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Migration Amendment (Complementary Protection) Bill 2009

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Contents

Migration Amendment (Complementary Protection) Bill 2009

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House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 of Schedule 1 commence on the day of Royal Assent. Items 1 to 16, 18 and 19, and 21 to 34 of Schedule 1 commence on a day to be fixed by Proclamation or six months after the day of Royal Assent which ever is the sooner. Items 17 and 20 commence immediately after the afore-mentioned provisions commence.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose of the Migration Amendment (Complementary Protection) Bill 2009 (the Bill) is to amend the *Migration Act 1958* (the Migration Act) to introduce a statutory regime for assessing claims that may engage Australia's *non-refoulement* (non-return) obligations under various international human rights treaties (otherwise known as complementary protection). The Bill proposes to assess such claims under a 'single integrated protection visa application process' which means applicants that are found not to be refugees but owed protection on complementary protection grounds will be granted permanent protection visas with the same conditions and entitlements as refugees.[1] In turn, unsuccessful applicants (that is, applicants found not to be owed protection) will have the same administrative and judicial review rights as persons seeking protection under the 1951 Convention relating to the Status of Refugees (read in conjunction with the 1967 Protocol relating to the Status of Refugees) (together, the 1951 Refugee Convention).[2]

1. L Ferguson, 'Second reading speech: Migration Amendment (Complementary Protection) Bill 2009', House of Representatives, *Debates*, 9 September 2009, p. 8991.

2. The Convention relating to the Status of Refugees (adopted 28 July1951, entered into force 22 April 1954) 189 UNTS 137; The Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

Background

Basis of policy commitment

In the 2009-10 Budget, the Government announced that it would 'implement a system of complementary protection for people to whom Australia has *non-refoulement* (non-return) obligations under international human rights treaties, other than the 1951 Convention Relating to the Status of Refugees'.[3]

There is no internationally accepted definition of 'complementary protection'. The term is not a term of art defined in any international treaty or domestic legislation.[4] However, the term broadly describes protection obligations arising under international law. Such obligations are in addition or complementary to, the protection obligations that arise under the 1951 Refugee Convention which provides protection to refugees, as defined.[5]

The obligation to provide protection to people that do not satisfy the Convention definition of 'refugee' but are nonetheless in need of protection on the basis that they face serious violations of their human rights if returned to their country of origin has been said to mainly stem from two treaty-based sources of international law.[6] Namely Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which expressly prohibits removal to another State where there are substantial grounds for believing that a person would be in danger of being subjected to torture.[7] The second is Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) which have been defined as precluding removal to torture or cruel,

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3. 2009-10 Budget Measures, Immigration and Citizenship, http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-18.htm

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

5. Article 1A(2) of the 1951 Refugee Convention defines a 'refugee' as any person who:

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

6. GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, Oxford University Press, Oxford, 2007, third edition, p. 296.

7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

inhuman or degrading treatment or punishment; or to a place where a person may be arbitrarily deprived of their life.[8]

There is currently no mechanism within the Migration Act that enables the Department of Immigration and Citizenship to assess, at first instance, claims that may engage Australia's *non-refoulement* obligations under such treaties. Rather, claims are currently decided by the Minister for Immigration and Citizenship personally using a non-compellable, non-transparent and non-reviewable process. This determination process has been described as being 'administratively inefficient' on the basis that applicants 'must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered' by the Minister.[9] The second reading speech also acknowledges that the ministerial intervention process does not 'provide sufficient guarantee of fairness and integrity for decisions'.[10]

For further background information on complementary protection, including the basis for reform, see the Parliamentary Library's research paper entitled 'Complementary Protection for Asylum Seekers – overview of the international and Australian legal frameworks'.[11]

Committee consideration

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills considered the Bill and commented on the drafting of **proposed subsection 36(2A)** (**item 13**) which is the provision which lists the five grounds or 'matters' upon which complementary protection may be granted. The Committee was of the view that the provision, beginning with the words 'the matters are' was 'inelegant and provided little context or description'.[12]

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8. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

9. Department of Immigration and Citizenship (DIAC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, p. 2, viewed 1 October, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=478b4183-3f3f-4ff8-b0c5-0d1b2da086da

10. L Ferguson, op. cit., p. 8988.

11. E Karlsen, *Complementary Protection for Asylum Seekers – overview of the international and Australian legal frameworks*, Research paper, no. 7, 2009-10, Parliamentary Library, Canberra, 2009, viewed 27 October 2009, http://www.aph.gov.au/library/pubs/rp/2009-10/10rp07.pdf

12. Senate Standing Committee for the Scrutiny of Bills Committee, *Alert Digest No. 12 of 2009*, 16 September 2009, p. 12.

The Minister for Immigration and Citizenship disagreed with the Committee's comments noting that the meaning of proposed subsection 36(2A) would be quite clear when read in the context with section 36 of the Migration Act. In response to the Committee he stated:

> If the Bill were to pass as proposed, I am of the view that taking section 36 of the Act in its entirety, the reader would grasp the context of proposed subsection 36(2A), despite it beginning with the opening words "The proposed matters are". I note that this language links back to proposed paragraph 36(2)(aa) (to be inserted by item 11 of the Bill) that ends with "…because of a matter mentioned in subsection (2A)".[13]

On the issue of whether **proposed subsections 36(2B) and (2C) (item 13)** trespass unduly on rights and liberties, the Committee noted that it is clearly a matter of policy whether these provisions, which in effect exclude protection, strike the appropriate balance with protecting the Australian community. The Committee was of the view that further consideration of these issues should be left to the Senate as a whole.[14]

Senate Legal and Constitutional Affairs Legislation Committee

The provisions of the Bill were referred to the Senate Legal and Constitutional Affairs Legislation Committee (Senate Committee) for inquiry and report by 16 October 2009.[15] Details of the inquiry are at the inquiry webpage. The Committee was chaired by Senator Crossin (Australian Labor Party) and the Deputy Chair was Senator Barnett (Liberal Party).

