ACT Refugee Action Committee Submission on Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

> For reasons of both principle and pragmatism, successive Senate Committees over more than a decade have recommended that Australia's *non-refoulement* obligations under international human rights treaties be explicitly incorporated into domestic law. Australia should no longer rely solely on the Minister's discretionary powers under s 417 to meet this purpose. (Professor Mary Crock, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, Federation Press, Sydney, 2011, 430)

> … the Committee is concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. The Committee is left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends. (*Report of the Senate Select Committee on Ministerial Discretion in Migration Matter*s, March 2004, para 8.80)

> Leaving people in legal limbo is inconsistent with international human rights law. (Professor Jane McAdam, "Australian Complementary Protection: A Step-by-Step Approach" (2011) 33 *Sydney Law Review* 687, at 729)

Recommendation to the Committee

That the Committee recommend to the Senate that the Bill not proceed on the grounds that it is unnecessary and regressive, and would fail to provide adequately for (i) the protection of those in danger of significant harm in relation to whom Australia has *non-refoulement* obligations under international treaties, (ii) the satisfaction of its obligations under those Conventions.

ACT Refugee Action Committee

The ACT Refugee Action Committee (RAC) is a Canberra-based committee with a mailing list of about 850 people who want Australian governments to treat asylum seekers humanely, with dignity and sympathy, in line with all the requirements of the 1951 Refugee Convention and its 1967 Protocol (the Refugee Convention), under which there are no grounds for deterring or repelling those fleeing persecution and seeking protection here, however they may arrive. To this end, we argue specifically for abolition of mandatory detention and offshore processing of boat arrivals.

The treatment of asylum seekers is a humanitarian and human rights issue rather than a security issue. Australia should accept its fair share of refugees by processing refugee claimants who arrive in Australian territory and resettling those found to be refugees under the Convention, and do so in accordance with internationally accepted standards. This should be done without mandatory detention.

Similar principles apply in relation to those who are in danger of suffering major human rights abuses such as torture, deprivation of life, subjection to the death penalty, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Australia has binding international obligations of *non-refoulement* in relation to such people under such treaties as the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman

or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).[1]

Overview

The title of the present Bill is misleading and unpersuasive. It indicates that the government is proposing to reduce the areas where protection visas are provided for in the Commonwealth *Migration Act 1958* (the Act). We are told nothing at all about the ways in which the very vulnerable people affected by this measure will be protected in practice under the reversion to the former discretionary system.

Unavoidably, the scope of protection under the Refugee Convention is more limited than under international human rights law generally, and provision needs to be made for protection against *refoulement* from Australia to their former countries of people in respect of whom Australia has obligations under international law.

There is nothing about the complementary protection processes or outcomes that could be called "out of control". As the name implies, complementary protection complements the refugee system in cases that are just as deserving of protection in the full sense as those of Convention refugees. As Professor McAdam puts it, "persons protected by the principle of *non-refoulement* ought to receive identical rights and entitlements", namely a legal status equivalent to that of refugees, "irrespective of the source of the State's *non-refoulement* obligation".[2] On this analysis, the Refugee Convention is only one of a number of international measures providing for *non-refoulement* for breaches of human rights that may occasion serious harm, all of them capable of founding claims for full protection.

From the Minister's contention that the Minister needs to have power to deal "flexibly" with "genuine cases", it is clear that he rejects the fundamental basis for the introduction of statutory complementary protection status referred to above. The Minister seeks to draw a bright line distinction between "genuine refugees" under the Refugee Convention, who obtain protection status under Australian law (albeit of a temporary character under the present government in the case of boat arrivals), and others who, while they cannot be *refouled*, can be treated as the Minister in his or her discretion decides.

The present Bill is completely regressive in character. It seeks to reverse the reforms introduced by the former Labor Government with effect from 24 March 2012. Those reforms were the culmination of a lengthy process of consideration and discussion at

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[1] The International Covenant on Civil and Political Rights (ICCPR) (adopted 1966, entered into force 1976) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 1984, entered into force 1987), and the Convention on the Rights of the Child (adopted 1989 and entered into force 1990).

[2] Jane McAdam. *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007, at 257. And note the quotation in note 2 on 252 from Mandal (2005) concerning non-Convention and Convention refugees having similar if not identical needs: "They are both without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes and fearful for their future. Moreover, there is no obvious reason why non-convention refugees will be in need of international protection for a shorter period than their Convention counterparts."

