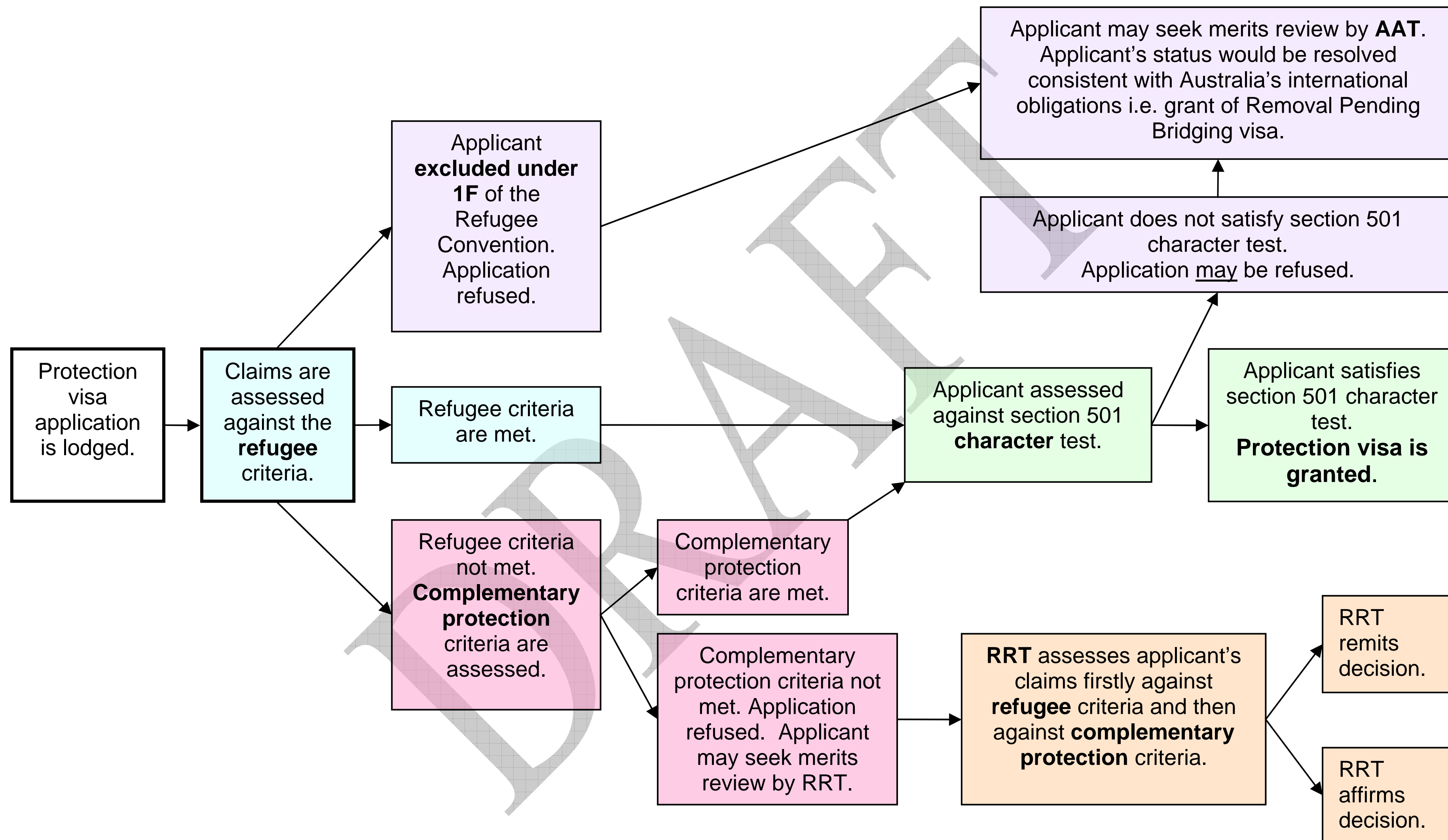
Draft Complementary Protection Model - Process Flowchart – October 2008



Draft Complementary Protection model

Introduction

The Department of Immigration and Citizenship's purpose is to support government by enriching Australia through the well managed entry and stay of people. An essential element in the practical application of our purpose is the ability to grant permission to stay (by way of a visa) to a person in Australia who cannot be returned to their home country owing to a *non-refoulement* obligation (the obligation not to return a person to a place where they may face certain kinds of harm).

