DEPARTMENT OF IMMIGRATION AND CITIZENSHIP SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

On 10 September 2009, the Senate referred the above Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 16 October 2009. The Bill amends the *Migration Act 1958* (the 'Migration Act') to more efficiently meet Australia's obligations under international human rights law through the introduction of complementary protection legislation for those facing a real risk of a violation of their fundamental human rights.

The Bill introduces complementary protection arrangements to allow all claims that may engage Australia's *non-refoulement* (non return) obligations to be considered under a single Protection visa application process, with access to the same decision-making framework as is currently available to applicants who make claims under the *1951 Convention* and the *1967 Protocol Relating to the Status of Refugees* (the 'Refugees Convention'). The Bill also provides tests and definitions for identifying a *non-refoulement* obligation and criteria for the grant of a Protection visa where *non-refoulement* obligations are owed under international instruments other than the Refugees Convention.

The central policy objective underpinning the Bill is to enhance the integrity and efficiency of Australia's arrangements for meeting our *non-refoulement* obligations under international law to not remove a person who would be arbitrarily deprived of his/her life, have the death penalty imposed on him/her and carried out, be subjected to torture or be subjected to cruel, inhuman or degrading treatment or punishment.

Background

As a party to the Refugees Convention, Australia has an obligation to identify and protect refugees lawfully within its territory. The Refugees Convention defines a refugee as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable, or owing to such fear, is unwilling to avail himself or herself of the protection of that country. At the core of the Refugees Convention's protection obligations is the obligation of *non-refoulement* – that is, the obligation to not return a refugee to a country where they would be persecuted for a Refugees Convention-related reason.

Australia's protection obligations under the Refugees Convention have been incorporated into the Migration Act and the *Migration Regulations 1994* (the 'Regulations') through the Protection visa system. The Protection visa system provides a strong and effective mechanism for assessing claims and meeting Australia's *non-refoulement* obligations under the Refugees Convention. Asylum seekers applying for a Protection visa have their applications decided through a transparent process that incorporates principles of procedural fairness and provides access to independent merits and judicial review. The

existing Protection visa process has been recognised as providing for fair, transparent and accountable decisions with the United Nations High Commissioner for Refugees (UNHCR) in early 2009 describing Australia as a model asylum country in this regard.

Australia is also a party to a number of other major United Nations human rights treaties. These include:

- the 1966 *International Covenant on Civil and Political Rights* (ICCPR) (including its Second Optional Protocol which is aimed at the abolition of the death penalty);
- the 1984 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and
- the 1989 *Convention on the Rights of the Child* (CROC).

These treaties contain express or implied *non-refoulement* obligations which prohibit the removal of people from Australia if it will lead them to face a real risk of a violation of their fundamental human rights, such as the right to life and the right to be protected from torture. However, the Migration Act does not currently make provision for the consideration of claims that may engage Australia's *non-refoulement* obligations under treaties other than the Refugees Convention.

Australia currently meets its *non-refoulement* obligations under the ICCPR, CAT and CROC through reliance on the Minister for Immigration and Citizenship's personal intervention powers. The process by which the Minister decides to consider cases under his personal intervention powers is not transparent – there is no requirement to provide reasons for a decision not to consider the exercise of his powers, there is no clear requirement for procedural fairness and no access to merits review.

The use of the Ministerial intervention powers to meet *non-refoulement* obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate of the Minister and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other *non-refoulement* obligations must apply for a visa for which they are not eligible and exhaust merits review before their claims can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no *non-refoulement* obligation as this would not be determined until the Ministerial intervention stage.

International practice

Australia is almost alone among modern Western democracies in not having a formal system of complementary protection in place. Most European Union (EU) member countries, the United Kingdom (UK) and Canada include assessment of Refugee Convention claims and *non-refoulement* obligations

within a single procedure. A formal complementary protection system for Australia has been recommended by the Australian Human Rights Commission and in several Parliamentary committee reports including the Senate Legal and Constitutional References Committee report, *A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian determination Processes* (June 2000), the Senate Select Committee report on *Ministerial Discretion in Migration Matters* (March 2004) and the Legal and Constitutional References Committee report on *Administration and Operation of the Migration Act 1958* (March 2006).

