REFUGEE COUNCIL OF AUSTRALIA

INCORPORATED IN A.C.T. - ABN 87 956 673 083

37-47 ST JOHNS RD, GLEBE, NSW, 2037
PO BOX 946, GLEBE, NSW, 2037
TELEPHONE: (02) 9660 5300 • FAX: (02) 9660 5211
info@refugeecouncil.org.au • www.refugeecouncil.org.au

Response from the Refugee Council of Australia to Questions on Notice For the Inquiry into the Administration and Operation of the Migration Act from Senator Ludwig

Q.1 The Justice for Asylum Seekers network has developed an alternative system for the management of asylum seekers in Australia, which the network has called the *Reception and Transitional Processing (RTP) System*. The RTP system is detailed in submission 163 to the inquiry (a copy of which is available on the committee's website).

- **Do you have a view on this model or system?**
- **How does it compare to or fit with the Complementary Protection model developed by the Refugee Council, Amnesty International and the National Council of Churches?**
- **Which model or system would you prefer?**

The Justice for Asylum Seekers (JAS) Model is intended to provide alternative care arrangements for asylum seekers while their claims for protection are being considered. The Refugee Council of Australia has long advocated that alternatives to keeping asylum seekers in immigration detention for the duration of the determination process are required for legal, ethical and practical reasons. The JAS Model has been developed by people with considerable experience in the sector and is based on sound principles. For this reasons, the Council has been a strong supporter of the Model.

The Complementary Protection Model deals with an entirely different issue and thus there is no question of having to choose between this and the JAS Model.

Whereas the JAS Model is about the care and support of people while a decision is being made, the Complementary Protection Model is linked to the decision making process itself.

The basic principle underlying the Complementary Protection Model developed by the Refugee Council, Amnesty International and NCCA is that not all people in need of and eligible for international protection, fit the narrow definition of a refugee contained in the 1951 Convention Relating to the Status of Refugees (the Refugee Convention). Refugee status is designed to protect a very particular and vulnerable class of people but it does not cover people who, *inter alia*:

- are stateless;
- come from a country enveloped in civil war;
- have been subject to gross violations of their human rights for non-Convention reasons;
- would face torture on return to their country;
- come from a country where the rule of law and order no longer applies.

Australia, like other asylum countries, has obligations to such people under international law. These are set out in the Complementary Protection Model which accompanied the Council's original submission and which has been resubmitted with this document.

Most other asylum states have concluded that the effective and efficient way of meeting these obligations is to have parallel administrative determination procedures that first require the decision maker to consider whether a person is a refugee and, if the person is not, to then assess whether there are other protection-related reasons why he or she should not be returned to the country of origin. This is consistent with the recently adopted ExCom Conclusion (see below). The Complementary Protection Model not only gives the justification for why such a system should be adopted in Australia but also how this could operate administratively.

Q.2 The Committee understands that there is a proposal before the United Nations High Commissioner for Refugees Executive in Geneva that governments adopt a UNHCR complementary protection model. Are you able to advise the committee how your preferred model or system fits with or reflects the proposed UNHCR model?

The recent meeting of the United Nations High Commissioner for Refugees' Executive Committee (UNHCR ExCom), a body of which Australia is a member, adopted a Conclusion on Complementary Protection.

ExCom Conclusions are considered to form a body of soft law. They are non-binding on States but, because they are adopted by consensus, it is expected that States, especially those that are part of the body that adopted them, will abide by them.

The recently adopted Conclusion is not a "model" as such. It is a statement which essentially reminds States that there are people in need of protection who fall outside the Refugee Convention and calls on States to put in place procedures to ensure that these people receive protection, which at the same time, should not undermine the protection afforded by the Refugee Convention.

The full text of the ExCom Conclusion follows as Annexure 1. The Refugee Council contends that the relevant paragraphs from the Conclusion in this context are:

> *Recognizing* that, in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol; …
>
> (h) *Acknowledges* that complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs;
>
> (i) *Encourages* the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol; …
>
> (k) *Affirms* that measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime; …
>
> (n) *Encourages* States, in granting complementary forms of protection to those persons in need of it, to provide for 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 interest 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;

(r) *Notes* that, where applicable, in considering a comprehensive procedure, the applicable procedure should be fair and efficient;

(s) *Underlines* the importance of applying and developing the international refugee protection system in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.

The Complementary Protection Model developed by the Refugee Council, Amnesty International and the National Council of Churches, and supported by many other organisations, provides a concrete and achievable framework for how Australia can implement the recommendations contained in the Conclusion.

Further, the Model if adopted, would enable Australia to fulfil one of the commitments it made when it adopted the Agenda for Protection in 2002. The Agenda for Protection was adopted by members of UNHCR's Executive Committee and is the product of UNHCR's wide-ranging Global Consultation process. It sets out the framework for action by UNHCR, States and other players to further refugee protection. One of its core objectives is:

> *Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention but require international protection.*[1]

The Refugee Council thus reintegrates the importance of the Committee recommending the adoption of measures that allow for administrative determination of complementary protection such as those outlined in the Complementary Protection Model.

Concluding Comments

The Refugee Council hopes that this clarifies matters for Senator Ludwig. Should there be any additional questions, please do not hesitate to ask.

