



Australian Government
Department of Immigration and Border Protection

**Submission to the Senate Legal and Constitutional Affairs
Legislation Committee Inquiry into the Migration Amendment
(Protection and Other Measures) Bill 2014**

August 2014

people our business

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The Department of Immigration and Border Protection welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, following the introduction of this Bill into the House of Representatives on 25 June 2014.

1. Purpose of the Bill

The Migration Amendment (Protection and Other Measures) Bill 2014 (the Bill) amends the *Migration Act 1958* (the Act) to improve the integrity and efficiency of Australia's decision-making process with respect to all asylum seekers in Australia by making changes to the way the claims of asylum seekers are assessed. The amendments are also necessary 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 (defined as unauthorised maritime arrivals under the Act).

Schedule 1 of the Bill contains amendments which contribute to the integrity and improve the efficiency of the onshore protection status determination process. The measures clarify the responsibility of asylum seekers and require that a case for protection be made as completely and as soon as possible. The measures apply to all asylum seekers regardless of their mode of arrival.

Schedule 2 of the Bill contains amendments relating to clarifying the threshold for Australia's *non-refoulement* obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR). In *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (SZQRB) the Full Federal Court found that the threshold for assessing complementary protection claims is whether there is a 'real chance' of suffering significant harm, the same low threshold that applies to the assessment of claims under the Refugees Convention. A 'real chance' can be as low as a 10 percent chance of harm occurring. It is the Government's position that the risk threshold applicable to the *non-refoulement* obligations under the CAT and the ICCPR is 'more likely than not'. 'More likely than not' means that there would be a greater than 50 percent chance that a person would suffer significant harm were they to be returned to the receiving country.

Schedule 3 of the Bill introduces amendments to streamline the operation of the current statutory bars placed on illegal maritime arrivals (defined as unauthorised maritime arrivals under the Act). These amendments also ensure that an unauthorised maritime arrival or transitory person who is an unlawful non-citizen, a bridging visa holder or the holder of a temporary visa prescribed for the purposes of this provision will be prevented from making a valid application for a visa unless the Minister determines that it is in the public interest to allow them to do so. It is inefficient and administratively complex for a person to be subject at different times to different provisions that prevent them from making a valid application for a visa when one would suffice. These amendments will significantly reduce complexity without impacting on the practical effect of the existing arrangements. Statutory bars are essential mechanisms which support the orderly management of applications from illegal arrivals.

Schedule 4 of the Bill contains amendments to improve processing and administration of both the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT). The Principal Member of the Tribunals will be able to issue practice directions to applicants at review and their representatives, including migration agents and legal practitioners, regarding the procedures and processing practices to be followed for reviews. The Principal Member will also be able to issue guidance decisions to Tribunal members to reduce inconsistencies across decisions. The Tribunal must comply with the guidance decisions unless a Tribunal member is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances in the guidance decision. The Tribunals will also have a discretionary power to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons. This change has the potential to significantly reduce the administrative burden on the Tribunals. The Tribunals will also be able to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so.

The measures in this Bill which seek to enhance the integrity of the current protection determination system aim to discourage applications made in bad faith and the exploitation of the protection visa process by applicants who are not genuinely pursuing a protection claim but seeking to extend their time in Australia. Both the integrity and efficiency measures in the Bill seek to ensure public confidence in Australia's capacity to assess claims for asylum.

2. Content of the Bill

2.1 *Schedule 1 – Protection visas*

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

Section 5AAA inserts a new provision into the Act that clearly articulates a non-citizen's responsibility in relation to protection claims. Consistent with requirements in other signatory countries, and guidelines from the United Nations High Commissioner for Refugees, this provision clarifies that the responsibility for making claims for protection and providing sufficient evidence to establish any claims, sit with those who are seeking protection. The provision makes it clear that it is not the responsibility of the decision-maker to make a case for protection on behalf of a person.

This measure is intended to put a basic expectation beyond doubt. It has long been accepted that an asylum seeker is obliged to make and support their case for protection in good faith and to the best of their ability. This is reflected in guidelines from the United Nations High Commissioner for Refugees, as the current UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (reissued December 2011) states that the applicant should "tell the truth" and "assist the examiner in full in establishing the facts of his case". Where necessary, an applicant "must make an effort to procure additional evidence". An applicant is to "make an effort to support his statements" and "give a satisfactory explanation for any lack of evidence". An applicant is to "supply all pertinent information ... in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40). The proposed section 5AAA makes it clear that it is not the responsibility of decision-makers in the Department or the RRT to make a case for protection

on behalf of asylum seekers. This is consistent with law in like-minded countries, including the United States, New Zealand and the United Kingdom.