Commonwealth level[3] as to whether, and how, Australia should respond to strong trends in the developed world[4] in relation to "complementary protection" claims that fall outside the scope of the Refugee Convention.

In the words of the Explanatory Memorandum to the original bill introducing these provisions, the amendments would "both enhance the integrity of Australia's arrangements for meeting its *non-refoulement* obligations and better reflect Australia's longstanding commitment to protecting those at risk of the most serious forms of human rights abuses".[5]

The mechanism adopted in 2011, effective from 24 March 2012, was to provide that a successful complementary protection claim would result in a protection visa in the same way as a successful refugee claim. Under that mechanism, the question of complementary protection must be considered in the same process as a refugee claim, if the refugee claim is rejected. This replaced the former situation that complementary protection claims could only be considered by the Minister under the Minister's personal discretionary powers under s 417 of the Act after an unsuccessful application to the Refugee Review Tribunal (RRT), and any decision by the Minister to exercise or not exercise his or her powers was not compellable or subject to review, nor were reasons for substantive decisions made available. That process was severely criticised at the time as not being transparent, consistent, or subject to review, and as overburdening the Minister, as well as requiring the applicant to have to begin over again at the end of the refugee process.[6]

The new process is far from perfect,[7] but we strongly oppose the attempt to completely abolish this important supplementary category of protection visas. If there are flaws in the process, they could be addressed without removing complementary protection visas as such. If there were a real desire to make the legislation work better, the government could well consult with the academics who provided Briefing Notes to Parliamentarians at the time of the passage of the 2011 Act.[8] Alternatively, or as well, it could be appropriate to ask an independent body such as the Australian Human Rights Commission, or the Australian Law Reform Commission, to look at

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[3] Professor Mary Crock lists the principal reports, from the Senate Legal and Constitutional References Committee (2000 and 2006), the Senate Select Committee on Ministerial Discretion in Migration Matters (2004), and Elizabeth Proust to the Minister (2008): see *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, Federation Press, Sydney, note 149, 430. The Explanatory Memo to the Migration Amendment (Complementary Protection) Bill 2011 (at 4) (Ex Memo CP Bill 2011) refers also to the views in favour of the need for complementary protection provisions expressed by the Australian Human Rights Commission, the United Nations Committee Against Torture, the United Nations Human Rights Committee, and the Executive Committee of the UNHCR. And see discussion by Professor Jane McAdam in article in note 7 below, Part II, "Legislative Background", and in her book *Complementary Protection in International Refugee Law*, Oxford UP, 2007, 131–134..

[4] See note 15 and text below.

[5] Ex Memo CP Bill 2011, 1.

[6] See also comments below on point 5 of the Minister's argument.

[7] See eg Professor Jane McAdam, "Australian Complementary Protection: A Step-by-Step Approach" (2011) 33 *Sydney Law Review* 687 at 690. The grounds for Professor McAdam's criticism are that the legislation conflates international and comparative tests, and formulates them in ways that marginalise international jurisprudence, thereby isolating Australian decision–making. In her view these matters could be met by legislative amendment.

[8] See McAdam, note 7, at 690, text and note 14.

the operation of the complementary protection system and recommend appropriate changes.

The Minister's case for reverting to the former system

The following section summarises and comments on the Minister's claims in his Second Reading Speech on 4 December 2013 introducing this Bill and proposing a return to Ministerial discretion (House of Representatives, *Hansard*, 4 December 2013, 1521). The Minister states that he is committed to *non-refoulement* of those with valid claims, but "determining an appropriate framework for considering complementary protection claims is a separate issue".

The existing regime assists people smugglers

1. *The existing complementary regime "creates another statutory product for people smugglers to sell". It goes beyond the requirements of the refugee convention and "creates a new channel for asylum seekers to a permanent protection visa even though they were not found to be a refugee and engage a lengthy process* (sic)*".*

Comment: This is mainly populist rhetoric, behind which lies a belief in a minimalist protection system, despite the existence of serious refugee-like situations where *refoulement* is prohibited absolutely by international human rights instruments. Those concerned need protection status and certainty about their future lives. The Bill certainly does not address the real protection needs of these people. As the Minister says later, interpretation of the Refugee Convention has expanded in recent times, and many people whose claims would once not have been thought to come within its scope are recognised as refugees (the Minister gives the examples of women fleeing honour killings and female genital mutilation), but there is no reason to deny full protection to others who would be in danger of significant harm if *refouled* but who cannot claim "persecution" under the Refugee Convention. For the applicant the length of the process will almost certainly be longer under an administrative Ministerial discretion process, as it was in the past.

