Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

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28 September 2009

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28 September 2009

To the Committee Secretary,

First and foremost we would like to congratulate the Government on the initiative reflected in the Migration Amendment (Complementary Protection) Bill 2009 ("**Complementary Protection Bill**"). It is clear that the Bill reflects a positive step forward for Australia in satisfying its international human rights obligations.

Although we do not seek to detract from this positive initiative, we consider it important to outline a number of concerns that we have with the Complementary Protection Bill as it is currently drafted. Given the tight timeframe it has not been possible to be comprehensive. We have instead focused in on seven key concerns. For each concern, we have provided a corresponding recommendation.

We hope that this submission is of assistance to the Committee. Please do not hesitate to contact us if you would like any clarification or further information on anything contained within this submission.

Yours sincerely,

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Contents

Glossary

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
UNHCR	United Nations High Commission for Refugees

Executive Summary

A **summary of the recommendations** made in this submission are set out below.

Recommendation 1:

Sub-section 36(2A) should read as follows:

"(2A) The matters are that:

(a) Australia has protection obligations under Article 3 of the Convention against Torture;
(b) Australia has protection obligations under Articles 6 or 7 of the International Covenant on Civil and Political Rights;
(c) Australia has protection obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty; or
(d) Australia has protection obligations under Article 6 or 37 of the Convention on the Rights of the Child."

Recommendation 2:

Whether in the form contained in **Recommendation 1**, or by incorporation of the terms of the treaty, the Complementary Protection Bill should incorporate the *non-refoulement* obligations contained within Articles 6 and 37 of the CRC.

Recommendation 3:

An application for international protection should be assessed first against the eligibility criteria under the Refugee Convention, and then, if that criteria is not satisfied, against the criteria for complementary protection.

This could be made clear by amending proposed sub-section 36(2)(aa) to read:

"(aa) a non-citizen in Australia (where that non-citizen does not satisfy the criteria mentioned in paragraph 2(a) or (b)) to whom…"

Recommendation 4:

The "intention" requirement currently contained in the definition of 'cruel or inhuman treatment of punishment' and 'degrading treatment or punishment' should be deleted.

Recommendation 5:

The phrase "necessary and foreseeable" should be deleted from proposed sub-section 36(2)(aa).

The phrase "irreparable harm" should be deleted from proposed sub-section 36(2)(aa).

Sub-section 36(2)(aa) (also taking into account **Recommendation 3**) should read as follows:

"(aa) a non-citizen in Australia (where that non-citizen does not satisfy the criteria mentioned in paragraphs 2(a) or (b)) the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk of a matter mentioned in subsection (2A)."

Recommendation 6:

Proposed sub-section 36(2B) should be deleted.

Recommendation 7:

The Complementary Protection Bill should recognise the absolute nature of the *non-refoulement* obligation, and grant some form of legal status to *all* individuals that cannot be returned, including those that the Government considers 'undesirable'.

PART 1: THE NEED FOR REFORM

We would like to congratulate the Government on the initiative reflected in the Complementary Protection Bill. It is clear that the Bill reflects a positive step forward for Australia in satisfying its international human rights obligations.

Before turning to the terms of the Migration Amendment (Complementary Protection) Bill 2009 ("**Complementary Protection Bill**"), we consider it important to briefly outline why legislation of this nature is a necessary addition to the framework of legal protection currently provided to individuals seeking international protection in Australia.

1. International protection obligations extend beyond the scope of the Refugee Convention

The fact that Australia's international protection obligations extend beyond the scope of the Refugee Convention[1] cannot be disputed.[2] Complementary protection has been the subject of considerable international scrutiny and transnational conversation. In September 2001 the Executive Committee of the UNHCR adopted a framework document entitled *Agenda for Protection*[3] ("***Agenda for Protection***"). This document was the result of a two-year consultative process on the future of the Refugee Convention, referred to as the Global Consultations on International Protection. Australia participated in these consultations, and affirmed the *Agenda for Protection*.[4]

Objective 3 of Goal 1 of the *Agenda for Protection* addresses the issue of complementary protection:

> Within the framework of its mandate, ExCom to work on a Conclusion containing guidance on general principles upon which complementary protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.
>
> States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.[5]

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[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the attendant *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Hereafter referred to in the collective as the "Refugee Convention" or the "Convention".

[2] There is now a very large body of scholarship on the existence of and scope of complementary protection obligations at international law. For the most comprehensive analysis of the scope of complementary protection see Jane McAdam, *Complementary Protection in International Refugee Law* (2007).

[3] UNHCR, *Agenda for Protection*, third edition (2003) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3e637b194&query=agenda%20for%20protection> at 28 September 2009.

[4] Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, Report (2004) (hereafter referred to as the "**Senate Select Committee Report**") [8.59].

[5] UNHCR, *Agenda for Protection*, third edition (2003) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3e637b194&query=agenda%20for%20protection> at 28 September 2009, 34.

In October 2005 the Executive Committee of the UNHCR adopted a Conclusion on complementary protection ("**ExCom Conclusion**").[6] The Conclusion arose out of a concern about the divergent state practices that had arisen in respect of complementary protection. In the Conclusion the Executive Committee:

> (m) *Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfill the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*;
>
> (n) *Encourages* States, in granting complementary forms of protection to those persons in need of it, to provide of the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interests of the child and family unity principles;
>
> …
>
> (q) *Encourages* States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied.

Although the UNHCR Executive Committee Conclusions are 'soft law' instruments, and generally considered to be non-binding, they are widely regarded as an important source of interpretative and operational guidance. They are also often used to influence the policies and practices of States.[7] It is also significant to note that Australia was a founding member of the UNHCR Executive Committee, and continues to be an active member.

The recognition of this wider ambit of the obligation to protect from *refoulement* is not just wishful thinking on the part of the UNHCR; rather it has been recognised by the relevant treaty bodies and many states have now implemented a scheme of complementary protection based on treaty obligations into domestic law. While states have always provided protection to 'humanitarian' cases that fall outside the strict ambit of the Refugee Convention, the significant development in the past few decades has been a recognition that states have an obligation – not discretion – to provide protection to a wider group of persons in need.

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[6] UNHCR Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection* (2005) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43576e292&query=Conclusion%20on%20the%20Provision%20of%20International%20Protection%20Including%20Through%20Complementary%20Forms%20of%20Protection> at 28 September 2009.

