT Rule 108 and UNHRC Rule 86.
193. DIAC, PAM3 – Migration Act: Removal Instructions – Removal from Australia, paragraph 15.7.

Pre-Removal Clearance Assessment by the Department

Section 198 of the Migration Act provides that unlawful non-citizens in particular circumstances should be removed from Australia as soon as reasonably practicable.¹⁹⁴ Though the Migration Act does not prohibit the removal of such persons from Australia, the department's policy is generally not to remove a person who has an outstanding request for ministerial intervention under section 417 of the Migration Act.¹⁹⁵

Prior to removal, the department may undertake a pre-removal clearance assessment. This process is independent of any previous request for ministerial intervention and is designed to identify any changes in a person's circumstances or in the country to which they are to be returned which might result in a breach of Australia's obligations under various international treaties.

Some of the 'risk factors' used to assess whether removal may breach Australia's international treaty obligations include:

- the person has previously applied for or held refugee status and does not want to be removed from Australia because they fear persecution or a violation of their human rights (including their right to life or right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment); or
- the person will face outstanding criminal charges in the country of return and it is a country which allows for the death penalty to be imposed or is known to use torture or cruel, inhuman or degrading treatment or punishment; or
- cases involving a child; or
- UNHCR, UN Human Rights Committee or UN Committee Against Torture have shown interest in the person.¹⁹⁶

The outcome of this assessment is not externally reviewable, as it is simply an internal procedure conducted by the department. Agencies such as UNHCR, the United Nations Human Rights Committee, the Australian Human Rights Commission, and the Ombudsman can also make representations to the department to halt the proposed removal of an

194. See also section 200 of the Migration Act which authorises the minister to order the deportation of a non-citizen to whom the Division applies.

195. The Assistant Secretary of the Department's Onshore Protection Branch and Assistant Secretary of the Department's Compliance Resolution Branch can nevertheless authorise removal: DIAC, PAM3 – Migration Act: Removal Instructions – Removal from Australia, paragraph 14.1.

196. DIAC, PAM3 – Migration Act: Removal Instructions – Removal from Australia, paragraph 15.6.

individual. Such representations will not automatically stop an individual being removed but will alert the department to possible humanitarian or other relevant issues which may have been overlooked. Significantly, the department is not required by law to notify such agencies that an individual with respect to whom they have made representations are to be removed. Moreover, though not required by law, the department has a policy of providing people who are to be removed with a minimum of at least 48 hours notice before removal occurs.¹⁹⁷ However, this does not always occur nor does it extend to notifying an individual's legal representative or migration agent.¹⁹⁸

Concerns about the pre-removal clearance assessment and notification requirements were raised during the parliamentary inquiry into the Administration and Operation of the Migration Act. This resulted in the Committee recommending that the Migration Act be amended to provide that a pre-removal risk assessment be entrenched in legislation and that the Act expressly require all persons to be removed to be provided with reasonable notice.¹⁹⁹ This latter recommendation was reiterated recently by the Joint Standing Committee on Migration when it recommended that the department provide prior notification of seven days to the person in detention and to the legal representative or advocate of that person.²⁰⁰ Problems surrounding the pre-removal screening process were also highlighted by the Commonwealth Ombudsman when a review was undertaken in 2006 into Mr X's case:

In 2000, Mr X came to Australia by boat and sought asylum in 2001. Following rejection of his claims, the department unsuccessfully attempted to remove Mr X in 2004 and again in 2005. In 2004 Mr X's removal was halted following assertions by the UNHCR that Mr X was a refugee under Article 1D of the 1951 Convention and would face protection problems if returned.

In January 2004 Mr X lodged an individual complaint with the United Nations Human Rights Committee (the Committee) claiming that he would face irreparable harm if deported. The Committee subsequently issued an Interim Measures Request (IMR) requesting that Mr X not be deported until the complaint was investigated. Notwithstanding, in August 2005 the minister decided that that the Committee's IMR was not warranted in Mr X's case and was not a bar to him being removed.

197. Though this minimum notice period can be waived in exceptional circumstances: DIAC, PAM3 – Migration Act: Removal Instructions – Removal from Australia, paragraph 61.3.

198. 'In certain cases, officers may see a need to advise persons or organisations not specified in this policy instruction of an upcoming removal': DIAC, PAM3 – Migration Act: Removal Instructions – Removal from Australia, paragraph 64.

199. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 279.