The views expressed in 2009 by the UNHCR Regional Office in Canberra are highly relevant here:

> UNHCR welcomes the proposed introduction, in Australia, of a legislative basis to protect persons who may not qualify as refugees but who are nonetheless in need of international protection, based on international human rights instruments. UNHCR particularly welcomes the intention to enable claims for complementary protection under international human rights treaties to be considered "in a transparent process that is subject to merits review and scrutiny by the courts".[9]

Procedures difficult for decision makers to apply, inconsistent in outcome, costly and inefficient

2. *The numbers of people benefiting from the complementary provisions is too low to justify its retention (57 successful claims since introduction in March 2012). The complementary protection regime is "a costly and inefficient way to approach the issue". The existing procedures are "complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes".*

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[9] UNHCR, Canberra Regional Office, *Draft Complementary Protection Visa Model: Australia – UNHCR Comments*, January 2009, para 8, quoting from the Department's Draft Complementary Visa Model, 13 November 2009.

Comment: The number given does not include those whose claims were not successful and who would usually have applied for the exercise of Ministerial discretion under the old system which it is proposed to revive. (The Kaldor Centre lists 440 such cases in which RRT decisions have been published: only approximately 40% of RRT decisions are published, according to the Deputy Principal Member in April 2013: see reference in note 17 of the submission no 4 of Professor Jane McAdam and 21 refugee law academics (McAdam et al).)[10] The low figures for successful claims belie the Minister's claim about another product for people smugglers, but would still be appropriate if they were higher; together with those for unsuccessful claims, they indicate a continuing need for provision of a specific process for complementary protection.

A proper study would be needed to tell whether refugee processing is being unnecessarily lengthened by the addition of complementary protection consideration – the Minister's assertions on this are not supported by evidence. The present process owes a lot to the views of the UNHCR's regional office in Canberra, in particular that "the primacy and integrity of the Refugee Convention is maintained, but should also specify that a claimant's need for complementary protection should be considered, even if he/she has not specifically asked for it to be considered".[11] In principle it is appropriate to test any refugee claim first so that Refugee Convention coverage does not become "frozen" in time by alternative resort to complementary protection.

The issue of inconsistency is one that is addressed by the RRT in the case of refusals, and is subject to the guidance of the courts in relation to the interpretation of the legislative provisions. This is not the case in relation to exercise of the Minister's personal powers, and inconsistency of decisions was one of the major criticisms of the former Ministerial discretionary system.[12]

To the extent that the process may be difficult for decision makers to apply, this may be due to the fact that the provisions concerning the standard of determination of claims are overlapping, and require the satisfaction of elements that in international law jurisprudence are meant only as explanations of the requirement of a real risk of significant harm (and see below, point 4 on interpretation).[13] Amendments along the lines of those suggested by refugee law academics in 2010 and 2011 could bring the requirements of the Australian legislation into line with international practice.[14]

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[10] Jane McAdam and Fiona Chong, "Complementary Protection in Australia: A Review of the Jurisprudence", Report of the Andrew and Renata Kaldor Centre for International Refugee Law at UNSW, accessible at: www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf . Note also that the Department informed a Senate Estimates Committee that, as at 31 October 2013, "a total of 83 cases had been remitted from the Refugee Review Tribunal … to the Immigration Department with a recommendation that a protection visa be granted on complementary protection grounds" (submission 4 from McAdam et al, 3–4 at note 15).

[11] UNHCR, note 9, para 19; see also para 15.

[12] Eg Crock, note 3, at 429: "… no reasons are given for a Minister's decision to exercise this power [in s 417] , so the decision-making is neither transparent nor consistent across like cases. While guidelines include reference to protection needs arising under international human rights treaties, it is not mandatory for the Minister to take these into account. The Minister's discretion is close to absolute."

[13] McAdam, note 7, 722.

