Complementary Protection Bill

Submission By The Refugee Advice And Casework Service ("RACS") and The Immigration Advice And Rights Centre ("IARC")

Set out below are the combined submissions to the Senate Legal and Constitutional Committee Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009* (**Complementary Protection Bill**) by IARC and RACS.

1. Overview

1.1 About the Immigration Advice and Rights Centre (IARC)

IARC is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent advice to approximately 3,000 people each year and many more attend our education seminars annually. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), the *Immigration News* (a quarterly publication), client information sheets (including in relation to protection visa applications, Refugee Review Tribunal appeals and requests for Ministerial intervention) and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, past torture and trauma experiences and domestic violence victims.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration law.

1.2 About the Refugee Advice and Casework Service (RACS)

RACS is a community legal centre which provides free legal advice and assistance to people seeking refugee status in Australia. It is the only specialised refugee legal centre in NSW.

RACS was established in 1988 at the request of Amnesty International with funding from UNHCR in order to meet the increasing demand for legal assistance to people seeking asylum in Australia. Since that time RACS has provided advice and full casework representation to well over 5,000 asylum seekers. In the past 5 years alone, RACS has represented over 800 asylum seekers from more than 50 countries, over 90% of whom were found to be owed protection obligations.

RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

1.3 General overview

IARC and RACS welcome the principles and measures introduced by the Complementary Protection Bill and would like to acknowledge the important changes that have been introduced recently in an attempt to create a more humane immigration system in Australia.

While we set out below an outline of concerns we hold about specific issues in relation to the Complementary Protection Bill it is important to note that given the very short time frame in which submissions were requested there may be additional areas of concerns which have not been adequately canvassed in our submissions set out below and which we may later make additional supplementary submissions in relation to.

2. Concerns regarding the Complementary Protection Bill

2.1 Breadth of complementary protection offered

The Complementary Protection Bill provides a protection visa may be granted to a person where they face a real risk of irreparable harm on the grounds set out in the Complementary Protection Bill. These focus on deprivation of life, the death penalty, torture, cruel or inhuman or degrading treatment or punishment. It does not extend to other human rights that Australia may have recognised through its becoming a party to relevant international treaties.

This is in contrast to complementary protection legislation that has been introduced in other countries which address additional serious humanitarian considerations. For example, in its report *Complementary Protection in Europe* the European Council on Refugees and Exiles provided the following summary:

> **2.1.1 Blanket clauses**
> Four countries have clauses that refer to international obligations in general. Finland's "Immigration on other Humanitarian Grounds" can be triggered in order to "fulfil international obligations." Germany's "Temporary Suspension of Deportation" may be ordered because of "international law considerations." Switzerland grants "Provisional Admission" when deportation conflicts with its obligations under international law and the British "Discretionary Leave" may be granted in cases of flagrant denial of any right guaranteed by the ECHR.
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> **2.1.2 Family**
> Article 8 of the ECHR protects private and family life. The European Court of Human Rights has recognized it as a basis for not removing people. Following their obligations under this provision, five countries adopted complementary protection related to family matters. In Austria and the United Kingdom, the clauses explicitly refer to Article 8, whereas Denmark opted for the term "family unity". Furthermore, Irish judicial practice has interpreted "humanitarian considerations" as encompassing "family connections," and Belgium administrative practice indicates that "exceptional circumstances" comprehend a concrete family-related situation, protecting parents of a child with Belgium nationality.
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> **2.1.3 Health**
> The European Court of Human Rights has declared that persons suffering from serious illness

> may in certain circumstances fall within the scope of Article 3 of the ECHR. Most of the surveyed countries maintain mechanisms of complementary protection based on health issues. While in most States legislation makes unspecified reference to health or medical necessity, in the United Kingdom, the Home Office Asylum Policy Instruction indicates the requirement of a "serious medical condition" for granting Discretionary Leave. Belgium recently adopted a health-based independent system, consistent with the European trend.

The Complementary Protection Bill represents a valuable opportunity for Australia to enshrine important international obligations into domestic law. For example, the Explanatory Memorandum to the Complementary Protection Bill makes it clear the amendments are to further structure Australia's "*non-refoulement* obligations" under various international instruments including the *Convention on the Rights of the Child* (**CROC**). The Explanatory Memorandum considers non-refoulement obligations to be implied in the CROC. However there is no reference, express or implied, to any particular protection measures for minors in the Complementary Protection Bill. The obligations upon Australia to "ensure" the rights for children specified in the CROC should be incorporated into the *Migration Act 1958* (Cth) (**Migration Act**) as a form of Complementary Protection where appropriate.

