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26 November 2015

Dear Committee Secretary,

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015.

Our submission focuses on five points:

- the requirement that a real risk of significant harm relates to all areas of the country (proposed s 5LAA(1)(a));
- the requirement that a real risk of significant harm is faced by the person personally (proposed s 5IAA(1)(b) and (2));
- modification of behaviour to avoid a real risk of significant harm (proposed s 5LAA(5));
- protection by non-State actors (proposed s 5IAA(4) and current s 5LA);
- ineligibility for grant of protection visa (proposed s 36(2C)).

Yours sincerely,

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1 Introduction

This bill is partly designed to align the complementary protection provisions of the Migration Act 1958 (Cth) with changes made to the refugee provisions by Schedule 5, Part 2 of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) ('Legacy Caseload Act').

Our concerns with those earlier amendments were outlined in Part 6 of our submission to the 2014 Senate inquiry on the Legacy Caseload bill (submission no 167). Those amendments created a 'new, independent and self-contained statutory framework' which removed most references to the Refugee Convention from the Migration Act. As we noted at the time, the amendments:

- altered the definition of a refugee in a way which may be inconsistent with international refugee law, and which therefore created risks of Australia violating its obligations under the Refugee Convention;
- confused and conflated the separate concepts of 'persecution' and 'protection';
- replaced the concept of State protection with a different and lesser standard;
- introduced the possibility that non-State actors could be sources of protection;
- provided no requirement that protection be stable, effective or durable;
- fundamentally misunderstood the system of international law in general, and treaty interpretation in particular, amounting to an isolationist approach which was fundamentally at odds with the purpose of international law; and
- excluded Australian courts from interpreting Australia's obligations under the Refugee Convention, in a way which could be seen as undermining the rule of law in Australia by overtly attempting to interfere with the independent judiciary's interpretation of Australia's international protection obligations.

These remain our serious concerns and we refer the Committee to our earlier submission for detailed analysis.

Our current submission focuses on five points:

- the requirement that a real risk of significant harm relates to all areas of the country (proposed s 5LAA(1)(a));
- the requirement that a real risk of significant harm is faced by the person personally (proposed s 5IAA(1)(b) and (2));
- modification of behaviour to avoid a real risk of significant harm (proposed s 5LAA(5));
- protection by non-State actors (proposed s 5IAA(4) and current s 5LA);
- ineligibility for grant of protection visa (proposed s 36(2C)).

We concur with the concerns identified in the report of the Parliamentary Joint Committee on Human Rights.¹ We note that, in contrast, the Human Rights Compatibility statement is devoid of any rigorous legal analysis or citation of legal authority, and simply repeats the Explanatory Memorandum. It cannot be relied upon as an independent analysis of the compatibility of the bill with international human rights law.

¹ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: 30th Report of the 44th Parliament* (10 November 2015) 19–27.

5LAA Real risk that a person will suffer significant harm

- (1) For the purposes of the application of this Act and the regulations to a particular person, there is a real risk that the person will suffer significant harm in a country if:
- (a) the real risk relates to all areas of the country; and
 - (b) the real risk is faced by the person personally.
- (2) For the purposes of paragraph (1)(b), if the real risk is faced by the population of the country generally, the person must be at a particular risk for the risk to be faced by the person personally.

Proposed section 5LAA provides that there is a real risk that a person will suffer significant harm in a country only if:

- the real risk relates to all areas of the country; and
- the real risk is faced by the person personally.

The stated purpose of the provision is to align the criteria for complementary protection with those under the refugee framework in existing paragraph 5J(1)(c) of the Migration Act.² We outlined our concerns with that provision when it was introduced by the Legacy Caseload Act, and we reiterate them here.

(a) Country-wide risk

The proposed change essentially means that a decision-maker will not have to consider whether it is reasonable for an applicant to relocate elsewhere within the country to escape the feared harm, overturning Australian judicial authority on this point. It is also contrary to international best practice and the approach in comparable jurisdictions.