[7] Alice Edwards, *Submission to the to the United Nations High Commissioner for Refugees' Policy Development and Evaluation Service's review of the Value of Executive Committee Conclusions* (2008) <http://www.nottingham.ac.uk/law/hrlc/fmhrunit/HRLC_Submission_to_UNHCR_Review_of_EXCOM_Conclusions_March_2008.doc> at 28 September 2009.

Over the past decade complementary protection has become a feature of most Western international protection regimes. The United States of America introduced a system of complementary protection in 1999. Canada introduced a system in 2001. The European Union Council adopted a Directive in April 2004[8] requiring each Member State to introduce a system of complementary protection, in the form prescribed in the Directive, by 10 October 2006. Many of the 25 European Union Member States, including the United Kingdom, already had such systems in place. New Zealand is in the process of implementing of a system of complementary protection.[9]

Notwithstanding,

- Australia's international protection obligations;
- Australia's involvement in the Global Consultations on International Protection and subsequent affirmation of the *Agenda for Protection*;
- the Executive Committee's adoption of Conclusions on complementary protection, and the protection of stateless persons; and
- the increased global phenomenon of complementary protection amongst Western democracies;

Australia remains one of the few developed countries in the world that does not have a codified domestic system of complementary protection. Rather, the Howard Government repeatedly relied upon section 417 of the *Migration Act 1958* (Cth) ("**the section 417 power**") as the means by which it satisfies its obligations under the CAT,[10] the ICCPR,[11] the Second Optional Protocol to the ICCPR[12] and the CRC.[13][14]

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[8] Council of the European Union, *Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted*, 29 April 2004, 2004/893/EC (hereafter referred to as the "**EU Qualification Directive**").

[9] The most recent draft of the *Immigration Bill 2007* (NZ) ("***Immigration Bill***") is available at <http://www.legislation.govt.nz/bill/Government/2007/0132-2/latest/versions.aspx>.

[10] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (hereafter referred to as the "**CAT**")

[11] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) (hereafter referred to as the "**ICCPR**")

[12] *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 29 ILM 1464 (entered into force 11 July 1991) (hereafter referred to as the "**Second Optional Protocol**".

[13] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) (hereafter referred to as "**CRC**").

[14] Commonwealth of Australia, *Common Core Document, forming part of the reports of States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (2006) <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~a00000Introduction+Common+Core.doc/$file/a00000Introduction+Common+Core.doc> at 28 September 2009, 81-82. See also Department of Immigration and Multicultural Affairs, *Submission to the Senate Select committee on Ministerial Discretion in Migration Matters* (2003) <http://www.aph.gov.au/senate/committee/minmig_ctte/index.htm> at 28 September 2009.

2. International and domestic criticism of Australia's reliance on section 417

Set out below is a brief overview of the criticisms leveled at the use of the section 417 power in recent years. A number of these were referred to by the Hon Laurie Ferguson MP in the Second Reading of the Complementary Protection Bill.

At an international level, the Committee Against Torture released its Concluding Observations, following consideration of the third periodic report of Australia on its compliance with CAT, on 22 May 2008. Of direct relevance, the Committee observed:

> The Committee is concerned that the prohibition of non-refoulement is not enshrined in the State party's legislation as an express and non-derogable provision, which may also result in practices contrary to the Convention. The Committee also notes with concern that some flaws related to the non-refoulement obligations under the Convention may depend on the exclusive use of the Minister's discretionary powers thereto. In this respect, the Committee welcomes the information that the same Minister for Immigration and Citizenship has indicated that the high degree of discretionary authority available to him under existing legislation should be reconsidered.
>
> The State party should explicitly incorporate into domestic legislation, both at Federal and State/Territories levels the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice. The State party should also implement the Committee's previous recommendations formulated during the consideration of the State party's second periodic report to adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister's discretionary powers to meet its non-refoulement obligations under the Convention.[15]

The Committee makes express reference to its recommendation for the implementation of a system of complementary system, as set out in the Concluding Observations following consideration of the second periodic report of Australia in 2000.

Similar observations were made by the Human Rights Committee in 2000 in its review of the third and fourth periodic reports of Australia. The Concluding Observations stated:

> The Committee notes the recent review within Parliament of the State party's refugee and humanitarian immigration policies [the *Sanctuary Under Review* Report] and that the Minister for Immigration and Multicultural Affairs has issued guidelines for referral to him of cases in which questions regarding the State party's compliance with the Covenant may arise.
>
> The Committee is of the opinion that the duty to comply with Covenant obligations should be secured in domestic law. It recommends that persons who claim that their rights have been violated should have an effective remedy under that law.[16]

More recently the Human Rights Committee was even more direct, in its consideration of Australia's fifth periodic report. The report submitted by the previous Australian Government on 7 August 2007[17] propounds the view that the section 417 power gives

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[15] Committee Against Torture, Concluding observations of the Committee against Torture - Australia, CAT/C/AUS/CO/3 (22 May 2008) [15].

[16] Human Rights Committee, Concluding observations of the Human Rights Committee - Australia, A/55/40,paras.498-528. (24 July 2000).

[17] Commonwealth of Australia, *Core Document forming part of the reports of State Parties – Australia* (2007) <http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf> at 28 September 2009, as supplemented by the Commonwealth of Australia, *Common Core Document, forming part of the reports of*

effect to Australia's obligations under the CAT, ICCPR and CRC. The Committee stated:

> The Committee is concerned at reports of cases in which the State party has not fully ensured respect for the principle of non-refoulement (art 2, 6 and 7).
>
> The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.[18]

Australia was also criticised by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Mr Martin Scheinin. Although technically outside his mandate – the very fact that it was addressed illustrating the extent of his concern – Mr Scheinin noted 'grave concern that the Migration Act 1958 does not prohibit the return of an alien to a place where they would be at risk of torture or ill treatment'.[19]

At a domestic level, the adequacy of the section 417 power in giving effect to Australia's international protection obligations was expressly considered in the *Sanctuary Under Review* Report.[20] That report is often cited as supporting the use of the section 417 power to fulfill Australia's *non-refoulement* obligations. The conclusions in that report were in fact somewhat more nuanced, highlighting some major concerns with the use of the section 417 power.

The Attorney-General's Department submitted, in its submissions to the Senate Legal and Constitutional References Committee, that there was a 'margin of appreciation'[21] as

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States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights (2006) <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~a00000Introduction+Common+Core.doc/$file/a00000Introduction+Common+Core.doc> at 28 September 2009.

[18] Human Rights Committee, Concluding observations of the Human Rights Committee - Australia, CCPR/C/AUS/CO/5 (2 April 2009).