[1] At Goal 1, Objective 3. The full text of UNHCR's Agenda for Protection is available at www.unhcr.ch

ANNEXURE 1:

ExCom Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection (Adopted October 2005)

The Executive Committee,

Reaffirming that the 1951 Convention relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of the international refugee protection regime; and *noting in this regard* the fundamental importance of their full application by State Parties, including that of the fundamental principle of *non-refoulement*,

Recognizing that, in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol; and *recalling in this regard* paragraph (l) of its Conclusion No. 74 (XLV),

Reaffirming the principle that all human beings shall enjoy human rights and fundamental freedoms without discrimination, including the right to seek and enjoy asylum,

Underlining the value of regional instruments, as and where applicable, including notably the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as the 1984 Cartagena Declaration on Refugees, which include among refugees persons who cannot return to their countries due to indiscriminate threats resulting from situations such as generalized violence, armed conflict or events seriously disturbing public order, and the asylum legislation adopted by the European Union, which recognizes certain international protection needs beyond the 1951 Convention and its 1967 Protocol,

Recalling that international and regional instruments to address the problem of statelessness, such as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, where applicable, are important tools for State Parties to use, in particular to avoid and resolve situations of statelessness and, where necessary, to further the protection of stateless persons,

Acknowledging that in many countries a number of administrative or legislative mechanisms are in place for regularizing, on a variety of grounds, the stay of persons, including those who may not be eligible for refugee protection but who may be in need of international protection,

Noting the value of establishing general principles upon which complementary forms of protection for those in need of international protection may be based, on the persons who might benefit from it, and on the compatibility of these forms of protection with the 1951 Convention and its 1967 Protocol and other relevant international and regional instruments,

(a) *Urges* State Parties to implement their obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments;

(b) *Calls upon* State Parties to interpret the criteria for refugee status in the 1951 Convention and/or its 1967 Protocol in such a manner that all persons who fulfil these criteria are duly recognized and protected under those instruments, rather than being accorded a complementary form of protection;

(c) *Recognizes* that refugee law is a dynamic body of law based on the obligations of State Parties
to the 1951 Convention and its 1967 Protocol and, where applicable, on regional refugee protection instruments, and which is informed by the object and purpose of these instruments and

by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection;

(d) *Reiterates* the need to ensure that the integrity of the asylum system is not abused by the extension of refugee protection to those who are not entitled to it and to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention and in other relevant international instruments;

(e) *Calls on* the State Parties to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness to apply these instruments in good faith, bearing in mind their protection objectives; and *requests* UNHCR actively to promote accession to these instruments;

(f) *Calls on* States to make maximum use of existing protection instruments when addressing international protection needs; and *encourages* States that have not already done so to consider accession to the 1951 Convention and the 1967 Protocol and to relevant, applicable regional instruments and/or to consider lifting existing limitations or withdrawing reservations in order to ensure the widest possible application of the protection principles they contain;

(g) *Calls upon* all State Parties, as applicable, to adopt the necessary national legislation or procedures to give effect to regional refugee instruments;

(h) *Acknowledges* that complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs;

(i) *Encourages* the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol;

(j) *Realizes* that States may decide to allow prolonged stay for compassionate or practical reasons; and *recognizes* that such cases must be clearly distinguished from cases where there are international protection needs;

(k) *Affirms* that measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime;

(l) *Notes* that temporary protection, without formally according refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from other forms of international protection;

(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 fulfil 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 for 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 interest of the child and family unity principles;

(o) *Recommends* that, where it is appropriate to consider the ending of complementary forms of

protection, States adopt criteria which are objective and clearly and publicly enunciated; and *notes* that the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may offer helpful guidance in this regard;

(p) *Notes* that States may choose to consult with UNHCR, if appropriate, in view of its particular expertise and mandate, when they are considering granting or ending a form of complementary protection to persons who fall within the competence of the Office;

(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;

(r) *Notes* that, where applicable, in considering a comprehensive procedure, the applicable procedure should be fair and efficient;

(s) *Underlines* the importance of applying and developing the international refugee protection system in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.

REFUGEE COUNCIL OF AUSTRALIA

INCORPORATED IN A.C.T. - ABN 87 956 673 083

37-47 ST JOHNS RD, GLEBE, NSW, 2037
PO BOX 946, GLEBE, NSW, 2037
TELEPHONE: (02) 9660 5300 • FAX: (02) 9660 5211
info@refugeecouncil.org.au • www.refugeecouncil.org.au

Response from the Refugee Council of Australia to Questions on Notice For the Inquiry into the Administration and Operation of the Migration Act from Senators Nettle and Crossin

1. Use of Chemical Restraint

The Refugee Council refers the Committee to the report "Deported to Danger: a Study of 40 Rejected Asylum Seekers" which was a joint project of the Edmund Rice Centre and Australian catholic University, released in September 2004. This report documents the use of chemical restraint. The report can be found at http://www.erc.org.au/research/1096416029.shtml.

2. How does Canada's Pre-Removal Risk Assessment Tool work?

Canada has a Pre-Removal Risk Assessment Tool (PRRA) which it uses prior to forced removal of failed asylum seekers to determine whether there are obligations to the person that have not been recognised by administrative procedures. Details of how this operates can be found at Annexure 1.