First, neither refugee nor human rights law stipulates that a well-founded fear of persecution or a real risk of harm must be faced in all areas of a country. The provision therefore inserts an additional, limiting phrase that is inconsistent with the ordinary meaning of the Refugee Convention and complementary protection jurisprudence.

Secondly, the provision is inconsistent with the protective object and purpose of the Refugee Convention and human rights-based *non-refoulement* because a 'country-wide persecution requirement' imposes on an applicant 'an impossible burden and one which is patently at odds with the refugee definition'.³

Thirdly, international practice is consistent in requiring a State to be satisfied that where an applicant is at risk of persecution or serious harm in one part of the country, he or she will only be returned to an alternative part of the country if he or she has the prospect of re-establishing a life with dignity. For example, article 8 of the European Union's recast Qualification Directive provides that in considering whether a person can be returned to an alternative place, consideration must be given to whether 'he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there'. This requires having regard to 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant' (article 8(2)). Similarly, UNHCR Guidelines on this matter reflect prevailing State practice in requiring an analysis of, inter alia, whether there is respect for basic human rights, including consideration of whether

² Explanatory Memorandum, para 54.

³ UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* (April 2001) note 28 <http://www.refworld.org/docid/3b20a3914.html>.

a person would be relocated to 'face economic destitution or existence below at least an adequate level of subsistence'.⁴

Fourthly, preventing Australian courts from applying pre-existing authority on whether relocation would be 'reasonable',⁵ the bill puts Australia at risk of violating its obligations under the Refugee Convention, the ICCPR and CAT,⁶ and takes an approach that diverges markedly from comparable jurisdictions.⁷

Finally, given the *absolute* prohibition on return to treatment proscribed by the ICCPR and CAT, the need to scrutinize rigorously whether it is reasonable for an applicant to be returned is especially important. The question in such cases is not about the reasonableness of the 'response to fear of persecution', but rather the reasonableness of a response to a 'real risk' of 'significant harm', including death. It is instructive to note the case law of the European Court of Human Rights on this point. In relation to non-removal to torture or inhuman or degrading treatment or punishment under article 3 of the ECHR, the court has stated that:

reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment.⁸

To examine whether relocation is 'reasonable' is not the same as determining 'whether the alternative flight option would provide the person with ideal or preferred living circumstances', as the Explanatory Memorandum suggests.⁹ As the House of Lords observed in *Januzi*, the 'reasonableness' of relocation should not be judged by 'whether the quality of life in the place of relocation meets the norms of civil, political and socio-economic human rights',¹⁰ but rather by asking: 'Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.'¹¹ Canadian case law shows that relevant factors to be considered may include: the presence/absence of family members; the in/stability of the government; age; gender; race; religion; political profile; employment

⁴ UNHCR, *Guidelines on International Protection No 4: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* (23 July 2003) UN Doc HCR/GIP/03/04, para 29 <http://www.refworld.org/docid/3f2791a44.html>.

⁵ The Explanatory Memorandum states: 'This amendment further clarifies the Government's intention that the approach will no longer encompass the consideration of whether relocation is 'reasonable' in light of the individual circumstances of the person. The Government considers that, in interpreting the 'reasonableness' element into the internal relocation principle in the refugee context, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation': para 60. In *SZATV v Minister for Immigration and Citizenship*, the High Court stated (para 24): 'What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality'.

⁶ As noted by the Joint Parliamentary Committee on Human Rights (n 1) para 1.105.

⁷ See eg *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para 141.

⁸ *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, para 266 (citations omitted); see also para 36.

⁹ Explanatory Memorandum, para 59.

¹⁰ *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, para 45 (Lord Hope), concurring with Lord Bingham.

¹¹ *Ibid*, paras 20–21; UNHCR *Guidelines* (n 4) paras 7, 28–30.

conditions; linguistic skills; the economic situation; familiarity with the area; health; and business and social contacts.¹²

The instrumentalist approach adopted in the bill fundamentally undermines human dignity by treating individuals as mere entities that can be shifted around. It overlooks whether a person can integrate, has family links, cultural ties, linguistic competence and so on in the place to which relocation is contemplated. There is a danger that the identification of a 'safe-ish' place to which a person could be removed may be used as an inappropriate shortcut, instead of a rigorous analysis of the individual's protection need.