Decision-makers are well-trained and supported in their decision-making (including having access to extensive, relevant country information) and are aware that it is not always possible for an applicant to provide evidence to support his or her claim to have a well-founded fear of persecution. In such cases, the applicant's account must be consistent with, and not run counter to, known facts. In certain situations, including some cases of statelessness, it may not be possible to obtain documentary evidence to support protection claims. These factors will be taken into account. Rights to merits review and judicial review in Australian courts remain unaffected by this provision.

All non-citizens seeking protection in Australia will be advised of the responsibility to make and substantiate their claims for protection as soon as possible. Departmental policy and procedures for decision-makers will take into consideration whether an application is from a person identified as vulnerable.

People claiming protection who have arrived lawfully and are disadvantaged or face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme (IAAAS). Non-citizens claiming protection in Australia, including unaccompanied minors or vulnerable people, who are not able to articulate their claims clearly or provide supporting evidence may arrange private application assistance from a Registered Migration Agent. The Government intends to provide a small amount of additional support to illegal arrivals who are considered vulnerable, including unaccompanied minors. The Department of Immigration and Border Protection is currently considering the most effective and efficient way to provide this support

Applicant to provide documentary evidence of identity, nationality or citizenship (sections 91W and 91WA)

Establishing identity is the keystone of applying for a protection visa, as it is necessary to determine an applicant's identity, nationality or citizenship before international obligations may be accurately assessed, and therefore before a visa is granted or refused. This is particularly the case in more recent times, where many people hold dual or multiple citizenships. It is therefore critical that a protection visa applicant provides documentary evidence of identity, nationality or citizenship, to the extent that it can reasonably be expected. The Government acknowledges that it is not always possible to do so.

Under section 91W of the Act, the Minister currently has the power to request documentary evidence of identity, nationality or citizenship, and draw an inference unfavourable to the applicant where they refuse or fail to comply with a request without a reasonable explanation. Under the proposed amendment to section 91W, a decision-maker must refuse an application if an applicant refuses or fails to comply with a request to provide documentary evidence of identity, nationality or citizenship, and does not provide a reasonable explanation for so doing. Further, under new section 91WA, a decision-maker must refuse an application for a protection visa where applicants provide a bogus document for the purpose of establishing identity, or have caused their identity documents to be destroyed or disposed of, whether by their own actions or those of another. Under sections 91W

and 91WA the refusal power will not apply where an applicant provides the required documentary evidence or has taken reasonable steps to do so.

These provisions provide a basis for refusal of a protection visa application and are not intended to displace the requirements for procedural fairness under the Act. Procedural fairness must be afforded to an applicant before a refusal decision is made under sections 91W and 91WA. First, providing genuine documentary evidence of identity, nationality and citizenship is a current expectation and reflected in public information available and, particularly, on the protection visa application form. Information on the Department of Immigration and Border Protection website will also be updated on passage of the Bill to reflect that not providing genuine documents may result in the refusal of an application for a protection visa. Secondly, the refusal power under section 91W is directly linked to an explicit request from the Department to provide documentary evidence of identity, nationality and citizenship. When that request is made, the applicant will be warned that a protection visa cannot be granted if the applicant fails or refuses to comply with the request, or produces a bogus document in response to the request. Under both sections, 91W and 91WA, the applicant is provided with an opportunity to give a reasonable explanation for not providing genuine evidence of identity, and a further opportunity to either provide such evidence or take reasonable steps to obtain it. A refusal decision under section 91W or 91WA is subject to merits review and judicial review.

These provisions do not breach Australia's international non-refoulement obligations. If a person is found to be owed protection obligations by Australia, but has not complied with either sections 91W or 91WA, the person will not be granted a protection visa, however, they will not be 'refouled' or returned to their home country. A person who engages Australia's protection obligations but cannot be granted a protection visa may have their case referred to the Minister for consideration of the Minister's non-compellable powers to determine the most appropriate way to resolve that person's immigration status. Each case will be considered on its individual merits and will result in the grant of a visa if the Minister thinks it is in the public interest to grant a visa to the person. Furthermore, establishing identity is part of establishing a claim for protection. This measure is therefore consistent with proposed section 5AAA, which is consistent with law in like-minded countries.

