28 September 2009

Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senate Committee Members,

A Just Australia and Oxfam Australia thank you for the opportunity to provide a submission on the Migration Amendment (Complementary Protection) Bill 2009.

A Just Australia was formed in July 2002 as Australians for Just Refugee Programs in response to spiralling community concerns about the treatment of asylum seekers and refugees. Currently, A Just Australia comprises over 12,000 individual supporters, 120 non-governmental organisations and over 70 prominent Australian Patrons. We aim to achieve just and compassionate treatment of asylum seekers and refugees, consistent with the human rights standards that Australia has developed and endorsed.

Oxfam Australia is an organization that, for the last 50 years, has been assisting others to build a fairer and more sustainable world by fighting global poverty and injustice. It undertakes long-term development projects, provides emergency response during disaster and conflict, and conducts campaigning and advocacy for policy that promotes human rights and justice. Oxfam Australia supports over 350 long-term development projects in 26 countries across Africa, Asia, the Pacific and Indigenous Australia. Its work was supported by over 250,000 Australians in 2008.

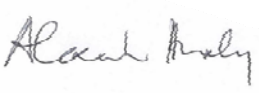
We commend the Australian Government on introducing the Complementary Protection Bill. We believe that the Bill addresses a dangerous gap in Australia's asylum legislation caused by the absence of a robust mechanism to engage our complementary protection obligations. We urge the Committee to support the Bill's passage.

This submission comprises material from a report that A Just Australia, Oxfam Australia and Oxfam Novib published in 2008 on complementary protection, called *Playing God with Sanctuary: A study of Australia's approach to complementary protection obligations beyond the Refugee Convention*. It explains in detail the pressing need for reform of our system of protection to establish a formal and robust mechanism for complementary protection.

We thank you for your consideration of this submission.

Yours sincerely,

Zhi Yan
National Coordinator (Acting)
A Just Australia



Alexia Huxley
International Program Director
Oxfam Australia

Contents

1 Executive Summary

Current Australian law

- Australia is now one of the few developed countries that does not have a formal system of complementary protection. Instead, Australia uses ministerial intervention powers as an informal but weak mechanism.
- Under current Australian law, all people seeking protection must file an application for refugee status with the Immigration Department even if they know from the outset that they will not fit this definition of a refugee. The claim is assessed against the Refugee Convention but not against other human rights treaties Australia has ratified, such as the Convention Against Torture (CAT).
- Unsuccessful applicants can appeal the decision to the Refugee Review Tribunal (RRT), which can again only review the application against the Refugee Convention. After a second negative decision the applicant may apply to the Minister for Immigration to assess their claim based on a much broader set of humanitarian criteria, which can include risk of torture or other claims under human rights treaties Australia has ratified.
- But the Minister does not have to intervene, no court can compel the Minister to intervene and s/he is under no obligation to give reasons for not intervening.
- If the Minister does intervene, s/he does not have to give reasons for his/her decision and no court can review the decision.

Why do we need a formal system of complementary protection?

- The current system fails people in need of protection, as it may result in the return of people to countries where they may be tortured or seriously harmed. It also results in psychologically harmful delays of protection to vulnerable people living in detention or in the community.
- The current system is more costly as it may result in prolonged detention, extra legal and financial costs and other hardships such as living in the community for extended periods without work rights or access to healthcare.
- The current system undermines the rule of law and democracy in Australia as it utilises a discretionary method to deliver international legal obligations.

2 Current Australian law

Despite being a signatory to all the relevant international treaties, Australia is now one of the few remaining developed countries without a formal system of complementary protection.

The problem is that if you have a complementary protection case, you can't just apply under complementary protection grounds. Instead, you have to first apply to the Department for refugee status, get knocked back, then appeal to the Refugee Review Tribunal, and get knocked back, before you can apply to the Immigration Minister under the relevant complementary protection grounds. That can take six months or several years. Meanwhile, you're stuck in a detention centre or living in dire poverty in the community without permission to work or receive income support. It also costs a small fortune to keep people in detention and process multiple applications.

James Thomson, National Council of Churches in Australia

Under current Australian law, all people seeking protection must file an application for refugee status with the Department of Immigration and Citizenship (DIAC), even if they know from the outset that they will not fit the definition of a refugee. The claim is assessed by DIAC against the Refugee Convention but not against CAT, ICCPR or CRC. Following a negative decision by the department, the applicant must then appeal that decision to the Refugee Review Tribunal (RRT) which will again only review the application against the Refugee Convention and again has no formal capacity to assess it against the CAT or other treaties. Following a second negative decision, the applicant then has a choice: s/he may proceed to have the decision of the RRT reviewed by the Federal Court for a narrow set of administrative or legal errors or s/he may apply to the Minister for Immigration to assess their claim based on a much broader set of humanitarian criteria, which can include risk of torture or other claims under the CAT, ICCPR or CRC.

Thus, only after having failed twice on criteria that probably never applied to them in the first place, can the applicant apply for the administration to look into their claim from the point of view of breaching Australia's complementary protection obligations under the CAT, ICCPR or CRC. According to refugee advocates and migration agents this process often takes several years and involves significant extra court, administrative and processing costs. In addition to these costs, if the claimant is also being held in detention while their claim is being processed it will cost the Australian taxpayer between $200 and $1800 per detainee per day[1] in order to have them apply for protection under the wrong international treaty. For asylum seekers living in the community on bridging or other temporary visas during this time, often without income support or work rights, this prolongs their hardship and isolation.

Some people have to make what could be called a fraudulent or false protection visa application just to be able to get through the system and access the Minister's discretion. The Department then complains about all these false or fraudulent protection visa applications, when asylum seekers have got nothing else that they can do.

[1] The latest figures given to a budget estimates hearing on 22 May 2006 suggest that it cost $238 per detainee per day to keep someone at the lowest cost facility at Villawood in Sydney rising to $1,830 per detainee per day to keep someone on the most expensive Australian facility at Christmas Island.