It is the view of the Refugee Council that the Canada is right to have such an assessment tool but that the criteria it employs are too limited. The Canadian PRRA only considers legal obligations under treaties that, we contend, should most appropriately be assessed at an earlier stage through proper application of Complementary Protection (as set out in RCOA's submission).

This being said, the Council contends that there are people to whom Australia has no legal obligations but who ethically should not be forced to return to their country of origin. It is our view that a properly defined Pre-Removal Assessment Tool could be used to make an assessment of the conditions in the country of origin to which the person is being involuntarily removed to ensure that:

- the physical,[1] legal[2] or material[3] safety of the person will not be endangered;

---

[1] It is not appropriate to return a failed asylum seeker to a country in which there is ongoing violence and intimidation. If these things existed in the past, there needs to be clear evidence of the (re)establishment of enforcement agencies that are compliant with human rights norms and an independent judiciary, and that such agencies are able to provide effective protection. There also needs to be evidence that the returnee will not be subjected to risks during the course of daily activities such as might occur from landmines, unexploded ordinances and the like.

[2] It is necessary to ensure that the returnee will have basic legal protection on return, in particular it is necessary to ensure that the returnee will:

- not be subjected to punishment for the sole fact of having fled the country;
- not be subjected to discrimination or harassment on the basis of having been outside the country and/or in a western country;

- the person will not be placed at risk because he/she has spent time in a western State and/or severed ties to local protection structures;[4]

- if the person is being sent to a third country, he/she will be able to enjoy basic rights and be protected from being forced to return to his/her country of origin.

If it is determined that return would place the person at risk or be unlikely to be sustainable, it is the position of the Refugee Council that the person should be granted a substantive visa to remain in Australia.

Failure to take these various issues outlined above into account will almost inevitably lead to unsustainable return in which the person is unable to re-establish him/herself and either lives in destitution or flees the country again.

- be able to reclaim all the rights of a citizen or permanent resident of that country, including being given necessary documentation and the right to vote;
- be able to reclaim property to which s/he is legally entitled;

[3] The conditions in the region of the country to which return is being considered must be such as to ensure that basic needs (including potable water, health services and education) can be met and that vulnerable individuals can receive appropriate assistance. In addition, there must be a means by which the returnee is able to sustain him/herself, either through employment or external assistance.

[4] It is inappropriate to draw comparisons between those returning from neighbouring states and the return of failed asylum seekers. Failed asylum seekers have often:

- lost touch with family members who themselves might have fled from their homes at a later date;

- no way of establishing themselves in their region of origin because their land and/or livelihood has been claimed by others;

- lost connection to the local protection mechanisms (war lords, mullahs etc) in their region of origin because of the length of time they have been away, assuming such protection existed in the first place (which in many cases it did not);

- heightened risk factors because they are seen to have been "in the west", tainted by foreign influences and/or as being in possession of money.

ANNEXURE 1:

Canada's Pre-Removal Risk Assessment[5]

Canada is committed to making sure that people are not sent back to a country where they would be in danger or face risk of persecution. To ensure this, most persons placed under a removal order can apply to Citizenship and Immigration Canada (CIC) for a Pre-Removal Risk Assessment (PRRA.) A PRRA Officer will conduct this assessment.

PRRA candidates who are eligible for a PRRA are sent an application form and guide. When this is done, their removal order is stayed. The removal order will not be in effect until:

- the 15 day deadline passes and CIC has not received the applicant's application;
- the application is refused; or
- the candidate indicates an intention to not apply, or abandons or withdraws the application.

PRRA applicants may present written submissions to help explain the risk they would face if removed from Canada. Where a PRRA applicant has already had a PRRA, or has had a refugee protection claim assessed by the IRB, only new evidence will be considered.
With the exception of cases involving inadmissibility on such grounds as security and serious criminality, PRRA officers' assessments will consider the "consolidated grounds" of:

- risk of persecution as defined in the *Geneva Convention*;
- danger of torture; and
- risk to life or risk of cruel and unusual treatment or punishment.

Persons who may not apply for a PRRA

A person may not apply for a PRRA if that person is:

- subject to extradition;
- ineligible for an IRB determination because they came to Canada from a Safe Third country;
- a repeat refugee protection claimant returning to Canada less than six months after their departure;
- already recognized as a protected person under the *Immigration and Refugee Protection Act*; or
- recognized as a Convention Refugee by a country to which they can return.

Most persons who are found by a PRRA Officer to be at risk may apply for permanent resident status using the Application for Permanent Residence in Canada: Protected Persons. If you cannot view and print this application form and guide from your computer, contact the Citizenship and Immigration Canada Call Centre.

---

5 Copied from http://www.cic.gc.ca/english/refugees/asylum-3.html

COMPLEMENTARY PROTECTION
The Way Ahead

April 2004

1. Background

For over 50 years the Refugee Convention[1] has provided the framework for protecting people forced to flee their homelands in fear of persecution because of their race, religion, nationality, political opinion or membership of a particular social group, and who are unable to secure protection from their own government. The international community has recognised that it has a responsibility to such people and confers refugee status on those who meet the definition set out in the Refugee Convention.