How the RRT is to deal with new claims or evidence (section 423A)

This Bill introduces a new provision, section 423A, that applies to the RRT and affects claims or evidence presented by a protection visa applicant for the first time at the review stage. Where claims and evidence are raised at the RRT for the first time, unless the RRT is satisfied that there is a reasonable explanation for the failure to provide the information at the primary stage, the RRT must draw an inference unfavourable to the credibility of the claim or evidence. This measure is intended to encourage all protection visa applicants to raise their claims and provide supporting evidence as soon as possible, in order to avoid unnecessary delays in deciding an application.

The new section 423A does not curtail an applicant's ability to make or substantiate their claims to protection. It reinforces and is consistent with the applicant's clear responsibility as articulated in the new section 5AAA. The policy position is that, where a claim can be made at the primary stage, it ought to be made then. New claims include any previously undisclosed reason the applicant may have to establish claims for protection. It is intended that an applicant may provide more detail regarding an existing claim without having to explain the delay. However, if the applicant provides

more supporting documents regarding an existing claim, they would constitute new evidence. The applicant will need to explain why that evidence was not provided earlier for an adverse inference not to be drawn. There are several opportunities for an applicant to raise claims or evidence at the primary stage, including, but not limited to, by way of details in the application form, at an interview, in a response to a request, or simply as information volunteered by the applicant at any stage prior to the primary decision.

To be clear, the measure does not prevent the later presentation of new claims and supporting evidence. It is acknowledged that genuine claims and supporting evidence may arise in the interval between a primary decision being made and an application for review being finalised. Before an RRT member is able to assess whether claims and evidence presented at the review stage are new, they must have regard to all claims and evidence presented, as is currently the case. However, where new claims and evidence are not accompanied by a reasonable explanation, the RRT will now draw an adverse credibility inference regarding those claims or evidence.

A reasonable explanation is one that is generally credible and does not run counter to, or at variance with, generally known facts. Such a standard is consistent with UNHCR guidelines.¹ An applicant will be afforded procedural fairness where no reasonable explanation for new claims and evidence has been provided. The applicant will be warned of the consequences of not providing a reasonable explanation, namely, that the RRT will draw an adverse credibility inference with regard to new claims or evidence presented without a reasonable explanation and they will be requested to provide a reasonable explanation. As now, applicants will continue to be given the opportunity to clarify or elaborate on what appear to be inconsistencies, discrepancies or contradictions in claims and/or evidence provided, where it may have a material bearing on the outcome of the visa application.

Advocates have expressed concern that this provision will make it easier for reviewers to refuse protection and that it therefore risks the refoulement of asylum seekers in difficult circumstances, for instance, those living with post-traumatic stress disorder or people who have fled a country where circumstances have changed since the time the application was lodged. However, these circumstances may be the basis for a reasonable explanation to justify why a claim or evidence was not raised before a primary decision was made. A reasonable explanation will address an applicant's inability to present claims and evidence at an earlier stage, and will explain why their circumstances are not simply a matter of refusing to present their case for protection in a timely manner. This provision is intended to facilitate a Tribunal member refusing an application for a protection visa where new claims or evidence have been raised to prolong an applicant's stay in Australia, rather than due to a genuine need for protection. Its goal is to support the integrity of protection visa processing and the compliance of protection visa applicants with reasonable and proportionate integrity measures.

Application for protection visa by member of same family unit (section 91WB)

This measure seeks to put beyond doubt the interpretation of the existing criteria under paragraphs 36(2)(b) and (c) in the Act regarding the grant of a protection visa on the basis of an applicant being

¹ Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, reissued Geneva, December 2011. Paragraph 204 refers.

a 'member of the same family unit' of a person to whom Australia has protection obligations. The definition of a 'member of the same family unit' under the Act remains unchanged and continues to apply to protection visa applicants.