The introduction of a formal system also has the strong support of the UNHCR and a number of other United Nations Committees. In May 2008 the United Nations Committee Against Torture recommended that Australia adopt a system of complementary protection to ensure that the Minister's discretionary powers are no longer solely relied on to meet Australia's *non-refoulement* obligations under human rights treaties. In addition, in May 2009 the United Nations Human Rights Committee recommended that Australia should take adequate measures, including legislative measures, to ensure that nobody is returned to a country where they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

This Bill addresses these issues by incorporating complementary protection criteria into the Migration Act under a single integrated Protection visa application process. The Bill seeks to ensure that all people who may be owed Australia's protection and to whom Australia has *non-refoulement* obligations have access to an administratively efficient, transparent, reviewable and procedurally robust decision-making framework, not just those people who make claims under the Refugees Convention.

An open and transparent complementary protection assessment as an integral part of the Protection visa process also adds procedural safeguards that will assist in enabling the timely removal from Australia of people who are not owed a *non-refoulement* obligation and have no other right to remain in Australia. It will also help restore confidence that all *non-refoulement* obligations have been fairly considered before a person is removed from Australia.

Removing the necessity of considering complementary protection claims in the Ministerial intervention process will mean that the Minister's intervention power can be reserved for cases which raise unique and exceptional circumstances as originally contemplated when this power was created.

What the bill does

A summary of the specific changes to the Migration Act made by this Bill is at Attachment A.

Australia's international *non-refoulement* obligations are of long-standing and this Bill does not change these obligations in any way. Rather, the measures contained in the Bill enable incorporation of a *non-refoulement* (complementary protection) assessment to be made as part of the Protection

visa decision-making process. This will provide a more efficient and transparent mechanism for meeting Australia's *non-refoulement* obligations under all relevant treaties.

An explanation of the revised Protection visa decision-making process which incorporates complementary protection is at Attachment B. A flow chart of this process is at Attachment C.

Under current arrangements, a criterion for grant of a Protection visa is that the applicant is owed protection under the Refugees Convention. The Bill acknowledges the primacy of the Refugees Convention by ensuring that protection claims are always considered first against this criterion. Only those Protection visa applicants who are found not to be refugees will have their claims considered under the new complementary protection criteria. This approach is supported by the UNHCR and is consistent with the UNHCR's Executive Committee 2005 Conclusion number 103 on the Provision of International Protection which states that complementary forms of protection should only be resorted to after full use has been made of the Refugees Convention.

The UNHCR also supports establishing a single efficient procedure for determining whether a person is in need of international protection and which would entail an examination of the Refugee Convention grounds to be followed, as necessary and appropriate, by an examination of the possible grounds for the grant of a complementary form of protection. This approach is also consistent with international practice of other countries with individualised asylum systems, particularly in the UK, in the countries of the EU, Canada and the United States.

The complementary protection criteria established by this Bill have been developed in close consultation with and advice of the Office of International Law in the Attorney-General's Department. The criteria are limited to the five grounds in which *non-refoulement* obligations arise in the relevant human rights treaties. These are:

- arbitrary deprivation of life;
- having the death penalty imposed and carried out;
- being subjected to torture;
- being subjected to cruel or inhuman treatment or punishment; or
- being subjected to degrading treatment or punishment,

Both 'arbitrary deprivation of life' and 'having the death penalty imposed and carried out' are grounds for which definitions have not been specified in the Bill. They are to be given their usual meaning. The word 'arbitrary' should be interpreted consistently with its interpretation in international commentary. That the death penalty must not only be imposed but also carried out is an essential aspect of that ground and it is expected that claims relating to prison conditions on death row will be considered against the last three grounds. This is also consistent with how this issue is dealt with in the extradition context.

The Bill provides exhaustive definitions of 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment'. This is intended to guide decision-makers and the Australian judiciary in interpreting and implementing these international law concepts when assessing Australia's *non-refoulement* obligations. These definitions reflect the extent of Australia's *non-refoulement* obligations without expanding the concepts beyond interpretations currently accepted in international law and commentary.

