



Migration Amendment (Protection Obligations and Other Measures) Bill 2014

Senate Committee on Legal and Constitutional Affairs

4 August 2014

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Law Institute of Victoria

New South Wales Bar Association

International Law Section's Migration Law Committee

Executive Summary

1. The Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) (the Bill) forms part of the Coalition Government's *Operation Sovereign Border's* Policy and aims to improve the efficiency of the current system for assessing protection claims and issuing protection visas.
2. Key amendments relate to: the process and procedures that apply to the assessment of protection visas; the threshold test for when Australia's *non-refoulement* (or non-return) obligations under the *International Covenant on Civil and Political Rights*¹ (ICCPR) or the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*² (CAT) are invoked (known as complementary protection)³ and the operation of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).
3. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas. Indeed, certainty of the legal framework for the determination of protection claims is urgently needed – particularly given the many thousands of asylum seekers currently in Australia who continue to await consideration of their protection claims. To this end, the Law Council supports the stated rationale for the Bill – namely to increase the efficiency of existing protection status determination processes. It also supports efforts to ensure complementary protection assessment processes remain codified in legislation, and efforts to clarify procedural matters such as when a decision will be finally determined, and how notice is given.
4. However, the Law Council is concerned that many of the amendments contain features that depart from relevant domestic and international jurisprudence and which contrast sharply with existing procedural frameworks for the assessment of protection claims. As currently drafted, these features of the Bill may in fact fail to improve the efficiency of the existing system and may put protection visa applicants at risk of not having their claims fairly assessed, and of return to a place where they face persecution or other forms of serious harm. For example, the Bill changes the existing test for determining whether a person engages Australia's protection obligations under the ICCPR or the CAT from a 'real chance/ real risk' threshold to 'more likely than not'. The Bill also requires the Minister to refuse to grant a protection visa in certain circumstances if an applicant refuses to comply with a request to produce documents, or produces bogus documents, even if the need for protection is established under law.⁴

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR').

² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('the CAT').

³ Schedule 2 of the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) seeks to change the complementary protection provisions that were introduced to the *Migration Act 1958* (Cth) in 2012 with the enactment of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) that received Royal Assent on 14 October 2011 and came into effect on 24 March 2012. These provisions will only come into effect (if the Bill is passed), if the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth), currently before the Senate, is not enacted.

⁴ This does not apply if the Minister is satisfied that the applicant has a reasonable explanation for refusing or failing to comply with the request and has either produced documents concerning their identity, nationality or citizenship, or has taken reasonable steps to produce this evidence: Migration Amendment (Protection and Other Measures) Bill 2014, Schedule 1, Part 2, Items 10-1.

5. The Bill also seeks to significantly alter the existing inquisitorial character of the protection status determination process by introducing procedural changes that import adversarial features into the RRT. For example, the Bill introduces a new onus on lawful and unlawful non-citizens to specify the particulars of their protection claim and to provide sufficient evidence to support their claim, removing the RRT's existing discretion to assist in the collection of evidence where appropriate, such as where the applicant face insurmountable practical barriers in the verification of documentation.
6. The Law Council also continues to hold strong concerns about the inadequate access to independent legal or migration advice for asylum seekers in Australia, which as the Senate Standing Committee for the Scrutiny of Bills has noted, has particularly serious implications for those people whose claims will be subject to the reforms proposed in this Bill.
7. The Law Council's primary recommendation is that the Bill not be passed. However, if this recommendation is not adopted, the Law Council urges the Committee to recommend that amendments be made to the Bill to ensure that it more appropriately aligns with Rule of Law principles, procedural fairness and Australia's international law obligations.

Introduction

8. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) as part of its inquiry into the provisions of the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) (the Bill).
9. The Bill was introduced into the House of Representatives on 25 June 2014 and forms part of the Coalition Government's *Operation Sovereign Border's* Policy which it has sought to implement in legislation⁵ since outlining its key features prior to the 2013 Federal Election.⁶ The Policy includes a Regional Deterrence Framework which 'links the actions of destination, transit and source countries with the objective of deterring and disrupting people smuggling at every point in the chain, with individual country plans fashioned to address specific actions in each jurisdiction.'⁷
10. This submission will outline the Law Council's support for efforts to clarify the legal framework for determining protection claims. It will also set out its key concerns with the Bill, which include: concerns relating to changes to the legal framework of refugee status determination processes and changes to the threshold test for complementary protection; concerns relating to the broadening scope of Ministerial discretion to exclude certain asylum seekers from making protection applications; and, concerns regarding the retrospective application of some provisions of the Bill.
11. In light of these concerns, and having regard to the Law Council's past advocacy in this area,⁸ the Law Council submits that the Committee should recommend that the Bill not be passed.
12. If this primary recommendation is not adopted, the Law Council urges the Committee to recommend that amendments be made to the Bill as summarized at the end of this submission.

⁵ The Bill follows the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 on 4 December 2013; the Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013 on 9 December 2013; the Migration Amendment Bill 2013 on 12 December 2014 (which received Royal Assent on 27 May 2014); and the Migration Amendment Bill (No. 1) 2014 [Provisions] on 27 March 2014. The Government has also introduced legislative instruments, such as the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* that was made on 12 December 2013 and was open to disallowance to 14 July 2014, when the motion to disallow was voted down in the Senate: Commonwealth, *Parliamentary Debates: Proof*, Senate, 14 July 2014, 80-6, available at: http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/toc_pdf/Senate_2014_07_14_2666.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/0000%22.

⁶ Liberal Party of Australia and The Nationals, *The Coalition's 'Operation Sovereign Borders' Policy* (July 2013).

⁷ Ibid 7. Operation Sovereign Borders commenced on 18 September 2013 and was described as 'a military-led border security operation supported by the direct involvement of a number of agencies and departments brought together under single operational command and a single ministerial responsibility': The Hon Scott Morrison MP, Minister for Immigration and Border Protection and Lieutenant General Angus Campbell, Commander of Operation Sovereign Borders, 'Operation Sovereign Borders' (Joint Press Conference, Sydney, 23 September 2013).

⁸ For a summary of the Law Council's previous advocacy, including its 2013 Policy Statement *Principles Applying to the Detention of Asylum Seekers*, see: <http://www.lawcouncil.asn.au/lawcouncil/index.php/immigration-detention-and-asylum-seekers>.

Key Features of the Bill

13. The Bill aims to amend the *Migration Act 1958* (Cth) to implement a range of measures that will increase the efficiency and enhance the integrity of the onshore protection status determination process.⁹ In his Second Reading Speech on the Bill, the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, stated that the changes made to the Migration Act by the Bill are 'necessary changes required to effectively respond to the evolving challenges in the asylum seeker caseload arising from recent judicial decisions and management of the backlog of illegal maritime arrivals'.¹⁰
14. The Bill contains four schedules. Schedule 1 makes amendments to provisions in the Migration Act concerning protection visas. It includes changes that would introduce a new onus on lawful and unlawful non-citizens to specify the particulars of their protection claim and to provide sufficient evidence to support their claim. The Schedule also includes provisions relating to 'bogus' documents which provide the Minister with the power to refuse to grant a protection visa if an applicant refuses to comply with a request to produce documents, or produces bogus documents unless the applicant has a reasonable explanation and subsequently produces documentary evidence for the Minister, or takes reasonable steps to do so. The Schedule also introduces section 423A that requires the RRT to draw an inference unfavourable to the credibility of an applicant's claim or evidence unless it is satisfied that there is a reasonable explanation why a claim or evidence was not previously raised.
15. Schedule 2 to the Bill contains amendments relating to Australia's complementary protection obligations. It changes the existing test for determining whether a person engages Australia's protection obligations under the ICCPR or the CAT from a 'real chance/ real risk' threshold to 'more likely than not'. The related provisions will not commence if the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2014 (Cth) (the Regaining Control Bill), currently before the Senate, is enacted.
16. Schedule 3 of the Bill contains amendments to powers to award protection visas to unauthorised maritime arrivals and transitory persons. This Schedule seeks to make a number of changes that will affect asylum seekers who have been issued Temporary Safe Haven Visas. These visas are currently granted to unauthorised maritime arrivals as an alternative to Temporary Protection Visas, disallowed by the Senate on 2 December 2013.
17. Finally, Schedule 4 makes a number of changes to the procedural operations of the MRT-RRT, including changes to the way that oral decisions are made and recorded; setting out the steps taken for the MRT-RRT to have notified a decision to dismiss or reinstate an application for review where the applicant failed to appear; and empowering the Principal Member to make Guidance Decisions that must be followed by other members of the MRT-RRT, unless the facts or circumstances of the decision under review are clearly distinguishable from those of the Guidance Decision.
18. The most significant amendments to the Migration Act are discussed in detail below.

⁹ Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014 ('EM Protection Amendment Bill'), available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5303_ems_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590%22.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014, 8 (Scott Morrison).

The Law Council's support for clear, fair legal framework for determining protection claims

19. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas that is consistent with Rule of Law principles¹¹ and Australia's relevant international law obligations.
20. These principles require, for example, that Australia apply a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive,¹² and comply with Australia's international obligations, such as the obligation to have robust safeguards in place to prevent against *non-refoulement*, including:
- (a) a clear, legal process for determining whether a person invokes any of Australia's protection obligations, including those contained in the *Convention Relating to the Status of Refugees*¹³ (Refugee Convention), and on complementary protection grounds¹⁴ such as obligations to provide protection from certain types of serious harm under the CAT, ICCPR, the Second Optional Protocol to the ICCPR,¹⁵ and the *Convention on the Rights of the Child*¹⁶ (CROC);
 - (b) access to independent legal or migration advice for all people seeking Australia's protection;¹⁷ and
 - (c) access to merits review of all administrative decisions concerning protection status.¹⁸
21. For this reason, the Law Council supports the stated rationale for the Bill – namely to increase the efficiency and clarity of existing protection status determination processes. It also supports efforts to clarify procedural matters such as when a decision will be finally determined, and how notice is given within the MRT-RRT to the Secretary as well as to the applicant.

¹¹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at:

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

¹² Art 31 of the Refugee Convention. The Law Council has previously expressed concern about delays in processing of unauthorised maritime arrivals, see: Law Council of Australia, 'Legal uncertainty must end for asylum seekers' (Media Release, 8 November 2012), available at:

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1239%20--%20Legal%20uncertainty%20must%20end%20for%20asylum%20seekers.pdf>; and Law Council of Australia 'Law Council calls for greater legal rights in asylum seeker policy' (Media Release, 28 February 2013), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1311%20--%20Law%20Council%20calls%20for%20greater%20legal%20rights%20in%20asylum%20seeker%20policy.p](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1311%20--%20Law%20Council%20calls%20for%20greater%20legal%20rights%20in%20asylum%20seeker%20policy.pdf)

df.

¹³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention') to be read with the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

¹⁴ See: Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011, 2.

¹⁵ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991) ('Second Optional Protocol').

¹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) ('the CROC').

¹⁷ See for example art 16 of the Refugee Convention, arts 9 and 14 of the ICCPR.

¹⁸ Ibid.

22. These principles also give rise to the Law Council's support for efforts to ensure complementary protection assessment processes remain codified in legislation, however, as outlined below, the Law Council holds concerns in relation to the proposed changes to the existing statutory approach for determining when Australia's complementary protection obligations are invoked.