The insertion of section 91WB in the Act clarifies when a protection visa may be granted on the basis of the applicant being a member of the same family unit of a protection visa holder. This measure clarifies that a family member of a protection visa **holder** cannot be granted a protection visa on the basis of being a member of the same family unit. Such a person must either make a protection visa application on the basis of engaging Australia's protection obligations in their own right, or apply for a visa together with members of the family unit. Where eligible, the family migration pathway is the appropriate course for a person who seeks to enter or remain in Australia on the sole basis of being a member of the same family unit of a person who already holds a protection visa.

The change also discourages family members of protection visa holders from arriving in Australia, particularly illegally, expecting to be granted a protection visa on the basis of being a family member. This amendment does not change the definition of a "member of the same family unit". Nor does it affect the existing ability of a member of the same family unit to apply together with, or have their application combined with, the eventual holder of a protection visa when they are present in Australia at the same time.

This measure does not stop a protection visa holder being with their family. A member of the same family unit is able to apply for a protection visa in their own right if they arrive in Australia after the protection visa holder has already been granted their visa or the protection visa holder may act as a sponsor for various family migration visas as appropriate.

2.2 Schedule 2 – Amendments relating to Australia's protection obligations under certain international instruments

Defining the risk threshold for assessing Australia's protection obligations under the CAT and the ICCPR (section 6A and paragraph 36(2)(aa))

The purpose of Schedule 2 of the Bill is to clarify the threshold for Australia's *non-refoulement* obligations under the CAT and the ICCPR. The amendment is being made in response to recent judicial interpretation of the threshold, which is inconsistent with the Government's intended interpretation. The Government considers the 'more likely than not' threshold to be an acceptable interpretation of Australia's *non-refoulement* obligations under the CAT and the ICCPR. Applying this threshold will ensure that someone who is not found to engage Australia's protection obligations is not granted a protection visa under the Act in circumstances where they are not entitled to it under Australia's interpretation of the ICCPR and the CAT.

Judicial Interpretation

In March 2013, the Full Federal Court's decision *SZQRB* held that the risk threshold that decision-makers should apply in assessing whether claims meet the complementary protection criterion is whether there is a real risk, in the sense of there being a 'real chance' of suffering significant harm. This is the same threshold that applies to the assessment of claims under the Refugees Convention.

The 'real chance' test was established by the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62 (the Chan case) to assess the objective element of a person's well-founded fear under the Refugees Convention. In discussing what the concept of 'real chance' is, the High Court noted that it was not a precise science but rather, was a way of considering a spectrum of possibilities of events occurring that were not remote or far-fetched or measured through specific percentages. For instance, the Court considered a 'real chance' to be a substantial chance of persecution, rather than a far-fetched possibility, and to include less than a 50 per cent chance of persecution, and which can be as low as a 10 per cent chance.

'More likely than not' threshold

The Government is seeking to express the threshold as 'more likely than not' as this is the threshold that Australia has determined is appropriate and reflective of Australia's *non-refoulement* obligations under the CAT and the ICCPR. This Bill enshrines the 'more likely than not' threshold into legislation rather than have it exist only in policy.

The 'more likely than not' threshold is the same threshold that was initially adopted by Government when the *Migration Amendment (Complementary Protection) Act 2011* commenced in March 2012, introducing complementary protection provisions into the protection visa framework. The explanatory memorandum to the *Migration Amendment (Complementary Protection) Act 2011* stated that a "high threshold is required to engage Australia's *non refoulement* obligations under the ICCPR and the CAT." The Department's policy guidelines stated that the threshold for assessing complementary protection claims was higher than the threshold used in making assessments under the Refugees Convention.² The Guidelines noted that the threshold would be met if the risk was 'more likely than not' or 'more probable than not'.

The Schedule 2 amendment makes clear that, in the context of complementary protection, the Minister can only be satisfied that Australia has protection obligations in respect of a non-citizen, if the Minister considers that it is more likely than not that the non-citizen will suffer significant harm if removed from Australia to a receiving country.

The threshold test for assessing *non-refoulement* obligations has been the subject of ongoing differences of opinion in international fora and amongst the various national implementations of these obligations. Applying the risk threshold of 'more likely than not' is considered to be an acceptable position open to Australia under international law and is consistent with like-minded countries such as the United States and Canada.