Australia's *non-refoulement* obligations arise due to commitments that Australia has made through becoming a party to certain international human rights treaties. Australia's *non-refoulement* obligations protect persons to whom they are owed, from return to grave situations including persecution, torture, arbitrary deprivation of life, and subjection to the death penalty.

Australia has a *non-refoulement* obligation under Article 33(1)[1] of the *1951 Convention Relating to the Status of Refugees* (Refugees Convention).

In addition, Australia has *non-refoulement* obligations under other international treaties:

- Article 3(1) of the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (*CAT) expressly prohibits refoulement:
  - "(1) No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

- Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) implicitly prohibits return to a country where an individual would be arbitrarily deprived of their life:
  - "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

- Article 7 of the ICCPR implicitly prohibits return to a country where an individual shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment:
  - "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

- Article 1 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* implicitly prohibits the return of a person subject to the death penalty:

[1] Article 33(1) of the Refugees Convention provides that 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership .'

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– “No one within the jurisdiction of a State Party to the present Protocol shall be executed.”

- The *Convention on the Rights of the Child* (CROC) includes similar provisions as above but specifically for children (such as Article 37).

The Refugees Convention obligations are given effect through the class of visa called the Protection visa. By contrast, Australia’s *non-refoulement* obligations under other international treaties are currently considered through the Ministerial intervention process which provides the Minister for Immigration and Citizenship with a personal and non-compellable power to grant a visa to a person who has received a negative decision at merits review (a decision to refuse to grant a visa or to cancel a visa).

The Minister has asked the Department to develop a complementary protection model that creates a direct visa pathway for the consideration of Australia’s *non-refoulement* obligations under other international treaties. This would enable claims to be considered in a transparent process that is subject to merits review and scrutiny by the courts.

Grounds for complementary protection

Complementary protection is not defined in international law. At its broadest it can include protection for:
- persons to whom Australia has an actual *non-refoulement* obligation under an international treaty;
- stateless persons;
- persons fleeing armed conflict or serious public disorder;
- persons fleeing indiscriminate effects of violence and serious threats to life, liberty and security; and
- victims of natural or ecological disasters.

At this time we propose to limit complementary protection to Australia’s *non-refoulement* obligations under international treaties other than the Refugees Convention. It is proposed that a Protection visa could be granted on complementary protection grounds in such circumstances as:

- Where the person may be sentenced to death if removed to a particular country

- Where there are substantial grounds for believing that there is a real risk that the person will be arbitrarily deprived of his or her life

- Where there are substantial grounds for believing that the person would be in danger of being subjected to torture if removed to a particular country

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- Where there are substantial grounds for believing that there is a real risk that the person will be subjected to cruel, inhuman or degrading treatment or punishment

The *1954 Convention relating to the Status of Stateless Persons* prohibits State-parties from 'expelling a stateless person lawfully in their territory save on grounds of national security or public order'. Stateless persons lawfully in Australia hold a visa and therefore cannot be removed unless their visa is cancelled (for reasons of national security or public order) or ceases. However, it does not follow that the grant of a Protection visa is the appropriate outcome in every case, as the Protection visa exists to provide benefits and entitlements to victims and potential victims of serious human rights violations such as persecution or torture. While stateless persons within Australia have the same entitlement to apply for a Protection visa as any other non-citizen, statelessness itself is not proposed as a criterion for grant of a visa on complementary protection grounds.

Other persons falling within the broader definition of complementary protection could continue to access Ministerial intervention or any subsequent alternative mechanism.

Legislative Framework

Under the proposed model, the grounds for affording complementary protection are similar to the grounds on which refugee protection is afforded, in the sense that both involve protection from removal to a situation of harm. Therefore it is proposed that the migration legislation be amended to enable complementary protection claims to be considered within the Protection visa process.

There is currently one visa subclass in the Protection visa class – the subclass 866 (Permanent) Protection visa. There are two options available in order to create a visa pathway for complementary protection. Either:

- The existing subclass 866 visa could be amended to include complementary protection criteria; or
- A new visa subclass could be created to cater exclusively for complementary protection criteria

Given that the proposed model provides equal benefits and entitlements to both refugees and complementary protection recipients (see below), and to be consistent with the Department's visa rationalisation program, it is proposed to include complementary protection criteria within the existing subclass 866 visa.

Under the current legislative framework, a Protection visa is also granted to members of the same family unit in Australia of a person found to be owed protection under the Refugees Convention. To avoid potential adverse effects on the family unit, it is proposed that the migration legislation also be amended to enable grant of a Protection visa to a member of the same family

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unit in Australia as a person granted a Protection visa on complementary protection grounds.

