Submission by Elizabeth Maree Thompson, Registered Migration Agent #1171762 –-
Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

1. Introduction

2. The risk of harm for Afghan Hazara Shia males on the roads in Afghanistan

3. a) Representative excerpts of Tribunal reasoning from s.36(2)(a) – Refugee Convention - remittal cases

3. b) Representative excerpts of Tribunal reasoning from s.36(2)(aa) – Complementary Protection - remittal cases

3. c) Representative excerpts of Tribunal reasoning from affirmed (not in need of Australia's protection) decision

4. The negative impact on this particular client group of a return to a Ministerial Intervention-only process in Complementary Protection matters

5. The 'administrative burden' of Complementary Protection

6. Conclusion

1. Introduction

I am a migration agent working in the Immigration Advice and Application Assistance Scheme (IAAAS), assisting those who arrive in Australia by boat to prepare protection visa applications. Since April 2011 I have assisted several hundred refugees with different stages of the protection visa application process including primary application preparation, departmental interviews, statutory and non-statutory review applications and hearings and client contact in detention centres and the community. In the last 18 months I have undertaken three self-funded research trips to Afghanistan and conducted interviews with members of the Afghan parliament as well as human rights organisations. I have travelled by road through the Hazarajat in Central Afghanistan and in parts of the capital and the regions largely off-limits to Australian diplomatic staff and UNHCR staff for security reasons. I work predominantly with protection visa applicants of Hazara ethnicity from both Pakistan and Afghanistan.

The purpose of this submission is to highlight a number of matters that appear not to have been covered in either the parliamentary debate or other submissions to the committee, in order to argue that the proposed legislation is unnecessary and counter-productive to an orderly and fair refugee status determination process.

While there has been much focus on gender and sexuality-related cases in relation to complementary protection, McAdam and Chong's excellent analysis of the 35 published RRT decisions involving complementary protection (remitted on the basis that the applicant meets the criteria in section 36(2)(aa) of the *Migration Act)* highlights that in fact the largest *single* group to have obtained protection visas on the grounds of Complementary Protection is Afghan Hazara Shia males.[1]

An examination of the decisions in these cases alongside a representative sample of cases remitted under *s.36(2)(a)* of the *Migration Act* during the same period (from 24th March 2012 until January 2014) as well as the small number of negative decisions affecting this group, highlight the enormous complexity of these decisions and the importance of leaving complementary protection decisions in the hands of trained decision-makers within the Department of Immigration and Border Protection and the Refugee Review Tribunal. The line separating positive refugee cases, from positive Complementary Protection cases and then from negative decisions is extremely fine and as committee members can see, the stakes in these cases could not be higher.

I have made reference in this submission to 18 Refugee Convention-based remittal decisions - decisions in which *"The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act"* - made by 18 different decision-makers to enable the

[1] Jane McAdam and Fiona Chong, *Complementary Protection in Australia: A Review* (Report, December 2013)

committee to sensibly compare and contrast the kind of analysis and legal reasoning which separates refugee decisions from complementary protection decisions and from decisions that, while recognising the risk of serious harm to an applicant, decline to grant a protection visa on the basis that the risk is insufficiently personal to an applicant. It is important to recognise that even in decision records in which the Tribunal declines to grant a visa, it is acknowledged that an applicant may face serious harm upon return.[2]

In a large proportion of published Afghan, Hazara Shia cases in which the question of harm along the roads arises, decision-makers come to the same conclusion: that the person in question would face serious harm. The difference between a protection visa application remitted on Refugee Convention grounds, Complementary Protection grounds, or not remitted at all is far more complex than simply the absence or presence of evidence of serious harm.

2. The risk of harm for Afghan Hazara Shia males on the roads in Afghanistan

The key questions in the cases under discussion - the 11 Complementary Protection cases cited by McAdam and Chong[3] and the 18 refugee cases reference herein - are: Were the numerous Hazaras who are reported to have been killed and harmed along these roads by the Taliban, killed for reasons of their race and religion? Do these Hazara applicants face a risk of serious harm not faced by the population of Afghanistan generally?