To qualify for grant of a Protection visa on complementary protection grounds, an applicant will be required to establish a real risk of harm arising as a necessary and foreseeable consequence of their removal from Australia. The Department sees this provision as explaining the likelihood of harm that must exist to engage one of Australia's *non-refoulement* obligations. It anticipates this aspect will be interpreted in accordance with international commentary suggesting that a real risk is one that is personal, direct and foreseeable towards the person. This specific term is derived directly from the test put forward by the United Nations Human Rights Committee for identifying a *non-refoulement* obligation under the ICCPR.

In accordance with the manner in which the concept of a 'real risk' has been interpreted internationally, the Bill confirms that there are circumstances in which a purported risk of harm will not be interpreted as amounting to a 'real risk' and therefore will not lead to the grant of a Protection visa. Such circumstances where a 'real risk' will not exist will include where a person may face a risk of harm which is one also faced generally by the population of the receiving country, and not faced by the non-citizen personally. The risk will also not be found to be a 'real risk' if it is reasonable for a person to relocate to a part of the country where they would be safe or where they could receive the protection of the appropriate authorities in the country. A person would also not be owed Australia's protection if the person has the protection of another country where they have a right of entry and residence.

Australia's *non-refoulement* obligations under the CAT, the ICCPR and CROC are absolute. If Australia has identified that a person is owed a *non-refoulement* obligation, international law provides that person cannot be removed to the relevant receiving country until it can ensure that it will not result in a violation of the person's fundamental human rights. That stated, each State Party has the discretion as to how to implement its non-refoulement obligations domestically.

In most instances, the Department anticipates that grant of a Protection visa will be the most appropriate solution in the Australian context. However, it is not appropriate to give protection under the Humanitarian Program to those who have violated others' human rights in their past. Specific provision has been made in the Bill to refuse the grant of a Protection visa where there are grounds for considering that the applicant has committed war crimes, crimes against humanity, serious non-political crimes or other particularly serious crimes and are a danger to the Australian community. These provisions are modelled on the existing exclusion provisions under Articles 1F and 33(2) of the Refugees Convention, which apply in the current Protection visa framework when assessing a person's refugee claims.

In the very small number of instances where *non-refoulement* obligations would arise for persons who are excluded on security or serious character grounds, determinations as to whether a person may remain in Australia temporarily or permanently will remain with the Minister personally. The Minister's personal intervention powers are adequate in their current form to deal with these specific types of cases and so the Bill does not propose any amendments to these powers.

Incorporation of exclusion provisions in the Bill is in line with general international practice, particularly in Europe, Canada and the United States, where similar clauses have been incorporated into most countries' respective legislative versions of complementary protection.

The Bill does not encompass grant of a Protection visa to stateless people who are not refugees or who do not face a real risk of death, torture or cruel, inhuman or degrading treatment or punishment – that is, statelessness alone does not give rise to a protection need. This is fully consistent with Australia's obligations under the 1954 *Convention Relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*. As is the case with all other applicants, the Protection visa framework will enable the grant of a Protection visa to stateless persons where Australia's *non-refoulement* obligations arise. The Minister for Immigration and Citizenship has directed the Department to explore possible policy options for the small cohort of people who are stateless but do not engage Australia's international protection obligations and can not return to their country of former residence to ensure that their cases receive appropriate and timely resolution.

Similarly, people fleeing from generalised violence or places of general humanitarian concern do not engage a *non-refoulement* obligation for these reasons and would not therefore be eligible for grant of a Protection visa. In the past Australia has used a number of alternative responses to specific humanitarian crises including temporary suspension of removals, generous consideration of visa extensions and specific new temporary visas. These options will continue to be used on a case by case basis as an appropriate means of assisting people in generalised humanitarian need.

Protection visa applications will continue to be required to be decided within the 90 day timeframe. There will be no change to this as a result of this Bill.

Non-citizens who arrive without a valid visa at an excised offshore place are unable to apply for a Protection visa unless the Minister allows it. The introduction of this Bill will not change this arrangement.