[19] Mr Scheinin further noted that that 'the Minister for Immigration and Multicultural Affairs may, if he or she considers it to be in the public interest, intervene and substitute a more favourable decision than the Refugee Review Tribunal (sect. 417). It is of some reassurance that the Minister has published guidelines identifying Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as relevant to the exercise of the latter discretion. It is of concern to the Special Rapporteur, however, that the latter guidelines are not binding and the latter discretion non-compellable and non-reviewable. The principle of non-refoulement is an absolute one and must be adhered to in order to avoid the extradition, expulsion, deportation, or other forms of transfer of persons to territories or secret locations in which they may face a risk of torture or ill-treatment': Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Australia: Study on human rights compliance while countering terrorism*, A/HRC/4/26/Add.3 (14 December 2006) [62].

[20] Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) (hereafter referred to as "***Sanctuary Under Review* Report**")

[21] *Sanctuary Under Review* Report, [2.59]. See also Department of Immigration and Multicultural Affairs, *Interpreting the Refugee Convention – an Australian contribution* (2002) at page 3. In that report Phillip Ruddock states, the then Minister, states: '[t]here is no prescribed means by which States must give effect to or fulfill human rights obligations. In implementing their treaty obligations, State Parties enjoy a 'margin of appreciation'. This margin allows States to determine with some flexibility the best means by which to implement their international obligations given their particular circumstances'.

to how the Australian Government gives effect to its treaty obligations.[22] In that regard, a representative from that Department gave the following evidence:

> The Government does not need to legislate to regulate its own behaviour. The Government can simply undertake not to, and in fact not, refoule people. It is where obligations are going to be imposed on citizens that it is likely to be necessary to enact a law so that the Government can impose those obligations on people subject to its jurisdiction. Where the obligation is only on the Government, the Government can simply undertake to fulfill that obligation without any law to compel it to do so.[23]

The *Sanctuary Under Review* Report noted that the Australia Government was exercising its sovereign right, consistent with the principles of international law, to choose the mechanisms by which it gave effect to the obligation of *non-refoulement*.[24] In that regard, the report concluded that the section 417 power was a mechanism that *could* be used to fulfill Australia's obligations under the CAT, ICCPR and CRC.[25] However, the report further concluded that the section 417 power was not sufficient to *ensure* compliance with Australia's international protection obligations.[26] In light of this finding, recommendation 2.2 states:

> The Committee recommends that the Attorney-General, 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.[27]

The issue was revisited by the Senate Select Committee in 2004. The Senate Select Committee Report was far stronger in its criticism of the section 417 power. It stated:

> There is a serious risk that Australia is in continuing breach of Article 2 of the ICCPR because it does not have appropriate systems in place to provide 'effective remedies' for breaches of human rights instruments. It also seems likely that the discretionary process is an inadequate mechanism for offering protection from refoulement because it is incompatible with the obligations under Article 3 of the CAT, which is considered to be 'absolute'.
>
> The Committee heard from various witnesses that reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the minister's intervention at the end of a determination process which is not relevant to them.
>
> The Committee accepts the general thrust of these criticisms and concludes that Australia continues to be at risk of breaching its international legal obligations under the CAT, CROC and ICCPR not to refoule individuals in fear of torture or other forms of cruel and inhuman treatment. The Committee, therefore, cannot accept assurances from DIMIA that the minister's discretionary powers always enable Australia to meet those international obligations in respect of individual applicants. This assessment from the department contradicts the weight of evidence before the Committee.[28]

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[22] *Sanctuary Under Review* Report, [2.59].

[23] *Sanctuary Under Review* Report, [2.60].

[24] *Sanctuary Under Review* Report, [2.62].

[25] *Sanctuary Under Review* Report, [2.77].

[26] *Sanctuary Under Review* Report, [2.77].

[27] *Sanctuary Under Review* Report, 60.

[28] Senate Select Committee Report, [8.86] – [8.88].

The Senate Select Committee concluded that:

> [I]n the future complementary protection might be a significant and positive development towards eliminating the risk of Australia being in breach of its international human rights obligation. Complementary protection has the potential to enable migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Convention asylum seekers who are in genuine need of humanitarian protection. However, the Committee finds that complementary protection is a relatively undeveloped concept in the Australian context. It is for this reason that the Committee recommends that the Government give consideration to a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its international humanitarian obligations.[29]

The previous Government did not take up the recommendations of the Senate Legal and Constitutional References Committee or the Senate Select Committee.

In 2008 Elizabeth Proust addressed the issue of complementary protection.[30] In a report commissioned by the current Minister, Proust noted:

> I am attracted to the submission made to the Senate Select Committee by the Refugee Council. In refugee cases, Australia lacks a visa category for people who fall outside the criteria for the grant of refugee status and their cases are decided, on a case by case basis, by the Minister. For example, people who are stateless, fleeing countries where there is civil war and those likely to be tortured if they were to return to their countries, require the Minister to use his discretion.
>
> The Refugee Council argued that a system of complementary protection should be introduced for these people. Under such a system, there would be a single administrative process that would first consider whether a person is a refugee, and then, if the answer is no, assess whether there are grounds for complementary protection. In summary, this would require initial assessment by the Department. If the application was refused, it would go to the Refugee Review Tribunal. Both the Department and the Tribunal would have the power to recommend the grant of complementary protection. Only if the Tribunal refused, would there be a request to the Minister.
>
> This proposal has the advantage of transparency, efficiency, accountability and, for the applicant, gives more certainty and reduces the time involved in the processing. For the Minister, it would be a significant reduction in workload.[31]

Both domestically and internationally, a large number of prominent organisations have been critical of Australia's failure to implement a system of complementary protection. These include the Refugee & Immigration Legal Centre,[32] the Human Rights Law Resource Centre,[33] Amnesty International,[34] the Refugee Council of Australia,[35] the UNHCR[36] and the Human Rights and Equal Opportunity Commission.[37]

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[29] Senate Select Committee Report, [8.94].

[30] Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations* (2008) (hereafter referred to as the "**Proust Report**").

[31] Proust Report, 10.

[32] David Manne, 'The refugee system is still badly broken', *The Age* (Melbourne) 21 June 2008 <http://www.theage.com.au/opinion/the-refugee-system-is-still-badly-broken-20080620-2u4i.html?page=-1> at 28 September 2009. Note also reference to submissions of the Center in the *Sanctuary Under Review* Report, for example at [2.64].