(b) Requirement of personal risk

Proposed paragraph 5LAA(1)(b) provides that there is a real risk that a person will suffer significant harm in a country if the real risk is faced by the person personally. Proposed paragraph 5LAA(2) adds that if the real risk is faced by the population of the country generally, the person must be at a particular risk for it to count as a 'personal' risk.

This is inconsistent with approach in refugee law, which rejects 'singling out', and creates a risk that people will not be protected in situations of general yet significant danger.

The relationship between personal and general risk has been the subject of extensive analysis and judicial consideration in Europe.

In the EU Qualification Directive, article 15(c) and recital 35 together set a high threshold for protection in situations of general risk. Article 15(c) extends complementary protection to civilians who face a 'real risk' of a 'serious and individual threat' to their 'life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. Recital 35, which is non-binding but of interpretative assistance, provides that: 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.' There have been many cases about how personal this risk needs to be.¹³

However, the Court of Justice of the European Union, which oversees the interpretation of the Qualification Directive, has now clarified that article 15(c) does not require an applicant to 'adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances'.¹⁴ Rather, the threshold is met where the indiscriminate violence feared 'is so serious that it cannot fail to represent a likely and serious threat to that person'.¹⁵ In other words,

the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually

¹² See Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) and cases cited there <http://www.irb-cjsr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ProtectLifVie.aspx>.

¹³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) (2011) OJ L37/9 ('Qualification Directive').

¹⁴ *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber) 17 February 2009, para 45.

¹⁵ *Ibid*, para 42.

affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.¹⁶

It therefore encompasses harm where ‘substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.’¹⁷

Accordingly, ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.’¹⁸

Likewise, the European Court of Human Rights has stated that in demonstrating a ‘real risk’ of inhuman or degrading treatment or punishment, an applicant does not have to establish ‘further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk.’¹⁹ It has said that if violence in a particular area ‘is of such a level of intensity that anyone in the [area], except possibly those who are exceptionally well-connected to “powerful actors”, would be at real risk of [ill-]treatment’, then protection should be forthcoming.²⁰

Similarly, the Federal Court of Canada has held that while a claimant must establish a personal and objectively identifiable risk, this ‘does not mean that the risk or risks feared are not shared by other persons who are similarly situated.’²¹

This has also been the approach in Australia:

where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, an assessment of the level of risk to the individual may disclose a sufficiently real and personal risk to engage a non-refoulement obligation under the ICCPR and/or CAT. As such, s.36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason. What is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment.²²

Further, in *SZSRY v Minister for Immigration*, Driver J stated that:

even if the section excludes the risk of harm that is not personally faced by an applicant, and is not specifically directed at him or her, it leaves open the possibility that an applicant may fear harm directed specifically at members of a class of persons which includes him or her and, as a member of that class, he may face that harm personally.²³

¹⁶ *Ibid*, para 37. See also the approach in *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKAIT 00091, para 110.

¹⁷ *Elgafaji v Staatssecretaris van Justitie* (n 14) para 35.

¹⁸ *Ibid*, para 39.

¹⁹ *Salah Sheekh v The Netherlands* (n 7) para 148.

²⁰ *Sufi and Elmi v United Kingdom* (n 8) para 250.

²¹ *Surajnarain v Canada (Minister of Citizenship and Immigration)* [2008] FC 1165, para 11. See also *Salibian v Canada (Minister of Citizenship and Immigration)* [1990] 3 FC 250, 259; *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791 (TD), para 37; *Prophète v Canada (Minister of Citizenship and Immigration)* [2008] FC 331; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31; *Re WXY* [2003] RPDD No 81.

²² *SZSFF v Minister for Immigration and Border Protection* [2013] FCCA 1884 [34] (‘SZSFF’).

²³ *SZSRY v Minister for Immigration and Border Protection* [2013] FCCA 1284 [74] (‘SZSRY’).