200. Joint Standing Committee on Migration, 'Immigration Detention in Australia - A new beginning: Criteria for release from detention', December 2008, p. 110.

In August 2005 the department again attempted to remove Mr X. He was only provided with a few hours' notice of his pending removal and his legal representatives were not notified in advance. In addition, the department did not notify the Committee of the removal until Mr X had subsequently departed Australia. When Mr X's legal representatives became aware of the removal, they notified UNHCR who then contacted the department to reiterate its belief that Mr X would not be guaranteed effective protection and requested time to provide additional information. Mr X was stopped in transit in the Middle East and following receipt of information from UNHCR about the risk to Mr X's safety, was returned to Australia. Mr X was subsequently granted a protection visa in October 2006.²⁰¹

Monitoring of returnees

There is currently no formal process in place for the monitoring of persons who are no longer entitled to remain in Australia and are returned to their countries of origin. Broadly speaking, international law operates on the premise that persons at risk of serious harm would be provided with protection whilst those not at risk would be safely returned to their countries of origin. In other words, the issue of monitoring only appears to arise when there are concerns raised about the safety of persons being returned who have unsuccessfully attempted to seek asylum or stay on humanitarian grounds under international human rights law. Accordingly, the issue of returnee monitoring is a complex and sensitive one involving consideration of numerous legal as well as political, economic, diplomatic and moral factors.²⁰²

This was evident when the issue arose for consideration by the Senate in its 2000 and 2006 Committees which both noted that 'some form of monitoring may be the only way in which Australia can be assured that its refugee determination processes are correctly identifying genuine refugees and humanitarian cases'.²⁰³

The 2000 Senate Committee considered that 'a more effective and efficient way of ensuring that our international *non-refoulement* obligations are met is to improve current refugee determination procedures and to ensure that a sufficiently wide humanitarian safety net, in the form of the s417 ministerial discretionary power, is in place for those in genuine need of

201. Author's summary of John McMillan (Commonwealth Ombudsman), 'Report for Tabling in Parliament by the Commonwealth Ombudsman under section 4860 of the *Migration Act 1958*' Personal identifier: 040/06, 17 January 2006, viewed 12 December 2008, [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/immi_report_2006_040.pdf/\\$FILE/040-06_report_tbl.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/immi_report_2006_040.pdf/$FILE/040-06_report_tbl.pdf).

202. For further information see Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, ch. 11 which examines whether Australia has any obligations to monitor returnees, and if so, who should undertake the monitoring. It also discusses the benefits of, and difficulties with, monitoring.

203. Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 337.

protection’,²⁰⁴ though the 2006 Senate Committee accepted ‘that there are practical impediments to the Commonwealth implementing a system that formally monitors returnees after they have left Australia’.²⁰⁵

The former Coalition Government was of the view that a system which monitors individual returnees would be ‘impractical and possibly counter-productive’.²⁰⁶ In addition, it considered that ‘monitoring by its very nature, would be intrusive and could draw unwelcome attention to the individuals concerned and to those with whom they associate’.²⁰⁷

However, concerns have remained about the fate of returnees and the adequacy of the present migration system to implement Australia’s international obligations. Such concerns have been compounded by research conducted by the Edmund Rice Centre which ‘reported on a significant number of persons who were placed into dangerous situations upon their removal from Australia’.²⁰⁸ The Law Society of South Australia has emphasised, ‘the removal of even just one person who is placed into a situation where they are at risk of a serious human rights violation is unacceptable. The consequences of administrative error in this area are potentially tragic’.²⁰⁹ In this context, it is also relevant to consider the impact voluntary return initiatives or ‘reintegration packages’ that offer financial incentives have on the decision people make to return to their country of origin.²¹⁰

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204. Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 342.
205. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 303.
206. Government Response to the Senate Legal and Constitutional References Committee Report: ‘A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes’, February 2001, response to Recommendation 11.1 cited in Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 297.
207. Answers to questions on notice, 5 December 2005, p. 92 cited in Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958*, March 2006, p. 301.
208. Senate Committee 2006 Report, p. 299. See Edmund Rice Centre for Justice & Community Education, *Deported to Danger, A Study of Australia’s Treatment of 40 Rejected Asylum Seekers*, September 2004; Edmund Rice Centre for Justice & Community Education, *Deported to Danger II - The Continuing Study of Australia’s Treatment of Rejected Asylum Seekers*, September 2006; ‘A Well-Founded Fear’, documentary film, 2008, November Films. See also D Corlett, *Following Them Home: The Fate of the Returned Asylum Seekers*, Black Inc books, July 2005.
209. Law Society of South Australia, *Submission 110*, p. 13 cited in 2006 Senate report, p. 300.
210. For example, \$2,000 per person for detainees prepared to return to Iran and Afghanistan in 2003.