[33] Human Rights Law Resource Centre, *Australia's Compliance with the Convention against Torture - Report to the UN Committee against Torture* (2007) <http://www.hrlrc.org.au/files/4M6OEL69DU/HRLRC%20Report%20to%20CAT.pdf> at 28 September 2009.

The above discussion paints a telling picture of the past ten years as a period plagued by inaction. Notwithstanding strong criticism from United Nations treaty bodies, various domestic parliamentary Committees and a long stream of non-Government organizations, the previous Government maintained an arbitrary and misconceived position that the section 417 power – an entirely discretionary, non-compellable and non-reviewable power – was sufficient to satisfy its international protection obligations.

In these circumstances, the current position of the Government provides a *welcome* and *long overdue* relief.

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[34] Amnesty International Australia, *Amnesty International's submission to the Select Committee on Ministerial Discretion in Migration Matters* (2003) <http://www.aph.gov.au/senate/committee/minmig_ctte/index.htm> at 28 September 2009.

[35] Refugee Council of Australia, *Submission to the Select Committee on Ministerial Discretion in Migration Matters* (2003) <http://www.aph.gov.au/senate/committee/minmig_ctte/index.htm> at 28 September 2009.

[36] United Nations High Commission for Refugees, *Submission to the Senate Select committee on Ministerial Discretion in Migration Matters* (2003) <http://www.aph.gov.au/senate/committee/minmig_ctte/index.htm> at 28 September 2009.

[37] Human Rights and Equal Opportunity Commission, Comments of the Human Rights and Equal Opportunity Commission (HREOC) on Australia's Compliance with the Convention against Torture and other Cruel, Inhuman and Degrading Treatment (2007) <http://www.hreoc.gov.au/legal/submissions/2008/080415_torture.html> at 28 September 2009.

PART 2: CONCERNS WITH THE PROPOSED COMPLEMENTARY PROTECTION BILL

Although we do not seek to detract from this positive initiative, we consider it important to outline a number of concerns that we have with the Complementary Protection Bill as it is currently drafted.

In this Part we focus on seven concerns. Given the tight time frame for submission, this should not be regarded as a comprehensive exposition of the issues raised by the Complementary Protection Bill. We have not, for example, addressed the failure to incorporate Australia's obligations under the Stateless Conventions[38]; the need for a comprehensive training program for Department officials; or other transitional arrangements. We have no doubt that these and other important issues will be identified and examined by academics and practitioners making submissions to the Inquiry.

The first three concerns are of a more general nature. The remaining four address specific provisions in the proposed Complementary Protection Bill. These are not listed in any order of importance. For each concern, we have provided a corresponding recommendation.

1. The scope of protection provided by the Complementary Protection Bill has the potential to create unnecessary confusion

Our point here is a relatively simple one. In our view, proposed sub-section 36(2A) should *directly* incorporate Australia's international protection obligations under the CAT, the ICCPR, the Second Optional Protocol and the CRC. In our view this is the most principled means of incorporating Australia's protection obligations into domestic law. With respect, it is somewhat disingenuous to claim to incorporate Australia's *non-refoulement* obligations and then, via legislative drafting, to narrow the scope of the obligations assumed under those instruments. As a practical matter, it can also lead to considerable difficulties in interpretation.[39]

The EU Qualification Directive provides a case in point. The European Union has been criticised extensively for the development of an entirely new concept, that of 'serious harm'.[40] Although the definition of 'serious harm' is framed using the language of the CAT and the ICCPR, its scope is narrower than required by international law. Criticism of the Directive has been compounded by the fact that the Directive initially contained

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[38] *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

[39] For example, the separate definitions of 'cruel or inhuman treatment of punishment' and 'degrading treatment of punishment' are likely to cause difficulties for decision-makers.

[40] See, for example Jane McAdam, *Complementary Protection in International Refugee Law* (2007); Hugo Storey, 'EU Refugee Qualification Directive: a Brave New World?' *International Journal of Refugee Law* (2008) 1. See also UNHCR, *UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence* (2008).

another category of 'serious harm', which provided that serious harm could consist of a 'violation of human rights, sufficiently severe to engage the Member State's international obligations'.[41] This provision was subsequently deleted. Dr Jane McAdam, a leading commentator on complementary protection, was particularly critical of this subtraction:

> It seems absurd to exclude known protection categories from the ambit of the Directive… Doing so does not delete such categories but simply recasts the class of non-removables with an ill-defined legal status.[42]

Legislative drafting, and the creation of narrow definitions will not in any shape or form obviate Australia's international protection obligations. Rather, it creates a 'greater splintering'[43] of the concept of international protection; creating a category of 'tolerated persons',[44] recognised as entitled to international protection, but having no domestic recourse to realise that status. This could in effect take Australia back to square one.

Recommendation 1:

Sub-section 36(2A) should read as follows:

"(2A) The matters are that:

(a) Australia has protection obligations under Article 3 of the Convention against Torture;
(b) Australia has protection obligations under Articles 6 or 7 of the International Covenant on Civil and Political Rights;
(c) Australia has protection obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty; or
(d) Australia has protection obligations under Article 6 or 37 of the Convention on the Rights of the Child."

There is nothing particularly ground-breaking about **Recommendation 1**. Indeed, this is precisely the approach adopted as regards the incorporation of the protection obligations under the Refugee Convention in current sub-section 36(2)(a) of the *Migration Act 1958* (Cth), which *directly* incorporates Article 1 of the Refugee Convention. Our proposed sub-section 36(2A) extracts the least contestable international protection obligations, each of which have been unequivocally accepted by the Australian Government. The proposed amendment goes no further. This is notwithstanding the fact that there is jurisprudence that suggests that a State's *non-refoulement* obligations may extend beyond the obligations incorporated contained in proposed sub-section 36(2)(b).

[41] See discussion in Jane McAdam, *Complementary Protection in International Refugee Law* (2007) 58, 83.

[42] Jane McAdam, *Complementary Protection in International Refugee Law* (2007).

[43] Jane McAdam, *Seeking Refuge in Human Rights? Qualifying for Subsidiary Protection in the European Union* (2004) 16.

[44] Jane McAdam, *Complementary Protection in International Refugee Law* (2007) 83.