The Senate Committee received 36 submissions but rather unusually held no public hearings. The Committee review process was undertaken in a short period of time—the Bill was referred to the Committee on 9 September 2009 and submissions were to be received shortly thereafter (28 September 2009). A brief report was subsequently tabled on 19 October 2009.[16] The Senate Committee considered the 'issues' in the Bill in 12 pages and noted that 'the constrained circumstances of this short inquiry' meant they were not able to investigate some of the issues in any great detail.[17] It subsequently made only three recommendations relating to the content of the Bill which are discussed in further detail

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13. Senate Standing Committee for the Scrutiny of Bills Committee, *Twelfth Report of 2009*, 28 October 2009, p. 34, viewed 9 November 2009, http://www.aph.gov.au/senate/committee/scrutiny/bills/2009/b12.pdf
14. Senate Standing Committee for the Scrutiny of Bills Committee, op. cit., p. 13.
15. Senate Selection of Bills Committee, *Report No. 13 of 2009*, 10 September 2009, p. 3.
16. Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Complementary Protection) Bill 2009, Commonwealth of Australia, Canberra, October 2009, viewed 20 October 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/migration_complementary/report/report.pdf
17. Ibid., p. 19.

under the heading 'main provisions'. Significantly, the Senate Committee ultimately recommended the Bill be passed, subject to the three recommendations. In reaching this view, the Senate Committee concluded that:

> The committee is mindful that the community would expect claims of the type and gravity dealt with in this Bill to be dealt with through a process that affords natural justice and access to independent merits review. On the whole, the committee considers that this Bill achieves that outcome.[18]

Position of significant interest groups

Key domestic and international human rights bodies have recommended that Australia introduce a formal system of complementary protection. These include (amongst others), the Refugee Council of Australia, the United Nations High Commissioner for Refugees (UNHCR), the United Nations Committee against Torture (UNCAT), and the United Nations Human Rights Committee (HRC).[19] Other stakeholders that have previously expressed support for reform in this area are too numerous to mention.[20]

The Senate Committee noted that the Bill 'was widely supported by submitters, particularly in relation to its central aim of reducing the need for the use of Ministerial intervention powers'.[21] Submitters were also generally supportive of the proposed single integrated protection visa application process and the granting of the equal entitlements to that of refugees.[22] Notwithstanding, the Committee noted that some submitters were of the view that 'aspects of the Bill were sub-optimal' while others were of the view that 'the Bill represented a valuable step forward but fell short of meeting Australia's obligations'.[23]

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18. Ibid., p. 22.
19. L Ferguson, op. cit., p. 8989.
20. Over thirty interest groups endorsed the complementary protection model proposed by the Refugee Council of Australia in 2004 which similarly proposed amendment of the Migration Act to insert complementary protection criteria to section 36: Refugee Council of Australia, 'Complementary Protection: The way ahead', April 2004, p. 9, viewed 20 November 2009, http://www.refugeecouncil.org.au/docs/current/CPmodel04.pdf
21. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 22.
22. A single administrative procedure is in keeping with UNHCR's view that 'the requirements of fairness and efficiency can best be met through the implementation of a broadly comprehensive system in which one central and expert authority would determine, in a single procedure, the protection needs of an applicant: UNHCR, *Complementary Forms of Protection*, 1 April 2001, pp. 5-6, viewed 19 April 2009, http://www.unhcr.org/refworld/docid/3b20a7014.html
23. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 13.

These issues are discussed in greater detail below under the heading of 'key issues' and 'main provisions'.

Coalition/Australian Greens/Family First/Independents' policy position

The Age newspaper reported that the Coalition will oppose complementary protection in the Senate. Three Liberal Senators who were members (and participating members) of the Senate Committee inquiring into the Bill submitted a dissenting report in which they recommended that the Bill not proceed.[24] Broadly speaking they were of the view that the Bill 'is unnecessary, counterproductive and risks being represented as yet another softening of Australia's immigration laws'.[25] In particular, they are opposed to the passage of the Bill on the basis that:

- the existing Ministerial intervention process is a safeguard that has been in place for decades — 'a tried and proven system'
- there is no evidence that the Ministerial intervention process 'has been anything other than effective'
- primary decisions will be appealable which in turn will lengthen the time in which cases remain unresolved and 'exacerbate an already fraught situation'
- codification risks curtailing discretion 'otherwise available to help genuine refugees languishing in camps around the world', and
- the Bill will encourage the lodgement of non-refugee protection applications 'and the making of false asylum claims'.[26]

The Shadow Minister for Immigration and Citizenship the Hon. Dr Sharman Stone was also reported as stating that the existing intervention powers are adequate.[27] In a media release issued prior to the introduction of the Bill the Shadow Minister stated:

> Apparently a departmental decision not to grant "complementary protection" will be appealable, meaning that it may take many months, if not years for the matter to be resolved. In the meantime, the applicant may be able to access work rights or be fully supported," Dr Stone said. "The potential for a floodgate of new, non-refugee,

24. G Barnett, M.J. Fisher, C Fierravanti-Wells, Dissenting Report by Liberal Senators, in Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Complementary Protection) Bill 2009, Commonwealth of Australia, Canberra, October 2009, p. 23.
25. Ibid., p. 23.
26. Ibid., p. 23.
27. Yuko Narushima, 'Huge support for Kenyan fugitives', *The Age*, 23 September 2009, viewed 24 September 2009, http://www.theage.com.au/national/huge-support-for-kenyan-fugitives-20090922-g0jd.html