When the Refugee Convention was drafted, it was intended that it would assist particular groups affected by the events in Europe during World War II. The definition in the Convention has, however, proved durable and sufficiently flexible to be able to respond to many of the geo-political changes that have taken place in the last 50 years and the validity of the Convention as a protection tool was reaffirmed by a Ministerial Meeting of States Parties in December 2001. It is important to acknowledge, however, that the Refugee Convention is not and was never intended to be a mechanism to cover all people in need of protection.

The specificity of the definition in the Refugee Convention is such that it does not extend to many people who have protection needs that are widely recognised. It does not, for example, encompass all people who, *inter alia*:

- are stateless;
- come from a country enveloped in civil war;
- have been subject to gross violations of their human rights for non-Convention reasons;
- would face torture on return to their country;
- come from a country where the rule of law and order no longer applies.

In order to provide the necessary protection for such persons and ensure compliance with the *non-refoulement* obligations recognised in Customary International Law, a variety of protection mechanisms have evolved to complement the protection afforded by the Refugee Convention.

This paper considers how the international community responds to people in need of protection who fall outside the refugee definition and compares this to Australian practice. It then points out the deficiencies in current Australian practice and suggests a model that, if implemented, would ensure that Australian practice is fair, transparent, timely, efficient and legally defensible.

2. Use of Complementary Protection

2.1. The International Context

States and regional groupings have dealt with the need to provide protection to people not covered by the Refugee Convention in one of two ways:

- by expanding the definition of a refugee to cover people from situations such as those outlined above. This was done by African States in the OAU Convention,[2] by Latin American States in the Cartagena Declaration[3] and through the Bangkok Principles of 2001.[4] Further some

---

[1] 1951 Convention relating to the Status of Refugees, with the later addition of the 1967 Protocol.
[2] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. 1969.
[3] Cartagena Declaration on Refugees. 1984.
[4] Asian-African Legal Consultative Organization's Bangkok Principles on the Status of Refugees.

countries, Canada being one, apply a broader definition of what constitutes a refugee than is used elsewhere; or

- through the use of complementary protection – i.e. by having a separate visa category that can be used for those in need of protection who do not fit the criteria for the grant of refugee status. Most European countries currently have such provisions and the European Union is in the process of adopting this as part of the process of harmonizing asylum law.[5]

The second option is currently the one in greatest favour and it is consistent with the current direction of international protection. Not only is it being adopted in the European context (as mentioned above) but it is an objective of the **Agenda for Protection**[6] which was adopted by members of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) in 2002. The Agenda is the product of the wide-ranging Global Consultation process and sets out the framework for action by UNHCR, States and other players to further refugee protection. One of its core objectives is:

> *Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention but require international protection.*[7]

2.2. The Current Situation in Australia

Current practice in Australia is not, however, consistent with this international trend. Australia does not have an administrative process to assess protection applications from people with valid non-Convention reasons not to be returned to their country of origin or habitual residence. These claims can only be considered after the person has been rejected by each stage of the refugee determination process and then seeks personal intervention by the Minister for Immigration. The Minister has non-compellable, non-reviewable powers under Section 417 of the Migration Act to grant a visa to any failed visa applicant. In other words, the applicant has to go through an entire administrative determination process where his or her claims cannot be considered in order to get to the only place where they can.

Table 1 (following page) gives a diagrammatic representation of the current procedure. By leaving any consideration of non-Convention related protection claims to the very end of the process and by consigning the decision to Ministerial discretion, it can be argued that Australia's current practice:

- is an inefficient use of resources: the refugee status determination process has to deal with applicants who fall outside the jurisdiction but who otherwise have *bona fide* claims;

- is unnecessarily expensive: delaying the grant of protection to a person entitled to it can have significant cost implications, particularly if that person is in detention;

> Case Study: A family with six members was recently granted protection visa after intervention by the Minister. They had been in detention for four years. Had it been possible to make a decision on their need for protection at the primary determination stage, it is conceivable that they might have been released within six months of arriving. The cost of detention for the family for four years would have been in the order of $1.2million (based on $140 per person per day). Detaining them for 6 months would have cost about $150,000, a saving to the taxpayer of over $1million. This does not include, of course, additional savings in determination and health costs.

---

5 The proposal for a Council 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, more commonly known as the "Qualification Directive" is in the final stages of deliberation by the Council of Europe.

6 UNHCR's Agenda for Protection is available in full from www.unhcr.ch.

7 At Goal 1, Objective 3.

- places an unrealistic burden on the Minister for Immigration, requiring the Minister to personally consider matters that could more appropriately be dealt with by delegates;