Michaela Byers, Lawyer and Migration Agent
You have got people who would have claims triggered by our obligations under the convention against torture, but would not fit the very narrow interpretation or reading of the refugee definition that the Government uses. So they get rejected. They have RRT. They get rejected. They get rejected over and over again. Then finally they get to ministerial discretion stage and the best case scenario is that the Minister goes 'that's no good… we need to look after you, alright here is a visa', but after years sometimes. It's atrocious.

Elenie Poulos, UnitingJustice Australia

Even then, the procedure does not provide any guarantee that the Minister will actually look into their case and decide on its merits under CAT, ICCPR or CRC. Under Section 417 of the Migration Act, the Minister may exercise his/her discretion and issue a "more favourable decision" to any failed visa applicant if s/he finds that it is "in the public interest" to do so. However, the powers of the Minister are "non-compellable, non-reviewable and non-delegable"[2].

This means that:

1. The Minister does not have to intervene.
2. A court cannot order the Minister to use their discretionary power and the Minister cannot defer the matter to a court or other body to decide.
3. If the Minister does not intervene, they have no obligation to give reasons for not doing so.
4. If the Minister does intervene, no court or other body can review the decision, nor does the Minister have any obligation to explain their decision.[3]
5. Even if the Minister decides in favour of the applicant, they are free to grant any type of visa – not necessarily a protection visa.

This roundabout process is so unpredictable and opaque that it cannot be considered to be an effective protection mechanism.

Dr Jane McAdam, University of NSW[4]

The Minister has Ministerial Guidelines to assist in the decision making process. These guidelines do include potential scrutiny of whether Australia's obligations under the CAT, ICCPR, or the CRC may be engaged. They are not binding, however, so the Minister does not have to follow them or demonstrate that s/he did. Even if the Minister decides in the applicant's favour, s/he is free to grant any type of visa, and not necessarily a protection visa. This has resulted in some people being billed for their time in immigration detention, which is generally only waived for people granted

[2] McAdam, *Complementary Protection in International Refugee Law*, p131

[3] The Minister does have to table a statement about the decision in Parliament, however this statement is not allowed to contain anyything that could identify the individual and hence rarely explains a decision. "…a Minister must table a statement before both houses of parliament setting out the decision of the relevant tribunal and the reasons for substituting a more favourable decision in a manner that does not identify or name the individual. While this provision was designed to act as an accountability mechanism, in reality these tabled statements read like a set of templates, containing three or four paragraphs which convey very little substance about the specific case. The reason for this is that the statements are not allowed to contain any individually identifying information. Most are little more than half a page in length." Carrington Kerry (2003) *Ministerial Discretion in Migration Matters Brief Prepared for Senate Select Committee on Ministerial Discretion in Migration Matters*, Department of Parliamentary Library [available at http://www.aph.gov.au/Senate_minmig/rel_links/index.htm]

[4] McAdam, *Complementary Protection in International Refugee Law*, p132

protection visas. Furthermore, the absence of formally reasoned decisions by the Minister in these cases is again non-reviewable and therefore raises the question of whether or not the complementary protection concerns raised by the applicant in their request for intervention had been taken into account at all when deciding the case.

We are actually requiring a Cabinet Minister to undertake a status determination process, which is crazy. There are no clear guidelines. Anyone who puts forward an application really doesn't have any clear indication of what their chances of success are, nor why they were rejected.

Paul Power, Refugee Council of Australia

We agree that the Minister should retain the power to grant visas on 'national interest' or 'compassionate' grounds, but Australia's obligation to protect those with complementary protection claims stem from treaties that Australia has voluntarily signed such as the Convention Against Torture, which is just as important as the Refugee Convention. One wrong decision to return someone home could mean torture, persecution or death. To leave such a decision in the hands of the Minister of the day, without any transparency or accountability, is to subject claimants to the vagaries of politics and the Minister's personal whim. At the moment, the Minister not only does not have to even look at a case. Nor does the Minister have to provide any reason when a decision is made. There is no record of the decision and decisions are final. There is no right to an appeal or any review process.

James Thomson, National Council of Churches

In recent years, there have been several inquiries into the operation of Australian immigration laws, which have included consideration of ministerial powers or complementary protection issues. In 1989, under the former Hawke Labor government, a bill was introduced by the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray to remove the considerable exercise of ministerial discretion over immigration policy and decision making.

The original Bill was blocked in the Senate by the Coalition opposition and the Australian Democrats, who argued that the Bill went too far in removing ministerial discretion and was only passed after 82 amendments restoring some of the ministerial powers. In December 1989 another Bill was introduced by Senator Robert Ray setting out more comprehensively the limited context under which the minister is able to exercise discretion in immigration matters. The Bill was welcomed by the opposition parties for its recognition of the need to restore a residual power of ministerial discretion in immigration matters, particularly in relation to humanitarian applicants.

In 1999-2000, the Senate Legal and Constitutional References Committee examined the refugee and humanitarian determination process in its "A Sanctuary Under Review" report.[5] It recommended that the Attorney-General's Department, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the *non-refoulement* obligations of the CAT and ICCPR into domestic law.

[5] Commonwealth of Australia (2000) A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes JUNE 2000 [available at http://www.aph.gov.au/Senate/committee/legcon_ctte/ completed_inquiries/1999-02/refugees/report/index.htm

Similarly, in 2003-04, the Senate Select Committee on Ministerial Discretion in Migration recommended "the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CRC and ICCPR."[6]

In 2005-06, the Senate Legal and Constitutional References Committee inquired into the administration and operation of the Migration Act 1958, including the discretionary powers of the Minister under sections under sections 351 and 417. It recommended that a system of complementary protection be introduced which would involve the simultaneous consideration of refugee and complementary protection claims: "...consideration of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time."[7] It also recommended that the Migration Act be amended to require a comprehensive pre-removal risk assessment to ensure Australia was meeting its non-refoulement obligations and that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights and have access to health care.

In September 2006, Senator Andrew Bartlett of the Australian Democrats introduced a bill on complementary protection into Federal Parliament on 13 September 2006 called the Migration Legislation Amendment (Complementary Protection Visas) Bill 2006. This Bill would have introduced a class of visas to be known as "complementary protection visas" to protect asylum seekers who faced a "substantial threat to his or her personal security, human rights or human dignity on return to his or her country of origin." The Bill lapsed when parliament was dissolved for the Federal Election in 2007. After the election the Bill has been reinstated to the Notice Paper but not scheduled for a debate or vote.