[14] See McAdam, note 7, at 690 and note 14.

Problems with criminal connections

3. *(a) There have been a number of complementary protection claims where people have committed serious crimes in home countries, or are fleeing because of association with criminal gangs or involvement in blood feuds. While not derogating from these absolute non-refoulement obligations, there is no obligation to follow a particular process or grant a particular kind of visa, especially in cases of security or serious character concerns which don't meet the criteria for grant of a protection visa.*

Comment: The Minister's concerns about criminal behaviour and security are unconvincing in that persons who fail the requirements in s 36(2C) of the Act are taken not to satisfy the criterion for complementary protection in s 36(2)(aa). The point here is that, in cases where s 36(2C) applies, while the *non-refoulement* obligation remains in place in such cases, a protection visa is not granted. It is thus not necessary to repeal the complementary protection provisions to achieve this end. The submission from McAdam et al (no 4, 2 at note 4) also states that the Minister was unable to point to cases of protection being granted to "bikies and criminals" which he had implied was occurring.

That submission also lists the kinds of interpersonal disputes involved in the majority of successful claims, and comments: "This kind of caseload is very similar to that of other jurisdictions around the world." (at 4) This again belies the suggestion of the Minister and the Department that Australia is granting protection in cases that would not succeed elsewhere (the "exceptional" versus "routine" argument referred to in point 4 below).

Perhaps what the Minister is really concerned with is AAT review of adverse decisions concerning the application of the exclusions in s 36(2C) (pursuant to s 500(1)(c)(ii)). Such review is vital to ensure that *refoulement* does not happen where significant harm could result.

In this context, the government's desire to repeal the specific complementary protection processes and revert to Ministerial discretion alone, on the basis that it allows flexibility of visa outcome, is of considerable concern. Assuming that the *non-refoulement* obligation is adhered to, it is still necessary to ensure that Australia does not breach its other obligations under international human rights instruments in relation to those already here. This applies equally to those who cannot be returned to their former countries even though they do not qualify for a protection visa because of criminal or security concerns. Approval of legislation similar to this Bill would require at the very least further, satisfactory detail on the kinds of outcomes the government intends for those who seek the Minister's intervention, whether or not they receive a favourable result.

Certainly individual states have to determine their own processes and protection outcomes in relation to complementary protection claims, and countries differ as to how they provide for processing claims and what the migration outcomes will be. However, a high degree of harmonisation of is desirable in this field: this proposal goes in the opposite direction. Since 2004 there has been a strong trend to adopt specific complementary protection provisions,[15] including the view of the UNHCR

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[15] See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed, 2007, 296, including the EU Qualification Directive, 2004, and the UNHCR ExCom Conclusion, 2005. For

that persons making successful claims should be treated in essentially the same way as successful refugee claimants. Of the countries with codified complementary protection systems by the end of 2006, however, "only Canada and the Netherlands … provide[d] beneficiaries of complementary protection with a status equivalent to that of Convention refugees".[16]

Australia, on the other hand, has chosen to treat successful complementary protection claimants in the same way as it does acknowledged refugees, by granting them permanent protection visas, subject to exceptions in the case of serious crimes, security concerns etc. (See above, heading "Overview", for the theoretical underpinnings of this position.)

There is also a strong practical case for the current legislation in view of the fact that the "potential harm flowing from an error in a decision regarding these [*non-refoulement*] obligations is equally severe" (to that in the case of refugee claims).[17] As with refugees, the necessity to give such persons certainty as to their future in this country so they can get on with adjusting to life here and overcoming the traumas of their former lives, perhaps including the trauma of detention by Australia, makes a permanent protection visa the appropriate outcome.

> *(b) The Minister also says that it is necessary to rely on the Minister's personal and non-compellable power to consider granting a visa regardless of "whether a person of security or character concern has been assessed against the complementary protection criterion in the Migration Act or as part of an administrative process."*

In practice, however, in the majority of cases under the present system it is likely that such concerns will already have been dealt with under s 36(2C), which does not require exercise of the Minister's personal powers. As a criticism of the current legislation, this line of argument is quite unconvincing.

The courts have lowered the bar for obtaining complementary protection

4. (a) The courts have expanded the scope of the complementary protection obligations beyond what is required by international law. For example, in the Minister's view, the courts have lowered the statutory "risk threshold test for assessing whether a person engages Australia's complementary protection obligations … to the same 'real chance' threshold as under the refugees convention".