The Law Council's Concerns

23. While many of the features of this Bill are designed to streamline the way in which applications for protection visas are made and assessed, the Law Council is concerned that as currently drafted, the Bill detracts from and undermines existing processes designed to ensure that protection claims are assessed fairly and under a system that enables decision makers at the primary and review stages the discretion to assist in the timely and accurate specification of claims. If enacted, some features of the Bill may give rise to litigation at later stages of the protection status assessment process, or leave applicants with genuine claims for asylum at risk of removal due to procedural reforms that promote form over substance.
24. Many of the amendments proposed in the Bill will have particularly harsh impacts on certain protection visa applicants who, without appropriate advice and support, may lack capacity to understand and navigate Australia's protection system, access and produce documentation and make out a claim. This is exacerbated by the withdrawal of funding for the Immigration Advice and Application Assistance Scheme (IAAAS) which previously provided asylum seekers with limited forms of independent legal and migration advice to assist in the timely and accurate articulation of protection claims, and helped to ensure that claims without merit were not pursued. Although the Law Council welcomes the Government's commitment to maintaining limited forms of IAAAS-type services to certain categories of particularly vulnerable asylum seekers, it remains unclear on what basis such services will be provided, and how vulnerability will be assessed having regard to the many thousands of asylum seekers, including many families and unaccompanied minors, who are seeking protection in Australia.
25. If the changes proposed in this Bill are enacted, it remains unclear how protection visa applicants will be informed of the changes and the particular implications for their individual legal rights. Public information, such as fact sheets on the Department of Immigration and Border Protection (DIBP)'s website, is unlikely to provide a sufficient substitute for independent and individualised legal or migration advice particularly given the complexities of the existing and proposed provisions of the Migration Act.
26. The Law Council's specific concerns with the Bill are outlined below.

Changes to the legal framework of refugee status determination processes

27. The Law Council has set out the current legal framework for primary decision making and merits review at **Attachment B**.

The Changes Proposed by the Bill

28. Item 1 of Schedule 1 of the Bill introduces section 5AAA to Part 1 of the Migration Act. Part 1 of the Migration Act addresses 'preliminary issues'. Proposed section 5AAA provides:

5AAA Non-citizen's responsibility in relation to protection claims

(1) This section applies in relation to a non-citizen who claims to be a person in respect of whom Australia has protection obligations (however arising).

(2) For the purposes of this Act, it is the responsibility of the non-citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim.

(3) The purposes of this Act include:

(a) the purposes of a regulation or other instrument under this Act; and

(b) the purposes of any administrative process that occurs in relation to:

(i) this Act; or

(ii) a regulation or instrument under this Act.

(4) To remove doubt, the Minister does not have any responsibility or obligation to:

(a) specify, or assist in specifying, any particulars of the non-citizen's claim; or

(b) establish, or assist in establishing, the claim.

The Law Council's concerns

29. The Law Council is concerned that the introduction of section 5AAA could alter the current legal framework governing the determination of protection claims in a way that detracts from the existing inquisitorial features of the RRT and may not align with Australia's obligations under international law.¹⁹

30. Under the existing framework for primary decision making and merits review relating to protection visa claims, there is no 'legal burden of proof' on either party.²⁰ For example, existing paragraph 36(2)(a) does not prescribe a specific standard of proof or 'threshold test' for determining whether a claim for protection under Refugee Convention grounds has been established. Instead there is a 'forensic' burden in that it is for the party propounding a contention to 'advance whatever evidence or argument' it wishes in support of that contention, and, in accordance with the requirements of the inquisitorial process, it is then for the decision maker or the Tribunal to decide whether or not the proposition is established.²¹

¹⁹ Australia must have safeguards in place to guarantee against *non-refoulement*, including a clear, legal process for determining whether a person invokes any of Australia's protection obligations that can be found at art 33 of the Refugee Convention; as well as on complementary protection grounds such as obligations to provide protection from certain types of serious harm under art 3 of the CAT; arts 6 and 7 of the ICCPR as well as its Second Optional Protocol; and the CROC. Important guidance can be gained in this area from the Guidelines and Statements issued by the United Nations High Commissioner for Refugees, for example: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Office of the United Nations High Commissioner for Refugees, 2nd ed, 1992) 'UNHCR Handbook').

²⁰ *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [134].

²¹ *Ibid* [135] quoting *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 at 576 [187].

31. This approach is appropriate in the context of protection visa applications which are required to be assessed against provisions in the Migration Act that are designed to give effect to Australia's international obligations under the Refugee Convention and other relevant Conventions. As observed in *FTZK v Minister for Immigration and Border Protection & Anor* [2014] HCA 26, domestic law concepts of burden of proof and standard of proof cannot easily be equated with the essential task of interpreting the terms of an international treaty.²² As French CJ and Gageler J stated:

*The risk with the use of domestic standards of proof as analytical tools is that they can evolve into substitutes for the words of the Article [in the international Convention] and may result in the bar being placed too high or too low, according to the circumstances.*²³

32. Proposed new section 5AAA will introduce a burden of proof requirement more suited to an adversarial process that seeks to test claims relating to past or existing factual events that are within the applicants knowledge or that can be readily demonstrated by reference to documentary or other evidence. Applications for protection visas based on grounds of the fear of persecution or other forms of serious harm are of a substantially different category – relating to the potential for future action to occur such as the future exercise of power by a foreign government. Applicants for protection are also routinely made by applicants who lack experience or understanding of adversarial legal concepts such as the onus of proof and who may be without access to legal advice or other forms of independent assistance to present their claim.
33. Even in cases where extensive documentary and other evidence may exist to substantiate a claim for protection, the protection visa applicant may be unable to access and present the evidence necessary to meet the proposed new threshold due to resource and capacity constraints, or in cases where this evidence is held by foreign governments, due to the nature of their protection claim itself.
34. As recognised by the existing approach, visa claims reviewed by the MRT-RRT are most appropriately assessed utilising an inquisitorial approach where decision makers are able to ascertain the relevant facts in the most efficient and practical way having regard to the particular circumstance of the individual claim. This is the approach adopted through the MRT-RRT, and is not limited to protection claims. For example, and as indicated above, an applicant for a student visa who appears in the MRT can be accompanied by a support person, will have the procedures of the MRT explained to them, and can request that the MRT seek additional information that it considers relevant to making its decision.
35. Other visa applicants, such as student or work visa applicants, do not bear an evidentiary onus of the type proposed in section 5AAA. It is not clear why such an onus should be placed on protection visa applicants, who due to their need for protection, would appear to be the least likely category of applicants able to discharge such an onus.
36. These concerns have also been noted by the Parliamentary Joint Committee on Human Rights (PJCHR), which in its report on the Bill refers to the general legal principle of international law – that the burden of proof rests with the applicant, with the duty to 'ascertain and evaluate all the relevant facts' shared between the

²² See: *FTZK v Minister for Immigration and Border Protection & Anor* [2014] HCA 26.

²³ *Ibid* [15]. This discussion occurred in the context of art 1F of the Refugee Convention.

applicant and examiner.²⁴ The PJCHR also refers to statements by the United Nations High Commissioner for Refugees (UNHCR) that, 'in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.'²⁵

37. The PJCHR also noted that difficulties experienced with presenting a claim may be further compounded by language barriers and experiences of trauma.²⁶ The PJCHR requested further advice from the Minister over whether this amendment to the Migration Act is compatible with Australia's *non-refoulement* obligations;²⁷ the best interests of the child, pursuant to the CROC,²⁸ and rights to equality and non-discrimination.²⁹ The PJCHR also requested further advice from the Minister over whether Schedule 3 of the Bill is compatible with the best interests of the child, pursuant to the CROC.³⁰
38. In addition, the Law Council has concerns that, as this provision unambiguously sets out that the Minister is under no obligation to provide access to advice, assistance or support, asylum seekers may face a situation where they are given no information about the law that applies to their claim and no assistance to present their claim.
39. As the Law Institute of Victoria (LIV) – one of the Law Council's Constituent Bodies – has noted, a protection visa applicant cannot be assumed to be comprehensively informed of the criteria for the grant of a protection visa or the definitions contained in the Refugee Convention at an early stage of the protection claim determination process. Even if an applicant has received legal advice about the specific criteria and relevant definitions, the applicant cannot automatically be assumed to have applied them to their own life and circumstances. As a result, it is unlikely that a protection visa applicant will know from the outset all aspects of their personal history that are relevant to their claim.
40. The LIV also noted that a significant body of literature exists about the nuances of memory formation, and the transcultural factors that bear upon this as well as the inherent effects of trauma. Persons who have suffered from trauma cannot be expected to recall in a completely linear and uncomplicated fashion everything that has happened to them in the past.³¹ Similarly, there is a body of evidence that discusses the extreme hesitance and reluctance of victims of sexual violence to discuss their experiences particularly in the context of giving evidence in support of their protection claims, where a power imbalance is inherent between the applicant and questioner.³²

²⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of the 44th Parliament; Bills introduced 23 - 26 June 2014; Legislative Instruments received 7 - 20 June 2014*, 15 July 2014, 37 ('PJCHR Report'), quoting the UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, [196]-[197], available at: <http://www.refworld.org/docid/4f33c8d92.html>.

²⁵ Ibid.

²⁶ Ibid 38.

²⁷ Ibid 39.

²⁸ Ibid 46-7.

²⁹ Ibid 53.

³⁰ Ibid, 50.

³¹ Jane Herlihy, Laura Jobson, Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 *Applied Cognitive Psychology* 661.

³² Diana Bögner, Jane Herlihy, Chris Brewin, 'Impact of sexual violence on disclosure during Home Office interviews', (2007) 191(1) *The British Journal of Psychiatry* 75.

41. The LIV is also concerned that underlying the proposed changes is an assumption about how an applicant with a legitimate protection claim should relay his or her story to a decision maker. There are a number of reasons why an applicant may find it difficult to share their personal account with a decision maker including language barriers; difficulties with interpreters; the effects of trauma; and, fear of authorities. The proposed changes will increase the likelihood of a decision maker's individual cultural, gender and experience biases influencing their views of what kind of narrative establishes a legitimate protection claim. The LIV considers that decision makers should be capable of reviewing and analysing information for the purposes of making a decision even if the information is not presented in strict chronological fashion.
42. Another of the Law Council's Constituent Bodies, the New South Wales Bar Association (NSW Bar), opposes this provision on the basis that it requires asylum seekers to define their claims as if they were drafting a pleading.
43. The NSW Bar also query whether sub-section 5AAA(4) is unnecessary in light of the fact that the Courts have consistently been extremely conservative on imposing any duty to inquire or assist on the Tribunal. The NSW Bar is concerned that the proposed provision would remove the Courts' existing flexibility to ensure a fair process in the context of the inquisitorial nature of the Tribunal. For example, under these provisions children who may not be able to articulate claims will be severely disadvantaged. The Tribunal will be unable to give any assistance to a person unfamiliar with the complex provisions of the Act but who nonetheless has a genuine claim to protection. The NSW Bar also warn that the requirement to specify 'the particulars of his or her claims' may be inconsistent with guidance provided by UNHCR if applied to claims arising under the Refugees Convention.³³
44. The Law Council is also concerned that this provision, designed to improve the efficiency of the refugee status determination process, could be a counter productive measure, as decision makers may be required to make a decision without access to complete information or in circumstances where the applicant is not fully informed as to his or her legal rights and responsibilities. This may result in delays, more complex and lengthy merits review hearings and the very high risk of judicial review proceedings on the grounds of failure to ensure procedural fairness.
45. As the LIV has explained, by altering the existing approach to the onus or burden of proof in refugee status determination processes from inquisitorial to adversarial in nature, the proposed new section 5AAA give rise to greater need to ensure the requirements for procedural fairness are met in assessing a claim. In this way, the decision maker might be considered to be under an increased obligation to afford procedural fairness by informing the applicant of the criteria against which the decision will be made. For example, the LIV explains that given that section 36(2) of the Migration Act essentially adopts the test for determining whether a person is considered a refugee set out at Article 1 of the Refugee Convention, it may be that the decision maker has a duty to inform the applicant how this test is satisfied. This may require the decision maker to explain what is meant by a 'well-founded fear of prosecution', rather than simply asking why the applicant is seeking asylum in Australia
46. The Law Council also notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), in reviewing this Bill, has expressed concern that new section 5AAA may result in an applicant's access to a fair hearing becoming