It is worth quoting DFAT cable *CX310678: Afghanistan Hazara community: Situation update, Australia: Department of Foreign Affairs and Trade, 2 July, 2013* to get a sense of the dangers reported by the Australian government's own agencies.

"Many of our contacts report that security on the roads linking Kabul to Bamiyan and Ghazni has deteriorated in the last two years. There have been more and more documented cases of abductions and targeted killings perpetrated by the Taliban (and the Haqqani network) on Highway Two. These incidents have mostly occurred on the section of Highway Two which connect Kabul to the central highlands through Maidan Shahr, Jalriz, Behsood I and II districts in Maidan Wardak. One incident has also been documented on the Ghorband road between Kabul and Bamiyan in Parwan. Some attacks are likely attributable to criminal activities, rather than insurgent groups.

Hazara MPs from Ghazni and Bamiyan and several credible civil society contacts have told us that 'dozens' of Hazaras have been killed on these roads in 2013. However, it remains extremely difficult to state with any degree

[2] Jane McAdam and Fiona Chong, *Complementary Protection in Australia: A Review* (Report, December 2013) p 7 - 8

[3] Jane McAdam and Fiona Chong, *Complementary Protection in Australia: A Review* (Report, December 2013) p 4 - 8

of certainty that the victims' ethnicity was the prime criteria for targeting. Hazaras are often the main travellers on these roads (particularly Highway Two), so higher numbers of victims may reflect the higher volume of traffic. Many Hazaras are (or are perceived to be) affiliated with the either the central government or international military forces and this possibly a contributing factor as well. ***Confirmation of the level of this threat is difficult: official casualty figures are non-existent; media reports rare; and Hazaras themselves rarely report abductions to law enforcement or security authorities (given that is usually counterproductive to ensuring a positive outcome for ransom negotiations*** *- we expect any family/ethnic group would adopt this approach).*

Setting aside the question of whether the threat is targeted at Hazaras*, there is a widespread fear among Hazaras in Kabul of using these roads to travel to the central highlands, and contacts described to us elaborate protective security measures employed by Hazaras to avoid detection or to deceive those who conduct hostile checkpoints. None reported considering travelling by night."* (my emphasis)

Ministerial Direction Number 56 of 21 June 2013 under s 499 of the *Migration Act 1958* states that:

> *Where the Department of Foreign Affairs and Trade has prepared a country information assessment expressly for protection status determination processes, and that assessment is available to the decision maker, the decision maker must take into account that assessment, where relevant, in making their decision. The decision maker is not precluded from considering other relevant information about the country.*

That is, all RRT members are required to take DFAT cables on Afghanistan into account where the information is relevant to the case.

The following excerpts are representative of the reasoning used in the 18 cases cited in footnotes on the basis of the grounds of race and religion as per *s.36(2)(a)* of the *Migration Act.* All cases cited here are published RRT cases, obtained from a search of the Austlii RRT database.

3. a) Representative excerpts of Tribunal reasoning from s.36(2)(a) – Refugee Convention - remittal cases:

Member Hilary Lovibond (Melbourne) Oct 2012: *"115 Considering all of the above cumulatively, the Tribunal finds that there is a real chance the applicant will suffer systematic and discriminatory harm in Afghanistan in the reasonably foreseeable future on the basis of his ethnicity or religion. While Jaghori is not currently controlled by the Taliban, it is not certain how long this will be the case; country information cited above indicates that other parts of Ghazni are under Taliban control and there are reports of a Taliban presence in the district. As well, travel in and out of Jaghori is dangerous and there are reports of targeted killings of Hazaras on the roads. The country information above from the CPAU indicates that the government presence in Jaghori is*

extremely low and that the Afghan National Police and Afghan National Army are rarely seen in Jaghori. The Tribunal considers that cumulatively, these factors create a situation in which the likelihood of the applicant being seriously harmed is not remote, and finds that the applicant's fear of persecution for reason of his ethnicity or religion is well-founded.