In addition, as recommended by the UNHCR[1], Australia should also implement a process to provide a visa pathway for stateless persons in line with Australia's obligations under the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Specifically the UNHCR states that:

> … currently, in Australia, there is no avenue for Australia to consider the claims of a stateless person who does not also have a refugee claim, except under ministerial discretion, which is non-compellable and nonreviewable. In UNHCR's view, it would be desirable for Australia to establish a separate and distinct procedure for determining whether or not a person is stateless.

In light of the above, we recommend the inclusion of protection for:

- persons suffering from serious illness who would suffer serious harm if returned to their home country because of lack of appropriate health facilities or medical treatment; and
- persons who face a real risk that their rights to protection of their privacy, family and home (under Article 17 of the ICCPR) may be violated if they are returned to their country of origin or former country of residence; and
- minors whose fundamental rights as set out in the CROC would be at risk if returned to their country of origin or former country of residence, and
- stateless persons.

2.2 Section 5(1) – definition of torture

We note that the definition of torture set out in s5(1) of the Complementary Protection Bill differs from that set out in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (**CAT**). Article 1 provides the

1 UNHCR (January 2009) *Draft Complementary Protection Visa Model: Australia: UNHCR Comments* available at http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09.pdf

following definition:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In contrast to this, the definition under the Complementary Protection Bill refers only to discrimination that is inconsistent with the International Covenant on Civil and Political Rights (**ICCPR**). We recommend that wording be adopted which is reflective of Australia's obligations under the CAT by adopting the Article 1 definition of torture set out in the CAT.

2.3 Subsection 5(1) – definition of "cruel or inhuman treatment or punishment" and "degrading treatment or punishment"

We have had the benefit of reading the observations of Associate Professor Jane McAdam as set out in her paper *Observations for DIAC meeting on Complementary Protection Bill on 21 September 2009* as provided to the Department of Immigration (and attached to this submission for the Committee's reference). We agree with Associate Professor McAdam's submissions in relation to the inappropriate and unnecessary inclusion of definitions for the terms "cruel or inhuman treatment or punishment" and "degrading treatment or punishment". As referred to by Associate Professor McAdam, the UN Human Rights Committee and the European Court of Human Rights have both concluded that these terms cannot be defined. Such definitions risk a derogation from international protection obligations and are unnecessary given the plain English phrasing inherent in the term "cruel, inhuman, or degrading treatment". Therefore we recommend deletion of these definitions.

2.4 Subsection 5(1) – definition "receiving country"

The Complementary Protection Bill sets out the following definition of "receiving country":

> ***receiving country***, in relation to a non-citizen, means:
> (a) a country of which the non-citizen is a national; or
> (b) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident;
> to be determined solely by reference to the law of the relevant country.

The final phrasing of this definition sets out the determination method but is unclear and arguably unworkable in its application to an "habitual resident". It seems quite unlikely the laws of a country would be able to "solely" determine whether or not a person was an "habitual resident" of that country. They would of course provide guidance and should be a matter for consideration. We submit this definition should be reworded to remove the potential ambiguity regarding the determination method by deletion of the words "to be

determined solely by reference to the law of the relevant country". Guidance can then be included in the Departmental policy about how to determine which is the "receiving country" for a particular applicant.

2.5 Subsection 5(1) - relocating definitions of "serious Australian offence" and "serious foreign offence"

Whilst acknowledging that these definitions already exist in the Migration Act (ss 91U(2) and (3)) and the effect of this amendment is simply a 're-locating' of the definitions into the Definition section (section 5) of the Act we take the opportunity to express our ongoing concern that the inclusion of a '3 year imprisonment sentence' in the definition is not warranted. It has the effect of substantially lowering the threshold for determining whether or not a crime is a serious offence to an extent that would not find general acceptance in the Australian community.

Including a quantifying figure regarding the maximum or fixed terms of imprisonment in the legislative definition removes the flexibility and scope for mitigation inherent in any criminal jurisdiction in determining 'seriousness' of offences.

We submit there is no need to quantify a term of maximum or fixed sentence in defining whether or not a crime is a serious offence and that plain English and reasonable community standards should prevail to obviate the necessity to do so.