The new Minister for Immigration, Senator Chris Evans, has also recently commissioned a report into his ministerial powers, after telling a Parliamentary Committee in February 2008 that he believed there had been a substantial increase in ministerial powers under the previous government and has commissioned a report into how that could be changed. "I have formed the view that I have too much power … in terms of the power given to the minister to make decisions about individual cases," he said. "I am uncomfortable with that, not just because of concern about playing God, but also because of the lack of transparency and accountability for those ministerial decisions."[8]

However this report was both commissioned and written without the knowledge or input of the refugee and legal advocacy sector. In keeping with the historical lack of transparency surrounding ministerial discretion, the report was not made public, so the findings and recommendations have been made privately to the Immigration Minister without any formal mechanism for broader consultation on this issue.

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[6] *Inquiry into Ministerial Discretion in Migration Matters* (2004) Commonwealth of Australia, recommendation 19, para 8.82 [available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm]

[7] Recommendation 33,Senate Legal and Constitutional References Committee (2006) *Administration and operation of the Migration Act 1958,* Commonwealth of Australia, 2006 [available at http://www.aph.gov.au/senate/committee/legcon_ctte/migration/report/report.pdf]

[8] Senator Chris Evans, Senate Legal and Constitutional Affairs Committee: 2007/08 Budget Estimates. [available at http://parlinfoweb.aph.gov.au/piweb/Repository/Committee/Estimate/Linked/5704-6.PDF]

Under the current system, people who need to claim protection which is outside the Refugee Convention know that they are going to have to go through all these hoops and fail at every turn before they get the opportunity to put their claims to the Minister - it's just ludicrous. And if there were some consistency to a ministerial determination process, then at least people might think it is worth going through all these hoops because claims such as theirs are being seriously considered, but people don't even know that because there is no information given about decisions.

Paul Power, Refugee Council of Australia

3 Why do we need a formal system of complementary protection?

4.1 The current system fails people in need of protection

Australia sent back [trafficked] women when the Refugee Review Tribunal said their life would be at risk if they are returned, but they are not Convention refugees. So we sent them back. If you had complementary protection those women would have been given protection. Those are the situations where Amnesty International would say this is what is wrong with non-compellable, non-reviewable discretion. That's why it needs to be reformed.

Dr Graham Thom, Amnesty International

Migration agents, legal practitioners and community organisations with extensive experience in the sector repeatedly emphasised the damage done by the current laws to people who had genuine protection needs. This occurs on a number of levels, including:

- The system may result in the return of people genuinely in need of protection to countries where they may be tortured or seriously harmed.
- The system may result in people in need of protection being detained for extended periods.
- The system may result in people enduring undue hardship while exhausting an extensive legal process living in the community without work rights or access to health care.
- The system may result in people incurring extra financial costs associated with being forced to exhaust an appeal system that cannot actually address their claims, before being able to seek ministerial intervention that may or may not address these claims.
- There is no way for people in need of protection to correct or challenge flawed decisions or even to examine the decision-making process.

There's a real problem when you can't prove that the person fits into one of the five categories of the Refugee Convention. We have a case of a son who was targeted to be killed because his father killed another man's son. We've have been making special leave applications at the High Court and a 417 [ministerial discretion application] because he can't meet the definition of being a refugee, so I don't know what else to do. Hopefully his 417 should come in. If anything, he faces almost certain death or torture.

Francis Milne, advocate

A notorious example of this failure is illustrated by the case of Mr Sadiq Shek Elmi. In October 1997, Mr Elmi, a Somalian asylum seeker from a persecuted minority clan, arrived in Australia. He fled his war-ravaged country after his father and brother were killed and his sister committed suicide after being raped repeatedly by militia. He was detained at the Maribyrnong detention centre in Melbourne where his application for protection was rejected by DIAC and then by the Refugee Review Tribunal, on the grounds that any harm he faced upon return to Somalia would be because of the generalised situation of civil war, rather than any specific Refugee Convention

reason. The Minister refused to exercise his discretion for Mr Elmi and he was informed he would be returned to Mogadishu, via Johannesburg.

In November 1998, after further appeals to the High Court to halt his deportation had failed, Mr Elmi's lawyers made a complaint to the United Nations Committee Against Torture (UNCAT) that his imminent deportation from Australia would be in breach of non-refoulement provisions in Article 3 of the CAT. Australia agreed to halt his removal until his case was heard. In arguing against the merits of the case, Australia claimed that the case was inadmissible as the armed Somali clans Mr Elmi said would torture him did not constitute "public officials" as required under the definition of torture contained in the CAT. Australia also argued that Mr Elmi had failed to prove he personally faced a real risk of torture rather than there being a situation of generalised violence in Somalia. The Committee rejected Australia's claims that the Somali clans were not public officials, since the majority clan which held Mogadishu could be regarded as exercising de facto control over the city and was therefore responsible for any acts of torture for the purposes of the Convention[9]. It also rejected the notion that the CAT did not apply because it was a situation of generalised violence, finding that Mr Elmi was at personal risk of torture because of the evidence he supplied and because his case had received wide publicity making him more vulnerable to repercussions. The Committee found that Australia "*has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author* [Mr Elmi] *to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.*"[10]

Yet, instead of granting Mr Elmi a protection visa in response to CAT's finding, the Minister determined that he would have to re-apply for asylum from the beginning and remain in detention during the entire period that his case was being re-processed. His case was again rejected by the Department and the RRT, although the Department claimed the application was re-assessed in light of the new information arising during the CAT committee hearings. Mr Elmi then left Australia 'voluntarily' rather than face indefinite and prolonged detention.

I worked on the cases of two Columbian families. Both had been in Australia since the 1990s. In both families the children are Australian residents - we were able to legalise them but not the parents. So about the same time we put in 417 requests to the Minister about the parents. The cases were almost identical. They had the same country information in fact, and were almost identical except for personal details and personal claims. One wins and the other one doesn't. Now I don't know how you can explain that. So one family was very happy and one family was very upset with me, but there was nothing I could do. So I explain to the clients at the start that it is a lottery as to who the minister considers 'worthy', I suppose is the term, of intervention.