These core obligations are all expressly referred to in the current Ministerial Guidelines in relation to the administration of section 417. Particular attention is drawn to the following paragraphs of the MSI 387 Guidelines:

> There are circumstances that may bring Australia's obligations under the [CRC] into consideration. The circumstances of any children in Australia under the age of 18 must be assessed in the light of those obligations.
>
> Particular attention should be given to the obligation at Article 3 of the CROC that requires that the 'best interests' of the child be 'a primary consideration'.
> …
> The [CRC] also includes implicit obligations that require that a child not be returned to a country where there is a real risk that they would subject to cruel, inhuman or degrading treatment.
> …
> There are circumstances that may bring Australia's obligations under the CAT into consideration. When assessing a case against the Guidelines for CAT issues, certain elements must be determined.
>
> The key element is an assessment of whether or not there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned.
> …
> Under the CAT there are no exceptions in relation to the character of the person concerned – the obligation not to *refoule* exists irrespective of whether or not the person is of bad character.
> …
> There are circumstances that may bring Australia's obligations under the ICCPR into consideration. When assessing a case against the Guidelines in relation to the *non-refoulement* obligation under ICCPR certain elements must be determined.
>
> The key element is an assessment of whether there is a real risk the person would be subjected to treatment contrary to article 6 or article 7 of the ICCPR, taking into account the circumstances of the case and all relevant considerations.
> …
> Australia's adherence to the Second Optional Protocol to the ICCPR, which abolishes the death penalty, means that to refoule a person to a country where there is a real risk that they will face the death penalty is likely to amount to a breach of Australia's obligations under the ICCPR.
> The position of the Australian Government is that the implicit non-refoulement obligation applies to all of the rights contained in Article 6 (right to life) and Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR.

Indeed, the MSI 387 Guidelines go even further that the international protection obligations captured in Recommendation 1, making reference to Articles 17, 23 and 24 of the ICCPR and Article 3 of the CRC as relevant considerations in the assessment of the section 417 power.

Our proposed sub-section 36(2A) does not alter Australia's accepted international protection obligations, but rather shifts the consideration of those obligations out of the realm of an administrative discretion, and into the structured framework of a legislative determination process.

2. The Complementary Protection Bill fails to incorporate the *non-refoulement* obligations contained in the CRC

Similar to the ICCPR, Article 6 of the CRC protects the inherent right to life.[45] Article 37 provides for protection against torture and other cruel, inhuman or degrading treatment and punishment by way of Article 37.[46] Article 37 of the CRC is wider than Article 7 of the CCPR, in that it also prohibits the unlawful or arbitrary deprivation of liberty. The Committee on the Rights of the Child has interpreted Articles 6 and 37 (at the very minimum) as entailing a *non-refoulement* obligation. The Committee has stated, in General Comment 6,

> …States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.[47]

The Committee has also expressly referred to systems of complementary protection in General Comment 6:

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[45] Article 6(1) of the CRC provides: 'States Parties recognize that every child has the inherent right to life'.

[46] Article 37 of the CRC provides: States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[47] United Nations Committee on the Rights of the Child, 'General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin' (2005) UN Doc. CRC/GC/2006/6 at [27]. General Comment 6 goes further, and provides (at [28]): 'As underage recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail extraterritorial effect and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties'. There seems to be a strong argument that the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, opened for signature 24 May 2000, 39 ILM 1286 (entered into force 12 February 2002) gives rise to a distinct international protection obligation.

> In the case that the requirements for granting refugee status under the 1951 Refugee Convention are not met, unaccompanied and separated children shall benefit from available forms of complementary protection to the extent determined by their protection needs. The application of such complementary forms of protection does not obviate States' obligations to address the particular protection needs of the unaccompanied and separated child. Therefore, children granted complementary forms of protection are entitled, to the fullest extent, to the enjoyment of all human rights granted to children in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.[48]

The Committee expressly states that the *non-refoulement* obligation is 'by no means limited'[49] to those obligations assumed under Articles 6 and 37. There is a compelling argument that the overlaying "best interests" principle contained within Article 3 of the CRC – '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' – may give rise to a *non-refoulement* obligation in certain circumstances.[50]

The proposed Complementary Protection Bill fails to expressly incorporate the *non-refoulement* obligations assumed under the CRC. This is notwithstanding an express intention to do so (as reflected in the Second Reading Speech and the Explanatory Memorandum). It appears that this omission be the result of a view that Articles 6 and 7 of the ICCPR are sufficient in scope to subsume the *non-refoulement* obligations contained in the CRC.[51] With respect, this view is incorrect.

The *non-refoulement* obligation contained in the CRC is wider than the obligation contained under the ICCPR. This is made clear in the General Comments referred to above. For example, Article 37 extends to the arbitrary deprivation of liberty.

The proposed Complementary Protection Bill fails to acknowledge the particular vulnerability and special needs of children.[52] It may be, for example, that an act that may not be considered cruel, inhuman or degrading when inflicted on an adult, would have that effect if inflicted on a child. This is the approach of the European Court of Human Rights in assessing whether feared harm satisfies the criteria of inhuman or degrading treatment pursuant to Article 3 of the European Convention of Human Rights. The Court takes the view that assessing whether the 'minimum level of severity' is met is relative; 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of

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[48] United Nations Committee on the Rights of the Child, 'General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin' (2005) UN Doc. CRC/GC/2006/6 at [77].

[49] United Nations Committee on the Rights of the Child, 'General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin' (2005) UN Doc. CRC/GC/2006/6 at [27].

[50] This argument has been cogently made by McAdam: 'Though the requirement that children's best interests shall be a primary consideration in all actions concerning them should necessarily affect States' application of article 1A(2) of the 1951 Refugee Convention, by imposing an additional layer of consideration in cases involving children, it may also constitute a complementary ground of protection in its own right. In particular, it may provide a ground for protection for children fleeing generalized violence. Goodwin-Gill and Hurwitz argue that wherever children are involved, "a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm"': McAdam, *Complementary Protection in International Refugee Law* (2007) 174-175. For the development of McAdam's argument see generally McAdam, *Complementary Protection in International Refugee Law*, above n 1, 173-196.

[51] Explanatory Memorandum to the Complementary Protection Bill, [58].

[52] Although we acknowledge this is noted in the Explanatory Memorandum to the Complementary Protection Bill, [58].

health of the victim'.[53] This is also consistent with the fact that the significance of the age of the victim is well accepted in the context of assessing 'persecution' pursuant to the Refugee Convention.[54] The express inclusion of the *non-refoulement* obligations contained within the CRC would act as a reminder to the decision-maker of the particular needs and vulnerability of a child, and highlight the importance of considering the age of the applicant in any determination process.