We recommend omitting the parts of the definitions which refer to periods of terms of imprisonment. If the Department wants to provide guidance to decisionmakers on what length of sentence would generally be considered serious this can be done in policy. The inclusion of guiding quantifying figures in policy would allow flexibility in cases where there are mitigating circumstances that may not have been foreseen by the legislative drafters.

2.6 Subsection 36(2)(aa) – standard of proof

Again we refer the Committee to Associate Professor McAdam's paper (see 2.3 above) in relation to the standard of proof as set out in s36(2)(aa) of the Complementary Protection Bill. We agree with her analysis and in light of this we would recommend that s36(2)(aa) be amended to read:

> A non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because there is a real risk that the non-citizen will be subject to a matter mentioned in subsection (2A) if they are removed from Australia to a receiving country.

As argued in Associate Professor McAdam's paper, the inclusion of the more complex test currently set out in the Complementary Protection Bill will:

- cause substantial confusion for decision-makers
- be likely to lead to inconsistency in decision-making
- impose a much higher test than is required in any other jurisdiction or under international human rights law, and
- risk Australia exposing people to *refoulement.*

We would also argue that the inclusion of a multi-faceted test with such terms as "substantial grounds", "necessary and foreseeable consequence", "real risk" and "irreparably harmed" will lead to increased litigation as applicants seek clarification as to what each of these terms means. The simplification of the standard of proof would be likely to reduce the subsequent level of litigation resulting from the introduction of complementary protection.

2.7 Subsection 36(2A) & (2B) – exclusion of risks faced by the general population

The Complementary Protection Bill sets out in s36(2A) the types of irreparable harm in relation to which a non-refoulement obligation may be owed to a non-citizen by Australia. Subsection 36(2B) excludes certain types of harm.

We are concerned by the exclusion under s36(2B) of risks "faced by the population of the country generally" that are "not faced by the non-citizen personally". We respectfully submit that this should be deleted from the Complementary Protection Bill. If the real risk is not faced by the non-citizen personally (as set out in s36(2B)(c)) then they would not satisfy s36(2A). The inclusion of s36(2B)(c) is therefore meaningless and should the subsection should be removed.

In addition the wording in s36(2A) should be amended to correspond with Article 15 of the Council of the European Union Direction 2004/83/EC of 29 April 2004 on the *minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (**EU Directive**). Under the EU Directive complementary protection (also known as "subsidiary protection") is provided where there is "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Protection is also provided in Canada to persons who may face harm as a result of civil war/generalised violence.

This issue was recently debated in New Zealand where amendments in relation to complementary protection are currently before Parliament. In its report on the relevant bill, the relevant committee reached the following conclusions:

> Many submitters argued that clause 122 is inherently undesirable and fails to meet New Zealand's international obligations.
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> 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 in 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. The UN High Commissioner for Refugees suggested that a more appropriate test would be whether the claimant "can reasonably and effectively find protection from serious harm in other parts of the country".
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> The general intent of clause 122 is that noncitizens who can avail themselves of protection in their country or countries of nationality or former habitual residence should not be recognised

> as protected persons in New Zealand. It is logical that people who are protected elsewhere should not be entitled to the protection of another country. We believe consideration should also be given to whether there are substantial grounds for believing the claimant would be in danger of torture, arbitrary deprivation of life, or cruel treatment, in every part of his or her country. This would exclude people who could escape the danger in question by moving elsewhere in their own countries. Allowing protection status to be granted to claimants who were "unwilling" to avail themselves of their country's protection could undermine the system of protection status. If claimants could argue that they are not personally willing to seek protection from their States, this would introduce a subjective element into the judgement as to their eligibility for protection, in addition to the objective question of whether the claimant was in specific danger. We believe the bill should focus on whether claimants could really access meaningful protection in their country or countries of nationality or former habitual residence.
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> We therefore recommend that clause 122 be removed. Instead, clauses 120 and 121 should be amended to make it clear that where a claimant could access meaningful protection in their country of nationality or usual habitual residence, they could not be recognized as a protected person in New Zealand.

We would respectfully agree with the submissions made by the UN High Commissioner for Refugees, and conclusions reached by the committee in New Zealand, that the appropriate test would be whether the person can relocate in order to find protection (which is currently covered under s36(2B)(a) of the Complementary Protection Bill) rather than whether the risk is faced by the population of the country generally. If a person faces a real risk of irreparable harm as set out in s36(2A) then they should be provided with protection regardless of how many other people in the country may also suffer that risk.