Michaela Byers, Lawyer and Migration Agent

[9] "Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions." Sadiq Shek Elmi V Australia, *Communication No 120/1998 : Australia. 25/05/99. CAT/C/22/D/120/1998* [available at http://www.unhchr.ch/tbs/doc.nsf/0/b054cbf1e34a6c278025679a003c37ec?Opendocument]

[10] Sadiq Shek Elmi V Australia, *Communication No 120/1998 : Australia. 25/05/99. CAT/C/22/D/120/1998* [available at http://www.unhchr.ch/tbs/doc.nsf/0/b054cbf1e34a6c278025679a003c37ec?Opendocument]

The Elmi case illustrates the shortcomings of the current system. Mr. Elmi went through the whole asylum system and was unsuccessful as his situation did not conform with the Refugee Convention definition of a refugee. He applied to the Minister for a protection visa and was again refused, without knowing one way or another if his particular protection needs under the CAT had even been assessed by the Minister. His claim under the CAT was, however, accepted by UNCAT. Australia then made Mr Elmi go through the whole procedure again and fail again. Ironically, if Mr Elmi had been a criminal being extradited to his home country it would have been a requirement that the Minister consider the possibility of torture under CAT before attempting to deport him. In extradition cases, a review against the CAT is mandatory and the Attorney-General must inquire into the possibility of torture and is then required to give reasons why s/he thinks torture is not probable before extradition can occur. The Attorney-General must be satisfied that "on surrender to an extradition country, a person will not be subjected to torture"[11]. But Australia's Migration Act 1958 contains no such prohibition on returning a person to torture. So for a person seeking protection, the Minister is not obliged to look into possible torture claims. In essence, then, Australia gives more protection to suspected war criminals than to people in need of protection.

There are other cases of effectively stateless people because the country concerned refuses to accept them back. Not just Palestinians, but also cases involving the Indian government, which has refused to accept any identity documents the person has and so refuses to take them. We campaigned on behalf of a person detained for 7 years. Part of the problem was because the Indian government refused to take him back. The Department of Immigration was claiming he was refusing to give them all his personal details. He was saying, I have told them everything I have, what more can they ask me for?

Dr Graham Thom, Amnesty International

Examination of the limited set of available statistics on ministerial discretion[12] suggests that there is a strong possibility that Australia may well be letting people slip through the cracks in its system. While Kate (2005)[13] and others have argued that Australia's recognition rate of Convention refugees is just above the global average, in each of the three years between 2000-01 and 2002-03 the Immigration Minister intervened for less than 4 per cent of the total number of asylum claims processed in that year and less than 5.5 per cent of all those claimants who had been rejected as Convention refugees at the two earlier stages[14]. Of the 4 per cent of all claimants receiving ministerial interventions of some kind, only a handful in each year (between 0.1 and 0.8 per cent) received a protection visa rather than a

[11] :Extradition Act 1988, Section 22(3)(b) [available at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/730B5EA036676E14CA256F71004E8393/$file/Extradition88.pdf]

[12] As the system is not transparent, the only relevant data available arises from the two recent Senate inquiries into Ministerial Discretion in 2003-04 and 2005-06. See *Inquiry into Ministerial Discretion in Migration Matters* (2004) Commonwealth of Australia [available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm] and *Administration and Operation of the Migration Act 1958* (2006), Report of the Senate Legal and Constitutional References Committee, Commonwealth of Australia, [Available at http://www.aph.gov.au/senate/committee/legcon_ctte/Migration/report/index.htm]

[13] Kate, M (2005) *The provision of protection to asylum-seekers in destination countries,* New Issues in Refugee Research, Working paper no 114, UNHCR, p 1-3

[14] Source: *Inquiry into Ministerial Discretion in Migration Matters* (2004) Commonwealth of Australia, Chapter 3, Tables 3.1, 3.2, 3.4 [available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm]

visa for other humanitarian or compassionate reasons such as family, spouse or close ties categories. This appears to be quite low.

Table 1. The use of ministerial discretion in Australia and Australia's recognition rates of non-Convention refugees

	2000-01	2001-02	2002-03
Total number of decisions made by RRT/MRT	10,824	12,504	13,402
Number of negative decisions by RRT/MRT	7,356	8,007	8,946
Number of people applying for ministerial intervention following negative decisions	4,220	5,650	5,969
Number of people granted ministerial interventions	398	362	483
Percentage of total negative decisions by RRT/MRT reversed by ministerial intervention	5.4%	4.5%	5.4%
Percentage of all RRT/MRT decisions reversed by ministerial intervention	3.7%	2.9%	3.6%
Number of protection visas issued as a result of ministerial intervention	93	21	17
Protection visas issued by Minister as a percentage of all people applying for ministerial intervention	2.2%	0.4%	0.3%
Protection visas issued as a percentage of total numbers of decisions made by RRT/MRT	0.8%	0.2%	0.1%

SOURCE: *Inquiry into Ministerial Discretion in Migration Matters* (2004) Chapter 3, Tables 3.1, 3.2, 3.4[15]

While direct international comparisons are not feasible because of low levels of compatible data collected on complementary protection around the world, most other Western European countries appear to have higher recognition rates of non-Convention refugees than Australia. According to figures compiled by the European Council on Refugees and Exiles (ECRE)[16], in Denmark 9.1 per cent of asylum seekers were recognised as non-convention refugees in 2005 under the newly introduced system of complementary protection in the EU[17]. In Norway, the figure was 10.3 per cent, in Austria 7.5 per cent, in France 7 per cent, in Germany 1.6 per cent, in Austria 2.9 per cent and in the Netherlands 3.2 per cent. In Canada, where separate statistics for Convention and non-Convention refugee are not available, the overall recognition rate is very high, according to UNHCR, at around 50 per cent in

[15] available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm

[16] ECRE (2005) *European Council on Refugees and Exiles - Country Report 2005 [*available at http://www.ecre.org/files/ECRE%20Country%20Report%202005rev.pdf]

[17] Statistics are not available on this basis prior to 2004, as this is when Europe introduced its official system of complementary protection known as "subsidiary protection". The first full year of operation was 2005. See Section 6 of this report for more details on subsidiary protection.