Most recently, in conducting its 2008 inquiry into immigration detention in Australia, the Joint Standing Committee on Migration touched upon the removal of persons from Australia who may or may not have been returned to danger and persecution. Though falling short of an actual recommendation, the Committee ‘considered’ that the government ‘could improve monitoring and follow-up of persons who have been returned to their countries of origin’.²¹¹ The Committee envisaged that such information would not only ‘provide evidence on what proportion may or may not be returned to danger and persecution’ (which would strengthen the integrity of Australia’s immigration processes) but importantly also ‘inform the development of a complementary protection framework’.²¹²

Complementary protection models proposed for Australia

Refugee Council of Australia 2004 model

In 2004, the RCOA proposed a complementary protection model (see appendix B) which received endorsement from numerous refugee advocacy groups such as the National Council of Churches in Australia, Amnesty International, and most recently, A Just Australia.²¹³

Under the model proposed by the RCOA, an applicant’s eligibility for complementary protection would be assessed through a single administrative procedure which would firstly involve an assessment as to whether the person satisfied the definition of refugee under the 1951 Refugee Convention and if not, whether there were grounds for the granting of complementary protection. With regard to the latter, the RCOA proposed that a decision-maker would need to consider whether Australia owed obligations to the person under ‘other human rights treaties’ and then more broadly, whether there are any other protection-related reasons why a person should not be returned to their country of origin.²¹⁴

The RCOA argued that as Australia is a party to CAT, the Statelessness Conventions, and ICCPR (the former two containing specific and non-derogable obligations):

The criteria for the grant of complementary protection must therefore make specific reference to people who are stateless and to people who would face torture or death if returned to their country of origin or habitual residence.²¹⁵

211. Joint Standing Committee on Migration, *Immigration Detention in Australia*, p. 111.

212. Joint Standing Committee on Migration, *Immigration Detention in Australia*, p. 111.

213. N Field, ‘Playing God with Sanctuary: A study of Australia’s approach to complementary protection obligations beyond the Refugee Convention’, co-funded by A Just Australia and Oxfam, June 2008.

214. RCOA, ‘Complementary Protection: The way ahead’, pp. 4–5.

215. RCOA, ‘Complementary Protection: The way ahead’, p. 6.

The violation of other rights contained in numerous international human rights treaties to which Australia is a party may also trigger Australia's protection obligations if deemed sufficiently serious. In assessing the seriousness of the violation, the RCOA proposed combining the standard currently employed for persons applying under Australia's Special Humanitarian Program (SHP), namely 'a person must have experienced, or have a well-founded fear of gross discrimination amounting to a substantial violation of their human rights' with the test used in the European Union's Qualification Directive, 'well founded fear of unjustified serious harm'.²¹⁶

Accordingly, a broad range of persons would be eligible to be considered for grant of complementary protection under the proposed RCOA model. Amongst others, these would include those who:

- have no nationality nor right of residence elsewhere; or
- would face torture if returned to their country of origin; or
- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict; or
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law; or
- would face serious human rights violations if compelled to return.²¹⁷

Complementary protection would not extend to victims of natural disasters, and with regard to those persons who may pose a security risk, the RCOA model recommended that complementary protection should 'not extend to persons who have committed genocide, a crime against peace, a war crime or a crime against humanity, except where international treaty obligations override this exclusion'.²¹⁸

Procedurally, the RCOA envisaged that the Migration Act and Regulations would be amended to introduce a new visa subclass but the minister's discretionary power to intervene would remain. Though the RCOA model does not propose actual criteria to be satisfied by applicants, it did recommend that recipients should be entitled to the same rights and entitlements as those who were granted refugee status.²¹⁹

In acknowledging that the drafting of the legislative amendments lies with the government, the RCOA emphasised that the legislation should be well drafted with clear and unambiguous

216. RCOA, 'Complementary Protection: The way ahead', p. 6.

217. RCOA, 'Complementary Protection: The way ahead', p. 6.

218. RCOA, 'Complementary Protection: The way ahead', p. 7.

219. RCOA, 'Complementary Protection: The way ahead', p. 7.

language, preferably with explicit reference to relevant articles within international human rights treaties because ‘criteria that are loosely defined and imprecise open the doors to appeal’.²²⁰

This model clearly had the support of stakeholders and was viewed favourably by Elizabeth Proust when conducting the review into ministerial powers. It was not subsequently adopted by government, though it undoubtedly informed the development of the principle at the national level.