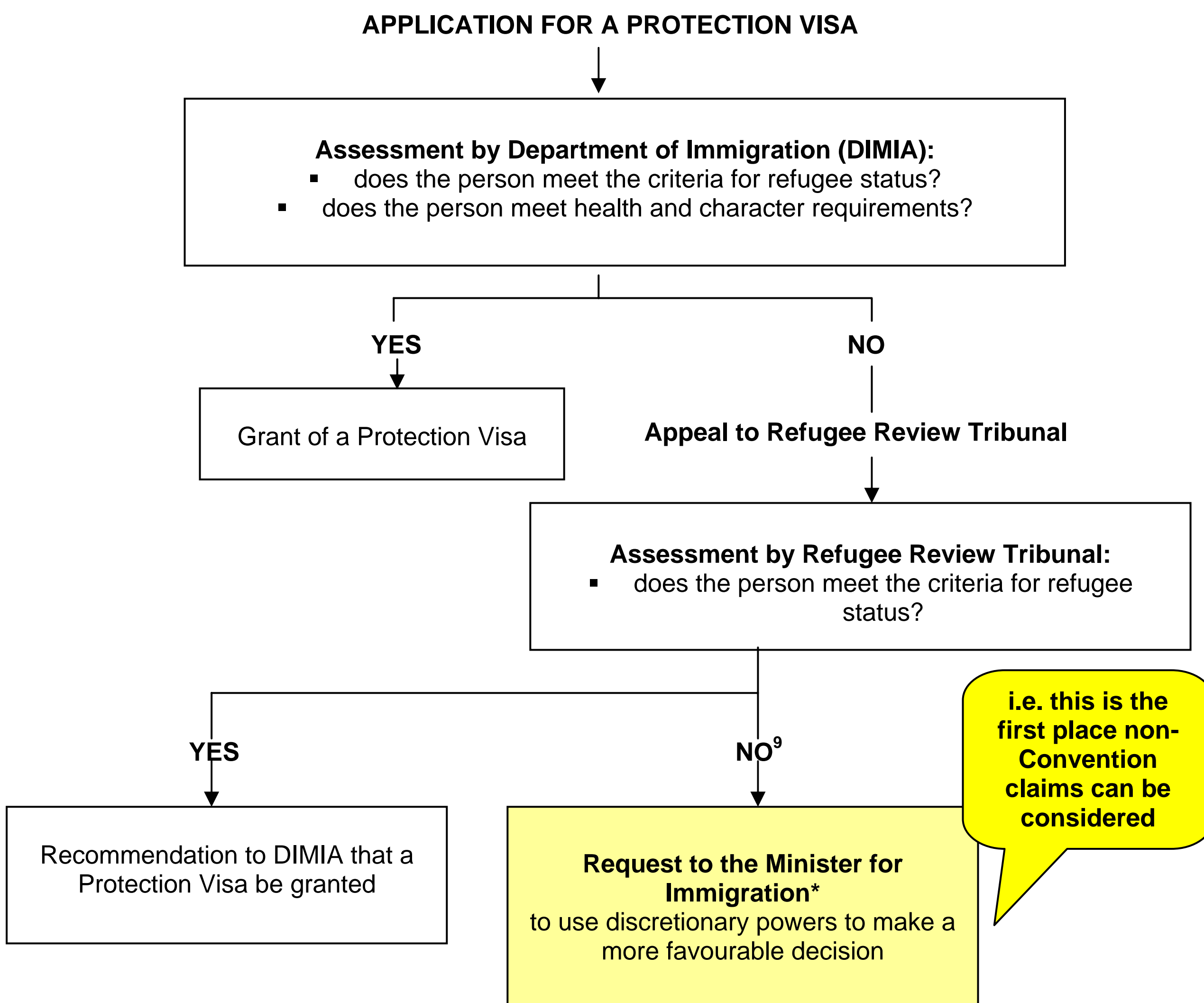
- is lacking in transparency and accountability: the Minister may simply choose to intervene if the Minister deems it is in the public interest to do so. The grounds for this intervention are not legally binding and no reason is given for the decision. Further, as no legally binding criteria are employed, no avenue of review exists. This leaves the Minister vulnerable to claims of abuse of power;[8]

- does not contain sufficient safeguards to ensure that those to whom Australia has protection obligations under international treaties receive this protection;

- is detrimental to Convention refugees as the processing of their claims is delayed by the number of meritorious but non-Convention related cases being processed;

- is detrimental to the person in need of complementary protection because a decision on the relevant aspects of his/her claim is delayed, sometimes for extended periods. This is of particular concern where the applicant is in detention.

TABLE 1: **CURRENT PROCEDURE**



---

8 This is an issue being examined in detail by the Senate Select Committee Inquiry into ministerial discretion on migration matters.

9 An applicant may also seek judicial review but while this process is in train, the Minister will not consider any requests.