2002-03. Similarly, the United States recognised some 30 per cent of all of its asylum seekers in 2002-03 and New Zealand 17 per cent.[18]

[18] See UNHCR (2003) *2003 UNHCR Statistical Yearbook, Chapter 3, [available at http://www.unhcr.org/statistics/STATISTICS/42b018454.pdf]*

4.2 The current system undermines the rule of law and democracy in Australia

Many of those interviewed for this report were concerned about the impact of the lack of transparency and accountability under the current system and the lack of an ability to review the outcomes. Some suggested that these sorts of deficiencies can undermine Australians' ability to be confident that a fair and equitable application of the law will occur in their country and also undermined the idea that democratic governments can be held accountable for their decisions. A democratic state is not free to capriciously decide which of its laws it will follow. Hence, no matter how capable a politician may be, the principle of democracy demands that his or her decisions are not only transparent to voters, but also reviewable by independent courts, which can assess decisions for lawfulness. Politicians receive, or lose, their mandate from the majority of voters, but judges are an important independent check that such majorities do not abandon the law.

It's a big legal problem where you have a person who will make those crucial decisions and who may make the decisions depending on how they are feeling that day. It's ad hoc. It's not in any way according to how a system of law should be.

Carolina Gottardo, Refugee Council of Australia

The current system is untenable when held up against such criteria, as there are no legal remedies available for people with complementary protection needs who are rejected at the ministerial discretion stage. The Minister's powers are non-compellable and non-reviewable, which means that no court can force the Minister to look at a claimant's case, even though Australia has agreed to abide by the relevant international laws. Even if the Minister does look at the case, there are no guarantees s/he will grant a protection visa based on the claim. A failed claimant could complain to the Human Rights and Equal Opportunities Commission (HREOC) if any provisions of the ICCPR or CRC had been violated. But HREOC has no direct jurisdiction to ensure the protection and promotion of the rights under CAT. HREOC might then launch an investigation into an individual's case, but any findings on such a matter are not enforceable in courts and are non-binding on the Minister.[19] So, even if HREOC found that Australia had comprehensively violated its treaty obligations under ICCPR or CRC, the Minister is not obliged by law to respond to the finding. HREOC's only effective power would be in "shaming" the Minister into a response, and by then the asylum seeker could have already been removed from Australia.

It is worth stressing, that none of those interviewed for this report were opposed to ministerial discretion altogether. In fact, they readily acknowledged that in humanitarian or compassionate cases, where it is difficult to apply the letter of the law, or where the case is very complicated legally and/or factually, the ministerial discretionary power is an essential tool. However, they stressed that ministerial discretion on these grounds is fundamentally different from a case where the claim is being made based on international laws that Australia has agreed to implement and abide by, and where the Minister cannot be compelled to address those legal issues.

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[19] *Comments of the Human Rights and Equal Opportunity Commission (HREOC) on Australia's Compliance with the Convention Against Torture and Cruel, Inhuman and Degrading Treatment,* HREOC, February 2007 [Available at http: //www.hreoc.gov.au/legal/submissions/2007/aust_compliance_with_the_convention_against_torture.html#endnote18]

Ministerial discretion is good for exceptional cases, but not in cases where the law is clear and, as other countries have demonstrated, a fairer and more transparent system is possible and functioning very well.

The lack of transparency also necessarily creates the possibility for Ministers to decide cases based on personal beliefs and values, political convenience or even a whim. Even if this is never actually the case, a Minister can still be perceived to be making decisions on such a basis, which leads to practitioners trying to fit their clients into some perceived category that will be received more favourably by the Minister. For example, practitioners freely admitted to trying to fit their clients to a family reunification situation, when a Minister is well known to favour such claims. While this might seem beneficial to the claimant involved, in the long run it is dangerous for the course of justice as it teaches lawyers to rely on the preference of the Minister, rather than on the law. It also encourages the Minister to rely more on his or her own values system and to forget the law and it tends to shift public servants towards applying government policy rather than applying the law.

I have been doing ministerial appeals quite successfully for about 7 years now, so I developed an understanding about how some different Ministers' minds work. But it seems very ad hoc.

Michaela Byers, Lawyer and Migration Agent

In a worst case scenario, the lack of transparency raises the spectre of impropriety, with past Ministers often being the centre of allegations of bribery or political favour in return for favourable immigration decisions. For example, the 2003-04 inquiry into the use of ministerial discretion powers occurred amid "cash-for-visa" allegations by the then Labor Opposition, that former Immigration Minister, Mr Phillip Ruddock, had on at least four separate occasions received donations to the Liberal Party in exchange for positive visa decisions.[20] This leads to a distortion of the system and potentially less favourable outcomes for all concerned. It also risks crowding out genuine claimants.

4.3 The current system is more costly

The current system encourages increased costs in the form of:

- Department costs of processing of extra refugee claims made only because this is the only way to access (ministerial intervention) protection under other conventions.
- RRT costs of processing appeals against negative DIAC decisions, because this is the only way to access (ministerial intervention) protection under other conventions.
- Increased levels of judicial review as people seek to exhaust all potential avenues of appeal before the stage of having their complementary protection claims reviewed by the Minister.
- The cost of detention during this extended process.
- The cost to the community and welfare sector of supporting non-detained people who generally do not have work rights or access to Government financial support during this extended process.

[20] *Inquiry into Ministerial Discretion in Migration Matters* (2004) Commonwealth of Australia, Chapter 1, Section 1.6, [available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm]

The National Council of Churches gave an example of a case[21] where a family of six who did not fit the definition of a refugee were granted protection in Australia after intervention by the Minister, but only after they had been in detention for four years. The four years of detention for the family of six would have cost between $1.8 million (based on $200 per detainee per day[22]) and $15.8 million (based on $1800 per detainee per day). If they had been able to apply under the correct criteria from the start, they may have only remained in detention for six months or so, costing something more in the order of $220,000 to $2 million – a saving to the taxpayer of between $1.6 million and $13.8 million. The National Council of Churches' James Thomson also suggested that this family would have incurred thousands of dollars of legal and processing costs, with an RRT application fee amounting to $1500 and costing around $4000 to process.