Recommendation 2:

Whether in the form contained in **Recommendation 1**, or by incorporation of the terms of the treaty, the Complementary Protection Bill should incorporate the *non-refoulement* obligations contained within Articles 6 and 37 of the CRC.

3. The need to retain the primacy of the Refugee Convention

We are of the view that refugees and beneficiaries of complementary protection should be granted the same legal status.[55] We therefore strongly support the current procedural framework adopted in the Complementary Protection Bill, whereby both refugees and beneficiaries of complementary protection are eligible for a Protection Visa.

As a procedural matter, we are of the view that an application for a Protection Visa should first be assessed against the eligibility criteria under the Refugee Convention (section 36(2)(a) of the *Migration Act 1958* (Cth)) and then, if that criteria is not satisfied, against the criteria for complementary protection.

Conceptually, it is widely accepted that an application for international protection should be assessed first against the eligibility criteria under the Refugee Convention. This approach is consistent with the position adopted by the UNHCR, and the recognition of

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[53] *N v United Kingdom*, Application No 26565/05 at [29]. Indeed the European Commission found a complaint against the UK's deportation of children to Nigeria admissible under Article 3 given that the children were 'ill, isolated, uneducated and suffering the loss of the facilities they enjoyed in the United Kingdom': *Fadele v UK* 70 DR 159, cited in Blake and Husain, *Immigration, Asylum and Human Rights* (2003) at 2.100 (page 100). They also cite *Taspinar v Netherlands* 44 DR 262,where Dutch authorities grant the right to remain following admissibility decision under Article 3. In the more recent decision in *Mubilanzila Mayeka v Belgium* [2007] 1 FLR 1726 the ECtHR found that Belgium had violated Article 3 in connection with the manner in which it expelled a child, namely, in the fact that it did not ensure that she was accompanied or that she was met on return to Kinshasa in the Congo. We note that the House of Lords has also recently emphasised the importance of assessing all 'foreign' (ie expulsion) cases from the perspective of any children involved. In *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 (22 October 2008) the applicants successfully challenged the removal of a mother and child to Lebanon on the basis that the compulsory removal of the child from the mother's custody (which would occur as a result of discriminatory family law in Lebanon) would violate the right to family life of both the mother and child (Article 8). Lady Baroness Hale particularly emphasised that importance of considering the case 'from the child's point of view': at [48]. For an application of this principle to the case of a young woman, see *LM (Democractic Repulic of Congo) v SSHD* [2008] EWCA Civ 325. See generally, Michelle Foster, 'Non-refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) *New Zealand Law Review* (forthcoming).

[54] For an extensive discussion of this issue in the refugee context, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007).

[55] See Jason Pobjoy, 'Treating like alike: the principle of non-refoulement as a tool to mandate the equal protection of refugees and beneficiaries of complementary protection' (2009) (forthcoming).

the Refugee Convention as the primary refugee protection instrument.[56] It also literally reflects the *complementary* nature of complementary protection. In that regard, the ExCom Conclusion on complementary protection states that a system of complementary protection should be applied 'in a manner that strengthens rather than undermines the existing international refugee regime'.[57] In these circumstances, a person should only be entitled to complementary protection if he or she does not fall within the scope of the Refugee Convention.

This approach is also consistent with the views expressed in the Explanatory Memorandum of the Complementary Protection Bill which expresses (at [50]) a desire to retain the 'primacy' of the Refugee Convention.

It is important that, notwithstanding the incorporation of a system of complementary protection, the Refugee Convention is 'fully, inclusively and progressively interpreted'.[58] It is important that individuals that would satisfy the requirements of the Refugee Convention are not 'siphon[ed]'[59] by decision-makers into a system of complementary protection on the basis that the complementary protection eligibility criteria is easier to apply (for example, the decision-maker does not have to deal with the issue of nexus). Such an approach could have the effect of 'stultifying' the development of the Refugee Convention.

In circumstances where the same legal status and attendant rights would be afforded to all persons entitled to international protection, apprehension about the development of refugee jurisprudence could be chastised as a purely academic concern. Critics may argue that the focal concern should be the protection of individuals, and that the development of jurisprudence should be a secondary concern. Although well intentioned, such criticism fails to recognise the far-reaching consequences that may flow from a limited interpretation of the Refugee Convention within a particular jurisdiction.

There is an increased recognition of the importance of engaging in 'transnational dialogue',[60] to promote a 'common understanding'[61] of the Refugee Convention.[62]

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[56] The UNHCR has referred to the Refugee Convention as 'the cornerstone of the international refugee protection regime': UNHCR Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection* (2005) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43576e292&query=Conclusion%20on%20the%20Provision%20of%20International%20Protection%20Including%20Through%20Complementary%20Forms%20of%20Protection> at 28 September 2009.

[57] UNHCR Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection* (2005) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43576e292&query=Conclusion%20on%20the%20Provision%20of%20International%20Protection%20Including%20Through%20Complementary%20Forms%20of%20Protection> at 28 September 2009.

[58] Ruma Mandal, 'Protection Mechanisms outside of the 1951 Convention ("Complementary Protection")', UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (June 2005), who reviews the following jurisdictions; UNHCR. *Asylum in the European Union – A Study of the Implementation of the Qualification Directive* (2007) 75.

[59] Jane McAdam, 'The European Union proposal on subsidiary protection: an analysis and assessment', UNHCR Working Paper No. 74 (December 2002) 7.

[60] The Honourable Justice Michael Kirby, 'Transnational dialogue, internationalization of law and Australian judges' (2008) 9 *Melbourne Journal of International Law* 171.

[61] James C Hathaway, *The Rights of Refugees under International Law* (2005) 2.

Decisions of the Federal Court and High Court of Australia are often cited in courts all around the world.[63] These comparative 'judicial conversations' are particularly important in the context of an international treaty which lacks a central interpretative body with the jurisdiction to issue authoritative views as to the correct interpretation of its key provisions, as is the case with the Refugee Convention.[64] In this context, it is vital that leading states such as Australia continue to contribute to the development and evolution of the key international treaty for the protection of refugees by continuing to engage in thorough and meaningful interpretation of the refugee definition.

Recommendation 3:

An application for international protection should be assessed first against the eligibility criteria under the Refugee Convention, and then, if that criteria is not satisfied, against the criteria for complementary protection.