□□□□ *The Tribunal finds that the harm faced by the applicant would be serious harm amounting to persecution as envisaged by ss.91R(1)(b) and 91R(2) as it would be likely to involve a threat to his life or serious physical harassment or ill-treatment. The Tribunal finds that the persecution would be systematic and discriminatory as it would be selective, deliberate and non-random as it would be directed at the applicant as a Hazara and/or as a Shi'a Muslim. The Tribunal finds that the applicant's ethnicity and religion would be the essential and significant reasons for the persecution."*[4]

Member Andrew Jacovides, (Sydney), August 2012: *"51. The Tribunal has formed the view that the applicant's religion and his ethnicity will place him at risk of serious harm by the Taliban, and other insurgent groups associated with the Taliban, if he returns to his former home in Ghazni.* ***The Tribunal has noted that there are differing views regarding the difficulties which Shia Muslim Hazaras face in Ghazni.*** *Nevertheless, the Tribunal is satisfied by the information from external sources that Hazaras in Ghazni face an increased risk of harm by the Taliban, and persons associated with the Taliban, such as the Kuchi people, because of their race and religion. The Tribunal has formed the view that the applicant is not a person of particular interest to the Taliban or other insurgents in Ghazni. However, given the rapidly changing security situation in the region, as well as the Taliban's continuing resurgence, and the animosity it has historically demonstrated towards Shia Muslim Hazaras,* ***the Tribunal cannot be satisfied that the risk of harm for the applicant will be remote or insubstantial or a far-fetched possibility in the reasonably foreseeable future.*** *The Tribunal is satisfied that under current conditions, and those which may prevail in the foreseeable future, the applicant cannot safely return to Ghazni."*[5]

Member Adam Moore, (Melbourne) December 2012: *"87 Against this, the Tribunal notes the evidence of Professor William Maley and Associate Professor Alessandro Monsutti, both of whom indicate that while some gains have been made by Hazaras, the deep-seated causes of discrimination against Hazaras remain unchanged. Both Maley and Monsutti indicate that the gains made by some Hazaras have not been enjoyed by all and further, that they may not last. Having weighed carefully the information outlined above, the Tribunal does not consider the reported absence of "targeted persecution" eliminates the likelihood that Hazaras may be harmed for reason of their ethnicity or their religion.*

---

[4] 1211431 [2012] RRTA 975 (19 October 2012) (Hilary Lovibond) Melbourne

[5] 1211829 [2012] RRTA 737 (28 August 2012) - Andrew Jacovides (Sydney)

88 The Tribunal has had regard also to the evidence of respected commentators including Giustozzi, Ruttig and the International Crisis Group with respect to the transition of power in Afghanistan and the prospects this presents for sustainable peace and security and notes that there are strong arguments to suggest that this process is likely to lead to a resurgent Taliban. The Tribunal notes that in some areas, as described above in relation to Ghazni, the Taliban already has a strong presence and significant authority and also that a number of AOG attacks of significant scale and impact have been carried out over the past two years in Kabul. In this context, the Tribunal prefers the evidence of Maley and Monsutti as an indicator of what is likely to occur in the reasonably foreseeable future than the observations of the international agencies cited above with respect to the current situation. Taking all of the foregoing into account, the Tribunal finds that on balance, the independent evidence indicates that Hazaras in Afghanistan if not now in areas such as Jaghori from which the applicant hails, will be at risk of harm for reason of their ethnicity and religion in the reasonably foreseeable future."[6]

Member Christopher Smolicz (Perth), November 2012: *"87* ***The Tribunal notes even the DFAT report concedes travel in and out of districts, including Ghazni could still be dangerous in the context of broader security in Afghanistan although drew the line at finding any ethnic group was a particular target. The Tribunal considers it open on the country information before it to find that Hazaras are particular targets when confronted by the Taliban at road blocks.***
88 The Tribunal has considered whether the applicant could return to his home district of Jaghuri in the province of Ghazni in Afghanistan. The Tribunal has taken into account the information provided by the UNHCR, cited above, which suggests relocation, or in this case return, may be reasonable where the person can seek protection with members of their extended family.
89 The Tribunal finds that as a Hazara Shia Muslim travelling to Jaghuri he will be exposed to serious threats of harm that are not remote or insubstantial or a far-fetched possibility. ***The Tribunal notes that the information on Jaghuri indicates it is an economically poor area with limited opportunity for someone of the applicant's profile to make a living. The Tribunal finds that the need to work and potentially to travel out of the Jaghuri district for this purpose would place the applicant at a real chance of serious harm from the Taliban.***
90 The Tribunal is not satisfied in the circumstances that the applicant can return to Jaghuri as although the Tribunal accepts a settled Hazara living in Jaghuri may well be safe from persecution from the Taliban, ***in the applicant's circumstance where he will be faced with risks associated with first travelling to Jaghuri and then subsequent travel in order to find work, the Tribunal finds there is a real chance he could be targeted as a Hazara Shia on such travel.***
91 The Tribunal finds the harm the applicant fears from the Taliban is for reason of his religion and ethnicity. The Tribunal is satisfied the persecution is