> protection applications will be opened if lessons from the past are not learnt," she said.
>
> "If the Government accepts that "complementary protection" should apply to those who have come from a country in the grip of a civil war – Sri Lanka for example – the potential numbers could be immense.[28]

It remains to be seen whether Liberal Senator Judith Troeth (who will not be re-nominating for pre-selection when her term expires in June 2011) will oppose the Bill in the Senate. Senator Troeth recently crossed the floor to vote for the Government's abolition of detention debt Bill and reportedly indicated that she had been willing to do the same to support the abolition of the 45 day rule.[29]

The Australian Greens policy is that they would 'replace the current system of humanitarian visas (granted only by the Immigration Minister after rejection as a refugee) with an open, accountable humanitarian visa process incorporating a humanitarian review tribunal'.[30] Senator Hanson-Young, who replaced Senator Ludlum as a member of the Senate Committee, submitted additional comments in which she stated:

> While the Greens are indeed supportive of the need to introduce a complementary protection scheme, to finally bring Australia in line with other Western countries in meeting our core human rights and protection obligations, under international law, beyond that of the Refugee Convention, **we remain concerned that the Bill, in its current form, does not explicitly address all of the holes in our overall protection framework**.[31] [Emphasis added].

Senator Hanson-Young subsequently made six recommendations. In brief, these were as follows:

- that section 36(2A) be amended to include 'all of the rights in which Australia has *non-refoulement* obligations under international law

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28. S Stone, 'Complementary Protection for non-refugees', *media release*, 20 May 2009, viewed 12 October 2009, http://www.sharmanstone.com/Pages/article.aspx?ID=882

29. L Curtis, 'Liberal defies party on refugees twice', *ABC News Online*, viewed 24 September 2009, http://www.abc.net.au/news/stories/2009/09/08/2680281.htm . Migration Amendment Regulations 2009 (No.6) as contained in Select Legislative Instrument 2009 No. 143 removed the 45-day rule for certain bridging visa holders which prevented some bridging visa holders, including asylum-seekers from being given permission to work.

30. Australian Greens, *Australian Greens Policy: Immigration and Refugees*, issued 1 March 2007, accessed 15 October 2009 using Parlinfo Political Party Documents database.

31. S Hanson-Young, Additional Comments by Senator Hanson-Young, in Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Complementary Protection) Bill 2009, Commonwealth of Australia, Canberra, October 2009, p. 25.

- that the phrases 'necessary and foreseeable' and 'irreparably harmed' be deleted from the Bill
- the words 'and it will be carried out' with regard to the death penalty be deleted from paragraph 36(2A)(b)
- that the Government reassess the exclusion criteria
- that section 46A of the Migration Act be repealed to enable offshore entry persons to lodge visa applications, and
- that the Government identify, as a priority, options 'for the resolution under the Migration Act, through enacting legislation that provides official recognition and protection for stateless people within Australia'.[32]

Speaking recently to the *ABC* on the case of two failed asylum seekers from Kenya fearing female genital mutilation if returned, Independent Senator Nick Xenophon is reported to have stated:

> I think it's interesting that the proposed laws that the Federal Government has put up in the Parliament, in terms of complementary protection which would give protection to this women, haven't yet been passed.[33]

The *Sydney Morning Herald* recently reported that Family First Senator Steve Fielding was undecided on the new measures.[34]

Financial implications

In the 2009-10 budget, the Government stated that it would 'provide $4.8 million (including capital of $0.2 million for information technology changes) over four years' to implement a system of complementary protection.[35] The Explanatory Memorandum notes that the proposed amendments will have a low financial impact and that costs will be met from within existing resources of the Department.[36]

32. Ibid., pp. 25–28.
33. D Bain, 'Women facing mutilation fight for asylum', ABC Radio, viewed 12 October 2009, http://www.abc.net.au/worldtoday/content/2009/s2693044.htm
34. Yuko Narushima, 'MPs, lawyers and refugees demand visa intervention', *Sydney Morning Herald*, 23 September 2009, p. 5.
35. 2009-10 Budget Measures, Immigration and Citizenship, op. cit.
36. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009, p. 2.

Key issues

The Senate Committee identified seven main 'issues' from the written submissions it received. Broadly speaking they were as follows:

1) the complexity of the test and/or the difficulty in meeting it, particularly the requirement that a person be at risk of 'irreparable harm'[37]
2) the distinction in the Bill between personal and generalised violence, 'and the intention of the Bill to disqualify applications on the basis of risk to a person not being personal'
3) the apparent unworkability of the death penalty provision which required that the death penalty will be carried out
4) the imposition of an additional intention criterion in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' and the splitting up of the definitions
5) the inconsistency of proposed subsection 36(2C) with the non-derogable provisions of the CAT and ICCPR
6) the undesirability of quantified terms of imprisonment in the existing statutory definition of 'serious offence', and
7) the exclusion of Statelessness from the protection framework.[38]

These issues will be discussed in further detail below.

Main provisions

Amendments to the interpretation sections

Existing section 5 of the Migration Act is the interpretation section. **Items 1, 2, 3, 5 and 8** insert five new definitions into subsection 5 (1) of the Act. The following terms will now be defined:

- 'Covenant'

37. As noted in the Second Reading Speech 'in each case, there must be substantial grounds for believing that, as a necessary and foreseeable consequence of being removed, there is a real risk that a person will be irreparably harmed. A risk of harm must go beyond mere theory or suspicion to give rise to a *non-refoulement obligation*. According to the commentary of the United Nations Human Rights Committee, a real risk of harm is one where the harm is a necessary and foreseeable consequence of removal': L Ferguson, op. cit., p. 8990.

38. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 11–21.

- 'cruel or inhuman treatment or punishment'
- 'degrading treatment or punishment'
- 'receiving country', and
- 'torture'.

Item 1 defines 'Covenant' as the International Covenant on Civil and Political Rights.

Item 2 defines 'cruel or inhuman treatment or punishment' as an act or omission by which:

- severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
- pain or suffering, whether physical or mental, is intentionally inflicted on a person:
  - for the purpose of obtaining from the person or from a third person information or a confession
  - for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed
  - for the purpose of intimidating or coercing the person or a third person
  - for a purpose related to a purpose mentioned above
  - for any reason based on discrimination that is inconsistent with the Articles of the Covenant, or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person for any other reason so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.

However, it 'does not include an act or omission that is not inconsistent with Article 7 of the Covenant; or arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant'.[39] According to the Explanatory Memorandum, 'the purpose of expressly stating what 'cruel or inhuman treatment or punishment' does not include is to confine the meaning to circumstances that engage a *non-refoulement* obligation'.[40]

Item 3 defines 'degrading treatment or punishment' as an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- that is not inconsistent with Article 7 of the Covenant; or

39. **Proposed paragraph 5(1)(d)** of the definition of 'cruel or inhuman treatment or punishment'.

40. Explanatory Memorandum, op. cit., p. 4.

– that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

Definitional issues

The proposed definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' (**items 2 and 3**), in effect requires that the perpetrator of the harm must have intended to cause the harm or the consequences of the harm. The Senate Committee noted that 'submitters contended that the imposition of an additional [intention] criterion is inconsistent with Australia's international human rights obligations'.[41] For instance, Associate Professor McAdam from the University of New South Wales (and internationally renowned specialist on complementary protection) asserted that the intention requirement 'imposes a higher test than international law and comparative jurisprudence in the European Court of Human Rights, EU Member States and Canada'.[42]

In addition, Associate Professor McAdam queried why the Bill proposed to separate 'cruel or inhuman treatment or punishment' from 'degrading treatment or punishment' which she submitted was contrary to international practice which 'is to regard these forms of harm as part of a sliding scale or hierarchy, of ill-treatment'. This has meant that Courts and Tribunals elsewhere have not needed to determine precisely where a violation falls within the range of proscribed harms.[43]

Interestingly, the current guidelines used to explain the circumstances in which the Minister for Immigration and Citizenship may intervene does not separate 'cruel or inhuman treatment or punishment' from 'degrading treatment or punishment' nor do they require that the person responsible for the harm to have intended to cause the harm.

The significance of these definitional issues can not be overstated. They will not only be the basis upon which protection is granted or refused, they will consequently determine Australia's adherence to its international obligations. However, due to the 'constrained circumstances of the short inquiry' the Senate Committee did not have the opportunity to investigate these issues in any detail. It simply noted the Department of Immigration and

41. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 18-19.

42. J McAdam, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, pp. 21-22, viewed 29 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=d52755f5-ea43-4a60-a132-7b9d5c5a9748

43. Ibid., p. 5.

Citizenship's written assertion that 'the definitions are consistent with current international law' and made no recommendation/s to amend or review the definitions.[44]

Item 5 defines 'receiving country' as a country of which the non-citizen is a national, or if the non-citizen has no country of nationality—the country of which the non-citizen is a habitual resident. The latter is to be determined by sole reference to the law of the relevant country.

Item 8 defines 'torture' as an act or omission by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person:

- for the purpose of obtaining from the person or from a third person information or a confession
- for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed
- for the purpose of intimidating or coercing the person or a third person
- for a purpose related to a purpose mentioned above, or
- for any reason based on discrimination that is inconsistent with the Articles of the Covenant.

However, it does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

Though not discussed in the report of the Senate Committee, it is worth noting that Associate Professor McAdam recommended that this definition of 'torture' also be amended to accurately reflect the Article 1 CAT definition of torture because 'there are small, but potentially significant, differences in the way that the Bill sets out the definition of torture'.[45]

The current guidelines used to explain the circumstances in which the Minister for Immigration and Citizenship may intervene simply states that one of the factors in assessing whether a case involves unique or exceptional circumstances includes where there are 'substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.[46] The

44. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 19.

45. J McAdam, Submission, op. cit., p. 20.

46. Department of Immigration and Citizenship, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), section 11 Unique or exceptional circumstances, accessed using the Department's Legend database.

guidelines expressly refer to the Article 1 definition of 'torture' and do not attempt a reformulation.

Items 4, 6 and 7 transfer and make minor consequential amendments to three existing definitions in the Act. Namely:

- non-political crime (currently in existing section 91T of the Act)
- serious Australian offence (currently in existing subsection 91U(2) of the Act), and
- serious foreign offence (currently in existing subsection 91U(3) of the Act).[47]

Items 16 to 19 make consequential amendments to existing section 91T of the Act. **Items 20 to 23** make consequential amendments to existing section 91U of the Act.

Eligibility for grant of a protection visa on complementary protection grounds

Existing paragraph 36(2)(a) sets out a criterion for a protection visa. Namely, that the applicant for the visa is 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.[48] **Item 11** inserts **proposed new paragraph 36(2)(aa)** which sets out an alternative or subsequent criterion for a protection visa for complementary protection claimants. Being, a non-citizen in Australia (other than a refugee) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that as a necessary and foreseeable consequence of the person being removed that there is a real risk they will be irreparably harmed. The harm must be for reason of a 'matter' listed in proposed new subsection 36(2A).