In the Minister's view, "the 'real chance' test is a very low bar and lower than required under the CAT and the ICCPR". The court's interpretation "transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties."

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provisions in Canada, the United States, New Zealand, Hong Kong and Mexico, see McAdam, note 7, 688. Note also that the grounds on which "States offer complementary protection are varied which leads to different outcomes – for example, in Austria, Luxembourg and Spain complementary protection is simply an obligation not to remove a person, whereas in Sweden, the UK and Italy it requires the grant of a residence permit of some kind": *Report of the Senate Select Committee on Ministerial Discretion in Migration Matters*, 2004, at para 8.57.

[16] Goodwin–Gill & McAdam, note 15, 332.

[17] HREOC submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, quoted in the Committee's 2004 *Report*, at para 8.54.

In its submission to the Committee (no 3) the Department of Immigration and Border Protection states:

> The Department had been applying the real risk test as a "more probably than not" risk of harm, that is, as more than a 50 per cent chance of suffering significant harm. This is consistent with the standard applied by the United States of America and Canada.

Comment:

Far from transforming "provisions intended to be **exceptional** into ones that are **routine** and **extend well beyond what was intended by the human rights treaties**" (our emphases), the courts' decisions are not inconsistent with Australia's treaty obligations, and accord with the needs of a decision-making process involving both refugee claims and complementary protection claims. Two separate standards would be likely to confuse decision makers and lead to comparative injustice. The Department's "50 per cent" risk of harm would seem an excessive and inflexible standard in cases where the issue is of future significant harm of death, torture, or cruel, inhuman and degrading treatment or punishment.

Moreover, nothing in the consideration of the complementary protection legislation indicates an intention that these provisions are "exceptional", although the numbers involved are fewer than in the case of refugee claims. They apply in all situations where persons claim that their return to their former countries could result in significant harm of the kinds set out in the Act. Once again, the Minister's approach is opposed to the fundamental basis of the complementary protection regime, and should be resisted.

Australian court decisions

In two decisions dealing with s 36(2)(aa), the Full Court of the Federal Court of Australia proceeded on the basis that "in assessing the 'real risk … of significant harm' to the non-citizen under s 36(2)(aa) of the Act, that question may be resolved by asking whether there is a 'real chance' that the non-citizen will suffer significant harm if he is removed from Australia to the receiving country. …" (see *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147 (24 October 2012), Lander, Jessop and Gordon JJ, at [31]; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (20 and 22 March 2013), Lander and Gordon JJ at [240]–[246], with whom Besanko and Jagot JJ, and Flick J agreed).

Neither case seems to have been based on full argument of the opposite case by the then Minister. In one case, at least, withdrawal of argument because of differences between the views of the then Attorney–General and the Immigration Department on the proper test, may have contributed to the High Court refusing special leave to appeal the decision in *SZQRB* partly on the ground that the court did not "have the benefit of a decision below resolving any contested construction of the statutory criterion" ([2013] HCA Transcript 323 (13 December)). A further ground for refusing the application was that, despite it concerning a statutory criterion not yet considered by the court, there were insufficient prospects of success.

Professor McAdam notes that "real or substantial risk", or a "substantial or real chance" of prejudice" test, similar to the test of a "real chance" of persecution for a Refugee Convention reason applied in Australian refugee claims (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379) has been adopted by the Federal Court in extradition cases (McAdam, note 7, 721–722, citing several

Federal Court decisions; see also *Santhirarajah v Attorney–General for the Commonwealth of Australia* [2012] FCA 940, and the Full Court's comment on that case in *SZQRB*, above, [244]–[245]).

International considerations

It is not clear, as is claimed by the Department, that the evidentiary standards under the Convention on Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) are significantly different from the test adopted by the Australian courts in interpreting s 36(2((aa).