3. A New Model for Australia

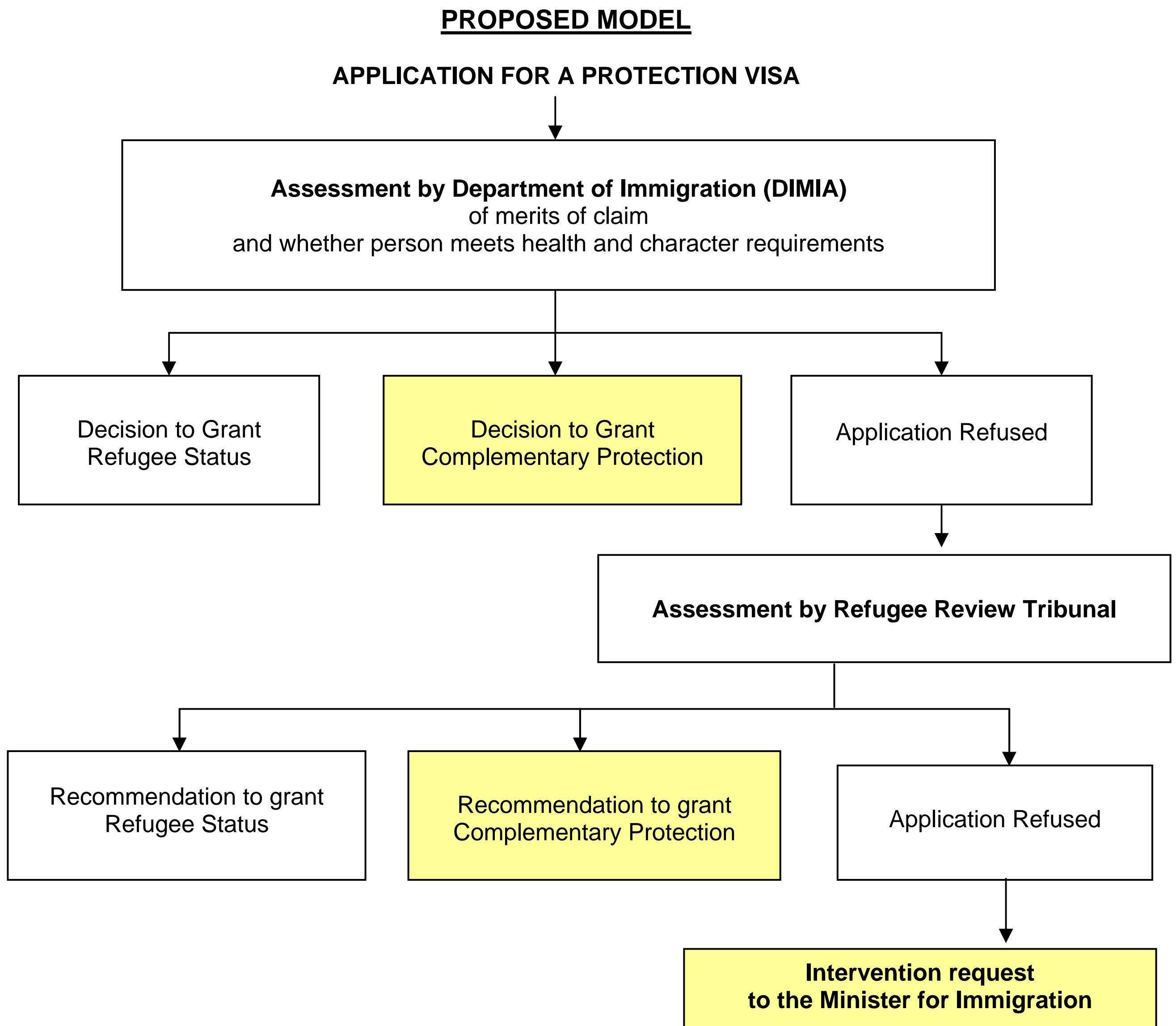
In order to address the identified deficiencies in Australia's current procedures and to ensure that Australian practice is both consistent with internationally recognized best practice and the promises made by the Government when adopting the Agenda for Protection, changes are required to the way that protection applications are considered.

The following section will make recommendations in relation to the application process and determination criteria and will then explain the benefits of this model.

3.1. Application Process

The most efficient and cost effective way to consider whether a person is in need of complementary protection is to use a single administrative procedure that will first consider whether a person is a refugee and then, if the answer is no, assess whether there are grounds for the grant of complementary protection. Table 2 gives a graphic representation of this process.

TABLE 2:



Under the proposed model, an applicant's eligibility for complementary protection can be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time.

3.2. Criteria for the Grant of Complementary Protection

The first point that is necessary to stress is that complementary protection should be used to supplement refugee status and never as a replacement for it. Refugee status affords particular protection under international law[10] and where a person meets the criteria for the grant of refugee status, this form of protection should be used. It is therefore suggested that the deliberation process would involve the decision maker considering a series of questions in the following order:

a. Does the person have a well-founded fear of persecution under the terms of the 1951 Convention (and thus meet the criteria for the grant of refugee status)? And if not:
b. Does Australia have obligations to the person under other human rights treaties?
c. Are there other protection-related reasons why a person should not be returned to his/her country of origin?

The criteria for the grant of refugee status are already defined in law.[11] This section will therefore consider how a decision maker should go about answering questions b and c.

The starting point for this consideration must be Australia's international treaty obligations. Australia is a party to a number of relevant international human rights treaties:

The Convention relating to the Status of Stateless Persons (1954); The Convention on the Reduction of Statelessness (1961); The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966); The International Convention on the Elimination of All Forms of Racial Discrimination (1965); The Convention on the Elimination of all Forms of Discrimination Against Women (1979); The Convention on the Rights of the Child (1989).[12]

Two of these treaties place specific and non-derogable obligations on States Parties:

- the Statelessness Conventions require States to provide assistance and protection (including the grant of nationality) to persons who are not considered as a national by any other State;

- the Convention Against Torture obliges a State (at Article 3.1) not to return a person to a country where there are substantial grounds for believing that he or she will be subjected to torture, taking into account the existence in the State concerned of a pattern of gross, flagrant or mass violations of human rights.