Impact of complementary protection on the Humanitarian Program

Australia's Humanitarian Program has both an onshore and an offshore component. The size of the Humanitarian Program is fixed by Government on an annual basis. As the Bill seeks only to make the process for complying with Australia's international obligations more efficient and transparent, it is not anticipated that there will be a significant increase in visa grants. Under current arrangements people owed complementary protection already receive a visa through the Ministerial intervention process. Humanitarian visas

granted by the Minister are counted in the Humanitarian Program. The net impact of complementary protection on the Humanitarian Program is therefore not expected to be significant.

Complementary protection is largely dependent on an assessment of the situation of the applicant's home country as well as a consideration of evidence as to whether the applicant is directly at risk of serious harm because of personal reasons. For this reason there is little data available on a 'typical' complementary protection case and little data on which to make projections as to how many people may be granted Protection visas on complementary protection grounds. Past experience, however, indicates that the number of cases is low. In 2008-09, 606 visas were granted by the Minister using his section 417 power of which 55 visas were granted out of the Humanitarian Program. The Department estimates that less than half may have involved cases which raised *non-refoulement* issues.

Conclusion

The initiatives in the Complementary Protection Bill will allow Australia to make more efficient and transparent the process for complying with Australia's long-established obligations under international human rights law. It will also provide for a fairer, more transparent and administratively efficient process for all people seeking Australia's protection.

Attachment A

Summary of the Legislative Changes effected by the Migration Amendment (Complementary Protection) Bill 2009

The Complementary Protection Bill amends the Migration Act to:

- Incorporate Australia's *non-refoulement* (non-return) obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as additional criteria for granting a person a Protection (Subclass 866) visa;
- Introduce a test for identifying whether a person is owed a *non-refoulement* obligation under the ICCPR, CAT or CROC, namely:
    - Where there are substantial grounds for believing that, as a necessary and foreseeable consequence of a non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be subjected to certain forms of harm.
- Specify the forms of harm that will engage a *non-refoulement* obligation as where a non-citizen will:
    - be arbitrarily deprived of his or her life;
    - have the death penalty imposed on him or her and it will be carried out;
    - be subjected to torture;
    - be subjected to cruel or inhuman treatment or punishment;
    - be subjected to degrading treatment or punishment.
- Provide clarification that there is no real risk where:
    - it would be reasonable for a non-citizen to relocate to an area of a receiving country where they will not be subjected to one or more of the specified kinds of harm;
    - a non-citizen could obtain protection from the authorities of a receiving country and as a result, would not be subjected to one or more of the specified kinds of harm;
    - the risk is one faced only generally by the population of the receiving country and not faced by the non-citizen personally.
- Define an act of 'torture';
- Define an act of 'cruel or inhuman' treatment or punishment;
- Define an act of 'degrading' treatment or punishment;
- Introduce a provision which will prevent applicants from being eligible for the grant of a Protection visa where, despite being owed a *non-refoulement* obligation, there are:
    - Serious reasons for considering that a person has committed:
        - a crime against peace, a war crime, a crime against humanity,

        - a serious non-political crime before entering Australia or
        - has been found guilty of an act contrary to the purposes and principles of the United Nations; or
    - Reasonable grounds that a person is a danger to Australia's security, or, having been convicted by a final judgment of a particularly serious crime, the person is a danger to the Australian community.

Consequential amendments

- Move the definition of 'non-political crime' to reflect the definition of political offence as it is under the *Extradition Act 1988* (Cth) and move the definition from subsection 91T to subsection 5(1), the Act's interpretation provision;
- Move the definition of 'serious Australian offence' from subsection 91U(2) to subsection 5(1), the Act's interpretation provision;
- Move the definition of 'serious foreign offence' from subsection 91U(3) to subsection 5(1), the Act's interpretation provision;
- Amend paragraph 5A(3)(j) to allow for personal identifiers of offshore entry people to be used to determine if they had sufficient opportunity to avail themselves of protection before arriving in Australia;
- Amend subsections 36(4) and (5) to extend the concept of effective protection to encompass complementary protection – that is, protection in a safe third country to non-citizens making complementary protection claims unless it is also a country which they will face a real risk of harm or which will send them to such a country;
- Amend section 48A to extend the definition of 'application for a Protection visa' to non-citizens who have been refused a Protection visa because they have not been found to be owed a *non-refoulement* obligation and prevent them from making a further Protection visa application;
- Amend subsections 336F(3), (4) and (5) to prevent unauthorised disclosures of identifying information about the offshore entry person to a foreign country unless the offshore entry person is found not to be owed a *non-refoulement* obligation or is found to raise issues that suggest they would be excluded from the grant of a Protection visa;
- Amend subsection 411(1) to allow the Refugee Review Tribunal (RRT) to review decisions where a non-citizen has been refused a Protection visa because they have not been found to be owed a *non-refoulement* obligation;
- Amend paragraph 500(1)(c) to allow the Administrative Appeals Tribunal (AAT) to review decisions where a non-citizen has been found ineligible for the grant of a Protection visa on complementary protection grounds and refused because there are:
    - Serious reasons for considering that a person has committed:
        - a crime against peace, a war crime, a crime against humanity,
        - a serious non-political crime before entering Australia or