This could be made clear by amending proposed sub-section 36(2)(aa) to read:

"(aa) a non-citizen in Australia (where that non-citizen does not satisfy the criteria mentioned in paragraph 2(a) or (b)) to whom…"

4. The definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' in proposed sub-section 5(1) should not include a requirement of intention

We are concerned about the inclusion of an 'intention' requirement in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment'. In our view the imposition of this additional criterion is inconsistent with Australia's international human rights obligations. It is, with respect, difficult to ascertain any justification for the imposition of this additional hurdle: the Human Rights Committee has never suggested that 'intention' is a necessary requirement in establishing a *non refoulement* obligation and indeed its jurisprudence suggests the contrary position[65]. The jurisprudence of the European Court of Human Rights in interpreting the almost identically worded Article 3 of the European Convention also clearly rejects the necessity to establish intention.[66]

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[62] For an extensive discussion of the importance of comparative analysis in the refugee context, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), Chapter Two.

[63] See, for example *Secretary of State for the Home Department v K and Fornah* [2006] UKHL 46.

[64] For example, there is no equivalent to the Human Rights Committee established by the Refugee Convention. Although Article 38 of the Refugee Convention permits one state to seek the views of the International Court of Justice, this has never been invoked.

[65] See for example *C v Australia* (900/1999), ICCPR, A/58/40 vol II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at [8.5].

[66] See *D v United Kingdom*, Application No. 30240/96, 2 BHRC at para 49; reiterated in *N v United Kingdom*, Application No 26565/05 at [42]. For an extensive discussion of this issue, with numerous citations of relevant domestic authority, see Michelle Foster, 'Non refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) *New Zealand Law Review* (forthcoming).

In addition, the Committee on the Rights of the Child has explicitly addressed this issue in its General Comment No 6 in which it explains that a State's *non refoulement* obligations under the Convention on the Rights of the Child apply:

> …irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors *or whether such violations are directly intended or are the indirect consequence of action or inaction'*.[67]

In light of this analysis we strongly recommend the deletion of the 'intention' requirement.

This concern would, of course, be obviated by adoption of **Recommendation 1**.

Recommendation 4:

The "intention" requirement currently contained in the definition of 'cruel or inhuman treatment of punishment' and 'degrading treatment or punishment' should be deleted.

5. Proposed sub-section 36(2)(aa) sets the standard of proof too high

The proposed section 36(2)(aa) sets out a combination of threshold tests. The result is a test much higher than that required under international human rights law. In addition to creating a legal test the application of which may expose individuals to the possibility of *refoulement* (notwithstanding the Government's intention), the test as currently stated is likely to create considerable confusion for decision-makers. We understand that these concerns have already been raised with the Department of Immigration and Citizenship, and we do not propose to deal with them in detail. Rather, we make two brief comments as regards the use of the phrases 'necessary and foreseeable' and "irreparable harm'.

As to the use of the phrase '**necessary and foreseeable'**, we are confused as to what precisely this is intended to add to the concept of a 'real risk'. It is generally understood that these concepts are subsumed with the concept of a 'real risk'.[68]

As to the use of the phrase '**irreparable harm'**, we understand that this has been taken from General Comment 31 of the Human Rights Committee. It is true that in seeking to explain the scope of the *non-refoulement* obligation, the Human Rights Committee has engaged the concept of 'irreparable harm'. In its General Comment on the nature of state parties' obligations, the Committee states:

> Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that

[67] United Nations Committee on the Rights of the Child, 'General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin' (2005) UN Doc. CRC/GC/2006/6 at [27]; emphasis added.

[68] See for example *ARJ v Australia,* UN Doc CCPR/C/60/D/692/1996.

> contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[69]

Similarly, the Committee on the Rights of the Child has explained in its General Comment on non citizen children:

> Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.[70]

We make two key points about the invocation of the phrase 'irreparable harm' in the Complementary Protection Bill. First and foremost, a careful reading of the above two General Comments strongly suggests that the drafters of the Bill have misunderstood the use of the phrase by the HRC and Committee on the Rights of the Child. In both General Comments the respective Committees have explained that a State's *non refoulement* obligations are enlivened when there is a real risk of irreparable harm *such as is contemplated by* Articles 7 and 7 of the ICCPR and Articles 6 and 37 of the CRC. The manifest meaning of each of these General Comments is that a risk of violation of the specifically identified articles *automatically* amounts to 'irreparable harm' ('such as that contemplated by'….).

Indeed, a correct reading of these General Comments, as well as relevant jurisprudence, suggests that the *non refoulement* obligations inherent in the ICCPR and CRC necessarily include but are not limited to the specific articles mentioned[71]. In other words, irreparable harm appears to be intended as a method to determine which articles, other than the clearly accepted Articles 6 and 7/37, may enliven a *non refoulement* obligation. There is no justification whatsoever, either in these General Comments or relevant jurisprudence, for adopting 'irreparable harm' as an additional criterion which an applicant must satisfy in order to benefit from protection from *refoulement* when Articles 6 and 7/37 are at issue.

The second point about the Bill's reliance on the phrase 'irreparable harm' is a more pragmatic one, namely, that the phrase lacks a clear meaning and would prove confusing and lead to unnecessary uncertainty and complexity for decision-makers. It is telling that the HRC, as far as we are aware, has never sought to engage the phrase itself in assessing whether a *non refoulement* obligation exists in the context of individual communications. Indeed, it is not clear from where the language of 'irreparable harm' is derived as it is not present in the jurisprudence of the HRC relating to the *non refoulement* principle nor in the General Comments dealing specifically with Articles 6 and 7. One possibility may be that the HRC has borrowed the term from its rules of procedure concerning interim

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[69] Human Rights Committee, General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) at [12].

[70] Committee on the Rights of the Child, General Comment 6: The Treatment of Unaccompanied and separated Children outside their country of origin, CRC/GC/2005/6 at [27].

[71] Indeed the HRC's decisions adopt very broad language which suggests that the *non refoulement* principle applies to all rights, and indeed the HRC has found a number of claims admissible where the *non refoulement* principle was based on rights other than Articles 6 and 7. See for example *ARJ v Australia*, UN Doc CCPR/C/60/D/692/1996; *Roger Judge v Canada*, UN Doc CCPR/C/78/D/829/1998.

measures,[72] although if this is so its relevance to such a different context is not self evident[73]. In any event, the difficulty with the adoption of this concept as a method of delimiting the scope of the *non refoulement* doctrine is that it is, as Noll points out, 'ambiguous and difficult to pin down'[74]. It thus, he argues, 'opens up a new arena for indeterminacy, turning on the question of exactly what is reparable and what is not'[75]- an assessment likely to involve medical and psychological assessments. As Maarten den Heijer has explained, the adoption of this phrase would mean that 'courts will not only have to decide upon the foreseeability of a future violation, but also on the potential consequences this not yet manifested act will have on the individual; a cumulative assessment of future contingencies'.[76]

Thus, for both principled and pragmatic reasons, we strongly recommend that the phrase 'irreparable harm' be removed from the Bill.