³³ See: UNHCR Handbook, [66]-[67].

compromised because there is no mechanism or requirement to ensure that applicants are aware of the burden of proof required to be discharged under the proposed section 5AAA. As noted above, this concern is amplified by the recent withdrawal of funding for IAAAS.³⁴ Similarly to the PJCHR, the Scrutiny of Bills Committee has also noted that this issue may be compounded because of poor levels of English language, legal literacy and the vulnerability of some applicants.³⁵

47. Although the Minister has noted that the Government will continue to provide limited advice and application assistance to vulnerable applicants who have not arrived lawfully, there remains no clear information about what criteria will apply to determine vulnerability and what assistance will be made available. The Scrutiny of Bills Committee has noted that applicants who have arrived *lawfully* and can demonstrate financial hardship and disadvantage may also be eligible for assistance with their primary application,³⁶ though this assistance remains very limited.
48. The Minister has also stated of this amendment that it 'will put Australia on a par with like-minded countries including the United States, New Zealand and the United Kingdom.'³⁷ The Law Council has not had the opportunity to conduct a detailed comparative analysis of the protection status determination process in these jurisdictions but notes that this analysis has been undertaken by the Kaldor Centre which has observed that while the Bill seeks to import adversarial features to the review process that are reflective of the approach taken in the United Kingdom, it fails to reflect other adversarial rights guarantees that are present in the UK, such as the principle of equality of arms that provides both parties to proceedings with a reasonable opportunity to present their case under equal conditions.³⁸ The Kaldor Centre has also noted that the House of Lords does not consider the imposition of a particular evidentiary standard of proof helpful when interpreting the Refugee Convention.³⁹
49. For these reasons, the Law Council recommends that proposed section 5AAA be removed from the Bill.
50. In the alternative, if the amendment is pursued, Law Council recommends that:
 - proposed section 5AAA be amended to provide the decision maker with discretion to assist in specifying any particulars of an applicant's claim in

³⁴ Scrutiny of Bills Committee Report, 18. On 2 April 2014, the Law Council issued a media release expressing its regret that the Government had ceased funding the Immigration Application Advice and Assistance Scheme for unauthorised maritime arrivals, and calling on the Government to reinstate that funding: Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_--_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf.

³⁵ Ibid.

³⁶ Ibid 18-9, citing Statement of Compatibility, 4.

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014, 8 (Scott Morrison).

³⁸ The European Court of Human Rights has considered this principle in the context of monitoring State compliance with Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). In the seminal case *Dombo Beheer B.V. v. the Netherlands* 14448/88 [1993] ECHR 49, the Court states (at [33], citing *Feldbrugge v. the Netherlands* judgment of 26 May 1986, Series A no. 99, p. 17, para. 44): '...certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases.'

³⁹ *Secretary of State For The Home Department v. Rehman* [2001] UKHL 47 at [56] per Lord Hoffman. This approach was also taken in the UK Supreme Court: *Al-Sirri v Secretary of State for the Home Department* (2012) [2013] 1 AC 745, [45].

exceptional circumstances; for example where the applicant is an unaccompanied minor, there were difficulties with interpretation at the preliminary level of decision making, if the applicant has a disability, and/ or the applicant is experiencing severe trauma or other serious health difficulties;

- publicly available guidelines be developed that clearly outline how proposed section 5AAA will be applied (explaining, for example, what is meant by 'sufficient evidence') and made available in plain English and translated versions to all protection visa applicants, including unauthorised maritime arrivals; and
- all protection visa applicants be provided with necessary assistance; for example, translation services and Government-funded independent legal and/or migration assistance) at all stages (including primary decision making and merits review stages) of the protection status determination process.

Particular changes to primary decision making

51. The Migration Act currently provides a range of provisions designed to deter and prohibit the use of incorrect information in protection visa applications. For example:

- pursuant to existing section 91W of the Migration Act, if an asylum seeker 'refuses or fails to comply' with a request to provide documentary evidence of an applicant's identity, nationality or citizenship, the Minister can draw an adverse inference in relation to the applicant's identity, nationality or citizenship, provided the asylum seeker was warned of this possibility at the time of the request; and
- section 103 of the Migration Act also prohibits non-citizens from presenting a 'bogus document' to a decision maker or a tribunal performing a function or purpose under the Migration Act. The Act also contains discretionary powers for the Minister to cancel or refuse visas if incorrect information has been provided – whether intentionally or not.

52. The phrase 'bogus document' is defined in section 97 of the Migration Act as a document that the Minister reasonably suspects is a document that: (a) purports to have been, but was not, issued in respect of the person; or (b) is counterfeit or has been altered by a person who does not have authority to do so; or (c) was obtained because of a false or misleading statement, whether or not made knowingly. The amendments proposed in the Bill seek to impose additional penalties and adverse consequences on protection visa applicants who include incorrect information in their visa applications, whether they do so intentionally or not.

53. Item 10 of the Bill amends section 91W to provide that the Minister must refuse to grant the protection visa to the applicant if the applicant refuses to comply with request to provide documents or produces a 'bogus document' in response to the request. It also provides that the applicant should be given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant refuses or fails to comply with the request; or produces a bogus document in response to the request. Item 10 also amends section 91W to provide that the amended provision does not apply if the Minister is satisfied that the applicant has a 'reasonable explanation' for refusing or failing to comply with the request or producing the bogus document; and either produces documentary evidence of his or her identity, nationality or citizenship; or has taken reasonable steps to produce such evidence.

54. Item 11 inserts new section 91WA. This provision provides that the Minister:

...must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

55. This provision does not apply if the Minister is satisfied that the applicant has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and either provides documentary evidence of his or her identity, nationality or citizenship; or has taken reasonable steps to provide such evidence.

56. Like the Kaldor Centre, the Law Council is concerned that if enacted, amendments to section 91W and 91WA would:

- require the Minister to refuse the protection visa applicant in circumstances where bogus documents are provided or where identity documents have been destroyed, rather than allow for an adverse inference to be made; and
- extend the provision to cases where an asylum seeker does not provide the 'bogus' documents, but 'causes' the documents to be provided.

57. As noted by the LIV, these amendments will have broad-ranging consequences for applicants where national identity documents are produced predominantly through self-report by applicants. For example, an applicant may only be able to provide an approximate date of birth if born at a time when births were not recorded and the applicant is unaware of his or her exact age.

58. The definition of 'bogus document', which includes documents which were 'obtained because of a false or misleading statement, whether or not made knowingly', also has the potential to capture national identity documents obtained innocently by applicants based on their self-report and estimation of identity particulars. For example, it is unclear how the amendments would apply to permit the refusal of a protection visa application by an Afghan national, who obtained a Taskera (an Afghan identity card) based on an estimated and self-reported age, that DIBP (after independent age-testing) suspects to be incorrect. This is particularly the case given that the standard of proof under the proposed amendments does not require that the Minister be positively satisfied that the information in the document is false or misleading, but 'reasonably suspects' it to be so.

59. As the NSW Bar notes, this could mean that protection is denied on the basis of a mere opinion that a document is 'bogus' in circumstances where the Minister is not required to reach any level of proof as to whether the document is actually bogus. This may be particularly unfair for those applicants who have no control over or ability to verify the documents obtained and sent by well-meaning family or other third parties in support of their claims. It may also result in an adverse inference being drawn where the applicant has no control over the circumstances in which their documentation may have been destroyed. It could, for example, disqualify people

who have been victims of people smugglers who have forced them to destroy their documents at a time when they could not be expected to have known about this law.

60. The LIV notes that these amendments may have particularly harsh consequences for certain categories of asylum seekers, such as Afghans holding a Taskera – identity documents that even where produced through entirely ‘official’ means through the Afghan Ministry of Home Affairs, are widely reported to contain imprecise information regarding identity particulars of their holders.⁴⁰ This occurs through no fault of the applicant but simply because of defects in Afghan national record-keeping processes, the unavailability of reliable family data, and the reliance on applicants’ self-report (confirmed by witnesses) of their identity particulars.
61. The NSW Bar has commented that the amendments to section 91W and the addition of section 91WA shifts the inquiry from the weight to be given the document as corroborative evidence of the applicant’s claims/credibility to the assessment of the document itself as bogus and therefore a ground for refusal. If a document is reasonably suspected of being bogus there might be no need to go into the applicant’s claims, the application must be refused on the basis of the document alone.
62. In the Second Reading Speech accompanying the Bill, the Minister outlined that the proposed amendments to section 91W and the proposed new section 91WA would not apply if the Minister is satisfied that the applicant has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and either provides documentary evidence of his or her identity, nationality or citizenship; or has taken reasonable steps to provide such evidence.
63. This is an important safeguard, however as currently drafted this exemption is dependent on the subjective views of the Minister (namely if ‘the Minister is satisfied’), rather than an objective consideration of whether reasonable steps were taken by the applicant. In addition, there is no guidance contained in the Explanatory Memorandum in relation to what steps would be considered ‘reasonable’ by the Minister and/ or his or her delegate.
64. As a result, this amendment may still leave stateless people and other applicants (including unaccompanied minors or people with disabilities) at risk of having their protection claims refused on the basis of their inability to produce documentary evidence and may not adequately take into circumstantial factors, such as access to the internet and phone, translation services and advice over what may be considered ‘reasonable’.
65. The Law Council also notes that the proposed changes to section 91W include the requirement that the applicant be given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant refuses or fails to comply with the request; or produces a bogus document in response to the request. Again this is a welcome safeguard but may be of limited utility if applicants do not have access to the type of advice and support services they need to understand the content and implications of this warning – particularly if such a warning is provided orally and no mechanisms are in place to ensure that it has been fully understood. The Law Council does not support such warning being given orally.

⁴⁰ See Canada: Immigration and Refugee Board of Canada, *Afghanistan: Description and samples of the Tazkira booklet and the Tazkira certificate; information on security features*, 16 September 2011, AFG103812.E, available at: <http://www.refworld.org/docid/4f1510822.html> [accessed 21 July 2014].

It notes that access to legal assistance would also be very important for applicants to enable them to understand the consequences of the RRT's decision.

66. The PJCHR has commented, with respect to the amendments to section 91W and the insertion of section 91WA, that these amendments may be inconsistent with the assessment that is required under international law to guard against *non-refoulement*.⁴¹ It is noted that people who are fleeing persecution frequently do not possess personal or identity documentation, and that this is acknowledged by the Refugee Convention.⁴² The PJCHR noted that Ministerial discretion is not sufficient to protect against the risk of *non-refoulement* or satisfy the 'independent, effective and impartial' review standards under the ICCPR and the CAT.⁴³ The PJCHR also requested further advice from the Minister over whether this amendment to the Migration Act is compatible with the best interests of the child, pursuant to the CROC.⁴⁴
67. In light of these concerns, the Law Council queries whether the proposed amendments to section 91W and the new section 91WA constitute a necessary and proportionate response to any identified prevalence of the use of such documents, particularly when regard is had to:
- (a) the range of existing provisions that already empower decision makers to refuse protection applications that rely upon incorrect or 'bogus' documents or to draw adverse inferences relating to credibility;
 - (b) Article 31 of the Refugees Convention which acknowledges that refugees have good cause for attempting to enter a territory without a visa;⁴⁵
 - (c) the reality that most asylum seekers flee their home country in a state of emergency and are unable to obtain the necessary documentation before leaving, particularly where fleeing government persecution; and
 - (d) the lack of legal assistance currently available to such applicants.
68. If the amendments are pursued, the Law Council recommends that an amendment be made to the proposed exemption to remove the subjective requirements that: (a) the Minister must be satisfied that the applicant has a reasonable explanation for providing the bogus document or for its destruction or disposal, and (b) that the Minister must be satisfied that the applicant has taken reasonable steps to provide evidence (unless the evidence is subsequently provided), and replace this with an objective test.