        - has been found guilty of an act contrary to the purposes and principles of the United Nations; or
    - Reasonable grounds that a person is a danger to Australia's security, or, having been convicted by a final judgment of a particularly serious crime, the person is a danger to the Australian community.

- Amend paragraph 500(4)(c) to confirm that a decision to refuse or cancel a Protection visa made on complementary protection grounds where a non-citizen has been found ineligible for the grant of a Protection visa, is only reviewable by the AAT and is not reviewable by the RRT.

Transitional provisions

- These amendments will apply to all new Protection visa applications made to the Department on or after commencement of the amendments, as well as to all Protection visa applications already received but not yet decided by the Department at the time of commencement;
- These amendments will also apply to all current applications for review already received but not yet decided by the RRT at the time of commencement as well as to all new applications for review made within the review period to the RRT on or after commencement.

Attachment B

Proposed Protection Framework

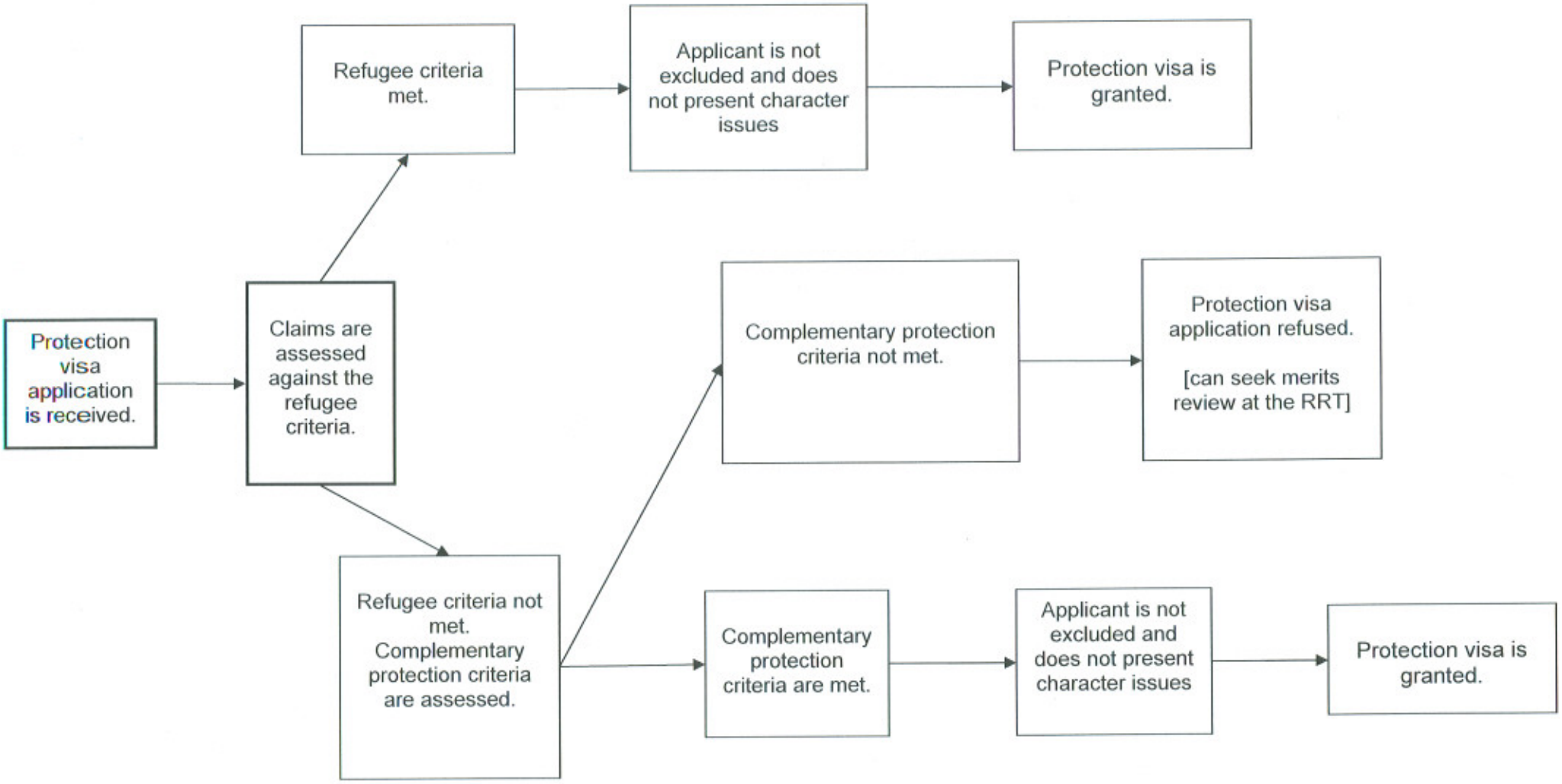
- Applications for a Protection visa will first be considered by an officer of the Department of Immigration and Citizenship acting as the Minister's delegate
    - first against the Refugees Convention. If the person is found to be a refugee, they will be eligible for the grant of a Protection visa at this point (subject to meeting health and character requirements).
    - if the person is found not to be a refugee, they will be considered against the complementary protection criteria. If they are found to engage Australia's *non-refoulement* obligations, they will be eligible for the grant of a Protection visa at this point (subject to meeting health and character requirements).
- If the person is not found to be a refugee or in turn is not found to engage Australia's *non-refoulement* obligations, the delegate takes the decision to refuse the Protection visa application and provides written reasons for this decision.
- The Refugee Review Tribunal (RRT) will have jurisdiction to review decisions where a non-citizen has been refused a Protection visa because they have not been found to be owed protection on the basis of the Refugees Convention or complementary protection.