As set out in the UNHCR's review of Australia's proposed complementary protection regime the UNHCR believes provision should be made for the protection of persons at danger of harm as a result of generalized violence. The UNHCR has stated:

> 12. UNHCR notes that the Australian draft model currently does not extend to persons risking indiscriminate but serious threats as a result of armed conflict or generalized violence, although United Nations Member States have repeatedly reaffirmed their support for UNHCR's mandate activities to secure international protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts or serious disorder.
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> 13. While UNHCR understands that persons facing indiscriminate but serious threats could in many cases be protected through a broad interpretation of the provisions of the 1951 Refugee Convention, international human rights instruments or under ministerial discretion, UNHCR would, in principle, welcome the explicit inclusion of such persons in Australia's codified complementary protection regime.

Like the UNHCR, we would also welcome the inclusion of such persons in the Complementary Protection Bill.

Further, in light our point 2.6 above and in the interests of consistency in drafting we

recommend replacing the term *"irreparably harmed because of"* which appears in s36(2B), s36(2B)(a), and s36(2B)(b) with "*subjected to*".

2.8 Subsection 36(2A)(b) – death penalty

We agree with the submissions put forward by Associate Professor McAdam as outlined in her paper (referred to in 2.3 above) in relation to the requirement under s36(2A)(b) that the death penalty "will be carried out". As argued by Associate Professor McAdam the inclusion of these words creates additional, unrealistic criteria which may not align with the intent of the legislature. Therefore, we recommend their deletion.

2.9 Exclusion under subsection 36(2C) – defined terms and wording

The Complementary Protection Bill sets out in s36(2C) a number of circumstances in which an applicant may be refused complementary protection. This includes where "the non-citizen committed a serious non-political crime before entering Australia". Definitions are provided for "non-political crime", "serious Australian offence" and "serious foreign offence" but not for the term "serious non-political crime". While we recognise that these provisions mirror those set out in Article 1F of the Refugee Convention, the inclusion of definitions for related terms would tend to the logical conclusion that a definition should be clearly set out for a "serious non-political crime" also. For example, it may be defined as a "serious foreign offence" that is a "non-political crime".

Subsection 36(2C)(a) states that a person may be excluded if "the Minister has serious reasons for considering that…". This stands in contrast to s36(2C)(b) which excludes a person where "the Minister considers, on reasonable grounds that…". Again we recognise that the wording in s36(2C)(a) reflects Article 1F of the Refugee Convention. However, we consider that the Complementary Protection Bill should be made consistent between the two provisions to require the same standard of proof regardless of whether the person is to be excluded under (a) or (b).

2.10 Use of Article 1F exclusion clauses

We respectfully submit that it is inappropriate for the exclusions set out in Article 1F of the Refugee Convention to be transcribed into the complementary protection regime which is designed to implement Australia's obligations under other international instruments. The UNHCR has expressly recognised that although a person may be excluded by Article 1F from the Refugee Convention, they may still be owed protection against refoulement under other international instruments, including the ICCPR and CAT. The UNHCR has stated:[2]

> 26. The 1951 Refugee Convention envisages that a person who is properly excluded from that Convention under Article 1F may be returned to his or her home country, notwithstanding that person may have a well-founded fear of persecution. In this regard, UNHCR's Guidelines on the application of the exclusion clauses make the following point:

2 UNHCR (January 2009) *Draft Complementary Protection Visa Model: Australia: UNHCR Comments* available at http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09.pdf

> While a State's decision to exclude removes the individual from the protection of the Convention, that State is not compelled to follow a particular course of action upon making such a determination (unless other provisions of international law call for the extradition or prosecution of the individual). States retain the sovereign right to grant other status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against refoulement by the application of other international instruments, notably Article 3 of the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment and Article 22 of the 1969 American Convention on Human Rights.

The application of Article 1F exclusion clauses to the complementary protection regime potentially puts Australia in breach of its obligations under the ICCPR and CAT which do not contain those same exclusion clauses.

We would respectfully submit that Australia's public interest in keeping people with character concerns out of Australia is already sufficiently protected by the requirement that all applicants for a Protection Visa have to pass the character test under s501. The additional exclusions under Article 1F are therefore unnecessary and potentially in breach of Australia's international obligations.