Proposed changes to the review stage

69. The amendments to the Migration Act concerning 'bogus' documents also apply to the assessment of protection claims undertaken by the RRT. New section 423A sets out how the RRT must deal with a claim that was not raised in the application for a

⁴¹ PJCHR Report, 45.

⁴² Ibid, citing arts 25, 27, 28 and 31.

⁴³ Ibid 45-6.

⁴⁴ Ibid 49.

⁴⁵ Art 31 also notes that refugees should not be 'penalised'. In this context, a penalty is considered as extending beyond criminal penalties – see: Guy Goodwin Gill "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection" in Erika Feller, Volker Türk, and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

protection visa before the primary decision was made, or evidence that was presented in the application for a protection visa, but that was not presented before the primary decision was made. In these circumstances, the RRT will have to draw an inference that is unfavourable to the credibility of the claim or evidence if the RRT 'is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made'.

70. The NSW Bar has noted that the relevance of some aspects of a personal history sometimes become apparent only after the primary decision and once the applicant understands the refugee definition better, for example facts that might identify the applicant as a member of a particular social group, or that go to the reasonableness of relocation. It considers that the amendment will unfairly inhibit some applicants from raising such new claims or responding to new issues for fear of the adverse inference as to credibility, and suggested that this provision will lead to further litigation on the question of whether the issue raised was in fact raised at an earlier stage.
71. The Law Council is also concerned that the proposed amendment may interfere with the independence and discretion of the RRT. In particular, the amendments could operate to require the RRT to ignore the merits of the particular claim before them and the particular circumstances that the applicant may face in obtaining accurate documentary evidence (such as lack of physical access to evidence, illiteracy and experiences of persecution) in favour of a procedural requirement to produce verified documentary evidence and/or adduce evidence at the first instance. The proposed amendments also sit uneasily with the Tribunal's traditional role of considering the merits of the application afresh, and practical considerations, such as the need for the applicant to address evidence raised by the primary decision maker in the application for review.
72. Such concerns were expressed by the Scrutiny of Bills Committee in its report on the Bill as follows:

*...it has long been accepted that the critical question for a merits review tribunal is not whether the decision which the original decision-maker was the correct or preferable decision one on the material before the original decision-maker. Rather, the question for a merits review tribunal is what the correct or preferable decision should be on the material before the tribunal.*⁴⁶

73. The Scrutiny of Bills Committee concluded that the proposed amendment was a 'significant departure' from the 'typical and distinctive' function of merits tribunals, and queried why decisions relating to protection visas require a departure from their standard practice.⁴⁷ It sought a justification from the Minister on why there should be this departure from general practice.⁴⁸ It also considered that this section, in addition to new section 5AAA (as discussed above), may compromise a fair hearing for an applicant, thus raising issues concerning procedural fairness.⁴⁹

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 8 of 2014, 9 July 2014, 16 ('Scrutiny of Bills Committee Report'). The Committee notes that merits review generally allows for applicants to introduce new facts at the time of the merits hearing, citing *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* The Committee also sought further responses from the Minister over specific issues.

⁴⁹ *Ibid.* 19.

74. The PJCHR has expressed similar concerns, concluding that the proposed section 423A is inconsistent with Australia's *non-refoulement* obligations under the ICCPR and CAT.⁵⁰ It requested further advice from the Minister over: whether this amendment to the Migration Act meets the standards of the quality of law test;⁵¹ is compatible with the best interests of the child, pursuant to the CROC;⁵² and rights to equality and non-discrimination.⁵³ It noted that:

- the proposed amendments lack sufficient procedural and substantive safeguards to ensure that a person is not removed from Australia in contravention of Australia's *non-refoulement* obligations⁵⁴
- people may be unable to recount their story fully and in the first instance owing to trauma that they may have suffered, or may fail to understand the types of information that may be important in making their claim;⁵⁵ and
- the provision is 'inconsistent with the fundamental nature of independent merits review', departing from the 'typical character' of merits review tribunals in Australia.⁵⁶

75. As with primary decision makers, an exception is available if the RRT is satisfied that the applicant has a reasonable explanation of why the claim was not raised, or the evidence was not presented, before the primary decision was made. However, the PJCHR has noted that the reference in the proposed provision to a 'reasonable explanation' for drawing an unfavourable inference is unclear, and does not appear to satisfy the 'quality of law' test that requires that any interference with human rights must be certain and accessible such that people can understand when the interference with their rights will be justified.⁵⁷ The Scrutiny of Bills Committee also noted of this requirement on the RRT that it is difficult to evaluate, as the circumstances that may support a 'reasonable explanation' are not specified in the legislation.⁵⁸

76. For these reasons, the Law Council also opposes these amendments and recommends that if they are pursued, that:

- the provisions be redrafted to provide that the Minister *may* rather than *must* make an adverse inference when the applicant provides bogus documents or refuses or fails to comply with a request to produce documents, and the RRT *may* rather than *must* make an adverse inference on the credibility of a claim or evidence before it;
- greater guidance is given as to the meaning of 'reasonable explanation' in the context of failing to comply with a Minister's request to produce documents or producing bogus documents, as well as why a claim or evidence was not raised prior to the applicant's hearing at the RRT;

⁵⁰ PJCHR Report 44.

⁵¹ Ibid 44.

⁵² Ibid 48-9.

⁵³ Ibid 54.

⁵⁴ Ibid 43.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Scrutiny of Bills Committee Report, 17.

- the requirement in section 91W that the applicant be given a warning that the Minister cannot grant the protection visa to the applicant if the applicant refuses or fails to comply with the request; or produces a bogus document in response to the request should be strengthened to require warnings to be given in writing only, and be accompanied by interpretive and other support services necessary to ensure it is fully understood by the applicant;
- greater guidance is given as to the types of documents that would be considered a 'bogus document';
- the Minister must provide an explanation to the applicant of why their documents are considered bogus documents and provide them with an opportunity to respond; and
- following a request by the Minister to produce documentation, an applicant is not required to take steps to provide documentary evidence to the Minister where this would not be reasonable.

Further procedural changes to the MRT- RRT

77. The Bill also proposes further changes to the procedures of the MRT-RT which detract from the existing inquisitorial approach. These include:

- broadening the powers of the MRT-RRT to enable the Tribunals to dismiss or reinstate an application if the applicant fails to appear;⁵⁹
- broadening the power of the Principal Members of the MRT-RRT to give directions, such that the Principal Member may set out procedures to be followed by applicants and their representatives;⁶⁰
- new powers relating to Guidance Decisions, whereby the Principal Members of the MRT- RRT may direct that a decision is to be complied with by the Tribunals in reaching a decision on a review, where specified by a direction. It is noted that non-compliance with the guidance decision does not invalidate the Tribunals' decision on review.⁶¹

78. The Law Council is concerned that, taken together, these changes risk disadvantaging certain protection visa applicants, including: (a) applicants in detention who may not be able to obtain approval to appear in person at their hearing; and/ or, (b) since the revocation of IAAAS funding,⁶² applicants who cannot make arrangements to obtain representation; and/ or, (c) due to the proposed amendments at Schedule 1 with the introduction of section 5AAA, applicants who are unable to access assistance for their protection claim. In addition, many applicants at the MRT also are unrepresented, and may also be disadvantaged by changes to the operation of the Tribunals.

79. The Law Council acknowledges the potential benefit of the amendments that introduce a system of Guidance Decisions for the RRT. This may result in high quality decisions being more easily identified and utilized more consistency by

⁵⁹ Migration (Protection and Other Measures) Bill 2014, Schedule 4, ss 349(2) (MRT) and 415(2) (RRT).

⁶⁰ Ibid ss 353A (MRT) and 420A (RRT).

⁶¹ Ibid ss 353B (MRT) and 420B (RRT).

⁶² The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (Media Release, 31 March 2014), available at: <http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>.

Tribunal members. However, without further detail regarding how they will apply in practice, these amendments also raise concerns.

80. For example, the Law Council is concerned that the existence of such Guidance Decisions will affect the ability of Tribunal Members to make decisions based on the facts of each individual case. It is unclear from the Bill how Guidance Decisions that the Principal Member directs are to be complied with will be made and identified, and how the facts of a decision under review are distinguishable from a Guidance Decision. . These changes raise questions about the underlying concept of precedent and the principle of justice that like cases should be treated alike.⁶³ This principle acknowledges that the following of principle or decisions is appropriate only where the facts are similar. As the LIV notes, to do otherwise would be to attempt to impose criteria additional to those imposed by Parliament in legislation, which is not the function of the Principal Member of the Tribunal, being a member of the Executive.
81. The Scrutiny of Bills Committee has also expressed its concern in relation to these provisions, stating that:
- it may not be clear which of the facts or reasons in the Guidance Decision are binding and have general application due to the lack of indication in the proposed sections;
 - that legal precedent is typically an exercise of judicial, rather than administrative power and cannot be conferred on administrators for Constitutional reasons; and
 - if the Guidance Decision is not characterised as a judicial power, it may be characterised as a legislative power on the basis that it appears to determine how the law should be applied to a certain category of cases, thereby making it subject to disallowance under the *Legislative Instruments Act 2003* (Cth).⁶⁴
82. Other amendments proposed in this Schedule also fetter the Tribunal Members' existing discretion to have regard to the particular circumstances of individual applicants, for example those amendments concerning the provision of information and those concerning the failure of the applicant to appear before the Tribunal on review.
83. The Law Council does not oppose measures to promote the timely and efficient resolution of protection visa applications, but considers that it is important that Tribunal members retain an appropriate degree of discretion to take into account the particular disadvantages and practical obstacles faced by many applicants.
84. The amendments imposing strict time frames raise similar concerns. For example, the proposed short, 7-day timeframes to apply to the Tribunal for reinstatement after notice of an oral decision is received, and that cannot be extended at the direction of the Tribunals, may have particularly harsh consequences for applicants on bridging visas who may be struggling to find and retain housing or who may not be able to independently read and understand such information. The LIV has also raised concerns that this particular change threatens to erode procedural fairness and fails to acknowledge the obstacles faced by applicants in appearing in person; the time it

⁶³ Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1st ed, 1998).

⁶⁴ Scrutiny of Bills Committee Report, 21-2. The Committee sought further advice from the Minister on the characterisation of guidance decisions.

takes to prepare and lodge an application for reinstatement; and, where applicants are represented, the reality in which representatives receive instructions from applicants, and the significant case load pressures faced by representatives.

85. The LIV has also expressed its concern that a written statement of an oral decision need only be provided by the MRT-RRT at the written request of an applicant. The LIV believes that this creates a significant risk that an applicant may not be fully informed about the reasons for a decision that has a significant impact on the applicant's rights. Receiving written reasons for a decision is important for an applicant to understand a finding, particularly in the case of an adverse finding where the applicant must decide whether to challenge the decision in an appeal. Written reasons are also very important for self-represented applicants who are not necessarily able to assess reasons at the time they are given orally and would benefit from having more time to consider and understand the decision. There is also a risk that self-represented litigants will not be aware of the requirement to make the request. The importance of providing reasons for a decision was discussed by the High Court in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16.⁶⁵ The Administrative Review Council has also acknowledged that the writing of reasons both assists administrative decision makers during the decision-making process, and results in the making of better quality decisions.⁶⁶
86. Opposition to this change has also been expressed by the Law Council's Migration Law Committee, that is particularly concerned that oral decision making puts great pressure on practitioners, particularly where unrepresented clients seek initial advice after a decision. It does not support the use of oral decisions over written decisions, because this limits the opportunity to consider review rights; creates further obstacles for applicants who have low levels of English language or legal literacy; and encourages members to make decisions quickly without adequately considering the often complex information presented in regard to an applicant's claim.
87. Although the capacity for the Tribunals to choose to make a written statement may mitigate some of these concerns, there would appear to continue to be a risk that an applicant may – through the operation of a combination of these amendments – not be fully informed about the reasons for a decision that can have significant impacts on his or her rights.
88. The Law Council notes that the PJCHR, in reviewing the Bill, has requested advice from the Minister as to whether the proposed amendment that would allow the MRT-RRT to dismiss an application under 362C(1A) and 426A(1A) is compatible with the right to a fair hearing under Article 14 of the ICCPR,⁶⁷ an issue also raised by the Scrutiny of Bills Committee.⁶⁸
89. Both the LIV and the Migration Law Committee consider that these changes to the MRT-RRT are ill-timed and inappropriate, in light of the Government's recent announcement to amalgamate these Tribunals and the Social Security Appeals Tribunal and the Classification Review Board with the Administrative Appeals Tribunal (AAT) from 1 January 2015.⁶⁹ The Law Council suggests that – if any

⁶⁵ At [32]-[36].