Recommendation 5:

The phrase "necessary and foreseeable" should be deleted from proposed sub-section 36(2)(aa).

The phrase "irreparable harm" should be deleted from proposed sub-section 36(2)(aa).

Sub-section 36(2)(aa) (also taking into account **Recommendation 3**) should read as follows:

"(aa) a non-citizen in Australia (where that non-citizen does not satisfy the criteria mentioned in paragraphs 2(a) or (b)) the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk of a matter mentioned in subsection (2A)."

6. Proposed sub-section 36(2)(2B) is superfluous, and potentially inconsistent with Australia's international human rights obligations

This concern stems from the same arguments raised at Part 2, Section 1 above.

We understand that both Canada and New Zealand have adopted/proposed similar exceptions to those contained in proposed sub-section 36(2B). In this regard, we stress

[72] Rule 92 of the HRC's Rules of Procedure (CCPR/C/3Rev.8 22 September 2005) states that: 'The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.'

[73] See Michelle Foster, Non refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law (2009) *New Zealand Law Review* (forthcoming).

[74] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000) 466.

[75] Ibid.

[76] Maarten den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-refoulement under the European Convention on Human Rights' (2008) 10 *European Journal of Migration and Law* 277 at 301.

that neither of these systems should be regarded as systems of 'best practice'. It is imperative that in developing a domestic system of complementary protection Australia returns to first principles.

If the criterion in proposed sub-section 36(2A) are satisfied, Australia's will owe protection obligations to that non-citizen. In our view it is unprincipled to exclude categories of persons who may be owed international protection obligations from the ambit of legislative criteria seeking to incorporate those very same obligations. Just as limiting the incorporation of international protection obligations by legislative drafting does not in any way limit the obligations under international law, the express exclusion of a particular category of person does not obviate Australia's international protection obligations to the individuals falling within the category.

Further to this more general observation, proposed sub-sections 36(2B)(a) and (b) are entirely superfluous, as they are subsumed within the requirement for a "real risk" contained in proposed sub-section 36(2)(aa).

Finally, proposed sub-section 36(2B)(c) is contrary to the position at international law, and in particular the jurisprudence of the HRC.[77] A similar provision appeared in the initial draft of New Zealand's *Immigration Bill*, however the provision was the subject of strong criticism.[78] It has been deleted from the current bill now before the New Zealand parliament.

Recommendation 6:

Proposed sub-section 36(2B) should be deleted.

7. Proposed sub-section 36(2)(2C) is incompatible with the absolute nature of the principle of *non-refoulement* at international law

At the outset we acknowledge the fact that the Government has recognised the absolute nature of Australia's *non-refoulement* obligations. Paragraph [64] of the Explanatory Memorandum states:

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[77] Human Rights Committee, *General Comment No 6: The Right to Life (Article 6)*, UN Doc. HRI/GEN/1/Rev.1 (1982) at [2].

[78] See, for example, Human Rights Commission, *Submission on the Immigration Bill* (2007). That submission acknowledges the difficulty in devising criteria, given the 'absence of consistent international direction'. Notwithstanding that, the Commission unequivocally states that the *Immigration Bill* as initially drafted was 'arguably inconsistent with the standards and procedures adopted by some other like minded countries'. The Commission recommended that 'the meaning of protected person [be] redrafted to ensure that it cover[ed] indiscriminate or generalized risk of violence in a person's country of origin'. In the commentary accompanying the current draft *Immigration Bill* the Transport and Industrial Relations Committee stated: 'Many submitters argued that clause 122 is inherently undesirable and fails to meet New Zealand's international obligations. Of particular concern was subclause (b) which requires that, in order for a person to gain protection status, the torture, arbitrary deprivation of life, or cruel treatment in question would "not be faced generally by other persons or from that country". In the opinion of the Refugee Status Appeals Authority, this provision is unprincipled, unnecessary and fails to meet New Zealand's international obligations…We therefore recommend that clause 122 be removed.'

> Australia's non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Australia must, however, balance the delivery of its humanitarian program with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern. There is no obligation imposed on Australia to grant a particular form of visa to those to whom non-refoulement obligations are owed. It is intended that, although a person to whom Australia owes a non-refoulement obligation might not be granted because of this exclusion provision, alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected.

It is of course correct that Australia is not obliged to provide all beneficiaries of complementary protection with the *same* protection visa.[79] Notwithstanding this, the proposed – effectively ad hoc – approach is unsatisfactory. As a cursory review of the treaty body jurisprudence makes plain, many of the cases concerning violations of the *non-refoulement* obligation arise in precisely the circumstances carved out in proposed sub-section 36(2C).

It is important that a domestic system of complementary protection make provision for individuals currently captured by proposed sub-section 36(2C). This does not necessarily require that individuals captured by this provision be granted identical status. It is important however that these individuals are not left in a form of legal limbo.[80]

By way of comparison, the proposed *Immigration Bill* contains no exceptions for the grant of complementary protection. Significantly, this was the preferred position set out by the New Zealand Government in the Discussion Paper released at the outset of its review into its current immigration legislation.[81] This position was supported by a number of Government bodies and NGOs.[82]

Recommendation 7:

The Complementary Protection Bill should recognise the absolute nature of the *non-refoulement* obligation, and grant some form of legal status to *all* individuals that cannot be returned, including those that the Government considers 'undesirable'.

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[79] See Jason Pobjoy, 'Treating like alike: the principle of non-refoulement as a tool to mandate the equal protection of refugees and beneficiaries of complementary protection' (2009) (forthcoming).

[80] Jane McAdam, *Complementary Protection in International Refugee Law* (2007) 204. There is some authority that suggests that this, in itself, may amount to a violation of Article 3 of the CAT or Article 7 of the ICCPR. See Jane McAdam, *Complementary Protection in International Refugee Law* (2007) 205-206.

[81] Department of Labour, *Discussion paper on proposed Immigration Bill* (2006) Section 14, <http://www.dol.govt.nz/actreview/document/section14.asp> at 28 September 2009.

[82] See, for example, Human Rights Commission, *Submission on the Immigration Bill* (2007).