*2.11 **Transitional arrangements***

The Complementary Protection Bill provides important protection for highly vulnerable applicants. We understand that the transitional provisions would extend the protection afforded under the Complementary Protection Bill to those applicants who may have been refused at primary level but still have an appeal on foot at the Refugee Review Tribunal.

While we welcome this concession, we would also recommend inclusion of transitional provisions which would allow those applicants who have been refused protection at the Refugee Review Tribunal but have not yet lodged a request to the Minister to benefit from the protection under the Complementary Protection Bill. We understand that the intention of the Minister in introducing the Complementary Protection Bill is to reduce the number of cases to be dealt with by the Minister under his non-compellable, non-reviewable powers to intervene under s417. In light of this it would be logical to provide some transitional arrangements for applicants who would otherwise be eligible for protection under the complementary protection provisions but for the fact that they are currently barred from lodging an application under s48A because they had their applications finalised before the commencement of the Complementary Protection Bill.

*2.12 **Inclusion of two step process***

We welcome the streamlined approach outlined in the Complementary Protection Bill whereby an application for a Protection visa will first consider whether the applicant falls within the definition of a refugee under the Refugee Convention and, if not, whether they fall within the complementary protection provisions.

However, as recommended by the UNHCR[3] it would be beneficial for a provision to be

3 UNHCR (January 2009) *Draft Complementary Protection Visa Model: Australia: UNHCR Comments* available at http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09.pdf

included in the Complementary Protection Bill requiring that written reasons be provided for why the application was refused under the Refugee Convention, even if it was accepted under the complementary protection provisions. As the UNHCR states:

> In this regard, UNHCR believes it will be important to maintain a clear distinction and rigorous approach to assessing refugee claims first, and complementary protection needs only after the refugee claim has been considered. It might be desirable to establish a clear requirement that written reasons for decisions state specifically why refugee status was declined, including in the case where no refugee status was claimed, but the claim for complementary protection was accepted.
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> 19. Clear guidelines and training for decision makers will be crucial in ensuring that the primacy and integrity of the Refugee Convention is maintained, but should also specify that a claimant's need for complementary protection should be considered, even if he/she has not specifically asked for it to be considered.

The requirement to provide reasons for a refusal under the Refugee Convention will encourage decision-makers to make robust and consistent decisions in relation to claims under the Refugee Convention. This would also ensure that there is a clear two step process where claims under the Refugee Convention are given primacy, in accordance with the recommendations of the UNHCR. As pointed out by the UNHCR:

> The 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection affirms that complementary forms of protection should only be resorted to after full use has been made of the 1951 Refugee Convention.

3. **Summary and conclusion**

We appreciate the significance of the amendments introduced by the Complementary Protection Bill and believe that they will assist to create a fairer and more humane detention system under Australian immigration law. We also appreciate the opportunity being afforded to stakeholders to make appropriate submissions in relation to the Complementary Protection Bill.

We hope that the comments above are useful for the Senate Legal and Constitutional Committee and that the adoption of our recommendations will be given appropriate consideration.

Regards

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28 September 2009

ATTACHMENT

OBSERVATIONS FOR DIAC MEETING ON COMPLEMENTARY PROTECTION BILL ON 21 SEPTEMBER 2009

Associate Professor Jane McAdam
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A STANDARD OF PROOF: s 36(2)(aa)

1 'substantial grounds for believing'[1]

In the EU, the standard of proof for subsidiary protection is that 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin … would face a real risk of suffering serious harm as defined in Article 15.'[2] The reference to 'substantial grounds' stems from the case law of the European Court of Human Rights on article 3 of the ECHR and the Torture Committee on article 3 of the Convention against Torture,[3] and was deliberately selected in order to avoid divergence between international practice and that of the Member States themselves.[4] The Torture Committee has consistently held that 'substantial grounds' involve a 'foreseeable, real and personal risk' of torture.[5] They are to be assessed on grounds that go 'beyond mere theory or suspicion' or 'a mere possibility of torture',[6] but the threat of torture does not have to be 'highly probable'[7] or 'highly likely to occur.'[8] The European Court of Human Rights has said that the

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[1] This is an extract from J McAdam, 'The Impact of the Standard of Proof on Complementary Protection Claims: Comparative Approaches in Europe and North America', in JC Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (CUP, Cambridge, forthcoming 2009).

[2] Qualification Directive, art. 2(e).