For example, the evidentiary standard in article 3 of the CAT is that there are "substantial grounds" for believing a person would be in danger of being subjected to torture if sent to another State. Australian and world expert on complementary protection, Professor Jane McAdam of the University of New South Wales, says of the CAT requirements:

> [The Torture Committee under the CAT] has consistently noted that "substantial grounds" involve a **"foreseeable, real and personal risk of torture"**. They are to be assessed on grounds that go "beyond mere theory or suspicion" or "a mere possibility of torture", but the threat of torture does not have to be "highly probable" or "highly likely to occur". The danger must be "personal and present". … As Goodwin-Gill has noted, the brevity of the Committee's views in negative decisions, coupled with the formulaic conclusion that the facts lack "the minimum substantiation that would render the communication compatible with article 22 of the Convention against Torture", provide little further assistance in determining how, and against what standards of authority and corroboration, evidence is tested. (our emphasis) (Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007, at 121–122).

In view of that summary, it is suggested that the Torture Committee has not in fact formulated a probability-based test similar to that the Minister and the Department favour, speaking only of a "present" and "foreseeable, real and personal risk". Its approach does not clearly preclude the reading of "real risk" as "real chance", as in refugee claims under s 36(2)(a). The Committee's formulation also retains a degree of flexibility that is not present in the Department's proposed test.

It is correct, as stated by the Department, that in the United States and Canada the test of danger of torture etc following removal is one of "more likely than not" on a balance of probabilities (see McAdam, *Complementary Protection*, 128 and 123, note 82). In both cases this is a higher standard of proof than in refugee claims ("reasonable possibility" in the US, and "reasonable chance" or "serious possibility" in Canada's case.)

The US statutory-based process operates as a defence to deportation rather than an affirmative source of protection. The US does not accept the individual communication procedure under the Optional Protocol to the ICCPR or CAT, and in the view of one commentator the US "is less exposed than European States to binding international judgments concerning human rights bars to deportation" (referred to by McAdam, *Complementary Protection,* 128, note 8).

In Canada, the decision of the Federal Court of Appeal in *Li v Canada (Minister of Citizenship and Immigration* [2005] FCJ No. 1; 2005 FCA 1 established different standards for complementary protection and refugee status, endorsing for complementary protection a "more likely than not" test of serious danger of torture

and other human rights breaches, rather than the test in refugee claims of a "reasonable chance" of persecution.

There is no good reason for Australian courts and policy-makers to follow the Canadian decision in *Li*. Its reading of the test in the CAT is erroneous, as argued above, and the Canadian court was constrained by a previous court decision on the test in article 3 of the CAT that it presumed had been taken into account in drafting the complementary protection provisions. The earlier decision gave no consideration to the "reasonable chance" test.

Professor McAdam refers to an alternative line of authority in the UK House of Lords and Asylum and Immigration Tribunal, quoting the latter:

> It would therefore be strange if different standards of proof applied. … Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. …[18]

We agree strongly with Professor McAdam's conclusion that:

> **…** bearing in mind the protection function of both s 36(2)(a) and s 36(2)(aa), Australian decision-makers should follow the UK approach**.** In particular, given the Australian test for 'well-founded fear of persecution' is whether the applicant faces a 'real chance' of persecution, it would be a logical and relatively easy step to equate the meaning of 'real risk' in s 36(2)(aa) with 'real chance'.[19] (our emphasis)

The UNHCR has also expressed the view "that there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection", citing in support the difficulties facing all such claimants in obtaining evidence and the seriousness of the threats they face.[20]

While there may be room for a simplification of the test in s 36(2)(aa), there is certainly no need for a repeal of the provisions and the reintroduction of an unaccountable and secret discretionary Ministerial system that in the past has been found to be a nightmare.

(b) Further, court decisions have required that protection by a country's authorities (where the police and judicial system are functioning and effective) "must reduce the level of harm to below that of a 'real chance'" for the exception in s 36(2B)(b) to operate.

The Minister's second point is also hard to accept. The Full Court's reasoning in *MZYYL* (see above), concerning the required level of expected protection by an authority of the applicant's former state before the limitation in s 36(2B)(b) operates – that the "enquiry provided for in s 36(2)(aa) necessarily involves consideration of the matters referred to in s 36(2B)(b)" – leads logically to the conclusion that, for the limitation in that provision to apply, the protection available from the applicant's former state must reduce the likelihood of harm occurring below that of a "real risk" or "real chance" (see *MZYYL* at [39]–[40]). In addition, the court also queried the Minister's contention in that matter that this decision sets a higher standard than in

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[18] McAdam, note 7, 718 quotation.
[19] McAdam, note 7, 719, 722, and final para on 726.
[20] UNHCR, note 9, para 25.

refugee cases, saying that "courts have recognised that the mere existence of a system of state protection may not of itself be sufficient" ([38]).