⁶⁶ Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [1.154].

⁶⁷ PJCHR Report, 54-5.

⁶⁸ Scrutiny of Bills Committee Report, 23. The Committee sought the Minister's advice on the appropriateness of the 'overall approach' in new sub-ss 362B(1A) and 426A(1A).

⁶⁹ Senator the Hon George Brandis QC, Attorney-General, 'Streamlined arrangements for external merits review' (Media Release, 13 May 2014), available at: <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/13May2014->

provisions of Schedule 4 are considered favourably by the Committee – the Committee recommends that changes be made to the proposed amendments to guard against the negative impact they may have on the procedural rights of protection visa applicants. The Law Council has provided its comments to DIBP on the amalgamation of these tribunals. The Law Council noted the importance of members having expertise in the area of law the subject of the review; acknowledged that *all* applicants should have access to legal representation;⁷⁰ and that the inquisitorial nature of the MRT-RRT are beneficial to applicants, such as asylum seekers. As noted above, the Law Council does not support changes being made to the operation of the MRT-RRT whilst the review of the amalgamation is occurring.

90. In light of these concerns, the Law Council urges the Committee to seek further information from DIBP as to why such changes are necessary. If the amendments are pursued, the Law Council recommends, that:

- further detail be provided in the Explanatory Memorandum as to how Guidance Decisions will be identified and their legal status in subsequent Tribunal proceedings;
- the 7-day timeframe to apply to the MRT-RRT for reinstatement after notice of decision is received is extended to at least 14 days; and
- where oral decisions are made, written copies of decisions should be provided to the applicant in accordance with the process for written decisions.

Changes to the threshold test for complementary protection

91. Schedule 2 of the Bill seeks to make significant changes to the way certain claims for protection are assessed. The Law Council notes that despite the title of this schedule – Amendments relating to Australia's protection obligations under certain international instruments – the changes to sections 6A and 36(2) that are made by the Bill only apply to claims for protection on 'complementary' grounds (i.e. those under the ICCPR or the CAT) and not claims for protection under the Refugee Convention.

92. The existing approach to complementary protection under the Migration Act is set out at Attachment C.

Proposed changes to complementary protection under the Migration Act

93. The Bill seeks to make changes to the existing statutory test for granting a visa on complementary protection grounds and to ensure that this test applies to the determination of complementary protection claims arising in other decisions or actions taken under the Migration Act.

[Streamlinedarrangementsforexternalmeritsreview.aspx](#). The Law Council notes that merits review of Freedom of Information matters that are currently undertaken by the Office of the Australian Information Commissioner, will also be transferred to the Administrative Appeals Tribunal.

⁷⁰ See also the Law Council's Media Release on the removal of funding for the Immigration Application Advice and Assistance Scheme for unauthorised maritime arrivals to unauthorised maritime arrivals: Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_-_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf.

The Law Council notes that these instruments are identified in the Department of Immigration and Border Protection's *PAM3: Refugee and Humanitarian - Protection visas - Complementary Protection Guidelines*, at 1 – Introduction.

94. Item 4 of the schedule inserts new section 6A – Determining whether Australia has protection obligations in relation to a non-citizen – that sets out the following test for determining whether Australia has protection obligations in respect of a non-citizen arising under the ICCPR or the CAT (emphasis added):

*(2) The Minister can only be satisfied that Australia has protection obligations in respect of the non-citizen if the Minister considers that it is **more likely than not** that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country.*

95. This new provision applies for the purposes of determining whether Australia has complementary protection obligations in relation to a non-citizen in Australia under the Migration Act, or regulations or instruments made under the Migration Act or any administrative process that occurs in relation to the Act or regulation or instrument made under the Migration Act (new s 6A(1)). The term ‘significant harm’ is defined as where the non-citizen will be arbitrarily deprived of his or her life; be subject to the death penalty; or subjected to torture, cruel or inhuman treatment or punishment; or degrading treatment or punishment (new s 6A(3)). The term ‘protection obligations’ are also defined as any obligations that may arise because Australia is a party to the ICCPR or the CAT (new s 6A(4)).

96. Item 5 of the schedule repeals subsection 36(2)(aa) and replaces this paragraph with the following (emphasis added):

*(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister considers that it is **more likely than not** that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country; or*

97. The Minister has explained that this changes the threshold from a 10% chance of harm to a greater than 50% chance that a person would suffer significant harm, reflecting the Government’s interpretation of Australia’s obligations under international law.⁷¹ The Minister has stated that this would bring Australia in line with the thresholds in Canada, the United States and Switzerland,⁷² however, the Law Council notes that this interpretation of *non-refoulement* obligations by these countries has come under criticism by international bodies.⁷³

98. Item 6 of the Bill makes it clear that these changes apply to:

- an assessment made on or after the day this item commences;
- an assessment that commences before the Bill commences but has not yet been finally determined; and

⁷¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014, 9 (Scott Morrison). The Law Council notes that the change to the threshold is as a result of the decision of the Full Federal Court in *Minister for Citizenship v SZQRB* [2013] FCAFC 33. As discussed in that case, the Attorney-General’s Department disagreed with DIBP on the relevant threshold, applying the lower threshold on the basis of international law treaty interpretation.

⁷² The Hon Scott Morrison MP, Minister for Immigration and Border Protection, ‘Honouring our promise to restore integrity to our refugee assessment process’ (Media Release, 25 June 2014), available at: <http://www.minister.immi.gov.au/media/sm/2014/sm215807.htm>.

⁷³ See for example: Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000, 24th Sess, CAT/C/SR.424 (9 February 2001), [17].

- assessments made as part of an administrative process, if the administrative process has not been completed before that day.

99. The Law Council notes that the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014 is currently before Parliament, which proposes repealing the existing subparagraph 36(2)(aa) and reverting to a pre-2012 approach to determining complementary protection claims which relies entirely on the exercise of Ministerial discretion. The above provisions in this Bill *only* come into effect if the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014 is not passed first.⁷⁴

Law Council's Concerns

100. The Law Council has a history of advocating for the establishment of a legislative scheme for granting complementary protection in accordance with Australia's international obligations and one that has sufficient guidance for decision makers. Most notably, it supported the passage of the Migration Amendment (Complementary Protection) Bill 2009 upon which the Migration Amendment (Complementary Protection) Bill 2011 was based, and which ultimately resulted in the introduction of the complementary protection provisions in March 2012.⁷⁵ A number of the Law Council's Constituent Bodies have also made submissions and public statements in strong support of the complementary protection regime.⁷⁶

101. The Law Council supports the amendments proposed in Schedule 2 of the Bill insofar as they maintain a legislative approach to determining complementary

⁷⁴ The Law Council notes that the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 remains before the Senate. The Law Council's submission in respect of this Bill is available at: <http://www.lawcouncil.asn.au/lawcouncil/index.php/immigration-detention-and-asylum-seekers>. It opposes that Bill on the following grounds:

- complementary protection provisions are more efficient and effective than the exercise of Ministerial discretion;
- complementary protections are necessary to guard against the risk of exposing people to serious harm;
- complementary protection has been used sparingly and for genuine protection reasons;
- changes to the threshold test appear to derive from a misunderstanding of Australia's obligations under international law, and domestic interpretation of international standards of proof risk departure from the appropriate standard; and
- features of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 are contrary to Rule of Law principles

⁷⁵ The Migration Amendment (Complementary Protection) Bill 2009 was introduced in the House of Representatives on 9 September 2009 by the Hon. Laurie Ferguson M.P., Parliamentary Secretary for Multicultural Affairs and Settlement Services. On 9 September 2009, the Senate referred this Bill to the Senate Legal and Constitutional Affairs Legislation Committee, for inquiry and report by 16 October 2009. The Bill lapsed at the prorogation of the Parliament. On 24 February 2011, the Migration Amendment (Complementary Protection) Bill 2011 (2011 Bill) was introduced into Parliament. It has been altered to reflect some of the changes that were recommended by the Senate Committee and in other submissions made to the Minister for Immigration. The 2011 Bill was passed and the amendments came into effect in March 2012.

⁷⁶ For instance, the Law Society of New South Wales stated that an administrative process for dealing with complementary protection provides 'insufficient legislative protection' for Australia's international *non-refoulement* obligations - see: Jamine Morris and Peter Anagnostou, 'Prohibition against Torture – Proposed Complementary Protection Regime' (2009) 12 *Australian International Lawyer*, 2, available at: <http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/063678.pdf>; The Law Institute of Victoria (the LIV) also made a submission in respect to the 2009 Bill, welcoming the complementary protection provisions and noting the shortcomings of ministerial intervention as a means of giving effect to Australia's *non-refoulement* obligations. The LIV noted that ministerial discretion is non-compellable, non-reviewable and non-delegable and can be exercised only after a person has been refused a visa by DIAC and on review by a tribunal. It submitted that the previous administrative process was inefficient and does not provide for a sufficient guarantee of fairness and integrity: Law Institute of Victoria, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, September 2009.

protection (unlike the amendments to the Migration Act under the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 that would remove this legislative scheme). However, it notes that the Government appears to continue to preference an approach which would remove these provisions from the Migration Act, as noted in the Second Reading Speech to the current Bill:

... The [proposed new] threshold will ... be reflected in the complementary protection provisions under section 36(2)(aa) of the Migration Act until such time as the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 is passed by the parliament.⁷⁷

102. The Law Council also has concerns with the way the Bill seeks to amend the existing complementary protection provisions, and how this will further disadvantage people who already face numerous challenges in navigating the process of applying for protection. It is concerned that the new definition of 'receiving country', inserted by Item 3 of Schedule 2, includes a country where it may be impossible for the applicant to return and is used in the new test for determining protection obligations contained in proposed section 6A, outlined above. The NSW Bar noted that no guidance is provided as to which 'receiving country' is to be nominated as the reference point for determination, which opens the potential for abuse of the stated intention to extend the benefit of complementary protection to stateless people.
103. The Law Council is also concerned by the introduction of a new test into subsection 36(2)(aa) of the Migration Act. The proposed new test – which applies to applicants arriving by boat or plane – raises the threshold for when Australia's protection obligations will be engaged from the existing 'real chance or real risk' test to a 'more likely than not' test. As noted above, the proposed new test would apply to assessments made under the Migration Act, regulations or other instruments, as well as administrative processes.⁷⁸
104. The Law Council queries why such a change is considered necessary.
105. As explored by this Committee in detailed in the context of its inquiry into the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014, the existing complementary protection regime in the Migration Act provides critical, life changing protection for a small number of protection visa applicants who do not meet the definition of 'refugee' in the Refugee Convention but who face a real risk of significant harm such as death, torture or cruel, inhuman or degrading treatment on return to another country.
106. Information provided as part of that inquiry suggest that to date less than 60 protection visas have been granted on complementary protection grounds and evidence collated by the Kaldor Centre suggests that each of the visas issued on complementary protection grounds has been for genuine protection need.⁷⁹ For example, the Kaldor Centre reports that complementary protection cases have involved risks of serious harm arising from interpersonal disputes, such as extortion attempts, blood feuds, honour killings, and/or domestic violence, as well as people at risk of harm arising from intractable and violent civil unrest, such as the conflict in Syria, or due to their unavoidable need to dangerous roads if returned to

⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014, 9-10 (Scott Morrison).