Though this Bill does not technically create a sequential order in which claims must be assessed, a refugee would not satisfy the complementary protection criterion. The second reading speech notes that 'protection claims under the Refugee Convention will continue to be considered first … only protection visa applicants who are found not to be refugees will have their claims considered under the new complimentary protection criteria'.[49]

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47. These provisions were originally inserted into the Migration Act in 2001 by Migration Legislation Amendment Act (No. 6) 2001. For further information on the issues surrounding these provisions, including the fixing of set terms of imprisonment to determine serious crimes see: K Del Villar, *Migration Legislation Amendment Bill (No 6) 2001*, Bills Digest, no. 55, 2001-02, Parliamentary Library, Canberra, 2001, viewed 12 November 2009, http://www.aph.gov.au/library/Pubs/bd/2001-02/02bd055.htm

48. See also existing paragraph 36(2)(b) Migration Act as the criterion relates to a member of the same family unit of the non-citizen.

49. L. Ferguson, op. cit., p. 8989.

Standard of proof

As previously mentioned, the Senate Committee noted that 'the great majority of submitters criticise[d] the complexity of the test and/or the difficulty in meeting it'.[50] Associate Professor McAdam submitted that the problem with the proposed test was that it combined international and regional tests and additional ones drawn from other human rights documents which are not meant to be used cumulatively. In her view this made the test in **proposed paragraph 36(2)(aa)** 'confusing, unworkable and inconsistent with comparable standards in other jurisdictions'.[51]

The Committee was persuaded that the test was too restrictive and subsequently recommended that **proposed paragraph 36(2)(aa)** and all related paragraphs where the same words are used, be amended by omitting the words 'irreparably harmed' and replacing them with the words 'subject to serious harm'.[52]

The current guidelines used to explain the circumstances in which the Minister for Immigration and Citizenship may intervene contain varying standards of proof depending upon the context. For example, there must be 'substantial grounds for believing' that a person may be in danger of being subject to torture if returned, and a *non-refoulement* obligation arises under ICCPR if the person would as 'a necessary and foreseeable consequence' of their removal face a 'real risk' of violation of rights under Articles 6 and 7 of the ICCPR or face the death penalty.[53] The retention of these varying standards of proof (substantial grounds, necessary and foreseeable consequences, real risk), which differ from the standard of proof used in the assessment of refugee claims (well founded fear) may not only prove to be problematic for decision-makers at the primary and review levels but will arguably result in extensive litigation.[54]

Item 12 inserts **proposed new paragraph 36(2)(c)** which mirrors existing paragraph 36(2)(b). It enables family members of the same family unit of a person who is owed protection obligations arising from proposed new paragraph 36(2)(aa) and who holds a protection visa to remain in Australia.

Item 13 inserts **proposed new subsections 36(2A), (2B)** and **(2C)**. As previously mentioned, the irreparable harm that a non-citizen is at real risk of suffering must arise

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50. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 13.

51. J McAdam, Submission, op. cit., p. 12.

52. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 13, 15-16.

53. Department of Immigration and Citizenship, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J).

54. For analysis of the already considerable jurisprudence on the 'well founded fear' threshold see: Refugee Review Tribunal, *Guide to Refugee Law in Australia*, Chapter 3, viewed 11 November 2009, http://www.mrt-rrt.gov.au/docs/guidereflaw/wff_ch3.pdf

because of a 'matter' mentioned in **proposed new subsection 36(2A)**. These matters are that the person:

- will be arbitrarily deprived of their life (36(2A)(a))
- will have the death penalty imposed on them and it will be carried out (36(2A)(b))
- will be subjected to torture (36(2A)(c))
- will be subjected to cruel or inhuman treatment or punishment (36(2A)(d)), or
- will be subjected to degrading treatment or punishment (36(2A)(e)).

Children

The Senate Committee noted that a number of submitters recommended that **proposed section 36(2A)** be amended to expressly incorporate Australia's *non-refoulement* obligations arising under the Convention on the Rights of the Child (CRC).[55] Though the *non-refoulement* obligations arising under the ICCPR may be implied under the CRC, submitters argued that the Committee on the Rights of the Child had expressly recognised that the *non-refoulement* obligation is not limited to Articles 6 and 37 and therefore this should be reflected in the Bill.[56] The Australian Human Rights Commission (AHRC) similarly emphasised the need for the Bill to more broadly protect the rights of children under the CRC in danger of serious harm.[57]

The current guidelines used to explain the circumstances in which the Minister for Immigration and Citizenship may intervene make express reference to the CRC. It states that one factor that might be relevant in assessing whether a case involves unique or exceptional circumstances are 'circumstances that may bring Australia's obligations as a party to the Convention on the Rights of the Child into consideration'.[58] It then cites Article 3 which contains the 'best interests of the child' principle.

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

56. Senate Legal and Constitutional Affairs Legislation Committee, p. 14. Article 6.1 of the Convention on the Rights of the Child provides that 'States Parties recognize that every child has the inherent right to life'. Article 37 states (in part) that 'States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment…'

57. Australian Human Rights Commission (AHRC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, 30 September 2009, viewed 1 October, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=75ed5c78-9ccf-4dd0-a7bc-c050c23ccce0

58. Department of Immigration and Citizenship, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J.

The Senate Committee did not comment on this issue or make any recommendation to expand or amend **proposed subsection 36(2A)** in this regard.

Statelessness

Under the Bill, statelessness alone will not form the basis upon which a protection visa will be granted. However, 'the protection visa framework will provide protection to stateless persons in cases where there is a real risk of harm on return that engages Australia's *non-refoulement* obligations'.[59]

According to the second reading speech, the Government:

> is committed to ensuring that other stateless cases are not left in the too hard basket…[It] is acutely aware of past failures to resolve the status of stateless people in a timely manner. The Minister for Immigration and Citizenship **is committed to exploring policy options** that will ensure that those past failures are not repeated.[60] [Emphasis added].