[6] 1212746 [2012] RRTA 1076 (3 December 2012) - Adam Moore (Melbourne)

systematic and discriminatory and amounts to serious harm as it includes a threat to life or liberty, significant physical harassment or ill-treatment.
92 The applicant primarily fears harm from the Taliban, a non-state insurgency group. However, harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-state actors is Convention-related, and the state is unable to provide adequate protection against the harm."[7](my emphasis)

Member Andrew Rozdilsky, (Sydney) January 2013: 79 *"The Tribunal finds that the applicant would be flying in to Kabul. Roads are patrolled by Taliban, have Taliban checkpoints, and Hazaras are at risk of being killed, if in any manner, they stand out. According to country information about Taliban road blocks and travel between Kabul and the Hazarajat to get to the Hazara areas of Ghazni, there is a real chance that the applicant would be subject to systematic and discriminatory conduct by the Taliban that will result in serious harm, such as being killed, or face serious ill-treatment because of his ethnicity or religion."*[8]

These cases and the cases referred to in footnotes[1], represent 18 refugee cases decided in Afghan Hazara Shia cases (by 18 different decision-makers) decided on very similar factual bases (and with access to the same country information) to the 11 Afghan Hazara Shia cases referred to in Jane McAdam's analysis (decided by two decision-makers): the threat to Hazara Shias, on the basis of ethnicity and religion, from Taliban checkpoints in Ghazni province, in particular the road between Ghazni City and Jaghori. There are a large number of other positive refugee cases of Afghan Hazara Shia males from the same period, but the particular cases outlined herein recognise the threat based on group identity – race and religion – more than on the individual circumstances such as employment with US forces or NGOs central to other decisions.

These 18 decisions acknowledge that while Taliban road blocks potentially affect all travellers, that Hazaras and Shias are a particular target of the Taliban; that the threat of serious harm for Hazaras and Shias at Taliban checkpoints is for the essential and significant reasons of their race and religion. These decisions are based on both historical and current evidence of the Taliban movement's ethnically and religiously based hostility towards Hazaras.

---

[7] Christopher Smolicz (Perth) 1212941 [2012] RRTA 1041 (20 November 2012)

[8] Andrew Rozdilsky 1214195 [2013] RRTA 47 (25 January 2013) - see similar reasoning by Member Chris Keher: 1213881 [2012] RRTA 1044 (21 November 2012); 1214904 [2013] RRTA 211 (7 March 2013) – Roger Fordham (Adelaide); 1215271 [2012] RRTA 1163 (10 December 2012) – Jane Marquard – (Sydney); 1215631 [2013] RRTA 58 (11 January 2013) – Stuart Webb (Melbourne); 1216866 [2013] RRTA 139 (6 February 2013) – Wendy Boddison (Melbourne); 1217848 [2013] RRTA 661 (26 September 2013) – Charlie Powles (Melbourne); 1216766 [2013] RRTA 516 (9 August 2013) – Mila Foster (Sydney); 1305255 [2013] RRTA 471 (15 July 2013) – Robert Wilson (Sydney); 1303910 [2013] RRTA 448 (11 July 2013) – Paul Fisher (Melbourne; 1305063 [2013] RRTA 400 (7 June 2013) – Magda Wysocka (Melbourne); 1303828 [2013] RRTA 350 (14 May 2013) – Marten Kennedy (Adelaide); 1300757 [2013] RRTA 319 (15 April 2013) – Alison Murphy (Melbourne); 1215016 [2013] RRTA 169 (18 February 2013) – Filip Gelev (Melbourne)