⁷⁸ Migration Amendment (Protection and Other Measures) Bill 2014, pt 2, Item 8 of sch 2.

⁷⁹ Jane McAdam and Fiona Chong, *Complementary Protection In Australia: A Review of the Jurisprudence*, University of NSW, Kaldor Centre, 2013, available at: http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf.

Afghanistan. It is reported that this kind of caseload is very similar to that of other jurisdictions around the world.⁸⁰ Further, as set out by the Kaldor Centre, no cases assessed under the complementary protection provisions appear to have turned on the standard of proof issue.⁸¹

107. No evidence appears to be provided in the Explanatory Memorandum to this Bill that would demonstrate that future complementary protection claims would vastly exceed the numbers of past claims, or be likely to be made on fraudulent or unmeritorious grounds. Nor has any detail been provided that explains how the proposed change in the threshold test would address any such concerns.
108. The Law Council is also concerned that the proposed new test may not fully align with Australia's complementary protection obligations as defined under international law. These concerns are outlined in detailed in the Law Council's submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (at [114]ff).⁸² In that submission, the Law Council considered the findings of the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (in relation to which special leave to the High Court was refused) and the legislative history behind the existing complementary protection provisions. These considerations give rise to the following observations in relation to the implementation of Australia's complementary protection obligations arising under international law:
- the existing complementary protection provisions were introduced to give effect to the CAT, as well as the ICCPR, its Second Optional Protocol and the CROC. These Conventions are each set out in different terms and do not mandate the use any specific wording in respect of the standard or burden of proof to be applied and the legislature has given effect to those in section 36(2)(a) using the words 'real risk';⁸³
 - comparative jurisprudence cited by the High Court suggests that when considering protection claims under the Refugee Convention 'real chance' and 'real risk' were interchangeable terms and these tests do not demand a more probable than not mathematical standard;⁸⁴
 - the Second Reading Speech to the Bill that introduced the complementary protection provisions shows how the protection offered by paragraph 36(2)(aa) is supplementary to the same kind of protection of the Refugee Convention. In other words, paragraph 36(2)(aa) offers the same protection against persecution as the Refugee Convention, but extends this protection beyond the limited grounds of race, religion, nationality, membership of a particular social group or political opinion, to provide protection against harm as

⁸⁰ Ibid.

⁸¹ Andrew & Renata Kaldor Centre for International Refugee Law, *Australian Complementary Protection: Refugee Review Tribunal Decisions* (2014).

⁸² Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, 23 January 2014, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2774-MigrationAmendmentRegainingControlOverAustraliasProtectionObligationsBill2013.pdf>.

⁸³ In *FTZK v Minister for Immigration and Border Protection & Anor* [2014] HCA 26, Hayne J considered that it was erroneous to paraphrase the language of the Convention in regard to the expression 'serious reasons for considering', at art 1F of the Refugee Convention: at [33]-[36]. Chief Justice French and Gageler J also noted the risk in using domestic standards of proof as analytical tools of art 1F – they may result in the bar being placed too low or too high: at [15]-[16].

⁸⁴ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

identified in the relevant articles of the CAT, ICCPR, its Second Optional Protocol and the CROC. As a result, there is no contextual or purposive reason why the complementary protection provision should demand a higher standard of proof than that provided under the Refugee Convention; and

- changing the test of when complementary protection obligations are invoked to 'more likely than not' may put Australian law at odds with its own interpretation of international law. For example, the NSW has noted that with respect to the *non-refoulement* obligation under Article 3 of the CAT, Australia regards 'substantial grounds for believing' in Article 3 as involving a foreseeable, real and personal risk of torture. The risk does not have to be highly probable, but must go beyond mere theory or suspicion. This can be contrasted to the United States, which has made a reservation to CAT pursuant to which it interprets Article 3 as requiring the danger of being subjected to torture as being 'more likely than not'.

109. The LIV has also noted that the proposed changes to the test for complementary protection in paragraph 36(2)(a)(a) may pose difficulties for decision makers required to apply the two differing standards of proof side-by-side (i.e. the standard required under section 36(2)(a) of the Act for claims under the Refugee Convention and the proposed amended standard of 'more likely than not' under s 36(2)(aa) for claims based on 'complementary protection'). Given that the assessment of risk under the Refugee Convention is entirely at the discretion of the decision maker and dependent on the facts as made out by the applicant, it is conceivable that the marked difference between the two standards of proof might in turn subtly influence decision makers' assessment of claims under the Refugee Convention. This may increase decision makers' expectations of the threshold of risk that must be demonstrated by applicants and as a result decision makers might be unconsciously influenced to apply the higher standard to all claims.

110. In terms of the reference to 'significant harm' at proposed sub-section 6A(3), the NSW Bar has commented that the change in the definition of 'significant harm' has the potential to open up a serious gap between Australian law and the meaning of persecution under the Refugee Convention. In particular, the definition requires that the events *will* happen, not that a person will live under constant but unfulfilled threats that he or she will be killed. The NSW Bar notes that if the proviso in proposed sub-section 6A 4) is read as non-exhaustive and 'protection obligations', as otherwise defined in section 6A, are read to extend to the determination of 'protection obligations' wherever used in the Act, for example section 36 (2)(a), then the definition will create confusion and distract from the current definition of serious harm in refugee convention cases which includes threats to life or liberty; significant physical harassment and significant physical ill-treatment. The NSW Bar has also noted that changes to the definitions of certain words and terms in sub-section 5(1) that are set out at Part 2 of Schedule 2 appear to be unnecessary.

111. In addition to these concerns, many commentators and experts have suggested that contrary to the comments made in the Second Reading Speech to this Bill, the Australian complementary protection criterion establishes much higher threshold than that required in international human rights law and complementary protection regimes elsewhere.⁸⁵ This is because paragraph 36(2)(aa) of the Migration Act sets

⁸⁵ See for example Elibritt Karlsen, 'Complementary protection for asylum seekers—overview of the international and Australian legal frameworks' (Research Paper, Parliament of Australia, 2009); see also: Refugee Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 2009, available at:

out a three-pronged threshold which applicants for complementary protection must meet: the Minister must be satisfied that: (1) Australia has protection obligations because the Minister has substantial grounds for believing that, (2) as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, (3) there is a real risk that the non-citizen will suffer significant harm.

112. In examining the complementary protection provisions of the Bill, the PJCHR referred to its *Fourth Report of the 44th Parliament*, where it assessed the applicable human rights standards for assessing a State's *non-refoulement* obligations in its examination of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.⁸⁶ It also noted that the Committee against Torture has stated that the risk of torture does not need to meet the test of being highly probable⁸⁷ and that the United States' approach is too strict.⁸⁸ The PJCHR further observed that the UN Human Rights Committee has disagreed with the Canadian approach to interpreting the real risk under the ICCPR,⁸⁹ and that New Zealand and the UK have adopted approaches that are consistent with the jurisprudence of the Committee Against Torture and the Human Rights Committee.⁹⁰ The PJCHR therefore concluded that international jurisprudence does not support the proposed intention of Australia's *non-refoulement* obligations set out in Schedule 2 of the Bill and that Schedule 2 would be incompatible with Australia's *non-refoulement* obligations under the ICCPR and the CAT.⁹¹ The PJCHR also requested further advice from the Minister over whether this amendment to the Migration Act is compatible with the best interests of the child, pursuant to the CROC.⁹²
113. In addition to the above concerns, the Law Council is concerned that the new test may also apply to decisions other than protection visa decisions that are related to the Migration Act and its associated regulations. For example, it could extend to decisions relating to involuntary returns. This is made clear by Item 6 of Schedule 2 to the Bill that states that this new test will apply 'regardless of whether Australia has protection obligations in respect of a person, regardless of whether the assessment is made as a result of an application for a visa by a person'.
114. While the Law Council supports the retention of statutory approach to determining complementary protection claims, it does not support the proposed changes to the existing threshold test.
115. If the amendments are pursued, the Law Council urges the Committee to reflect on its the recommendations made in respect of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 where it requested that the DIBP:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2008-10/migration_complementary/index.

⁸⁶ PJCHR Report, 40.

⁸⁷ Ibid, citing United Nations Committee against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, A/53/44, annex IX, (21 November 1997).

⁸⁸ Ibid 42.

⁸⁹ Ibid 41, citing *Pillai v Canada (Communication No. 1763/2008)*, CCPR/C/101/D/1763/2008, (9 May 2011).

⁹⁰ Ibid, citing *AK (South Africa)* [2012] NZIPT 0800174 (16 April 2012) and *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at [12]-[13]. The United Kingdom and New Zealand adopt a domestic standard of proof, but have a consistent standard of proof for both refugee protection and complementary protection claims.

⁹¹ Ibid 42-3.

⁹² Ibid 49-50.

*...release consultation drafts of the guides and supporting material it intends to use as part of the administrative assessment of complementary protection claims if the Bill is passed and actively consults with stakeholders in finalising those guides and supporting materials.*⁹³

116. The Law Council welcomed the provision of this information in respect of the amendments proposed by the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 but notes that separate information would need to be provided to outline how the current amendments would be applied in practice.

Impact on rights to family reunion

117. Schedule 1 of the Bill makes a number of changes to the provisions of the Migration Act that currently relate to the rights to family reunion for applicants found to engage Australia's protection obligations.

118. Item 11 of the Bill inserts new section 91WB that 'applies to a non-citizen in Australia (the family applicant): (a) who applies for a protection visa; and (b) who is a member of the same family unit as a person (the family visa holder) who has been granted a protection visa.' Subsection (2) provides that:

Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) [that is, a family visa holder who has already been found to engage Australia's protection obligations under the Refugee Convention or other instruments under which Australia owes complementary protection] unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.

119. The Explanatory Memorandum provides that this provision is designed to encourage

*... people to enter and reside in Australia using regular means, thereby preserving the integrity of the migration system and the national interest. ... The Australian Government will not provide a separate pathway (outside of the Humanitarian Programme) for family reunification that will exploit children and encourage them to risk their lives on dangerous boat journeys..*⁹⁴

120. The Minister stated that the appropriate pathway for family members to come to Australia is through the 'established pathways for family migration', and that the new provision discourages family members of unauthorised maritime arrivals who arrive in Australia, including those who arrive 'illegally', from expecting to be granted a protection visa.⁹⁵

121. The Law Council is concerned that new section 91WB may not align with Australia's international law obligations relating to family unification. It may also have particularly serious consequences for unaccompanied minors seeking to reunite with their close family members. It notes that the proposed changes extend to *all* asylum

⁹³ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (2014), [3.37].

⁹⁴ EM Protection Amendment Bill, Attachment A – Statement of Compatibility with Human Rights, 8.

⁹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014, 8 (Scott Morrison).

seekers, not just those that have arrived by boat, including children who are overseas from reuniting with their parents who are in Australia.

122. If enacted, new section 91WB would mean that a family member who seeks to join a person who has been found to be a refugee under Australian law must have an independent claim to being a refugee in order to apply for a protection visa, or otherwise must apply for resettlement in Australia under the offshore Humanitarian Programme.
123. For example, the mother of a young man who has been found to be owed protection by Australia and issued with a protection visa cannot be granted a protection visa under subsection 36(2) unless the mother applied for a protection visa under these grounds before her son was granted the protection visa. Once the son has been granted refugee status in Australia, the mother's only options are to either make a protection claim in her own right or apply for resettlement in Australia under the offshore Humanitarian Programme.
124. The Law Council considers that if implemented, section 91WB would risk contravention of the Refugee Convention, as well as certain obligations on Australia to guarantee peoples' rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁹⁶ and CROC.
125. The Law Council notes that it is in the spirit of the Refugee Convention to ensure family unification. The Conference that completed the drafting and signing of the Refugee Convention, held 2-25 July 1951, unanimously passed a recommendation on the 'principle of unity of the family'. There were two elements to this recommendation, as follows:
- (1) *Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,*
- (2) *The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*
126. The right to family unity is also reflected in the *Universal Declaration on Human Rights*,⁹⁷ the ICESCR and the CROC.⁹⁸
127. These concerns are exacerbated by the fact that the current Government has recently further restricted access to family reunion for protection visa holders, including by removing 4,000 additional Family Stream places for people found to be owed protection in Australia to reunite with immediate family members announced as a measure in the 2014-15 budget;⁹⁹ the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth) that removes parent visa subclass 103, the aged parent visa subclass 804, the aged dependent relative visas subclasses 114 and 838, the remaining relative visas subclasses 115 and 835, and the carer visas subclasses 116 and 836; and the fact that, as noted by the NSW Bar, since July

⁹⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976), arts 7, 10 and 11.