The Senate Committee noted 'general acceptance of this position, and strong support for the implementation of new options'…[61]

Death penalty

The Senate Committee noted that 'a number of submitters pointed out the apparent unworkability of the provision, querying how it is possible to know whether the death penalty will or will not be exacted in the future'.[62] The Committee essentially agreed with submitters noting that the provision could 'cause problems for decision-makers and the judiciary in carrying out their duties, due to the difficulty in establishing categorically that a death sentence will be carried out'.[63] It subsequently recommended that **proposed paragraph 36(2A)(b)** be amended to substitute 'and it will be carried out' with 'and it is *likely* to be carried out'.[64]

Proposed new subsection 36(2B) outlines three circumstances when a real risk will be deemed *not* to exist. These circumstances are if the Minister is satisfied that:

59. L Ferguson, op cit., p. 8991.
60. L Ferguson, op cit., p. 8991.
61. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 21.
62. Ibid., p. 18.
63. Ibid., p. 18.
64. Ibid., p. 18.

- it would be reasonable for the person to relocate to another area of the country where the risk of harm would not exist (36(2B)(a)) or
- the person could obtain protection from the authorities within the country such that there would not be a risk of the person being harmed (36(2B)(b)), or
- the risk faced by the person is faced by the population of the country generally and not by the person personally (36(2B)(c)).

Relocation and protection within the country

While there is nothing in the 1951 Refugee Convention or the Migration Act that expressly excludes from protection a person who might reasonably relocate to a safe part of their country, submitters recognised that such a principle has nonetheless evolved through Australia's jurisprudence in the refugee determination context.[65]

However, a number of submitters noted the undesirability of introducing a statutory internal relocation principle for complementary protection claimants (contained in **proposed paragraph 36(2B)(a)**).[66] As Associate Professor McAdam submitted 'there is a danger that codification for one group only may lead to the development of different tests, which would be highly undesirable'.[67] The UNHCR similarly considered it 'preferable for a proper analysis and assessment of any… relocation alternative to evolve through jurisprudence rather than through specific legislative provision'.[68]

Associate Professor McAdam noted that **proposed paragraph 36(2B)(b)** may similarly prove to be problematic for decision-makers because the requirement to assess whether a complementary protection claimant can obtain protection from the State could be interpreted as an additional and independent requirement as opposed to inherent in any assessment of whether a person will suffer a real risk of serious harm.[69]

The Senate Committee did not comment on these issues or make any recommendation to amend **proposed paragraphs 36(2B)(a)** or **(b)**.

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65. See for example, the High Court in *SZATV v MIAC* (2007) 233 CLR 18.
66. J McAdam, Submission, op. cit., p. 33, United Nations High Commissioner for Refugees (UNHCR), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, 30 September 2009, p. 10, viewed 1 October, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=f175865d-d80b-43b6-b845-fda2049ab713
67. J McAdam, Submission, op. cit., p. 33.
68. UNHCR, Submission, op. cit., p. 10.
69. J McAdam, Submission, op. cit., p. 33.

Generalised risk

The Senate Committee noted that 'another key concern emanating from submissions was the distinction in the Bill between personal and generalised violence, and the intention of the Bill to disqualify applications on the basis of risk to a person not being personal'.[70] Though this provision 'appropriately recognises that even where risks are very widespread, an individual can still be granted complementary protection if he or she is personally affected',[71] submitters argued that it could potentially be misinterpreted to deny protection to people it intended to protect.[72] For example, protection could be denied on the basis that the risk faced by the person could also be faced by the population generally (such as domestic violence) or the risk might be real but not directed to the person personally (potential victims of female genital mutilation).[73]

Accordingly, the Senate Committee recommended that 'the effect of **proposed paragraph 36(2B)(c)** be reviewed with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country'.[74] It is not clear why the Committee's recommendation isolates only two particular categories of people of potential concern instead of recommending more broadly that the provision be reviewed with a view to ensuring it would not exclude people deserving of protection that might similarly 'fall through the gaps'.[75]

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70. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 16.

71. J McAdam, Submission, op. cit., p. 40.

72. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 16-17.

73. Amnesty International, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, September 2009, p. 7, viewed 1 October, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=00ea174e-b418-4df0-ad91-37af6637d7fd

74. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 18.

75. 'It is by now widely recognized by States that the fear of a girl or woman of being subjected to FGM may be for reasons of membership of a particular social group, but also of political opinion and of religion': UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, viewed 24 September 2009, http://www.unhcr.org/refworld/docid/3d36f1c64.html. On gender-based persecution and Australian refugee law see: Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, pp. 131-132, viewed 24 September 2009, http://www.aph.gov.au/Senate_minmig/report/index.htm

Ineligibility for grant of a protection visa on complementary protection grounds

Proposed new subsection 36(2C) outlines the circumstances in which a person will be deemed ineligible for the grant of a protection visa on complementary protection grounds. It provides that a person is taken not to satisfy the criterion of proposed paragraph 36(2)(aa) if:

- the Minister has serious reasons for considering that (36(2C)(a)):
  - the person has committed a crime against peace, a war crime or a crime against humanity (as defined in international instruments prescribed by the Regulations) (36(2C)(a)(i)); or
  - the person committed a serious non-political crime before entering Australia (36(2C)(a)(ii)); or
  - the person has been found guilty of acts contrary to the purposes of the United Nations (36(2C)(a)(iii)); or
- the Minister considers, on reasonable grounds, that (36(2C)(b)):
  - the person is a danger to Australia's security (36(2C)(b)(i)); or
  - the person, having been convicted by final judgment of a particularly serious crime (including a serious Australian or foreign offence) is a danger to the Australian community (36(2C)(b)(ii)).