- As with the primary level decision, the RRT would consider the application
    - first against the Refugees Convention. If the person is found to be a refugee, the application would be remitted to the Department for finalisation of the grant of a Protection visa.
    - if the person is found not to be a refugee, they will be considered against the complementary protection criteria. If they are found to engage Australia's *non-refoulement* obligations, the application would be remitted to the Department for finalisation of the grant of a Protection visa at this point.
- If the RRT finds that the person is not a refugee or in turn does not engage Australia's *non-refoulement* obligations, the RRT will affirm the primary decision to refuse the Protection visa application and provide written reasons for this decision.
- Where the RRT affirms the decision to refuse an applicant's visa, the applicant will also be able to seek judicial review on points of law only, as is currently available to applicants whose Protection visa refusal decisions on refugee grounds are affirmed.

People who are found to be owed complementary protection will be granted a Permanent Protection visa. This means that they will have access to the same benefits and rights as refugees granted a Protection visa.

Minor amendments will need to be made to the Migration Regulations to ensure consistency with this Bill.

Flowchart of new Protection visa process

Attachment C



Flowchart of process for those who would be refused on exclusion or character grounds

Attachment D

EXCLUSION CASES

Person meets refugee criteria or complementary protection but is a war criminal or has committed crimes against humanity or particularly serious non-political crimes

Meets refugee criteria → Applicant excluded under Article 1F of the Refugees Convention. Application is refused

Does not meet refugee criteria but meets complementary protection grounds → Applicant excluded under exclusion-type provision. Application is refused.

Merits review by **AAT**. → Pre-removal clearance/ Ministerial intervention

CHARACTER CASES

Person meets refugee criteria or complementary protection but there are character concerns (section 501)

Application may be refused under section 501 → If the decision to refuse under section 501 is made by a delegate, applicant can seek merits review at the AAT. → Pre-removal clearance/ Ministerial intervention