Australian Democrats Complementary Protection Bill 2006

On 13 September 2006, the then Senator Andrew Bartlett, (Australian Democrats) introduced into Federal Parliament the Migration Legislation Amendment (Complementary Protection) Bill 2006.²²¹ The Explanatory Memorandum to the Bill simply noted:

This Bill seeks to introduce a system of Complementary Protection into the Migration Act to provide an alternative system of protection for those who do not meet the definition of a refugee under the Refugee Convention, but who have compelling humanitarian reasons why they cannot return to their country of origin.²²²

The Bill essentially sought to insert a new section 36A into the Migration Act. Whereas section 36 of the Migration Act sets out the criteria to be satisfied for ‘protection visas’,²²³ proposed section 36A set out the criteria to be satisfied for ‘complementary protection visas’. The criterion for a complementary protection visa was that the applicant ‘faces a substantial threat to his or her personal security, human rights or human dignity on return to his or her country of origin’.²²⁴ In determining whether an applicant satisfies this broad criterion, the minister would be required to have regard to the following:

- the circumstances in his or her country of origin at the time of the application for the visa
- whether the applicant is likely to be subject to harassment in his or her country of origin

220. Refugee Council of Australia, ‘Complementary Protection and Judicial Review: Supplementary Paper’, May 2005, p. 2.

221. Migration Legislation Amendment (Complementary Protection) Bill 2006, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2Fs522%22>

222. Explanatory Memorandum, Migration Legislation Amendment (Complementary Protection) Bill 2006, p. 1.

223. Namely, a non-citizen in Australia to whom the minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Protocol. Additional criteria are contained in Schedule 2 of Migration Regulations 1994.

224. Proposed subsection 36A(2).

- whether the applicant is likely to be denied basic rights available to others in his or her country of origin
- whether the applicant is likely to be subject to torture as defined in article 1.1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and
- whether the applicant is likely to be treated in a manner which would contravene any article of the United Nations International Covenant on Civil and Political Rights.²²⁵

In addition, the Bill provided that if the applicant was a child or the parent of a child, ‘the best interests of the child shall be the primary consideration for a complementary protection visa’.²²⁶

Though the Bill ultimately failed to pass through the Senate, it arguably did, as intended nonetheless ‘advance the agenda’ by clarifying various parties’ policy positions and raising potentially controversial issues for consideration.²²⁷

For instance, then Senator Kerry Nettle declared the Australian Greens support for the creation of a complementary protection system for Australia and support for the Bill.²²⁸ In contrast, a Coalition Senator, Senator Barnett stated that the Coalition could not support the Bill for a number of reasons primarily because the proposed complementary protection visa system would create what he termed ‘a queue jumping arrangement’ and because of concerns that such a system might open the floodgates.²²⁹

The Labor Party acknowledged that complementary protection was a matter that ought to be considered. It was similarly unable to support the Bill however, due to the fact that ‘complementary protection itself raises very complex issues and these require careful consideration’.²³⁰ Senator Kirk identified a number of issues with the complementary protection model being proposed. Labor’s main concerns included:

225. Proposed subsection 36A(3).

226. Proposed subsection 36A(4).

227. Senator Andrew Bartlett, ‘Second reading speech: Migration Legislation Amendment (Complementary Protection) Bill 2006’, Senate, *Debates*, 20 March 2008.

228. Senator Kerry Nettle, ‘Second reading speech: Migration Legislation Amendment (Complementary Protection) Bill 2006’, Senate, *Debates*, 20 March 2008.

229. Senator Guy Barnett, ‘Second reading speech: Migration Legislation Amendment (Complementary Protection) Bill 2006’, Senate, *Debates*, 20 March 2008.

230. Senator Linda Kirk, ‘Second reading speech: Migration Legislation Amendment (Complementary Protection) Bill 2006’, Senate, *Debates*, 20 March 2008.