The United Nations Committee against Torture (UNCAT) has repeatedly interpreted 'substantial grounds' as requiring a 'foreseeable, real and personal risk'.³ The UNCAT has stated that the risk must go beyond mere theory or suspicion, but does not need to meet a further test of being highly probable.⁴ The Government considers 'more likely than not' to be a lower threshold than being

² Department of Immigration and Citizenship Procedures Advice Manual 3: Refugee and Humanitarian – Protection visas – Complementary Protection Guidelines, 15 May 2012.

³ See eg, *EA v Switzerland* Comm No 21/1995 (10 November 1997) UN Doc CAT/C/19/D/28/1995 [11.5], *MSH v Sweden* Comm No 235/2003 (14 December 2005) UN Doc CAT/C/35/D/235/2003 [6.4], *Zare v Sweden* Comm No 256/2004 (17 May 2006) UN Doc CAT/C/36/D/256/2004 [9.3].

⁴ General Comment 1, UN Doc A/53/44, annex IX (22 November 1997).

‘highly probable’. The UNCAT have also stated that in their view ‘substantial grounds’ in Article 3 of the CAT requires more than a mere possibility of torture but that it does not need to be highly likely to occur.

The United Nations Human Rights Committee (UNHRC) has stated that a *non-refoulement* obligation will be engaged under the ICCPR where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of that treaty.⁵ The UNHRC has also articulated the test as requiring ‘substantial grounds for believing that, as a necessary and foreseeable consequence of...removal...there is a real risk that the person would be subjected to treatment prohibited in Articles 6 and 7.’⁶ The UNHRC has consistently emphasised the need for the risk to be ‘real and personal’ to the individual in order to engage a *non-refoulement* obligation under the ICCPR.⁷

The ‘more likely than not’ risk threshold in this Bill is intended to both capture and allow assessment of all potential circumstances and situations which may engage Australia’s *non-refoulement* obligations under the ICCPR and the CAT.⁸ The previous risk threshold drew on both the ‘substantial grounds for believing’ test under Article 3 of the CAT and the ‘real risk of harm as a necessary and foreseeable consequence of removal’ test that has been developed in relation to the implied *non-refoulement* obligation arising under the ICCPR.

In order to ensure that the desired threshold is consistent with Australia’s *non-refoulement* obligations under the CAT the Government considers it necessary to amend the overall language of the test. The original language of paragraph 36(2)(aa), when all parts were taken together, was intended to reflect a greater than real chance threshold. However, Government did not consider that simply replacing the words ‘real risk’ with ‘more likely than not’ would have satisfactorily reflected Australia’s *non-refoulement* obligations, but would have elevated the threshold above what is an acceptable position under the CAT. Therefore, in order to legislate the ‘more likely than not’ threshold into the new section 6A and the amended paragraph 36(2)(aa), the previously existing elements of ‘substantial grounds for believing’ and ‘as a necessary and foreseeable consequence’ have been omitted from the definition.

Expressing the risk threshold as a percentage

In applying the risk threshold of ‘more likely than not’, the Government has indicated that ‘more likely than not’ means that there would be a greater than 50 percent chance that a person would

⁵ Human Rights Committee, ‘General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (29 March 2004) [12].

⁶ Human Rights Committee, *Khan v Canada* Comm No 1301/2004 (25 July 2006) UN Doc CCPR/C/87/D/1302/2004.

⁷ See, for example, *Khan v Canada* (Communication 1302/2004, Views of 10 August 2006), *Singh v Canada* (Communication 1315 of 2004, Views of 28 April 2006), *Kaba v Canada* (Communication 1465/2006, Views of 21 May 2010).

⁸ The level of risk required to engage a non-refoulement obligation under each of these treaties has been expressed in slightly different terms by the UNHRC and the UNCAT. In practice, however, the level of risk required to engage a non-refoulement obligation under both the ICCPR and the CAT is similar. It is therefore appropriate for the interpretation of the amended s36(2)(aa) and the new s6A to be informed by the jurisprudence of both Committees.

suffer significant harm in the receiving country. This clarification is provided to ensure that the test is not again read down to be lower than the Government's intended threshold.

Expressing the risk threshold as a percentage is intended to be a way to clarify the test for decision-makers. This approach is consistent with how assessments are undertaken in the Refugees Convention context when applying the 'real chance' test adopted by the High Court in the Chan case. The use of a percentage is not mandated by the legislation; it is simply a tool to assist decision-makers in making more accurate and consistent assessments. How decision-makers assess an asylum seeker's protection claims must be dependent upon the individual facts of the case.