Claimed superiority of administrative process using Minister's discretion

5. *The Minister claims that consideration of complementary protection issues under an administrative process "allows the government to regain control over Australia's protection obligations" and assess claims according to international law. The Minister stresses that he could consider a range of options, including power to grant temporary or permanent visas. The Minister would have power to "deal flexibly and constructively with genuine cases of individuals and families" with unique and complex circumstances, especially involving civil strife where people are "unable to return home in the short term".*

Comment: A number of the grounds for rejecting Ministerial discretion as an appropriate way of determining complementary protection claims were well stated by Professor Mary Crock in her 2011 book, *Immigration, Refugees and Forced Migration* (at 429–430; see also McAdam, *Complementary Protection*, at 133):

> For reasons of principle, it is inappropriate for Australia to use a Minister's discretion to discharge its international obligations to prevent refoulement of individuals fearing human rights violations. A discretionary mechanism, by its very nature, cannot ensure compliance with an obligation. Further, using s 417 to provide complementary protection confuses protection rights of individuals under international law with a residual (humanitarian) discretion to offer protection to individuals on compassionate grounds. …

Similar comments were made in 2009 by the Canberra Regional Office of the UNHCR:

> [UNHCR] is of the general view that any decision with regard to a substantive legal obligation not to *refoule* pursuant to an international obligation should be circumscribed by legislation rather than left to ministerial discretion.[21]

The then Human Rights and Equal Opportunity Commission (HREOC) expressed a similar view in relation to the right to be protected from torture, one of the areas where complementary protection currently applies:

> If … discretion is exercised there will be no breach to the right to life in the specific circumstances. But the fact that there is no system in place to make sure that that breach does not occur is a continuing breach of … article 2 of the ICCPR.[22]

HREOC also described the former (and again proposed) system as "fragile", concluding that it "appears incompatible with the nature of the obligations Australia has assumed".[23]

We believe that both refugee claims and complementary protection claims need to be "considered in a transparent process, subject to merits review and judicial review",[24] none of which will be part of the proposed discretionary process. CASE for Refugees

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[21] Note 9, para 32.
[22] Quoted in *Report of Senate Select Committee on Ministerial Discretion in Migration Matters*, 2004, para 8.19.
[23] Note 23, para 8.35.
[24] Crock, note 3, 431. That position was also endorsed by the UNHCR, eg, comments referred to in text to note 9.

in its submission to the Committee (no 5, at 5) also makes the point that returning to the previous non-transparent system, where the Minister's actual grounds for decisions are not made public, "may substantially increase the number of claims as potential applicants".

Moreover, there is no indication by the Minister when complementary protection determinations would take place. If that system is revived, applicants should not, as in the past, have to await an unsuccessful review by the RRT, involving major and unnecessary delay, but should take place upfront as part of the refugee determination process. To state this proposition is to underline the potential cumbersomeness of two separate processes dealing with very similar materials.

We are also not told by the Minister how he intends to exercise his proposed powers in relation to complementary protection. As Professor Crock remarks, a discretionary power of its nature cannot be an adequate response to significant human rights obligations. The Minister's beliefs that complementary protection provisions were intended to be exceptional, and that the correct test for operation of the complementary protection criterion (essentially a "real risk" of "significant harm") is much stricter than a "real chance", can give no confidence that Australia's *non-refoulement* obligations will be met in all cases under the proposed system.

From the Minister's own words it seems clear that use of temporary visas is seen as an important part of a future discretionary regime. For the reasons given above, this is not satisfactory. The UNHCR takes a similar view, distinguishing "complementary protection clearly from temporary protection – a specific, provisional response to situations of mass influx".[25]

Conclusion

The Minister has not made his case.

The complementary protection system should be retained in its present basic form, not replaced by an administrative discretionary process. Complementary protection should be accepted as a legitimate addition to the refugee regime, enabling the decent treatment of people who could be subject to significant harm and in relation to whom Australia has *non-refoulement* obligations.

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[25] UNHCR 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, No 103 (LVI) – 2005, summarised in UNHCR, note 9, at para 7.