- the Bill ‘would entitle anyone at risk of having any of their rights under the ICCPR violated to be able to remain in Australia ... which would have the result of going well beyond Australia’s international human rights obligations’,²³¹
- the Bill seemed to create the possibility for chain applications (separate applications for a complementary protection visa and protection visa) when in Labor’s view a single process would be preferable
- the Bill did not specify whether successful applicants would be granted temporary or permanent visas
- the Bill did not address the entitlement of persons who ‘may pose some kind of danger to the community, whether it be for national security reasons or other reasons’, and
- the Bill did not address the review rights of persons refused a complementary protection visa.

The Department of Immigration and Citizenship 2008 draft model

At the request of the minister, the department developed a complementary protection draft model which was released to stakeholders in 2008 for consultation and feed-back (see appendix C). The draft model that was released proposed to initially limit complementary protection only to Australia’s *non-refoulement* obligations under international treaties other than the 1951 Refugee Convention, namely CAT, CRC and ICCPR.²³²

Accordingly, permanent protection visas (also known as subclass 866 visas) might also be granted to complementary protection recipients in circumstances:

- where the person may be sentenced to death if removed to a particular country; or
- where there are substantial grounds for believing that there is a real risk that the person will be arbitrarily deprived of his or her life; or
- where there are substantial grounds for believing that the person would be in danger of being subjected to torture if removed to a particular country; or

231. Senator Linda Kirk, ‘Second reading speech: Migration Legislation Amendment (Complementary Protection) Bill 2006’.

232. But not the 1954 Convention relating to the Status of Stateless Persons which prohibits State-parties from expelling a stateless person lawfully in their territory save on grounds of national security or public order: DIAC, ‘Draft Complementary Protection visa model’, p. 2.

- where there are substantial grounds for believing that there is a real risk that the person will be subjected to cruel, inhuman or degrading treatment or punishment.²³³

Importantly, the ministerial intervention path would remain for those with broader protection concerns that did not fall within the above categories. Such persons might include ‘stateless persons, persons fleeing armed conflict or serious public disorder, persons fleeing indiscriminate effects of violence and serious threats to life, liberty and security, and victims of natural or ecological disasters’.²³⁴

The Department of Immigration’s draft model proposed a single assessment procedure whereby unsuccessful complementary protection applicants would have access to merits and judicial review on par with the review rights of unsuccessful asylum-seekers. Successful applicants would also be eligible for the same rights and entitlements as refugees, including the right to family unity.²³⁵

However, there are at least three aspects of this draft model which may prove potentially contentious.

First and foremost, the restrictive application of the principle may be at odds with stakeholder’s desired scope of complementary protection in Australia (as reflected by the two broader models discussed above). Such concerns may be compounded by the fact that though the *non-refoulement* obligations contained in CAT and ICCPR are non-derogable, the model being proposed does not permit certain persons of bad character (that is those excluded from refugee protection under article 1F) to have their claims considered on complementary protection grounds. Similarly, persons who do not satisfy other statutory public interest

233. DIAC, ‘Draft Complementary Protection visa model’, pp. 2–3. Proposed clause 121 of New Zealand’s Immigration Bill (132–2) (2007) similarly provides that ‘A person must be recognised as a protected person under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or [cruel, inhuman, or degrading treatment or punishment] if deported from New Zealand’.

234. DIAC, ‘Draft Complementary Protection visa model’, pp. 2–3.

235. This is in keeping with UNHCR’s view that ‘the requirements of fairness and efficiency can best be met through the implementation of a broadly comprehensive system in which one central and expert authority would determine, in a single procedure, the protection needs of an applicant...As in all such determination systems, there should be an opportunity for a meaningful review of any negative decision, with suspensive effect, so that no applicant would be removed before a final determination of his or her need for protection ... any complementary protection regime should build in appropriate provisions for close family members to be reunited, over time, in the host country’: UNHCR, *Complementary Forms of Protection*, 1 April 2001, pp. 3–5. On a single status, see also J McAdam, *Complementary Protection in International Refugee Law*, ch. 6.

criteria (such as health, security and character assessments) will not be immediately eligible for grant of a permanent protection visa.²³⁶

Secondly, under the draft model the precise nature and scope of the minister's residual discretion remains unclear. Concerns may also remain about the transparency of the process and the absence of enforceable rights in this regard etcetera