As in refugee law, in cases involving situations of generalized violence, 'it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual'.²⁴ Thus, 'the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.'²⁵ Indeed, widespread human rights violations can help to substantiate the existence of significant harm.

The Explanatory Memorandum to the bill (paragraphs 66–68) is misleading in its characterization of the international jurisprudence on this issue. Further, the example provided in paragraph 68 suggests that only extreme situations of widespread violence will be sufficient to qualify individuals for complementary protection, which is inconsistent with the approach overseas and in Australia until now.

3 Modification of behaviour: section 5LAA(5)

- (5) There is not a real risk that a person will suffer significant harm in a country if the person could take reasonable steps to modify his or her behaviour so as to avoid a real risk that the person will suffer significant harm in the country, other than a modification that would:
- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

Proposed section 5LAA(5) provides that there is no real risk that a person will suffer significant harm if he or she could take reasonable steps to modify his or her behaviour so as to avoid such a risk, provided that modification would not conflict with a characteristic fundamental to the person's identity or conscience, conceal an innate or immutable characteristic, or do any of the things listed in paragraph (c). This provision effectively puts the onus on an applicant to avoid significant harm, a position that is fundamentally at odds with international human rights law.

In particular, we are concerned that this provision is inconsistent with the emphatic rejection across the common law world,²⁶ and recently by the Court of Justice of the European Union,²⁷ of any 'discretion' or 'modification' requirement in the Refugee Convention.

²⁴ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 129. See the reference there in fn 364 to *R v Secretary of State for the Home Department, ex parte Jeyakumaran*, No CO/290/84, QBD, (unreported, 28 June 1985).

²⁵ James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 97 (citations omitted). The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that a applicant show 'a pattern or practice ... of persecution of a group of persons *similarly situated* to the applicant', and his or her 'own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable': *Immigration and Nationality Act* (1952), 8 CFR §208.13(b)(2)(iii)—asylum (emphasis supplied); §208.16(b)(2)—withholding of removal.

²⁶ See, for example, Australia: *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; United Kingdom: *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; United States: *Karouni v Gonzales* (2005) 399 F 3d 1163 (USCA,

Although the bill purports to limit the impact of the ‘discretion’ or ‘modification’ requirement by protecting fundamental characteristics, it is not clear how this would be applied or interpreted in practice. The Statement of Compatibility with Human Rights states that under the ICCPR, some rights, such as those to freedom of thought, conscience and religion and to hold opinions, may be limited ‘as long as it is reasonable, proportionate and adapted to achieve a legitimate objective’.²⁸ This seems to suggest that this framework may guide an analysis of when a person can be expected to modify or repress his or her behaviour. However, since any limitation on rights in the ICCPR must be ‘prescribed by law’ and are addressed to when *governments* may limit rights, this rule does not assist in assessing when a person can be expected or required to *self-moderate* or *self-limit*, and is particularly unhelpful if an applicant fears harm by non-State actors at home.

4 ‘Effective protection measures’: section 5LAA(4)

(4) There is not a real risk that a person will suffer significant harm in a country if effective protection measures against significant harm are available to the person in the country.

Note: For effective protection measures, see section 5LA.

Our concerns with this provision echo those we raised when section 5LA was introduced into the Migration Act by the Legacy Caseload Act. In particular, we rebutted the proposition that non-State actors (‘a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State’) could provide adequate protection. This is controversial in international practice. It can be argued that ‘protection’ in the context of the Refugee Convention and, by extension, human rights law, can only mean State protection, since article 1A(2) refers to a refugee’s inability or unwillingness to avail himself or herself of the protection of his or her country of nationality or former habitual residence.

While the EU Qualification Directive recognizes the possibility of non-State actors as sources of protection, this has been extensively criticized, in particular by UNHCR and the European Council on Refugees and Exiles (ECRE).²⁹ It has also proven difficult to implement in practice.