Security concerns

The Senate Committee noted that 'several submissions raised the proposed amendments in subsection 36(2C) and their inconsistency with [the ICCPR and CAT]'.[76] The Committee noted that according to the Explanatory Memorandum, 'alternative case resolution solutions will be identified to ensure Australia meets its *non-refoulement* obligations' to persons deemed ineligible for grant of a protection visa by virtue of this proposed provision.[77]

Though numerous submitters and indeed the Senate Committee itself queried the actual substance of such 'alternative solutions', the Senate Committee appeared to give their somewhat qualified support to the proposed exclusion provision based on the limited written material available to it. It simply noted that 'the Government would appear to be adopting a fair and measured approach'.[78]

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76. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 19–20.
77. Explanatory Memorandum, op. cit., p. 10.
78. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 20.

Item 14 repeals existing subsections 36(4) and (5) relating to the protection obligations owed to refugees, though these subsections are reproduced in a slightly different drafting format in **proposed new paragraph 36(4)(a)** and **subsection 36(5)** so that they are consistent with the wording of **proposed new paragraph 36(4)(b)** and **subsection 36(5A)**.

Existing subsection 36(3) outlines the circumstances in which Australia will *not* have protection obligations. Namely, when a person 'has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national'.[79] **Proposed new paragraph 36(4)(b)** provides that existing subsection 36(3) does *not* apply to a country in respect of which the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person availing themself of a right mentioned in subsection (3), there would be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in subsection (2A).

In addition, **proposed new subsection 36(5A)** provides that existing subsection (3) will not apply in relation to a country if:

- the person has a well-founded fear that the country will return them to another country; *and*
- the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person availing themself of a right mentioned in subsection (3), there would be a real risk that they would be irreparably harmed because of a matter mentioned in subsection (2A) in relation to the other country.

Existing section 48A prohibits a non-citizen who has been refused a protection visa from making a further application for protection visa whilst in the migration zone.[80] **Item 15** inserts **proposed new subparagraphs 48A(2)(ac)** and **(ad)** which clarify that 'application for a protection visa' includes an application for a protection visa on complementary protection grounds under proposed subsection 36(2A). It also includes an application, a criterion for which is that the applicant is a non-citizen in Australia who is a member of the same family unit as a person to whom Australia has protection obligations on complementary protection grounds and who holds a protection visa.

79. Existing subsection 36(3) Migration Act.

80. Though this is subject to section 48B Migration Act which provides that the Minister may determine that section 48A does not apply to the non-citizen.

Offshore entry persons

The Migration Act precludes an 'offshore entry person' from applying for a visa, including a protection visa.[81] However, under the Act, the Minister for Immigration and Citizenship may permit an application to be lodged if he personally considers it would be in the public interest to do so.[82] As the Department's website explains:

> It will generally be the case that where such unauthorised arrivals are assessed as engaging Australia's protection obligations under the non-statutory refugee status assessment process, the Minister will lift the bar on making a valid visa application and they will be allowed to validly apply for a visa under the Act.[83]

Item 9 is a consequential amendment to **item 10** which inserts **proposed new subparagraph 5A(3)(j)(iii)**.[84] The effect of this amendment is to extend the purpose in existing paragraph 5A(3)(j) to include ascertaining whether an offshore entry person who makes a claim for protection on complementary protection grounds, had sufficient opportunity to avail himself or herself of protection before arriving in Australia.

Items 24 to **29** make minor amendments to existing section 336F which sets out the circumstances in which identifying information can be disclosed to foreign countries. Existing section 336F already makes provision for protection visa applicants and offshore entry people who make a claim for protection under the 1951 Refugee Convention. The proposed amendments seek to incorporate complementary protection claimants within the operation of the provision. Most significantly, **item 25** inserts **proposed new subparagraph 336F(3)(a)(iii)** which provides that disclosure of identifying information about an offshore entry person who makes a claim for protection on complementary protection grounds under proposed subsection 36(2A) is taken not to be authorised if it is to be disclosed to a foreign country in respect of which the application or claim is made, or a body of such a country. Similarly, **item 27** inserts **proposed new subparagraph 336F(4)(a)(iii)** which provides that disclosure of such information is taken not to be authorised if the officer making the disclosure is not reasonably satisfied that the country or body to which the disclosure is made will not disclose the identifying information to a

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81. Section 46A of the Migration Act. 'Offshore entry person' is defined in section 5 of the Migration Act as a person who entered Australia at an 'excised offshore place' after the excision time for that offshore place and became an unlawful non-citizen because of that entry.

82. A statement must subsequently be tabled in Parliament explaining the reason for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest: Subsection 46A(4) Migration Act.

83. Department of Immigration and Citizenship, 'Fact Sheet 81 - Australia's Excised Offshore Places', viewed 1 October 2009, http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm

84. Existing section 5A of the Migration Act sets out the definition of 'personal identifier'.

foreign country in respect of which the application or claim is made, or a body of such a country. However, **proposed new paragraph 336F(5)(c)(ca)** provides that subsections (3) and (4) do not apply if an offshore entry person is found not to be owed protection obligations because they do not satisfy proposed subsection 36(2A) or is found to be a person mentioned in proposed paragraph 36(2C)(a) or (b) ('ineligibility for grant of a protection visa').

Merits review

Existing section 411 sets out the decisions that are reviewable by the RRT. Existing paragraphs 411(1)(c) and (d) respectively provide that a decision to refuse to grant or cancel a protection visa are 'RRT-reviewable decisions'. **Items 30 and 31** clarify that neither a decision to refuse to grant or cancel a protection visa relying on proposed paragraph 36(2C)(a) or (b) ('ineligibility for grant of a protection visa') are 'RRT reviewable decisions'. **Item 33** clarifies that such decisions are also not reviewable under Part 5 or 7 of the Migration Act.