Thirdly, without an increase in the offshore humanitarian quota, the sponsorship of family members of complementary protection recipients in Australia may further reduce the number of people who can enter Australia under the offshore Humanitarian Program.²³⁷ This issue was raised when the RCOA urged an increase in Australia's total offshore quota in 2007 to 15, 000 places. In doing so, the RCOA not only emphasised that places for family reunion should not be taken out of the offshore humanitarian quota moreover, determining the offshore humanitarian program quota should operate independently from the onshore protection system.²³⁸

On 9 September 2009 the government introduced into Parliament the Migration Amendment (Complementary Protection) Bill 2009.²³⁹ When introducing the Bill, the Parliamentary Secretary for Multicultural Affairs and Settlement Services stated that it would amend the Migration Act to:

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236. Other temporary solutions may apply, such as the grant of a bridging visa until the person can be returned to their country of origin or elsewhere: DIAC, 'Draft Complementary Protection visa model', p. 5.
237. Australia allocates 6000 places to the Refugee category each year, and 7000 to the Special Humanitarian Program (SHP) category (also shared with protection visas granted to asylum seekers *within* Australia): UNHCR, *Resettlement Handbook, Country Chapter: Australia*, March 2007. Note that 500 additional places were allocated for the refugee category in the 2008–09 budget specifically for Iraqis and an additional 750 SHP places are expected to be allocated from 2009–10: Australian Government, 'Portfolio Budget Statements 2008–09: DIAC Budget Estimates', Table 1.2, p. 21. 'In 2007–08 a total of 13 014 visas were granted, of which 10 799 visas were granted under the offshore component and 2215 visas were granted under the onshore component': DIAC, 'Fact Sheet 60: Australia's Refugee and Humanitarian Program', viewed 23 March 2009, <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>.
238. RCOA argues that places should instead be made available under the family stream for a specific family reunion visa for humanitarian entrants, conferring the same supports and conditions as the Special Humanitarian Program: Refugee Council of Australia, 'Australia's Refugee and Special Humanitarian Program: current issues and future directions (2007–08)', February 2007, pp. 20–22.
239. The Bill and associated documents are available through Parlinfo at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22legislation%2Fbillhome%2Fr4197%22>

... introduce greater fairness, integrity and efficiency into Australia's arrangements for meeting our human rights obligations under international law ... 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.²⁴⁰

Concluding comments

Australia has attempted to meet its *non-refoulement* obligations by various means, although for the last twenty years it has relied principally on the ministerial intervention process. This process has been repeatedly criticized by several parliamentary inquiries and by the minister himself, who acknowledged that 'there is no transparency or accountability about the process'.²⁴¹ Such a system is made all the more unsustainable by the absence of statutory criteria, the potential injustices of which the ministerial intervention process was paradoxically originally designed to overcome. Rather, such decisions are presently only guided by broadly drafted policy guidelines. As Dr Mary Crock observes, 'in practical terms, the obligations assumed by Australia have no more or less force than the sanctions of domestic and international politics'.²⁴² Whether the recently proposed amendments to the Migration Act to introduce a formal statutory system of complementary protection will be passed by Parliament and be in accordance with Australia's international human rights obligations remains to be seen. As McAdam notes:

The conception of 'complementary protection' necessarily draws a line between the types of ill-treatment which international law regards as impelling *non-refoulement*, and other unenviable or vulnerable circumstances which do not demand surrogate protection. Of course, where that line should be drawn—and how international and supranational obligations should be construed and applied at the level of the State—is a matter which courts and parliaments perennially struggle, and one that requires rigorous analysis and principled interpretation.²⁴³

240. L Ferguson, 'Second reading speech: Migration Amendment (Complementary Protection) Bill 2009', House of Representatives, *Debates*, 9 September 2009, p. 4.

241. Senator the Honourable Chris Evans (Minister for Immigration and Citizenship), Senate Estimates Committee, 24 February 2009.

242. Crock M, 'A Sanctuary Under Review: Where to from here for Australia's Refugee and Humanitarian Program?', (2000) 23(3) *UNSW Law Journal*, p.256.