In many of the cases under discussion, there is recognition that while the area of Jaghori (a predominantly Hazara, Shia-populated area in Ghazni province) is not under Taliban control, that thoroughfares used by its population to access the means of subsistence, frequently are. The decision-makers could be said to be using a variant of what is referred to as the "Anne Frank principle" as it is described in the case of *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action; and HT (Cameroon) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action [2010] UKSC 31* which is itself a reiteration of the judgement of Madgwick J in the Australian case Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132**.** In this judgement, Lord Walker outlined the absurdity of an argument based on the idea of the persecuted living in hiding to avoid their persecutors, effectively what applicants from Jaghori would be forced to do if prevented from travelling outside their district to access the means of subsistence:

106. These principles also answer the "Anne Frank" question which is discussed in the case-law and which was the subject of argument on this appeal. In Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132, a political opinion case, the Minister argued that the Tribunal was only required, under the terms of the Convention, to consider whether the applicants would be punished for their political opinions; ***and that since the applicants had claimed to have operated clandestinely in the past and gave no indication that they would not do so in the future, it was appropriate for the Tribunal merely to ask what the prospects were that the authorities would discover their activities in the future****. Madgwick J said (at [18]):*
"… ***upon the approach suggested by counsel for the [Minister], Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote,*** *she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation."*
107. In this case the Secretary of State argued that had Anne Frank escaped to the United Kingdom, and had it been found (improbably, as the Secretary of State recognised) that on return to Holland she would successfully avoid detection by hiding in the attic, ***then she would not be at real risk of persecution by the Nazis, and the question would be whether permanent enforced confinement in the attic would itself amount to persecution. Simply to re-state the Secretary of State's argument shows that it is not possible to characterise it as anything other than absurd and unreal. It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution."*** (my emphasis)

In other words, just as it would be considered unreasonable to argue that Anne Frank would not be persecuted if she could hide in the attic and remain undetected by the Nazis, so it is unreasonable to imagine that Hazaras can hide in the Hazara-majority area of Jaghori to avoid Taliban checkpoints,

given the evidence before the Tribunals, indicating that it was likely that these men would have to travel outside the Jaghori area to access the means of subsistence.

3. b) Representative excerpts of Tribunal reasoning from s.36(2)(aa) – Complementary Protection - remittal cases:

McAdam and Chong's analysis[9] outlines in detail the reasoning used in the cases remitted on Complementary Protection grounds, under section 36(2)(aa). However, for the benefit of the committee, it is worth citing at length here the reasoning used by the member responsible for the majority of cases of this profile: that of Member David Corrigan (Melbourne). The DFAT information cited by Member Corrigan in this decision includes Department of Foreign Affairs and Trade, cable *CX310678: Afghanistan Hazara community: Situation update, Australia: Department of Foreign Affairs and Trade, 2 July, 2013.* The decision record in question of one of my clients.

"73 The recent information from DFAT indicates that access to employment and basic services (including health and education) is very poor across Afghanistan and that districts only have very limited medical clinics which are poorly provisioned with erratic power supply. Even relatively simple procedures require patients to travel to provincial capitals or to Kabul at significant expense. ***They also advise that residents of all districts of Ghazni province are likely to need to travel to Ghazni City or outside the province.*** *DFAT further state that in Ghazni, close to 80 per cent of employment is reliant on small scale agriculture. The applicant does not have work experience in agriculture though he does have various skills in hairdressing, construction, factory work and baking. I accept that the applicant in order to support his family (given his specific employment skills) may have to occasionally travel through areas that are dangerous for the purposes of this work and that he and his family would need to occasionally travel outside the area for other reasons such as obtaining medical care. Though the Bamiyan Road appears to be relatively safe, the information indicates that it can be regularly inaccessible in winter due to snowfalls which would mean that the Qarabagh route to Ghazni City would have to be employed. Given, Ghazni City is the closest provincial capital, it would also on occasions have to be used to obtain necessary medical care for the applicant, his wife and his three young children. Considering this country information and the applicant's individual circumstances, I accept that he faces a real chance of persecution in the reasonably foreseeable future on the roads outside Jaghori.*

74 A key question is whether the applicant would face a real chance of persecution for a Convention reason on the roads surrounding Jaghori.