---

10 As set out in the Refugee Convention and Article 22 of the Convention on the Rights of the Child.

11 One caveat should be made to this statement. There is a particular subgroup of people who must currently seek Ministerial intervention but who should appropriately be granted refugee status at first instance. These are people who were refugees at the time of their departure from their country, then conditions in their country change so that they no longer fit the definition of a refugee, but their subjective fear of return is such that it would be inhuman to send them back. The Migration Series Instruction which sets out the guidelines for the exercise of Ministerial discretionary powers (MSI no. 386) makes reference to this group but this ignores their legitimate right to refugee status. The Refugee Convention, at Article 1C, sets out a clear exemption from the application of the Cessation Clause and thus makes plain that such persons are entitled to Convention protection.

12 Two other relevant treaties, which Australia has yet to sign are the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

In addition, the International Covenant on Civil and Political Rights imposes an obligation on States not to return a person who, as a foreseeable consequence of their removal or deportation, would face a real risk of violation of his/her rights under Article 6 (right to life)[13] or Article 7 (freedom from torture and cruel, inhumane of degrading treatment or punishment).

The criteria for the grant of complementary protection must therefore make specific reference to people who are stateless and to people who would face torture or death if returned to their country of origin or habitual residence.

The other treaties do not impose such specific obligations on other States but they do provide a framework of internationally accepted human rights standards against which protection applications can be assessed.

The important question, however, is at what point does the fact that a person's rights are being violated in one country become the responsibility of another. There needs to be some form of test applied to assess whether the violation of rights is sufficiently serious to warrant protection being granted. It is argued that such an assessment could usefully combine:

- the test that Australia already applies in relation to selection for the Special Humanitarian Program (visa subclass 202) which is part of the offshore humanitarian intake which stipulates that a person must have experienced, or have a well-founded fear of *gross discrimination amounting to a substantial violation of their human rights;* and

- the test included in the European Union's Qualification Directive *"well founded fear of unjustified[14] serious harm[15]",* noting that such harm can be direct physical harm or substantial deprivation of fundamental rights.

In both cases, international human rights norms are seen as appropriate benchmarks for making assessments.

The criteria for the grant of complementary protection should therefore also encompass non-compellable responsibilities to people who would face gross discrimination amounting to a substantial violation of their human rights if returned to their country of origin.

Under the proposed framework, people should be considered for complementary protection would include, *inter alia,* those who:

- have no nationality nor right of residence elsewhere;
- would face torture if returned to their country of origin;
- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law;
- would face serious human rights violations if compelled to return.

---

[13] Which Australia has accepted to include the death penalty, irrespective of whether it is lawfully or unlawfully imposed).

[14] The term "unjustified" is included in order to reflect that there are circumstances in which a state might be justified in taking measures that cause harm to individuals, such as in the event of a public emergency or for national security grounds.

[15] "Serious harm" is defined in the EU Directive as "death penalty or execution … torture or inhuman or degrading treatment or punishment … or … serious and individual threat to a … person by reason of indiscriminate violence in situations of international or internal armed conflict".

Further, the criteria for the determination of complementary protection must always be indicative rather than strictly prescriptive. The international geo-political situation is such as to require sufficient flexibility for the system to adapt to changing world circumstances. Further, it is necessary that there is provision to provide protection to persons who left their country of origin before the development of the conditions that give cause to their fear of return (i.e. *sur place* cases).

3.3. Other Procedural Aspects

It is further recommended that a grant of complementary protection:

i. be based on a procedure in which appropriate evidentiary standards and rules are in place;

ii. entitle the recipient to the same rights and entitlements as those who have received refugee status.[16] Complementary protection does not signify that the person is in lesser need of protection, just that the reasons for the protection are different;

iii. include protection from *refoulement* consistent with Article 33 of the Refugee Convention, Article 3 of the Convention Against Torture and Articles 6 and 7 of the International Covenant on Civil and Political Rights;[17]

iv. not extend to persons whose claims to remain in the country are based on compassionate grounds such as health or family ties or to victims of natural disasters. Such claims should be considered under a separate regulatory regime which is beyond the scope of this paper;

v. not extend to persons who have committed genocide, a crime against peace, a war crime or a crime against humanity, except where international treaty obligations override this exclusion;[18]

vi. be based on a case by case determination of the relevant facts of the claim assessed against up to date and objective country information;[19]

vii. not only take into account the conditions in the person's country of origin but also in the person's country of former habitual residence;

viii. be based on a determination process that takes into account the particular circumstances of all applicants, including women and children within a family group, and which recognises the particular vulnerabilities of certain groups such as unaccompanied minors, victims of torture and trauma, the frail aged and those with a disability.

4. Advantages of the Proposed Model

The proposed model for complementary protection will:

i. bring Australia into line with international best practice,[20] ensure compliance with its obligations under the Convention Against Torture and the Statelessness Conventions and fulfil one of the commitments Australia made when endorsing the Agenda for Protection;

---

16 It is argued that people recognised as refugees should be granted permanent visas.

17 Reiterating that *non-refoulement* is also a norm of Customary International Law and as such is binding on all States.

18 Whilst complementary protection should not be available to this category, currently Australia's only options are indefinite detention, *refoulement* or relocation. In order to ensure that these people are brought to justice, other alternatives must be pursued.