It's a waste of time and money. Imagine, you have grounds for a complementary protection case, but you can't just apply for protection on these grounds. Instead, you have to put in an application to DIAC claiming to be a refugee, get knocked back, then appeal on refugee grounds to the RRT, and get knocked back, before you can apply to the Minister on complementary protection grounds.

It may take years to get a final decision. Meanwhile, you're stuck in a detention centre or living in dire poverty in the community with no permission to work or income support. Moreover, the taxpayer is shelling-out a small fortune to pay for high security detention centres and support facilities and process multiple applications. If you're living in the community with no permission to work and no income support, you soon end up destitute and reliant on overstretched churches and other charities for help; that's another huge waste of money.

Then there is the cost of unnecessary DIAC and RRT processing. An RRT application alone costs $4,000.00 to process. Then there is the cost of getting legal advice and paying $1,500.00 RRT application fee, which asylum seekers struggle to pay.

While you're destitute in the community or locked-up in a detention you're also being de-skilled and subject to further trauma, which eventually has to be addressed, and it's the taxpayer that ends up paying for the damage, rather than quickly processing people and getting them back on their feet.

Imagine all the time and money being thrown into thin air.

James Thomson, National Council of Churches

[21] *Complementary Protection, The Way Ahead*, January 2004 Background Paper, National Council of Churches [available at http://www.ncca.org.au/cws/rdp/issues/complementary_protection]

[22] This is based on the latest available figures for the cost of detention from 22 May 2006 Budget estimates which suggested it cost $238 per day to keep a detainee at the Villawood detention centre rising to $1830 per day to keep a person on Christmas Island.

4 Some common misconceptions about complementary protection

Myth 1: Complementary protection is best delivered by ministerial discretion

The lack of review and transparency involved in the ministerial discretion process means it is impossible to be confident that Australia is meeting its complementary protection obligations through ministerial discretion or humanitarian grounds.

It is also inappropriate to use a *discretionary* mechanism to deliver Australia's *obligations* under international law.

The Australian government talks about the fact that they already have elements of complementary protection in ministerial discretion…and therefore we don't need to adopt a more formal complementary protection process. We would say, that's not complementary protection. You need to have something at the beginning of the process, so you don't have these problems at the end of the process.

Dr Graham Thom, Amnesty International

Myth 2: Complementary protection will open the floodgates to spurious claims & excessive litigation

Former Immigration Minister Amanda Vanstone famously said during 2006 consultations with refugee organisations, that introducing complementary protection visas would be "like putting a bucket of cash on the table." Over the past few decades, both Labor and Coalition governments have been concerned with the impact of creating more legal avenues for asylum seekers to make claims, potentially resulting in an influx of claimants and a heavier burden on the department and the courts. The former Coalition Government had concerns that the introduction of a complementary protection system would act like section 6A(1)(e) of the Migration Act, which was removed in the 1980s after it had allowed the courts to exercise significant discretion in determining humanitarian cases and led to a rise in these sorts of visas being granted.

That section [6A(1)(e)] allowed for the courts to have a certain discretion in compassionate or humanitarian cases. That's not what we are talking about here. A residual discretion is appropriate for the Minister in compassionate and humanitarian cases. And I do think that you do still need some way of providing for those people if you are not going to codify it. So a residual discretion is important there. But here we are talking about obligations that Australian has undertaken. Apart from obligations to individuals, these are obligations Australia has assumed to the international community. So there is an argument that we are breaching our obligations to other States here by shuttling off these people, by sending them home or sending them wherever and saying someone else has to deal with them.

Dr Jane McAdam, University of NSW

However, complementary protection *is not* "complimentary" or "free" protection. It is not a protection system given for "free" to anyone, but protection that applies only in certain specific situations which "complement" the Refugee Convention. Many of those interviewed for this report suggested introducing a formal complementary protection system could actually reduce some of the burden on the legal and administrative system of these kinds of claimants rather than the other way around. It would eliminate the need for those seeking protection under other international treaties to exhaust the appeals system just to get a chance to be heard by the Minister.

The big fear is all about litigation. There is the perception that if you add another element into the system it will provide another element for people to go to court…but sometimes at the ministerial discretion stage the Department can suddenly find out that they would never have been able to remove a person due to protection needs under other conventions. So they have forced this person to sit through months or years of processing and rejected them with a view to removing them from Australia, only to find out that they never could remove them in the first place. That information needs to be sought at the first stage, not at the last stage.

Dr Graham Thom, Amnesty International

Between 1996-97 and 2002-03 there has been a significant increase in three relevant statistics: the number of negative tribunal decisions, the number of people applying to the Minister to use his/her discretion as a result of negative tribunal decisions and the number of actual interventions by the Minister. According to figures compiled by the 2003-04 Senate Inquiry into Ministerial Discretion, in 1996-97, 5,116 claimants were refused a visa by the RRT or MRT and hence were eligible to seek ministerial intervention. Of these people, 814 requested that the Minister intervene and 88 ministerial inventions occurred (1.7 per cent of all of those refused visas at earlier stages). By 2002-03, this had risen to a total of 8,946 claimants refused a visa by the RRT, with 5,969 requests for ministerial intervention and 483 interventions by the Minister (5.4 per cent of all those refused visas at earlier stages.)[23]. The 2006 Senate Inquiry confirmed these trends in the subsequent two financial years 2003-04 and 2004-05.[24] Figures in both these inquires also suggest that the tribunals have been refusing between 60 per cent and 70 percent of all applicants for visas between 1996-97 and 2004-05. Hence, it is possible that introducing a formal system of complementary protection could reduce some of this increasing case load on the tribunals and the Minister by identifying those people who will not be able to be removed by Australia as a result of its international obligations at an earlier stage of the process, rather than at the "last gasp" stage.

Myth 3: Complementary protection is the same as protection granted on humanitarian or compassionate grounds.