I have taken into account information that suggests that he would. For example, the comments of the Hazara MP set out above that it can be more difficult for Hazaras if they are kidnapped by the Taliban due to their lack of family and tribal networks to secure their release. I have had regard to the evidence from Kazem-Stojanovic that Hazaras are treated more violently and

[9] Jane McAdam and Fiona Chong, *Complementary Protection in Australia: A Review* (Report, December 2013)

are more at risk of death when involved in confrontations with Taliban than other ethnic groups, including at Taliban checkpoints. I also have regard to the similar evidence from Monsutti that Hazaras are currently under threat of being harmed or killed by the Taliban, more so than some other ethnic groups, in part because the Taliban consider the Hazaras to be "against them" or their "potential enemies" However, I have given greater weight to the country information from DFAT that indicates that travel is dangerous for all ethnic groups and that their Afghan and IC contacts had stated that they were not aware of any particular targeting of ethnic groups on the roads. In their most recent report they state that nobody they spoke to was of aware of targeting of any particular ethnic group on the roads. They had also commented that they believed the majority of violence was related more to criminality than the insurgency, focusing on bribes and protection. DFAT have commented that travel could be still be dangerous in the context of the broader security situation in Afghanistan but the situation was equally risky for all travellers and there was no clear evidence any ethnic group was a particular target of it. I have given the DFAT information greater weight because it is more recent and DFAT have been specifically charged with giving advice to the Australian government on such matters. Their advice is also consistent with the comments of Professor Saikal and the UNHCR Guidelines that do not indicate that Hazaras have a particular risk profile. Based on this information, I find that there is not a real chance that the applicant in his individual circumstances would face serious harm amounting to persecution from the Taliban or anyone else for the essential and significant reasons of his race, religion and imputed political opinion whilst travelling on the roads surrounding Jaghori.[10]"

Unlike the 18 decision-makers in the cases above, Member Corrigan explicitly defers to the DFAT cable *CX310678* to decide that whilst Hazaras and Shias are not targeted by the Taliban for reasons of their race and religion, they do face serious harm. The 18 decision-makers cited in the cases above, taking the DFAT cable into account, consider that there is enough evidence from other country information sources to establish a risk of serious harm for reasons of race and ethnicity.

RRT decision-makers are required to take DFAT cables into consideration, consideration that is evident in every one of the decisions examined. However, as is appropriate for an independent tribunal, RRT decision-makers are not required to agree with the assessment and are free to consider other independent country information and make conclusions that may differ from those made by the Department of Foreign Affairs and Trade.

3. c) Representative excerpts of Tribunal reasoning from affirmed (not in need of Australia's protection) decision:

Mara Mustafine (Sydney) March 2013: *"I accept that, in common with other travellers, the applicant would face some degree of danger (amounting to a real risk of harm) in relation to possible attacks by insurgents or others while*

[10] Corrigan RRT case 1215936 [2012] RRTA 1140 (29 November 2012)

travelling on insecure roads. However, I am satisfied that the real risk is one faced by the population of the country generally and not one which is faced by the applicant personally and is therefore caught by the exclusion discussed in paragraph 18 above."[11]

The difficult legal questions confronting decision-makers in all these cases revolve around an assessment of the motivations of the Taliban in an area in which no DFAT or Immigration official is able to obtain first-hand information because of precisely the dangers elaborated on in every Afghan Hazara Shia case from this part of Afghanistan: the high likelihood of being tortured or killed along the highways by the Taliban.

4. The negative impact on this particular client group of a return to a Ministerial Intervention-only process in Complementary Protection matters

It is vital to note that a significant number of the Afghan Hazara Shia applicants in the complementary protection cases under discussion have no or minimal formal education. **Currently, assistance with Ministerial Discretion applications under section 417 or section 351 is NOT available to applicants who are provided assistance under the IAAAS scheme**. Presuming that the IAAAS scheme continues to be funded, the Minister's proposal would leave this group of particularly poor, under-educated and vulnerable applicants significantly disadvantaged in relation to other applicants at risk of serious harm: in the position of having to argue over the minutiae of country information in one of Afghanistan's most under-reported regions, as well as the complex legal questions of state protection, relocation and what constitutes personalised risk, that as per Section 36 (2B) of the *Migration Act* can exclude a person from eligibility for Australia's protection – most likely unrepresented.