⁹⁷ *Universal Declaration on Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810, (10 December 1948) art 16(3).

⁹⁸ Articles 9(1), 16(1), 20(1) and 22. See also the UNHCR Handbook at [181]-[188].

⁹⁹ Commonwealth of Australia, 'Part 2: Expense Measures' *Budget Measures: Budget Paper No. 2* (Commonwealth of Australia, 13 May 2014) 154, available at: http://www.budget.gov.au/2014-15/content/bp2/download/BP2_Expense.pdf.

2013, fees for sponsors have increased up to 500%. Indeed, the NSW Bar notes that such factors may lead to whole families seeking asylum by boat rather than sending one family member, as is mostly the case at present.

128. For these reasons the Law Council opposes this amendment. If it is pursued, the Law Council recommends that the Committee seek detailed information from DIBP as to the anticipated number of protection visa applications by family members this amendment is likely to affect, as well as seeking further information from medical experts as to the long term impact of prolonged separation from immediate family members on the wellbeing of unaccompanied minors found to be owed protection and issued with protection visas in Australia.

Concerns relating to the broadening the scope of Ministerial discretion to exclude certain asylum seekers from making protection applications

129. Schedule 3 of the Bill contains amendments to powers to award protection visas to unauthorised maritime arrivals and transitory persons. This Schedule seeks to make a number of changes that will affect asylum seekers who have been issued Temporary Safe Haven Visas. These visas are currently granted to unauthorised maritime arrivals as an alternative to Temporary Protection Visas, disallowed by the Senate on 2 December 2013.

130. Item 1 broadens the scope of section 46A with respect to visa applications by unauthorised maritime arrivals (changes are made to sub-ss (1)(b), (2)-(4) and (7)), such that this provision will apply to unlawful non-citizens *and* a person holding a bridging visa or temporary visa. Section 46A(1) currently excludes unauthorised maritime arrivals from making a valid application for a visa under the Migration Act, but subsection 46A(2) provides the Minister with a non-compellable personal discretion to 'lift the bar' and allow an application to be made.

131. Item 2 further broadens the Minister's existing discretions under section 46A by including the following provisions:

(2A) A determination under subsection (2) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

(2B) The period specified in a determination may be different for different classes of unauthorised maritime arrivals.

(2C) The Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.

132. Subsection 46A(2) is currently already broad in scope. It provides:

If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

133. The proposed new subsections (2A)-(2C) seek to further broaden this discretion by making it clear that the Minister can change his or her mind about lifting the bar, or make his or her decision contingent on a certain time frame or apply differently to certain categories of applicants. This could have significant consequences for an

applicant who has been permitted under subsection 46A(2) to apply for a protection visa and then has this permission revoked prior to having his or her application finally determined. It could also invest the Minister with the power to set short time frames for applying for certain classes of visas.

134. The NSW Bar has noted that new subsections (2A) and (2B) will allow the statutory bar (to making a protection visa application) to be lifted for a limited period of time which could lead to serious injustice if a person does not have the advice and resources necessary to make the application with that period of time. The NSW Bar also noted that the proposed new sub-section (2C), could also allow retrospective invalidation of applications made in good faith on the basis of decisions by previous Ministers, which is unjustifiable, as such people have already been subject to a rigorous assessment process. The NSW Bar's concerns also relate to changes made to section 46B.
135. The Kaldor Centre has noted that the combined effect of these provisions would be to enable the Minister to transfer people currently on Temporary Safe Haven Visas on to Temporary Protection Visas, if and when these are legislated. In the past, temporary protection visas have not included supports such as access to Medicare and education, which are available under the temporary safe haven visas. The ability for the Minister to set time limits on determinations enabling the visa bar to be lifted would also increase the incentive for those on temporary safe haven visas to transfer before such determinations expired.
136. The LIV has raised concerns that the amendments contained in this Schedule would serve to make a larger number of potential protection visa applications personally dependent on the Minister's exercise of powers, which are discretionary both in terms of exercise and consideration. The LIV and the Law Council have previously expressed concerns with the shortcomings of ministerial discretion as a means of giving effect to Australia's *non-refoulement* obligations and the limitations of the discretionary approach have recently been discussed in detail in relation to the proposed repeal of complementary protection by the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013. These shortcomings have also been identified by the PJCHR in its analysis of that Bill.

Retrospective Application

137. The Law Council is concerned that, if enacted, the Bill would affect the outcomes of people who have not yet been granted protection for their application pursuant to the Refugee Convention, or pursuant to the complementary provisions of the Migration Act, including people who have refused, or failed to comply with requests for documents, or have produced bogus documents. These measures are inconsistent with Rule of Law principles, that require that the law be readily known and available, and certain and clear and that prohibit retrospective application of laws – particularly those that have an impact on the rights or liberties of individuals.¹⁰⁰ The Scrutiny of Bills Committee has also expressed concern that Schedule 2 of the Bill applies the new law to an antecedent fact, raising the question of whether it is fair to apply new legislation to applications or administrative processes that have already commenced, rather than being dealt with according to

¹⁰⁰ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>. See specifically, Key Principle 1.

the law that existed at the time of commencement.¹⁰¹ Retrospective legislation is also extremely difficult to understand for those applicants that it affects.

138. A number of the changes proposed in the Bill may have particularly significant consequences for asylum seekers on bridging or temporary visas, excluding them from validly apply for a visa under the Migration Act, and placing them in the same category of unauthorised maritime arrivals who have not been issued with a bridging visa or other form of temporary visa. The changes could also have significant consequences for an applicant who has been permitted under subsection 46A(2) and 46B(2) to apply for a protection visa and then has this permission revoked prior to having his or her application finally determined. For example, under the amended provisions, the Minister would be invested with the power to set short time frames for applying for certain classes of visas, such as Temporary Protection Visas that provide limited protection and assistance to people seeking protection. The NSW Bar has noted that, in particular, Part 3 of Schedule 1 changes the rules on documentation such that they apply retrospectively to all people who have, through no fault of their own, been held up from having a determination of their cases by the cap on protection visa places.

Conclusion

139. The Bill seeks to bring efficiency and clarity to existing protection status determination and migration review processes. This aim is welcomed by the Law Council, as is the maintenance of a statutory approach to determining complementary protection claims.
140. However, the Law Council considers that as currently drafted, the Bill risks undermining those features of the existing protection status determination process that seek to promote fair decision making, and allow decision makers to take into account the particular circumstances of each individual's claim. As a result, the Bill may fail to improve the efficiency of the process, particularly if applicants continue to be left without appropriate access to the advice and support they need to understand the implications of the proposed reforms and to articulate their claim in a clear and timely way.
141. If enacted, a number of features of the Bill may also give rise to concerns that Australia does not have adequately robust mechanism in place to ensure that it is meeting its *non-refoulement* obligations under the Refugee Convention and the other relevant Conventions to which it is a party.
142. For these reasons, the Law Council recommends that the Bill not be passed. If this recommendation is not adopted, the Law Council recommends a number of changes be made to the Bill to improve its compliance with Rule of Law principles, procedural fairness and international law obligations.

Summary of Recommendations

143. The Law Council's primary recommendation is that the Bill not be pursued as currently drafted.

¹⁰¹ Scrutiny of Bills Committee Report, 20.

144. If, contrary to this recommendation, the amendments proposed in the Bill are pursued, the Law Council recommends that the following changes be made:

- proposed section 5AAA be amended to provide the decision maker with a discretion to assist in specifying any particulars of an applicant's claim in exceptional circumstances, for example where the applicant has a disability or experiencing severe trauma or other serious health difficulties;
- publicly available guidelines be developed that clearly outline how proposed section 5AAA will be applied (explaining, for example, what is meant by 'sufficient evidence') and made available in plain English and translated versions to all protection visa applicants, including unauthorised maritime arrivals;
- all protection visa applicants be provided with necessary assistance for example, translation services and IAAAS type services at all stages of the protection status determination process;
- the relevant provisions in Schedule 4 be redrafted to provide that the Minister *may* rather than *must* make an adverse inference when the applicant provides bogus documents or refuses or fails to comply with a request to produce documents, and the RRT is *may* rather than *must* make an adverse inference on the credibility of a claim or evidence before it;
- greater guidance is given as to the meaning of 'reasonable explanation' in the context of failing to comply with a Minister's request to produce documents or producing bogus documents, as well as why a claim or evidence was not raised prior to the applicant's hearing at the RRT;
- the requirement in section 91W that the applicant be given a warning that the Minister cannot grant the protection visa to the applicant if the applicant refuses or fails to comply with the request; or produces a bogus document in response to the request should be strengthened to require warnings to be given in writing only, and be accompanied by interpretive and other support services necessary to ensure it is fully understood by the applicant;
- greater guidance is given as to the types of documents that would be considered a 'bogus document';
- the Minister must provide an explanation to the applicant of why their documents are considered bogus documents and provide them with an opportunity to respond;
- following a request by the Minister to produce documentation, an applicant is not required to take steps to provide documentary evidence to the Minister where this would not be reasonable;
- further detail be provided in the Explanatory Memorandum as to how Guidance Decisions will be identified and their legal status in subsequent Tribunal proceedings;
- the 7-day timeframe to apply to the Tribunal for reinstatement after notice of the decision is received is extended to at least 14 days;
- where oral decisions are made, copies of decisions are provided to the applicant in accordance with the process for written decisions;

- that the DIBP provide consultation drafts of the guides and supporting material it intends to use as part of the administrative assessment of complementary protection claims if that Bill is passed, and actively consult with stakeholders in finalising those guides and supporting materials;
- that DIBP provide information as to the anticipated number of protection visa applications by family members that the changes to section 91WB is likely to affect, as well as seeking further information from medical experts as to the long term impact of prolonged separation from immediate family members on the wellbeing of unaccompanied minors found to be owed protection and issued with protection visas in Australia; and
- that any changes to the Migration Act would only concern new applications for protection visas (i.e. changes will not apply to applications that are part-made or are under review; or applications made by people already in Australia on bridging or temporary visas).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: The current legal framework of refugee status determination processes

Primary decision making

145. The majority of the proposed amendments concern the legal framework for refugee status determination for unauthorised maritime arrivals.¹⁰² An application for a visa that is made by an unauthorised maritime arrival who is in Australia and is an unlawful non-citizen is invalid, and the Minister is not obliged to consider such an application.¹⁰³ The Minister may lift this bar and allow an unauthorised maritime arrival to make a valid application for a visa if he or she thinks that it is in the public interest to do so.¹⁰⁴ This is a non-compellable, non-reviewable personal power of the Minister.
146. If the Minister lifts the statutory bar and allows an application for a protection visa to be made, an assessment will be made as to whether the applicant meets the criteria in section 36 of the Migration Act, which seeks to satisfy Australia's obligations to provide protection to people who have a well-founded fear of persecution pursuant to the Refugee Convention and Australia's other relevant *non-refoulement* (or non-return) obligations such as those arising under the ICCPR, CAT and CROC.
147. According to DIBP, an application for a protection visa is first assessed against the Refugee Convention, and if the protection obligations under the Refugee Convention do not arise, then it will consider the application against the complementary protection provisions of the Migration Act.¹⁰⁵ This decision is delegated from the Minister to DIBP staff, who will assess a claim against Guidelines that contain DIBP's interpretation of the Migration Act, pursuant to Ministerial Direction No.56 - Consideration of Protection Visa applications.¹⁰⁶ Decision makers are also required to consider certain country information assessments prepared by the Department of Foreign Affairs and Trade.¹⁰⁷ The DIPB then puts that information to the applicant who has an opportunity to respond before the decision maker makes the decision.
148. Pursuant to section 91W of the Migration Act, the Minister or an officer making such a decision can request that an asylum seeker provide documents relating to his or her identity, nationality or citizenship. If the asylum seeker 'refuses or fails to comply' with this request without a reasonable explanation, the Minister can draw an adverse inference (i.e. consider that the evidence of the asylum seeker was less

¹⁰² An unauthorised maritime arrival is defined at section 5AA of the *Migration Act 1958* (Cth) as:

(a) [a] person [that] entered Australia by sea
(i) at an excised offshore place at any time after the excision time for that place; or
(ii) at any other place at any time on or after the commencement of this section; and
(b) the person became an unlawful non-citizen because of that entry; and
(c) the person is not an excluded maritime arrival

¹⁰³ Ibid s 46A. Pursuant to s 5AA(1)(a), an unauthorised maritime arrival is in Australia for the purposes of s 46A if they have entered '(i) at an excised offshore place at any time after the excision time for that place; or (ii) at any other place at any time on or after the commencement of this section'.