When refugees arrive and claim asylum, their claims are assessed under the 1951 Refugee Convention. If their claims fail, in certain cases they are still allowed to stay for humanitarian or compassionate reasons such as health concerns or family ties –

[23] *Inquiry into Ministerial Discretion in Migration Matters* (2004) Commonwealth of Australia, Chapter 3 [available at http://www.aph.gov.au/SENATE/committee/minmig_ctte/report/c01.htm]

[24] *Administration and Operation of the Migration Act 1958* (2006), Report of the Senate Legal and Constitutional references Committee, Commonwealth of Australia, chapter 4 – Ministerial Discretion [available at http://www.aph.gov.au/senate/committee/legcon_ctte/Migration/report/index.htm]

but not because they are in need of protection for a Convention reason. This is not complementary protection. Complementary protection is based on a set of international obligations that States (including Australia) have entered into, whereas humanitarian or compassionate reasons for granting protection are about a moral concern or consideration for individual circumstances above and beyond a country's obligations. It can include people who are simply too old or too sick to be returned.

The difference is that complementary protection refers to obligations that States have voluntary entered into under international law, whereas humanitarian grounds refer more broadly to compassionate cases or cases where people might be very elderly and shouldn't be sent back or have health reasons that should allow them to stay. Sometimes there may be protection or international human rights grounds on which these decisions may be based. But I try to define complementary protection as being quite distinct from things that we would think of as general humanitarian or compassionate reasons.

Dr Jane McAdam, University of NSW

Myth 4: The Convention offers the best protection to asylum seekers and anything else would be inferior.

The Australian government has argued in the past that the Refugee Convention offers more rights and protections than the other international legal conventions that form the basis of complementary protection. Hence Australian government officials under the former Howard government suggested that, in theory, there might be a situation where a person thinks that s/he is only fleeing from torture, but when his or her case is looked by the immigration officials it turns out that s/he is, in fact, a Convention refugee and is thus eligible for a protection visa. Thus, the Howard government claimed that the current system protects the claimants by affording them the most generous form of protection, even if they themselves seem unaware of it.

While this situation is theoretically possible, none of our interview subjects were able to name a case where this had actually occurred. However, even if it were true, it would not assist in the reverse situation, where a person is not a Convention refugee, but fears torture or other inhuman or degrading behaviour. Under the current system this person would not be able to access the rights and protections of the Refugee Convention. Instead, they would be forced to go through a procedure that s/he knows will fail, and the actual claim is not reviewed at all in the first two stages of the application for protection. The point where s/he can actually invoke the relevant legal provisions (CAT, ICCPR or the CRC) is only at the 'last gasp' stage. By then however, there is no guarantee that the Minister will actually look at the case and even if the Minister does look at it, s/he is under no obligation to address the facts and concerns the person has raised or issue a protection visa, even if they are considered. Hence for a person in this situation the Convention alone is clearly not offering the best protection.

The former Australian government was partially right, however, in that the Refugee Convention offers the best legal status and rights to a refugee once they are recognised as such, whereas the human rights treaties that trigger complementary protection needs do not explicitly confer these rights and status. According to complementary protection specialist, the University of NSW's Dr Jane McAdam, this is because of the generality of rights conferred by human rights treaties compounded by the lack of implementation of these treaties by States at the domestic level.

> "Whereas a grant of Convention status entitles the recipient to the full gamut of Convention rights, no comparable status arises from recognition of an individual's protection need under a human rights instrument....international human rights law is strong on principle but weak on delivery."[25]

McAdam goes on to argue that the treaties and the Convention should be taken by States as a whole system. The ICCPR, CAT or CRC may trigger a State's responsibility not to return an asylum seeker, but the status set out in the Refugeee Convention should attach to all those people whom this principle of non-refoulement protects.[26]

Myth 5: Those in need of complementary protection are less worthy or needy than Convention refugees and are therefore not "genuine refugees".

The Convention has always made provisions for those who may fall outside its technical definition of refugee and States have consistently recognised refugees who fall outside the technical definition over the years. McAdam[27] argued that the 1956 Hungarian Refugee Crisis following the failed uprising against communism was the first time the definition under the Refugee Convention was tested. Hundreds of thousands of Hungarian asylum seekers were accepted as refugees by countries across Europe and around the world, including Australia, despite them not fitting the strict definition of a "refugee". Hence, complementary protection is an alternative basis in international law for gaining protection status. It does not imply that the claimaint is less worthy of that protection or somehow in less danger. Someone who is returned to their country and is killed for being a particular race or religion and someone who is returned to their country and dies as a result of torture will be equally dead.

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[25] McAdam, J (2006) *The Refugee Convention as a rights blueprint for persons in need of international protection,* New Issues in Refugee Research, Research Paper no 125, UNHCR, p 4

[26] "To provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the international obligations to which States have agreed. In effect, therefore, this paper argues for a reconsideration of international law as a holistic and integrated system." McAdam, J (2006) *The Refugee Convention as a rights blueprint for persons in need of international protection,* p 14

[27] McAdam, *The Refugee Convention as a rights blueprint for persons in need of international protection,* p 11-12

5 Complementary Protection in other jurisdictions

The way in which complementary protection is offered varies significantly from country to country. Most countries offer a lower legal status and fewer rights and benefits to those granted complementary protection.

The United States

In the United States, only people applying from outside of the US are eligible for refugee status under the Convention. People in need of protection who are in the US or at its borders must prove their claim for "asylum status" in the courts.[28] People can be excluded from this process for suspected terrorist activities, having access to a safe third country in which to seek asylum or if they have committed particular criminal offences including drug offences. Alongside this asylum stream, the US system allows for people who are "more likely than not" to be tortured if removed to apply for protection under the CAT provisions. If successful, they may be awarded either "withholding of removal" or "deferral of removal" status. The former affords them the same rights and benefits as successful US asylum seekers, except for family reunification or the possibility of upgrading to permanent residency. A "deferral of removal" does not give them any immigration status or require that a claimant be removed from detention. "Deferral of removal" can be quickly withdrawn once the risk of torture has diminished in the home country. CAT claims can be appealed on merits to the Board of Immigration Appeals and judicially to the Federal Courts of Appeals.[29]

Canada

In Canada, claims for protection under the Refugee Convention and of others "in need of protection" are assessed simultaneously and successful claimants under both streams are granted permanent residence rights. A "person in need of protection" includes someone outside the scope of the Convention who faces a danger of being tortured, a personal risk to life or a risk of cruel and unusual treatment or punishment.[30] Failed applicants in Canada may also apply for a Pre-Removal Risk Assessment (PRRA), which looks at any new information that has come to light since the asylum decision was made. A PRRA reviews the same grounds for protection as the asylum procedure - both the Refugee Convention and the other "person in need of protection" claims. A successful PRRA claim would also result in permanent residency.