Rather, under **item 32** an application may be made to have such decisions reviewed by the AAT (**proposed new paragraph 500(1)(c)**). Decisions to refuse to grant or cancel a protection visa relying on Articles 1F, 32 or 33(2) of the 1951 Refugee Convention are similarly only reviewable by the AAT under existing paragraph 500(1)(c).[85]

Refugee Review Tribunal

At the May 2009 Budget Estimates hearing, the RRT estimated that '20 per cent of all protection visa cases will require additional time to consider complementary protection issues':

> The Refugee Review Tribunal (RRT) annually receives a small number of review applications from applicants who state that their applications have been lodged for the sole purpose of seeking access to Ministerial intervention on humanitarian grounds and not Refugee Convention grounds.
>
> The RRT does not maintain statistics on the number of such cases. However, we estimate that 20 per cent of all Protection visa cases will require additional time to consider complementary protection issues. The RRT maintains statistics on the number of cases that RRT Members refer to the Department for the Minister's consideration of the exercise of his powers under section 417 of the *Migration Act 1958*. 69 referrals were made in 2007-08 and 54 referrals were made from 1 July 2008 to 30 April 2009.

85. Existing subsection 500(1) provides in effect that applications to the AAT may not be made if the Minister has issued a certificate under section 502 in respect of a decision to the effect that due to the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person.

> The RRT will receive additional funding in 2009-10 and out years for additional work to be incurred in reviewing protection visa applications in which complementary protection claims are made…[86]

With regard to the training of Tribunal Members to assess complementary protection claims, the Principle Member of the RRT, Dennis O'Brien recently stated:

> We have engaged Associate Professor Jane McAdam from the University of New South Wales, who is currently in Oxford. She is preparing a training manual for us as we speak. The idea is that when she returns from Oxford at the end of this year she will be rolling out some training for members, probably in February or March. It depends a bit on the progress of the bill and when the new law comes into force. On the assumption that it may be coming into force in April, we have broadly worked out that our training ought to be in February-March.
>
> …
>
> We have agreed on a price with Associate Professor McAdam and we can cover that within our existing training budget.[87]

Application

Item 34 provides that Schedule 1 applies to protection visa applications made on or after this item commences or that are not 'finally determined' before the day the item commences. 'Finally determined' is when either a decision is not, or is no longer, subject to any form of merits review under Part 5 or 7, or the period within which to apply for such review has expired.[88]

Concluding comments

There is no denying that the introduction of a statutory complementary protection regime would be a significant development for Australia. Not only because it would bring Australia into line with the rest of the world but also because it would implement the recommendations of various international and domestic bodies, including three

86. Senate Legal and Constitutional Affairs Committee, Answers to Questions on Notice, Immigration and Citizenship Portfolio, Budget Estimates Hearings 2009-10, 27-28 May 2009, Question 62, viewed 12 November 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/bud_0910/diac/62_qon_28_May_2009.pdf

87. Senate Legal and Constitutional Legislation Committee, Immigration and Citizenship Portfolio, Supplementary Budget Estimates Hearings 2009-10, 20 October 2009, p. 17, viewed 12 November 2009, http://www.aph.gov.au/hansard/senate/commttee/S12494.pdf

88. Existing subsection 5(9) of the Migration Act.

parliamentary inquiries that have previously recognised the need for Australia to introduce a formal system of complementary protection.

That is not to say that this Bill signifies an expansion of Australia's international obligations. Rather, this Bill simply proposes to change the manner in which it adheres to its existing international *non-refoulement* obligations. It proposes to do so by enabling claims to be assessed against legally enforceable criteria at first instance, vesting the decision-making power with Departmental officers rather than with the Minister personally. It also proposes to provide the same administrative and judicial review rights as persons seeking protection under the 1951 Refugee Convention.

However, the decision to create a statutory basis for assessing complementary protection claims will undoubtedly have resource implications for the Department of Immigration and Citizenship along with the administrative review tribunals and courts vested with jurisdiction to review such matters. To this end, it is worth noting that the main criticisms surrounding this Bill appear to relate to the drafting of the inclusion and exclusion criteria. For instance, Dr Ben Saul of the University of Sydney is of the view that the criteria contained in the Bill are 'poorly drafted as a result of the inclusion of unnecessary qualifying phrases' and far from creating certainty would invite needless litigation.[89] Associate Professor McAdam is similarly of the view that the Bill 'makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be'.[90]

The proposed criteria differ from the existing ministerial intervention guidelines that have been used (with slight variations) for decades by successive Ministers to determine Australia's *non-refoulement* obligations. In certain respects, they are also inconsistent with international law and the criteria adopted in other comparable jurisdictions. The underlying rationale for such deviation is arguably to prevent large numbers of people benefiting or potentially benefiting from Australia's proposed statutory complementary protection regime. Importantly, the Department of Immigration and Citizenship does not expect any significant increase in visa grants as a result of the Bill.[91]However, though the criteria as currently drafted may succeed in keeping the number of beneficiaries or potential beneficiaries low, without minor amendment, the Bill may in turn ultimately fail to create a workable and inexpensive statutory regime that will not only adhere to

89. B Saul, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Complementary Protection) Bill 2009*, 24 September 2009, viewed 1 October, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=88909490-413b-4be9-827c-7a7b33331ebb

90. J McAdam, Submission, op. cit., p. 4.

91. Department of Immigration and Citizenship (DIAC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 6–7.

Australia's international obligations but also prevent potentially exposing people in genuine need of protection to *refoulement.*