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Appendix A

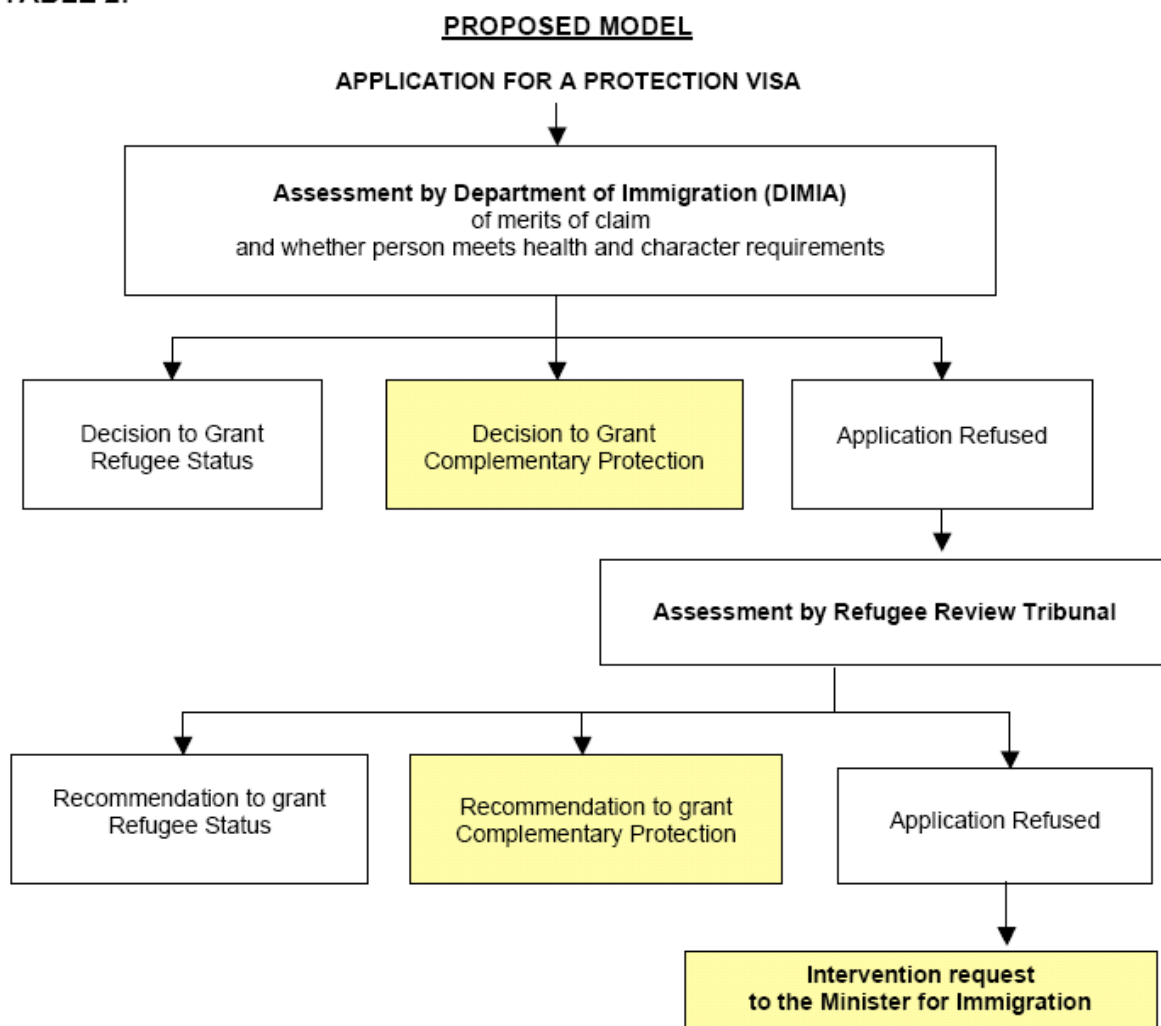
Major international human rights treaties to which Australia is a Party

- [International Covenant on Civil and Political Rights](#) (1966)
 - [Optional Protocol to the International Covenant on Civil and Political Rights](#) (1966)
 - [Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty](#) (1989)
- [International Covenant on Economic, Social and Cultural Rights](#) (1966)
- [International Convention on the Elimination of All Forms of Racial Discrimination](#) (1965)
- [Convention on the Elimination of All Forms of Discrimination against Women](#) (1979)
 - [Optional Protocol to the Convention on the Elimination of Discrimination against Women](#) (1999)
- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (1984)
- [Convention on the Rights of the Child](#) (1989)
 - [Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#) (2000)
 - [Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict](#) (2000)
- [Convention on the Reduction of Statelessness](#) (1961)
- [Convention relating to the Status of Stateless Persons](#) (1954)
- [Convention relating to the Status of Refugees](#) (1951)
 - [Protocol relating to the Status of Refugees](#) (1967)
- [Convention on the Rights of Persons with Disabilities](#) (2006)