The European Union

The European Union has a slightly different approach known as "subsidiary protection". On 29 April 2004, the European Union adopted the Qualification Directive, which sought to harmonize the different approaches to refugee legislation across Europe and provide for a consistent approach to refugee matters. Complementary protection was introduced under Article 2(e) as a "person eligible for subsidiary protection." The Directive contains a definition of persons in need of

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[28] McAdam, J (2005) *Complementary protection and beyond: How states deal with human rights protection*, New Issues in Refugee Research, Working Paper No 118, UNHCR, p 13

[29] Anker, D *Law of Asylum in the United States*, p. 570-572 and McAdam, J (2005) Complementary protection and beyond: How states deal with human rights protection, New Issues in Refugee Research, Working Paper No 118, UNHCR, p 17

[30] McAdam, *Complementary protection and beyond: How states deal with human rights protection*, p 11

protection which is broader than that enshrined by the 1951 Refugee Convention, covering people who, if returned to their country, would face a real risk of suffering "serious harm", as well as stateless people. The definition of "serious harm" includes the death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[31] The Directive also provides for broader exclusion clauses than the Refugee Convention, however, with more situations where a person potentially eligible for protection is excluded for other reasons. For example, persons who "instigate or otherwise finance, plan or incite terrorist acts or terrorist activities" are excluded, as are those who "constitute a danger to community or to the security of the country in which he or she is." (Article 17 (1)(d).[32] The EU directive also allows Member States to grant those gaining subsidiary protection a lesser legal status and fewer rights than Convention Refugees, including shorter residency permit lengths and more limited access to family unity, social welfare and health care.

New Zealand

In New Zealand, a Bill is before parliament that would introduce a formal complementary protection system by explicitly codifying New Zealand's obligations under CAT, ICCPR and the Refugee Convention into domestic legislation. The *New Zealand Immigration Bill 2007* creates a single integrated refugee and protection determination system where Convention and complementary protection claims would be considered simultaneously. It allows for protection of those at risk of torture, arbitrary deprivation of life or cruel treatment as defined by CAT and ICCPR. However, it does qualify these definitions slightly. At the time of writing this paper, the Bill is the subject of a parliamentary committee inquiry. In a submission to this inquiry, UNHCR generally welcomed the Bill, but said it had some concerns with the complementary protection section. In particular, UNHCR was concerned that in section 122 of the 2007 Bill, New Zealand was attaching some extra conditions on recognition of a protected person at risk of torture, arbitrary deprivation of life or cruel treatment above and beyond those contained in CAT and ICCPR. These individuals must also prove they are at risk of torture, in "every part of his or her country"[33] and that this risk is different to that faced "generally by other persons"[34]. UNHCR argued that if someone can show they face these risks the fact that others might be equally at risk is "an irrelevant consideration and New Zealand's convention responsibilities to protect that individual would be engaged."[35] UNHCR said section122 should be fully revised as it may not be consistent with international law.

As drafted, the Bill unduly restricts the application of 'complementary' protection to any person who individually faces protection concerns under CAT and ICCPR in every part of the country. In UNHCR's view, s. 122(b) tries to abstracts from the refugee protection context, the notion that an individual must show she/he can avoid harm in every part of the country of origin before New Zealand's convention responsibilities are engaged. This requirement – sometimes referred to as the 'internal flight alternative' or, as in New Zealand,

[31] McAdam, *Complementary protection and beyond: How states deal with human rights protection*, p 2-6

[32] McAdam, *Complementary protection and beyond: How states deal with human rights protection*, p 3

[33] Section 122 (b), New Zealand Immigration Bill 2007 [available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm]

[34] Section 122 (b), New Zealand Immigration Bill 2007

[35] *Submission by the Office of the United Nations High Commissioner for Refugees to the Transport and Industrial Relations Committee on the New Zealand Immigration Bill 2007*

the 'internal protection alternative' - is a very complex legal and factual issue that has not been adequately captured by the language of s. 122(b)."

Recommendation 6: UNHCR recommends a full revision of s. 122. As presently drafted, s.122 (a) invokes unique principles of refugee law (Article 1A(2) of the 1951 Refugee Convention) that may not be readily transferable into the context of other 'protected persons'. In addition, the statutory requirement that the risk faced by a 'protected person' be distinguished from the risk faced generally by 'other persons', and that such risk must prevail in every part of the country before 'protected status' can be granted, may not be consistent with either international refugee law or human rights law.

Submission by the Office of the United Nations High Commissioner for Refugees to the Transport and Industrial Relations Committee on the New Zealand Immigration Bill 2007

International law experts have suggested that those in need of complementary protection should enjoy the same rights as Convention refugees. This is not always the case, however, with the rights enjoyed by these asylum seekers varying considerably from country to country. In Canada, people in need of complementary protection enjoy the same rights as Convention refugees. In the United States and Europe, however, people eligible for complementary protection face more restrictions than Convention refugees. In the US, those granted relief under the CAT do not have the right to family reunification and cannot become permanent residents. The EU's Qualification Directive also has a less generous family reunification scheme for those under subsidiary protection, as well as limiting access to other benefits enjoyed by Convention refugees. This differential treatment has no basis in international law.[36] It could also lead to greater use of a country's legal appeals system in an effort to gain the more favourable refugee status.[37]

Legally there is no reason why the source of protection should require differentiation in the rights and status accorded to the beneficiary.

Dr Jane McAdam[38]

[36] Battjes, H *European Asylum Law and International Law*, Matinus Nijhoff Publishers 2006, p. 490-493.

[37] McAdam, *The Refugee Convention as a rights blueprint for persons in need of international protection,* p 16

[38] McAdam, *Complementary protection and beyond: How states deal with human rights protection*, p 5