Processing of claims

In Australia, it is anticipated that a majority of applicants would seek to have their claims considered against all possible grounds for obtaining Australia's protection and the most efficient and cost effective approach will be to establish a single assessment procedure. This is consistent with international practice and conclusions of the Executive Committee of the United Nations High Commissioner for Refugees. A single procedure would avoid the necessity for repeated consideration of an applicant's claims against a similar selection of country information and would limit the applicant's need to engage in repeated processes.

In order to preserve the primacy of obligations under the Refugees Convention, decision makers would first assess applicants' claims to be a person to whom Australia has protection obligations under the Refugees Convention. If found not to be owed Refugee Convention protection obligations for a reason other than exclusion under Article 1F, claims to be owed a *non-refoulement* obligation (complementary protection claims) would then be assessed.

All protection claims would be considered on a case-by-case basis, with regard to the most up-to-date and objective country information.

Access to merits and judicial review

The Refugee Review Tribunal currently has jurisdiction to review a Departmental decision to refuse to grant a Protection visa. Inclusion of complementary protection criteria in the subclass 866 visa will enable the Tribunal to consider both the complementary protection and refugee claims in one single review process.

Judicial review in the Federal Magistrates Court, Federal Court and the High Court is available, and would normally occur after the merits review decision.

Character issues

Unlike the Refugees Convention, there are no exceptions to Australia's *non-refoulement* obligations under other human rights treaties for persons who are not considered deserving of protection. Where a person is owed Australia's protection from *refoulement* under international law that person cannot be returned. This model, however, does not intend the Protection visa, to be the solution to every case where Australia's *non-refoulement* obligations are engaged.

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Protection visa applicants who are excluded from refugee protection under Article 1F of the Refugees Convention[2] will not have their claims considered against the complementary protection grounds. The application would be refused and the refusal decision would be reviewable by the Administrative Appeals Tribunal (AAT) as per current arrangements. This enables alternative handling strategies for persons where it may not be in the Australian public interest to grant a permanent visa.

In addition, Protection visa applicants are required to satisfy public interest criteria such as character and security assessments in order to be granted a Protection visa. It is proposed that in cases where serious character issues arise and a person fails the character test in the Migration Act, a protection visa may not necessarily be granted. Refusal to grant a Protection visa on character grounds is reviewable by the AAT. In cases where the AAT upholds a Departmental refusal on character grounds, a person's status would be resolved consistent with Australia's international obligations. Possible options may include access to a Removal Pending Bridging Visa until return could be affected, or exploration of alternative removal destinations.

This proposed approach is consistent with international practice. Many States have chosen to exclude or treat differently persons with serious character concerns. In the United States and Canada individuals of character concern may receive a temporary stay of removal until conditions in their home country improve and they can be removed. In Germany they receive a Toleration Permit with reduced work rights and social assistance. In the United Kingdom they receive six months Discretionary Leave to Remain and then have their situation reassessed. In New Zealand, under proposed legislation, their migration status will be decided at the Minister's discretion.

Benefits and entitlements

Whereas the Refugees Convention obliges States to ensure that refugees enjoy a range of rights within their territory, other human rights treaties that include a *non-refoulement* obligation do not include comparable provisions. However, our view is that all persons recognised to be in need of international protection should benefit from similar basic civil, political, economic and social rights as those afforded to refugees and that their need for protection can be as long in duration.

International practice varies with regard to the entitlements (duration of stay, access to social services, work rights, etc) extended to beneficiaries of complementary protection. Some States grant equivalent entitlements to refugees, while others grant reduced entitlements.

In the Australian context, owing to the similar nature of the grounds for affording refugee protection and the proposed grounds on which

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[2] Article 1F of the Refugees Convention articulates the categories of persons who are not considered to be deserving of refugee protection. These include persons who have committed a war crime; a crime against humanity; a serious non-political crime; or an act contrary to the purpose and principles of the United Nations.

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complementary protection would be afforded, it is proposed that persons found to be owed complementary protection be granted the same benefits and entitlements as are granted to existing protection visa holders (eg Medicare, social security, education, work rights, etc). A possible exception would be access to a Refugee Convention travel document.[3]

Persons granted a Protection visa on complementary protection grounds will be eligible to sponsor family members to Australia, under categories in the Humanitarian Program, or through the sponsorship avenues accessible to all permanent residents under the Migration Program.

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[3] Under the *Passports Act 2005*, Convention Travel Documents can only be issued to persons found to be refugees within the meaning of the Refugees Convention