Some of the main arguments against non-State actors being recognized as sources of protection, based both on principled and practical considerations, include that:

- non-State actors do not meet a key condition for providing protection, namely being a party to the Refugee Convention or relevant human rights treaties, and/or having an established practice of compliance with their provisions;
- non-State actors are not legally bound by any international human rights treaties and cannot be held accountable under them;

9th Cir); New Zealand: *Refugee Appeal No 74665/03* [2005] INLR 68; Canada: *Fosu v Canada* (2008) 335 FTR 223 (Can. FC 2008).

²⁷ *Bundesrepublik Deutschland v Y (C-71/11) and Z (Case C-99/11)*, Court of Justice of the European Union (Grand Chamber) 5 September 2012, para 79.

²⁸ Statement of Compatibility with Human Rights, para 34.

²⁹ See, for example, UNHCR, *UNHCR Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM(2009)551, 21 October 2009)* (July 2010) 5 <http://www.refworld.org/pdfid/4c503db52.pdf>; ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Qualification Directive* (2 March 2010) 8 www.ecre.org/component/downloads/downloads/128.html. Similar criticisms were also made of the Qualification Directive.

- non-State actors are unlikely to have been in a stable position over a sufficient period of time to (i) establish a practice of compliance with international standards; or (ii) be able to provide protection on an on-going and continuous basis;
- non-State actors are unlikely to be able to have the undisputed control of territory and administrative authority to enforce the rule of law and guarantee human rights; and
- the notion of non-State actors as actors of protection has proven problematic in practice for national decision-makers and courts, with no consensus on what criteria must be established to be satisfied that a sufficient level of protection will be provided. Indeed most decisions have continued to view the State as the main source of protection.

In addition to these issues, we are concerned that proposed section 5LAA(4):

- risks not complying with Australia's obligations under the Refugee Convention and international human rights treaties, because it remains disputed whether denying refugee status on the basis of NSA protection accords with its provisions;
- it risks creating immense factual and practical difficulties for decision-makers, and negatively impacting the quality of decision-making, by requiring assessments to be made about the changing capabilities of rebel groups, militias, clans, tribal groups or families in complex situations about which decision-makers may have no reliable or comprehensive information; and
- it constitutes a failure to learn from the experience of other States. Despite recognition of non-State actors as actors of protection in the European Union Qualification Directive, no settled criteria have emerged in European case law for when a non-State actor can be an actor of protection, and in practice 'decision-makers do not usually treat non-state entities as stand-alone protection actors. If they are referenced it is as reinforcement for state-provided protection, as for example with protection with the aid of multinational forces.'³⁰

Finally, in relation to paragraph 5LA(2)(c), we note that the existence of 'an appropriate criminal law, a reasonably effective police force and an impartial judicial system' is not enough to determine whether or not a State can provide effective protection. There needs to be detailed consideration of whether the law is implemented and enforced in practice.

5 Item 16: Ineligibility for grant of protection visa

<p>(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if the Minister has serious reasons for considering that:</p> <p style="margin-left: 40px;">(a) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or</p> <p style="margin-left: 40px;">(b) the non-citizen committed a serious non-political crime before entering Australia; or</p> <p style="margin-left: 40px;">(c) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations.</p>

This section conflates the exclusion clauses in article 1F of the Refugee Convention with the exception to the principle of *non-refoulement* in article 33(2) of the Refugee Convention. While using article 33(2) as an additional exclusion clause is unlawful under the Refugee Convention with respect to refugees,³¹ the absence of an overarching international

³⁰ ECRE, *Actors of Protection and the Application of the Internal Protection Alternative: European Comparative Report* (2014) 50 <http://www.ecre.org/component/content/article/63-projects/326-apaipa.html>.

³¹ Refugee Convention, art 42. See also the view of the UK government in House of Commons Select Committee on European Scrutiny, *Fourth Report of Session 2002–03* (The Stationery Office,

instrument on complementary protection means that this is not technically prohibited for people who would fall within section 36(2A).