¹⁰⁴ Ibid.

¹⁰⁵ Department of Immigration and Border Protection, supplementary submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, February 2013, 3.

¹⁰⁶ Migration Review Tribunal – Refugee Review Tribunal, *Guide to refugee law* (June 2014), Chapter 1 – Protection Visas, 1-28. The relevant guidelines are: *PAM3: Refugee and humanitarian – Complementary Protection Guidelines* and *PAM3: Refugee and humanitarian – Refugee Law Guidelines*.

¹⁰⁷ Ibid.

credible) in relation to the applicant's identity, nationality or citizenship, provided the asylum seeker was warned of this possibility at the time of the request.

Merits review

149. The RRT conducts independent merits review of certain protection visa decisions made by the Minister for Immigration and Border Protection or by officers of the DIBP, who are delegates of the Minister. The RRT is an independent body, established under the Migration Act. Not all protection visa decisions by the Minister can be reviewed by the RRT.¹⁰⁸

150. If a decision is made not to grant an applicant a protection visa, or to cancel a protection visa, DIBP will notify the applicant of that decision and as well as whether the applicant has a right to apply to the RRT for a review of the decision. In conducting a review, the RRT considers afresh whether the applicant is a person to whom Australia has protection obligations:

- under the Refugee Convention; or
- where there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia, there is a real risk that the applicant will suffer significant harm.¹⁰⁹

151. The RRT has the power to: affirm or vary the decision; remit the matter for reconsideration in accordance with such directions or recommendations of the RRT as are permitted by the regulations, where the decision relates to a prescribed matter; or set the decision aside and/or substitute a new decision.¹¹⁰

152. Strict time limits apply to applications for review by the RRT. For applicants in immigration detention, the RRT must receive the review application within 7 working days of the date that the applicant was notified of the decision by DIBP. For applicants not in immigration detention, the RRT must receive the review application within 28 calendar days of the date the applicant was notified of the decision by DIBP.¹¹¹

¹⁰⁸ The *Migration Act 1958* (Cth) stipulates the function and operation of the MRT-RRT. The MRT is compelled to review MRT-reviewable decisions provided that an application for review is properly made pursuant to s 347, and that it is not a decision in relation to which the Minister has issued a conclusive certificate under s 339: s 348. The RRT is compelled to review RRT-reviewable decisions provided that an application for review is properly made pursuant to s 412, and that it is not a decision in relation to which the Minister has issued a conclusive certificate under subsection 411(3): s 414. Pursuant to s 411, the RRT must review a decision to refuse to grant a protection visa, other than a decision that was made relying on arts 1F, 32 or 33(2) of the Refugee Convention or sub-ss 36(1B) or 36(2C)(a) or (b) of the Migration Act; and also a decision to cancel a protection visa, other than a decision that was made relying on arts 1F, 32 or 33(2) of the Refugee Convention, or an assessment by the Australian Security Intelligence Organisation that the holder of the visa is directly or indirectly a risk to security. Pursuant to s 411, the RRT cannot review: (a) decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made; (b) decisions in relation to which the Minister has issued a conclusive certificate under subsection (3). Pursuant to s 411(3), '[t]he Minister may issue a conclusive certificate in relation to a decision if the Minister believes that: (a) it would be contrary to the national interest to change the decision; or (b) it would be contrary to the national interest for the decision to be reviewed.'

¹⁰⁹ Migration Review Tribunal – Refugee Review Tribunal, *Annual Report 2012-3* (2013), Part 2, 8 ('MRT-RRT Annual Report').

¹¹⁰ *Migration Act 1958* (Cth) ss 349(2) (MRT) and 415(2) (RRT).

¹¹¹ More information regarding the review process is available at: <http://www.mrt-rrt.gov.au/Files/HTML/R10ReviewProcess-GU-CD-2014-02.html>.

153. The RRT hearings are private, relatively informal and inquisitorial in nature.¹¹² The department is rarely represented and the presiding member will guide the proceedings to suit the circumstances of the case, will ask questions and will give the applicant an opportunity to make a statement or present arguments.¹¹³ Although the applicant may bring along a legal representative to the hearing, the legal representative is not permitted to present the applicant's case and can only address the Tribunal if requested.¹¹⁴ The hearing may be conducted in person, by video conference or by telephone.¹¹⁵
154. The MRT-RRT also has the power to formally summons a person to appear to give evidence or to produce documents.¹¹⁶ This power is generally only used in circumstances where a person may otherwise be unwilling or unable to attend the hearing or provide a document. Requests for summons to be issued can be made by applicants in writing. If the applicant fails to appear at the hearing, the MRT-RRT can make a decision in his or her absence but cannot dismiss or reinstate an application.¹¹⁷
155. Currently, the MRT-RRT may review new information without making an unfavorable inference against the applicant. The MRT-RRT may also request additional information that it considers relevant to making its decision.¹¹⁸ The applicant may also provide new information in support of the application for review. The RRT must consider these documents and the case afresh, rather than reviewing the decision made by the Minister. Applicants can ask the presiding member to take oral or written evidence from other persons or to obtain other written material. The Migration Act stipulates that the following information may be reviewed by the MRT:
- (a) a written statement in relation to any matter of fact that the applicant wishes the Tribunal to consider; and*
- (b) written arguments relating to the issues arising in relation to the decision under review.*¹¹⁹
156. The following information may be reviewed by the RRT:
- (a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and*
- (b) written arguments relating to the issues arising in relation to the decision under review.*¹²⁰
157. The MRT-RRT can make oral decisions or decisions in writing. Where the Tribunals make an oral decision, they must provide a statement of the decision in writing to the applicant within 14 days of the decision.¹²¹

¹¹² The MRT hearings are open to the public: MRT-RRT Annual Report, Part 2, 10. Pursuant to s 420 of the *Migration Act 1958* (Cth), it '...is It is not bound by technicalities, legal forms or rules of evidence'.

¹¹³ MRT-RRT Annual Report, Part 2, 10.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Migration Review Tribunal – Refugee Review Tribunal, *Information about Tribunal Hearings – RRT* (July 2013); Migration Review Tribunal – Refugee Review Tribunal, *Information about Tribunal Hearings – MRT* (July 2013).

¹¹⁷ *Migration Act 1958* (Cth) ss 362B (MRT) and 426A (RRT).

¹¹⁸ Ibid ss 359 (MRT) and 424 (RRT).

¹¹⁹ Ibid s 358.

¹²⁰ Ibid s 423.

158. The Principal Members of the MRT and RRT currently have powers under the Migration Act to give certain directions. The directions concern the operations of the MRT-RRT and the conduct of reviews by the MRT-RRT.¹²² Members of the Tribunal are not compelled to comply with the Principal Member's directions.
159. The RRT has the discretion to receive further information from the applicant after the hearing (but not once a final decision has been made).¹²³
160. Outside of this merits review process, the applicant can also request that the Minister exercise his or her non-compellable, discretionary powers to intervene to reconsider a negative decision relating to a protection visa.¹²⁴ Judicial review may also be available, for example on the grounds of a failure by the primary decision maker to make the decision in accordance with law.¹²⁵

¹²¹ Ibid ss 368D (MRT) and 430D (RRT).

¹²² Ibid ss 353A (MRT) and 420A (RRT).

¹²³ Ibid s 430, as amended by *Migration Amendment Act 2013* (Cth).

¹²⁴ Ibid ss 391 (MRT) and 417 (RRT).

¹²⁵ Ibid pt 8.

Attachment C: The current legal framework for complementary protection

161. Currently, the complementary protection provisions in the Migration Act allow claims made by visa applicants that may engage Australia's *non-refoulement* obligations under the CAT, ICCPR, and the Second Optional Protocol to the ICCPR,¹²⁶ to be considered under a single protection visa application process, with access to the same decision-making framework that applies to applicants who make claims that may engage Australia's obligations under the Refugee Convention.¹²⁷ A protection claim must first be assessed against the Refugee Convention, with complementary protection criteria only requiring consideration if the person is found *not* to be a refugee.¹²⁸ The complementary protection provisions only apply to non-citizens who can make a valid application for a protection visa under the Migration Act, meaning that those persons who are prevented from making a valid application for a visa under section 46A of the Act, cannot make a valid application for a protection visa on complementary protection grounds (unless the Minister determines it is in the public interest to do so).

162. The test for granting a visa on complementary protection grounds is current contained in subparagraph 36(2)(aa) which provides (emphasis added):

*(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a **real risk** that the non-citizen will suffer significant harm*

163. Applicants for complementary protection also remain subject to other provisions of the Migration Act, including section 501(6)(c)(i), where the Minister can refuse or cancel a visa on character grounds such as a person's present or past criminal conduct (paragraph 501(6)(c)(i)) or where there is a significant risk the person represents a danger to the Australian community.

164. Decisions to refuse to grant a protection visa on complementary protection grounds may be reviewed in the same way as decisions to refuse to grant a protection visa on the Refugee Convention grounds, but are reviewed by the AAT, rather than the RRT.

165. The DIBP's Guidelines on assessment of complementary protection claims states that the central assessment of protection claims is made pursuant to section 36(2)(aa), but in order to establish whether the applicant meets the criterion set out at section 36(2) (aa), it is necessary to consider the following:

- *Which is the receiving country? (s5(1) of the Act)*
- *Would the feared harm constitute 'significant harm'? (s36(2A) of the Act)*

¹²⁷ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r4522_ems_03449275-3365-4a8f-b450-70dfc891c105%22;rec=0.

¹²⁸ *Migration Act 1958* (Cth) s 36(2)(aa).

- *Are there substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to a receiving country, there is a real risk the non-citizen will suffer the harm? (s36(2)(aa) of the Act)*
- *Would it be reasonable for the non-citizen to relocate to an area where there would not be a real risk? (s36(2B)(a) of the Act)*
- *Could the non-citizen obtain protection from an authority of the country such that there would not be a real risk of harm? (s36(2B)(b) of the Act)*
- *Is the risk faced by the population of the country generally, rather than faced by the non-citizen personally? (s36(2B)(c) of the Act)*
- *If the criterion is found to be met, would any of the ineligibility provisions in s36(2C) of the Act apply?¹²⁹*

¹²⁹ Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian - Protection visas - Complementary Protection Guidelines*, 7 – Questions for Consideration.