How will decision-makers apply the 'more likely than not' threshold

It has been suggested that a refugee may be returned to a country where they have a 49 percent chance of being subject to torture. This is not the case. Decision-makers will never be able to quantify the risk with that degree of precision. However it does mean that the visa can be refused where the decision-maker considers it to be unlikely that the person will face significant harm. The 'more likely than not' test is considered to be a workable and meaningful test that is already understood in Australian law and by the Courts as it is the same as the 'balance of probabilities' standard in civil proceedings.

In addition, when a person applies for a protection visa, they are first assessed under the Refugees Convention to determine if they are a refugee. Their refugee claims will continue to be assessed against the 'real chance' test. The majority of people found to engage Australia's protection obligations are those who are found to be refugees under the Refugees Convention. It is only once a person has been determined not to be a refugee that they are assessed against the complementary protection criteria. Those who are found to meet the complementary protection criteria and engage Australia's protection make up a small percentage of those who are granted a protection visa.

When assessing a person against the complementary protection criteria, a decision-maker must first make a finding about whether a claimed harm amounts to torture; cruel or inhuman treatment or punishment; or degrading treatment or punishment. Section 36(2A) of the Act provides that a non-citizen will suffer 'significant harm' if:

- they will be arbitrarily deprived of their life; or
- the death penalty will be carried out on them; or
- they will be subjected to torture; or
- they will be subjected to cruel or inhuman treatment or punishment; or
- they will be subjected to degrading treatment or punishment.

The categories of significant harm may overlap. It is possible that a claimed harm could meet more than one of these categories of significant harm. Therefore, whilst a person may not meet the 'more likely than not' threshold by being at risk of torture or being killed, that person may nonetheless meet the threshold for suffering significant harm in relation to either cruel or inhuman treatment or punishment; or degrading treatment or punishment. In such circumstances Australia would have protection obligations.

Decision-makers will be provided with guidance on assessing complementary protection claims against the new threshold test in the new section 6A and the amended paragraph 36(2)(aa). Decision-makers will be required to make assessments in accordance with such guidance. In making decisions it will also be clear that decision-makers should always refer to the test set out in the whole provision.

Following the passage of these amendments, decision-makers will apply the new test reflecting the 'more likely than not' threshold to all assessments of complementary protection claims. Any complementary protection claims considered as part of a protection visa application will be assessed against the criteria in paragraph 36(2)(aa) of the Act. The creation of the new section 6A in the Act allows for any complementary protection assessment to apply the same 'more likely than not' threshold test regardless of whether it is undertaken under the Act, the Migration Regulations or any administrative process that occurs in relation to the Act, Regulations or other instrument. This ensures consistency.

Decision-makers will apply the new threshold test to new and 'on-hand' complementary protection assessments as the Government considers that it is appropriate and fair for all assessments to be considered under the same law and against the same interpretation of Australia's *non-refoulement* obligations under the CAT and the ICCPR as agreed to by Parliament.

Amendment to definition of "receiving country" (subsection 5(1))

The purpose of this amendment is to clarify the interpretation of the definition of 'receiving country' to ensure that there is always a country of reference for a person claiming protection, regardless of the fact that a non-citizen may be stateless or that their country of nationality or habitual residence may not in fact accept their return. The intention is to prevent a finding being made that there is no receiving country, as the result of that would be that the person could not meet the complementary protection visa criteria, or could not be found to engage protection obligations, which is detrimental to the applicant and not the intended operation of the provision. Clarifying the intended operation of the provision will mean that people, stateless persons in particular, are not refused protection in Australia under the complementary protection provisions where they might otherwise be entitled to it.

It is intended that this amendment will clarify the original scope of this definition, which was to include countries in which non-citizens had formerly habitually resided, but to which they are unable to return. Where the person does not have a country of nationality, this is to be determined not solely by the reference to the laws of the relevant country, but by a range of factors such as the length of stay in the country and cultural, family and other ties to the community.

2.3 Schedule 3 – Unauthorised maritime arrivals and transitory persons

Sections 46A and 46B and Subdivision AJ

This Schedule makes amendments to statutory bars which prevent a person making a valid visa application without a determination by the Minister that the statutory bar does not apply to the person.