Mandal notes the inconsistency of this approach, given that the Convention exclusion clauses represent 'a considered balance between the humanitarian imperative of international protection and the need to maintain the integrity of the institution of asylum',³² and have been transplanted without elaboration into regional instruments such as the OAU Convention (in Africa) and the Cartagena Declaration (in Latin America).

However, since the exclusion clauses for complementary protection are wider than for Convention refugees, it is very important for decision-makers to properly assess protection claims against the Refugee Convention criteria first, before considering the complementary protection grounds.

While the Act permits the refusal of a protection visa on the basis of section 36(2C) to people who otherwise meet the complementary protection grounds, international human rights law prohibits in absolute terms their return to territories where they would face a real risk of such ill-treatment. This means that while Australia may deny a protection visa to such people, it cannot remove them to any place where they risk significant harm. To do so would breach Australia's *non-refoulement* obligations. This prohibition on removal applies irrespective of the applicant's conduct.³³

Holding people in immigration detention without a lawful justification is impermissible as a matter of international human rights law,³⁴ and may in certain cases amount to cruel, inhuman or degrading treatment.³⁵ Leaving people to live in the community without work rights or access to social security may amount to cruel, inhuman or degrading treatment.³⁶ The highest appellate courts of France, Germany, Belgium, the UK and South Africa have acknowledged that even people without any formal immigration status are entitled to minimum health and other social services, and that no individual can be denied minimum dignity whatever his or her immigration status.³⁷ States owe human rights obligations to all people within their territory or jurisdiction.³⁸

London 2003) para 6.22; Erika Feller, 'Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR' (Strategic Committee on Immigration, Frontiers and Asylum, Brussels, 6 November 2002) 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002 13623/02 ASILE 59 (30 October 2002) 3.

³² Ruma Mandal, *Protection Mechanisms outside of the 1951 Convention ('Complementary Protection')* UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (June 2005) para 135.

³³ This was established in *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 79–80 and has been affirmed consistently.

³⁴ ICCPR, art 9(1) and consistent line of authority from the UN Human Rights Committee.

³⁵ UN Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (30 August 2013) [3.12] ('*FKAG and others v Australia*'); UN Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) [3.14] ('*MMM and others v Australia*').

³⁶ *R v Secretary of State for the Home Department, ex parte Adam* [2006] 1 AC 396 (House of Lords), para 7 (Lord Bingham).

³⁷ France: Conseil constitutionnel DC 93-325 (13 August 1993), DC 97-39 (22 April 1997), DC 79-109 of 9 January 1980); Belgium: Judgment of the Court of Arbitration (22 April 1998), Judgment of Labour Tribunal of Liège 2nd Chamber (24 October 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 January 1959) BVerfGE 9, 89, Judgment (21 June 1987) BVerfGE 45, 187; Judgment (17 January 1979) BVerfGE 50; Judgment (24 April 1986) BVerfGE 172, cited in Daphné Bouteillet-Paquet, 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in Daphné Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, 2002) 240 fn 98. In South Africa, the Supreme Court of Appeal held that denying employment to asylum seekers, who had no entitlement to social security support, constituted a breach of their right to human dignity under the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, 1996). It noted that although the State did not have a

This ad hoc approach is unsatisfactory. It is important that individuals are not left in a form of legal limbo.³⁹ The Act should therefore recognize the absolute nature of the *non-refoulement* obligation and grant some form of legal status to *all* individuals who cannot be returned, including those the government considers 'undesirable'.⁴⁰

positive obligation to provide employment, deprivation of the opportunity to work attains a different dimension 'when it threatens positively to degrade rather than merely to inhibit the realization of the potential for self-fulfilment': *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326, para 32.

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 111–12; UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: United States of America, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006) para 10.

³⁹ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) 204. There is some authority that suggests that this, in itself, may amount to a violation of article 3 of CAT or article 7 of the ICCPR: see 205–06.

⁴⁰ See also papers from 'Preliminary Workshop: Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but Who Cannot Be Removed' (VU University Amsterdam, 27 March 2015) <http://www.sas.ac.uk/rli/research-projects/undesirable-and-unreturnable/preliminary-workshop/workshop-papers>.