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

[4] Council of the European Union Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on September 25, 2002 Doc. 12148/02 ASILE 43 (September 20, 2002) 5. The Netherlands supported Sweden's argument that wording from decisions of the Torture Committee should be taken into account to avoid different rulings from different courts of bodies concerning similar situations: 12199/02 ASILE 45 (September 25, 2002), p. 3 fn 3. See also *Kacaj** [2001] INLR 354.

[5] See eg *EA* v. *Switzerland* (Comm. No. 28/1995) UN Doc. CAT/C/19/D/28/1995 (November 10, 1997) para. 11.5; *X, Y and Z* v. *Sweden* (Comm. No. 61/1996) UN Doc. CAT/C/20/D/61/1996 (May 6, 1998) para. 11.5; *IAO* v. *Sweden* (Comm. No. 65/1997) UN Doc. CAT/C/20/D/65/1997 (May 6, 1998) para. 14.5; *KN* v. *Switzerland* (Comm. No. 94/1997) UN Doc. CAT/C/20/D/94/1997 (May 19, 1998) para. 10.5; *ALN* v. *Switzerland* (Comm. No. 90/1997) UN Doc. CAT/C/20/D/90/1997 (May 19, 1998) para. 8.7; *JUA* v. *Switzerland* (Comm. No. 100/1997) UN Doc. CAT/C/21/D/100/1997 (November 10, 1998) para. 6.6; *SMR and MMR* v. *Sweden* (Comm. No. 103/1998) UN Doc. CAT/C/22/D/103/1998 (May 5, 1999) para. 9.7; *MBB* v. *Sweden* (Comm. No. 104/1998) UN Doc. CAT/C/22/D/104/1998 (May 5, 1999) para. 6.8; *KT* v. *Switzerland* (Comm. No. 118/1998) UN Doc. CAT/C/23/D/118/1998 (November 19, 1999) para. 6.5; *NM* v. *Switzerland* (Comm. No. 116/1998) UN Doc. CAT/C/24/D/116/1998 (May 9, 2000) para. 6.7; *SC* v. *Denmark* (Comm. No. 143/1999) UN Doc. CAT/C/24/D/143/1999 (May 10, 2000) para. 6.6; *HAD* v. *Switzerland* (Comm. No. 126/1999) UN Doc. CAT/C/24/D/126/1999 (May 10, 2000) para. 4.10; *US* v. *Finland* (Comm. No. 197/2002) UN Doc. CAT/C/30/D/197/2002 (May 1, 2003) para. 7.8.

[6] *EA* v. *Switzerland*, para. 11.3.

[7] *Report of the Committee against Torture*, UN GAOR, 53rd Session, Supp. No. 44, UN Doc. A/53/44 (1998), Annex IX.

[8] *EA* v. *Switzerland*, para. 11.3.

relevant test is a 'real risk' of torture or inhuman or degrading treatment.[9] The UK Asylum and Immigration Tribunal (AIT) has interpreted this as simply meaning that the risk 'must be more than a mere possibility'—a standard which 'may be a relatively low one'.[10]

The problem with the current standard of proof in section 36(2)(aa) is that is combines all these tests, *plus* additional ones ('necessary and foreseeable consequence'; 'irreparable harm'). It is an amalgam of thresholds that were meant to explain each other, *not* be used as cumulative tests. Accordingly, the standard of proof needs to be made much simpler, otherwise (a) it will cause substantial confusion for decision-makers; (b) it will likely lead to inconsistency in decision-making; (c) it will impose a much higher test than is required in any other jurisdiction or under international human rights law; and (d) this will risk Australia exposing people to *refoulement*.

Significantly, the UK takes the view that the 'substantial grounds' test in article 2(e) of the Qualification Directive is intended to replicate the "well-founded fear" standard under the Refugee Convention. In *Sivakumaran*, the House of Lords said that that standard implies 'a reasonable degree of likelihood',[11] which generally falls somewhere lower than the 'balance of probabilities'.[12] As the AIT stated in *Kacaj*:

> The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. … Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and

[9] See *Cruz Varas* v. *Sweden* (1991) 14 EHRR 1; *Vilvarajah* v. *United Kingdom* (1991) 14 EHRR 248.
[10] *Kacaj*, para. 12. This threshold has also been used in Canada with respect to "well-founded fear" in Convention refugee claims: *Ponniah* v. *Canada (Minister of Employment and Immigration)* (1991) 13 Imm. L.R. (2d) 241 (FCA), p. 245.
[11] *R* v. *Secretary of State for the Home Dept, ex parte Sivakumaran* [1988] AC 958 (HL), pp. 994 (Lord Keith); 996 (Lord Bridge, Lord Templeman); 997 (Lord Griffiths); 1000 (Lord Goff).
[12] Article 7(b) of the original proposal for the Qualification Directive stated that well-founded fear was to be "objectively established" by considering whether there was "a reasonable possibility that the applicant [would] be persecuted." The Explanatory Memorandum (at p. 15) noted that a "fear of being persecuted … may be well-founded even if there is not a clear probability that the individual will be persecuted or suffer such harm but the mere chance or remote possibility of it is an insufficient basis for the recognition of the need for international protection."