Deputy Principal Member (MRT and RRT), Amanda McDonald has outlined the mechanisms that contribute to the high performance standards and accountability of the Refugee Review Tribunal. [12] Crucially, Ms McDonald highlights how the RRT process, unlike the Ministerial Intervention process, ensures that vulnerable applicants and unrepresented applicants are NOT disadvantaged by a lack of education, access to information or representation:

"The inquisitorial system seeks to ensure that applicants who are not represented are not disadvantaged, and in particular, are not adversely affected by an inability to access information. ***About 30% of review***

[11] Mustafine (Sydney) RRT case 1219643 [2013] RRTA 217 (12 March 2013)

[12] Amanda MacDonald, (Deputy Principal Member
Migration Review Tribunal and Refugee Review Tribunal) "*Merits Review of Refugee Status Decision Making"* Presentation to Global Manager Refugee and Humanitarian Conference, Sydney 15 March 2012

applicants do not have a representative and the quality of representation can vary before the Tribunal as it does before the Department."[13]

The Minister's office does not have the resources, expertise or appropriate distance from political imperatives to ensure that vulnerable, uneducated applicants with limited capacity to articulate their own claims are actually heard.

Professor James Hathaway cautions against allowing political considerations to taint the refugee determination process:

> *"As Goran Melander has noted, we have "a definition of the term 'refugee' which is applicable when political considerations do not prevent states from recognizing a person"…..*
>
> *…Human rights information must therefore be considered in as full and value-neutral a way as possible. If the focus is genuinely to be the welfare of the involuntary migrant, decision-makers must afford weight to inconvenient and politically awkward information that is demonstrative of the risk associated with return."*[14]

Deputy Principal Member (MRT and RRT), Amanda McDonald has outlined the mechanisms that contribute to the high performance standards and accountability of the Refugee Review Tribunal:

"Members are required to conduct an independent review of a case and cannot be directed as to the outcome of a particular case. All Members have performance agreements and their performance is reviewed annually. Members must maintain high standards of conduct, perform their tasks without bias, and are bound by a Code of Conduct published on our website."[15]

Member McDonald refers to the important educative function that RRT decisions provide for primary decision-makers.[16] Unlike primary decisions, for which applicants have an automatic right of review, RRT decisions can only be reviewed if there is a legal error found. With one eye on the courts, RRT Members provide detailed decision records, which reflect not only the most recent country information and a considered decision-making process, but

---

[13] Amanda MacDonald, (Deputy Principal Member Migration Review Tribunal and Refugee Review Tribunal) "*Merits Review of Refugee Status Decision Making"* Presentation to Global Manager Refugee and Humanitarian Conference, Sydney 15 March 2012 pg 4

[14] Hathaway, James 1999 The Law of Refugee Status, pg 82

[15] Amanda MacDonald, (Deputy Principal Member Migration Review Tribunal and Refugee Review Tribunal) "*Merits Review of Refugee Status Decision Making"* Presentation to Global Manager Refugee and Humanitarian Conference, Sydney 15 March 2012 pg 2

[16] Amanda MacDonald, (Deputy Principal Member Migration Review Tribunal and Refugee Review Tribunal) "*Merits Review of Refugee Status Decision Making"* Presentation to Global Manager Refugee and Humanitarian Conference, Sydney 15 March 2012 p 3

guidance provided to them by the courts. In my experience, these publically available decisions are of enormous assistance to primary decision-makers of the Department of Immigration and Border Protection and are gratefully received as submissions in support of applicants of a similar profile. Many DIBP members do not have the benefit of the extensive legal education or decision-making background of many RRT members.

5. The 'administrative burden' of Complementary Protection

Understanding that it is difficult for Committee members to appreciate the bureaucratic processes that takes place during the refugee determination process, I will also try to explain the minimal administrative burden involved in complementary protection decisions being made by the Onshore Protection officers of the Department of Immigration and Border Protection and Members of the Refugee Review Tribunal.