Section 46A will be amended to extend the bar to making valid visa applications in this section to unauthorised maritime arrivals who hold bridging visas or temporary visas prescribed for the purposes of this provision. Unauthorised maritime arrivals who are in Australia and are either unlawful non-citizens or hold a bridging visa or a temporary visa of a class prescribed for subparagraph 46A(1)(b)(ii) cannot make a valid application for a visa unless the Minister has made a written determination under subsection 46A(2). Section 46B will be amended to reflect the changes to section 46A so that transitory persons are subject to the same restrictions on making valid visa applications as unauthorised maritime arrivals.

Sections 91H and 91J will be amended so that the bar to making valid visa applications in section 91K will no longer apply to unauthorised maritime arrivals.

The amendments to the statutory application bars do not affect the substantive current objective of the statutory bars which is to allow the Government to control access to Protection visas and other substantive visas. The intention of these amendments is to simplify the legal framework which applies to unauthorised maritime arrivals and transitory persons. Currently unauthorised maritime arrivals may be subject to section 46A of the Act or section 91K or both. It is inefficient and administratively complex for a person to be subject at different times to different provisions that prevent them from making a valid application for a visa when one would suffice. The expanded operation of the section 46A bar makes section 91K redundant for the purpose of managing unauthorised maritime arrivals in the community, and the amendments will ensure section 91K no longer applies to unauthorised maritime arrivals.

2.4 Schedule 4 – Migration Review Tribunal and Refugee Review Tribunal

The amendments in Schedule 4 seek to implement measures to improve the MRT/RRT's processing and administration by:

- strengthening the powers of the Principal Member to issue:
 - Practice Directions to parties to a review, including migration agents and legal practitioners, regarding the procedures and processing practices to be followed in respect of particular review or classes of review; and
 - Guidance Decisions to MRT/RRT members whereby the decision is regarded as authoritative with respect to the issues determined and is to be complied with by MRT/RRT members, to the extent that subsequent cases on review relate to the same issues and evidence, unless MRT/RRT members are satisfied that the facts or circumstances of the decision under review are clearly distinguishable from that of the guidance decision. Non-compliance by MRT/RRT members with a guidance decision will not invalidate that decision on a review.
- introducing a power to dismiss an application for failure to appear before the Tribunal after being invited to do so, but also enabling the Tribunal to reinstate an application that has been dismissed for non-attendance, where the applicant applies within a specified period, and the Tribunal considers it appropriate to do so; and
- permitting an oral decision and statement to be provided in certain situations without having to automatically provide a subsequent written statement of reasons. Where an oral

decision and statement is given, a written statement of reasons is to be provided if the applicant makes a request within a specified period, or the Minister makes a request at any time.

In addition, this Schedule seeks to make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Act is 'finally determined'. This measure puts beyond doubt when a decision on review is made and when an application is finally determined.

The proposed measures will apply to all individuals within the MRT/RRT's jurisdiction and will strengthen the administrative efficiency and processes of the Tribunals to support the integrity of the merits review process. These amendments seek to reduce inconsistencies through the harmonisation of decisions by ensuring that the Principal Member is able to issue guidance decisions and practice directions, as well as provide greater efficiencies and enhance the overall consistency of outcomes in the processing of merits review applications by ensuring that like cases are treated alike.

The amendments will not affect applicants' right to a fair hearing. Applicants will continue to be made aware of the consequences of non-attendance at a Tribunal hearing, when being invited to do so, including the possibility now arising from the proposed amendment to dismiss the application for failure to appear. The MRT/RRT will have a power to reinstate an application where the applicant applies within a certain time period, and the Tribunal considers it appropriate to reinstate the application.

The amendments will not affect the requirements for procedural fairness provided under the Act. The Tribunals will be required to notify the applicant of the decision to dismiss the application for non-attendance. The notice will also include information that sets out how an applicant can seek reinstatement of their review application within a specified timeframe. Where the Tribunals reinstate the review application, applicants will be notified that their application is taken never to have been dismissed and the application on review will continue.

The amendments to subsection 5(9) seek to put it beyond doubt when the MRT or RRT's decision-making powers for the purpose of conducting review of a decision are exercised, and provide certainty over when an application is considered to be finally determined for the purpose of the Act. The amendments do not seek to remove, disturb or otherwise diminish a person's ability to seek merits review of a decision under Part 5 or 7 of the Act, in circumstances where the decision is merits reviewable.