> the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.[13]

In that case, the AIT rejected the government's submission that a higher standard of proof was applicable to claims under article 3 of the ECHR on the basis that:

> There is nothing in the jurisprudence of the human rights' Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed, in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to result in inconsistent decisions. We therefore reject the argument of the Secretary of State on this issue.[14]

2 'necessary and foreseeable consequence'

It is unnecessary to include 'necessary and foreseeable consequence' in the provision, since the Human Rights Committee has only used this language to explain its understanding of the term 'real risk'. As it stated in *ARJ v Australia*, the risk of treatment proscribed by article 7 ICCPR 'must be real, i.e. be the necessary and foreseeable consequence of deportation'. In other words, it is not an additional element of the test – the test is 'real risk', which may be understood by asking whether the alleged harm is a necessary and foreseeable consequence of removal.

3 'irreparable harm'

This is superfluous and should be removed. As the UN HRC jurisprudence shows, the notion of 'irreparable harm' is inherent in the very nature of the proscribed treatment in art 7 ICCPR. General Comment 31 did not intend 'irreparable harm' to impose an additional test, but rather used it as a shorthand term for art 7 harms. Neither the international jurisprudence, nor that of the ECtHR or the Canadian courts, imposes 'irreparable harm' as an extra threshold.

Alternatively, non-removal to 'irreparable harm' should be used instead of the enumerated grounds set out in 2A.

Apart from the HRC reference in GC31, in international law, the notion of 'irreparable harm' is only known in the context of provisional/interim measures (eg ICJ). Its threshold in that context is very low: anything that cannot be compensated with damages. In the Inter-American Court of HR, this has been held to include a serious risk to an individual's life or personal integrity (including physical, psychological and moral integrity), an imminent risk to freedom of expression and democratic values, and restrictions on accessing counsel and other infringements on rights of due process.

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[13] *Kacaj*, para. 10.
[14] *Ibid.*, para. 15.

Thus, if a purpose of including 'irreparable harm' in the standard of proof in section 36 is to make it more difficult for applicants to prove their claim, it is unlikely it would have this effect. I would therefore recommend its deletion.

B ELEMENTS OF COMPLEMENTARY PROTECTION: s 36(2A)

1 Section 36(2A)(b):

Why does this provision require that the death penalty 'will be carried out'? Does this mean this provision is not meant to encompass the so-called 'death row phenomenon'? (See *Soering*, which ironically was actually the first case where the ECtHR found that art 3 ECHR precluded removal to situations of inhuman/degrading treatment.) How can this be ascertained in advanced? What about last-minute pardons? I would strongly recommend deleting 'and it will be carried out'.

2 Section 36(2A)(d) and (e):

(a) Intent

Why is this a requirement for 'cruel/inhuman treatment'? This imposes a higher standard than is required under international human rights jurisprudence, which means we are not fully implementing our art 7 ICCPR obligation. Is it intent to harm or intent to commit an act/omission?

(b) Enumerated acts/omissions

Why does the Bill seek to separately define cruel/inhuman treatment and then degrading treatment? The general approach is to see torture and these three forms of harm as part of a sliding scale; indeed, the UN Human Rights Committee rarely explains which of these is violated in a violation of art 7.

Furthermore, the HRC and the European Court of Human Rights (which has a very extensive jurisprudence on this notion as per art 3 European Convention on HR) have both explained that these terms cannot be defined, especially because notions of what they encompass will evolve over time (see eg *Selmouni*).

Is the Bill's definition meant to be illustrative or exhaustive? It seems unnecessary to have such an extensive list of proscribed treatment for cruel/inhuman treatment given ss (b)(v) and (c) of that definition.

(c) Clarification as to transitional arrangements

Can a person who has exhausted RRT review but has not yet lodged a section 417 apply for CP once it comes into effect?