To put it simply, there is not a significant administrative burden involved in asking a departmental decision-maker or RRT decision-maker to consider broad human rights instruments and the definition of serious harm when considering a protection visa application because there is no additional *process*. There is no additional interview, no separate tribunal, *only* an additional set of criteria that a decision-maker must consider during the same interview and determination process. I invite the Committee members to read in full some of the decision records cited herein and in McAdam and Chong's analysis. One can easily follow the decision-maker's method: after ruling that an applicant is not a refugee, the decision-maker goes on to use largely the same facts to make a determination against the *36(2)(aa)* criteria.

To suggest that expecting knowledge of relevant human rights instruments is an unnecessary administrative burden for those making life or death decisions on protection visa applications is frankly absurd. Removing Complementary Protection visas from the statutory process will not only overwhelm the Minister's office with complex cases better handled by those trained to do so, but it will deprive the Minister's office of the guidance of the Refugee Review Tribunal and the courts in relation to these difficult legal matters – in particular the line between complementary protection and refugee convention cases.

Protection Visa Determination officers are constantly confronted with complex individual cases for which they are required to do more or less research depending on the circumstances of the case and the experience of the officers. For some cases, particularly cases of religious and ethnically-based persecution, a case officer's job may be made easier by access to a wealth of information from within the department of, for example, the persecution of Christians in Pakistan, or LGBT individuals in Uganda. The applicant's case may be one of scores from the same ethnic or religious group decided by the department in that year. For other cases, for example, political cases or cases based on membership of a particular social group, a case officer may be confronted with the need to research relatively obscure material. This is the only type of administrative burden one can conceive of in relation to the additional criterion in the Migration Act for deciding the matter of complementary protection: that case officers and RRT members responsible

for making life or death decisions be required to have an understanding of the concepts of torture, arbitrary deprivation of life and cruel and unusual punishment and how they may be relevant to a particular case.

Members of the Committee can see for themselves, by reading any one of the cases determined since the introduction of section 36(2)(aa) of the *Migration Act*, that the determination process is relatively simple in an administrative sense. Using largely the same facts as considered for a refugee claim, the decision maker asks themselves: if the applicant is not a refugee, not at risk of harm for one of the "5 reasons" that make up the Refugees Convention, is there any other risk of harm imminent if the applicant is returned to their home country? Is this harm generalised, or more specific to the applicant? Certainly there are legal complexities. However RRT Members and indeed departmental decision-makers already have the benefit of a 102-page training manual co-authored by internationally-renowned authority on Complementary Protection, Jane McAdam. As Complementary Protection matters are decided, challenged and litigated, the body of knowledge and Australian jurisprudence on which departmental decision-makers can draw to make these important decisions is expanded and their job becomes substantially easier.

6. Conclusion:

Without the benefit of section 36(2)(aa), these complex cases would all have to be decided by the Minister. There will be no oversight, no way for the Parliament or the public to assure itself of the propriety of Ministerial decisions, that the decisions are not influenced by irrelevant or irrational considerations, or driven by policy imperatives other than concern to save the life of those in need of international protection.

As Afghan Parliamentarian Ramazan Bashardost explained to a demonstration of deported asylum-seekers outside the Afghan Parliament in November 2013:

"The foreign minister must go to Australia and make it clear that there is a war threatening the lives of Afghans," *Bashardost said in reference to Canberra's "Stop the Boats" policies which dictate that any asylum-seeker arriving by boat must be transferred to another country while their case was under review.*[17]

The purpose of illustrating these cases is so that Committee members can understand the complexities confronting decision-makers in these cases, particularly the difficulty of collecting up-to-date country information in a conflict zone such as Afghanistan. These are life and death decisions. They should be handled with care, diligence and appropriate distance from political considerations.

[17] Ali M Latifi, "Afghan Minister grilled over migrant rights" 9th November 2013 *Al Jazeera* http://www.aljazeera.com/news/asia/2013/11/afghan-minister-grilled-over-migrant-rights-201311920362997657O.html

I would be happy to address the committee at any public hearings scheduled to elaborate on or clarify any matters in this submission.

Kind regards,

Elizabeth Maree Thompson
Registered Migration Agent #1171762

23rd January 2014