Appendix B

Proposed complementary protection model advanced by the Refugee Council of Australia²⁴⁴

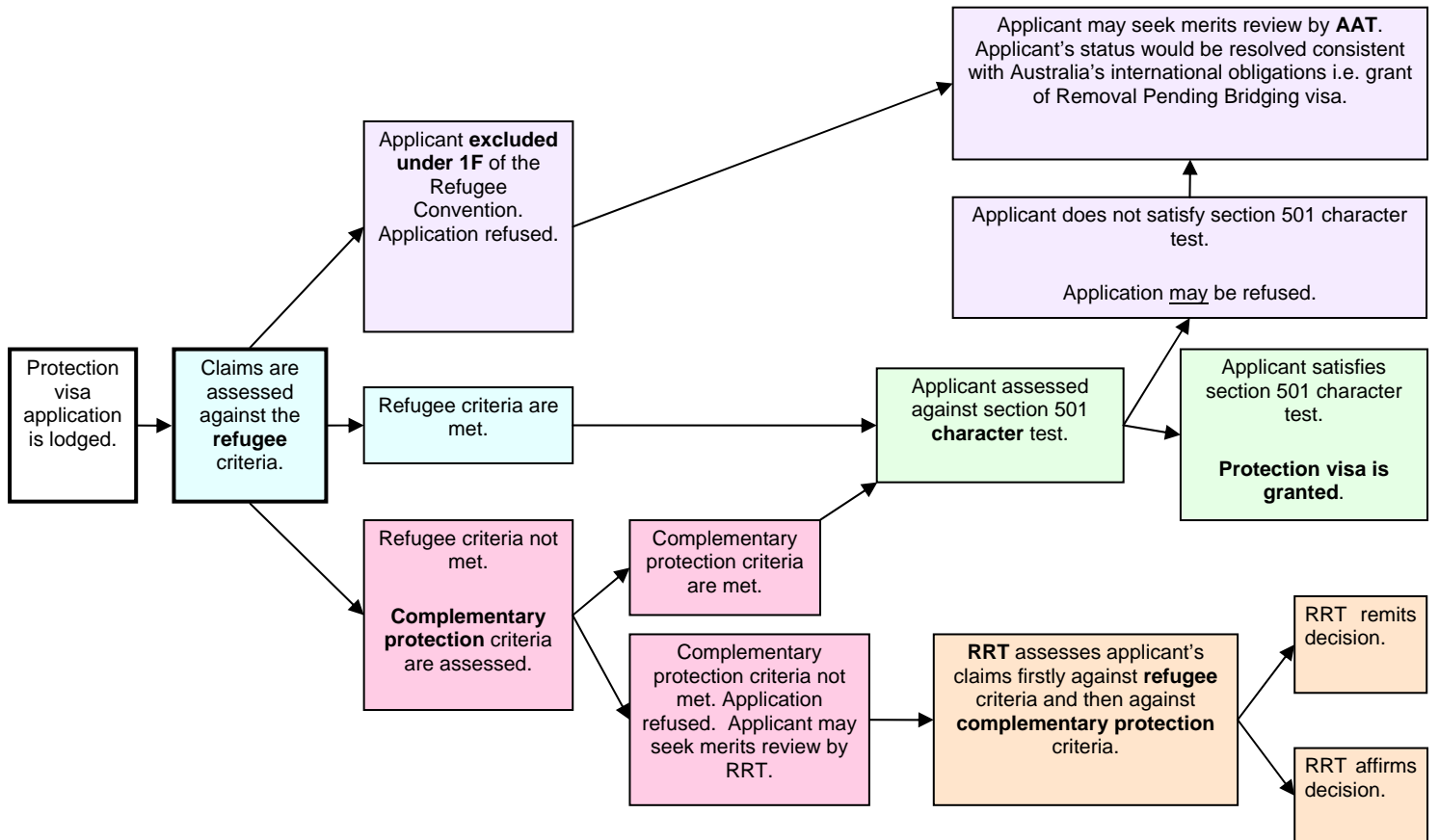
TABLE 2:



244. RCOA, ‘Complementary Protection: The way ahead’, p. 4.

Appendix C

Draft complementary protection model advanced by the Department of Immigration and Citizenship



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