19 It is acknowledged that there may be cases where a policy decision is made to grant *prima facie* status to all members of particular group and thus this provision need not apply.

20 In this regard it is relevant to note not only the process of harmonisation of European Union law but also:

ii result in consistency between Australia's policy with respect to off-shore and on-shore refugees;

iii result in significant cost savings for the determination bodies and also reduce welfare (ASAS) payments to asylum seekers and detention costs;

iv. enhance the efficiency and productivity of both the Department of Immigration and the Refugee Review Tribunal;

v. make it easier for applicants to present their claims as it will reduce the perceived need to find tenuous links between their fears of returning and Convention grounds;

vi. ensure necessary transparency, accountability and consistency in decision making;

vii. reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to be used for the exceptional cases for which such powers were intended;

viii. ensure that those entitled to Australia's protection receive it in a timely fashion and thus enhance their ability to become productive members of the Australian community;

ix. enable detained asylum seekers to have all relevant claims considered simultaneously and thus reduce the duration and trauma of the detention experience;

x. benefit Convention refugees by freeing up the determination processes;

xi. benefit holders of Temporary Protection Visas by enabling a thorough examination of the implications of changed country circumstances when their applications for a Further Protection Visa are being considered;

xii. reduce the incentive for people to abuse the protection application process to extend their stay in the country as decisions will be made faster.

Further, it can be argued that the proposed model:

- is simply the transfer of existing decision making powers and as such, cannot be seen as creating a pull-factor;
- need not result in abusive applications for judicial review if appropriate safeguards are incorporated. It is suggested that such safeguards might include clearly enunciated regulatory requirements and judicially controlled leave provisions.

5. Necessary Next Steps

The introduction of Complementary Protection provisions will require:

i. An Amendment to the Migration Act:

- the European Court of Human Rights has established beyond doubt the applicability of the European Convention of Human Rights to cases of expulsion, deportation or extradition to a country where a person is likely to be subjected to treaty contrary to Article 3, irrespective of the reasons for such treatment; and
- the evolution of law of armed conflict and of international criminal law. The International Criminal Court and the Tribunals for former Yugoslavia and Rwanda have reinforced norms of international humanitarian law, especially for the protection of civilians. It would be incongruent if those persons falling victim to violations of norms sanctioned by individual criminal liability and possible prosecution, would not be able to claim protection from being returned to situations where such violations are likely to occur.

Section 36(2)(b) of the Migration Act (1958) would need to be amended to include a new section which would:

- set out the criteria for the grant of a visa because of a recognised need for complementary protection;
- introduce a new visa subclass;
- set out any necessary limitations;
- stipulate that that nothing in this section removes or otherwise affects the exercise of the Minister's discretion.

ii. The Introduction of a new Regulation

A new regulation would be required to set out the framework for the grant of a visa on the grounds of the need for complementary protection and the rights and entitlements afforded to successful applicants.

* * * *

Responsibility for drafting the legislative amendments and the regulations rests with the appropriate officers of the Department of Immigration. DIMIA is encouraged to consult with key community agencies during the drafting process.

6. Conclusion

The community sector considers that the introduction of a mechanism to provide complementary protection would not only enhance the efficiency and fairness of the current protection system in Australia but would also address many of the challenges currently facing the Government. Key amongst these, of course, is the dilemma of how to deal with Afghans, Iraqis and others who cannot be returned to their country of origin because of ongoing instability and with people who cannot be removed because no country will recognise them as citizens. Many of these people are currently destined to indefinite detention. Others are on Temporary Protection Visas and face the trauma of having to prove their ongoing need for protection against changed conditions in their country of origin.

The model contained in this paper was developed to provide constructive guidance for those responsible for formulating Australia's policy and is commended to them by:

The Refugee Council of Australia
The National Council of Churches in Australia
Amnesty International Australia

The Model has also been endorsed by:

Anglican Church of Australia
Armenian Apostolic Church
Assyrian Church of the East
Asylum Seekers Centre
Australian Catholic Migrant and Refugee Office
Australian Council for Tamil Refugees
Australian Refugee Association
CARAD
Centre for Multicultural Pastoral Care
ChilOut
Churches of Christ in Australia
COPAS
Coptic Orthodox Church
Ecumenical Migration Centre
The Hon. Justice Marcus Einfeld
International Commission of Jurists (Aust)
Jesuit Refugee Service
Lutheran Church of Australia
Red Hill Paddington Community Centre
Refugee and Immigration Legal Centre
Religious Society of Friends
Roman Catholic Church

Salvation Army
Syrian Orthodox Church of Australia
South Brisbane Immigration and Community
Legal Centre
TEAR Australia
Uniting Church in Australia
Uniya

REFUGEE COUNCIL OF AUSTRALIA

INCORPORATED IN A.C.T. - ABN 87 956 673 083

37-47 ST JOHNS RD, GLEBE, NSW, 2037
PO BOX 946, GLEBE, NSW, 2037
TELEPHONE: (02) 9660 5300 • FAX: (02) 9660 5211
info@refugeecouncil.org.au • www.refugeecouncil.org.au

QUESTIONS AND ANSWERS ABOUT COMPLEMENTARY PROTECTION

What is Complementary Protection?

- Complementary Protection is a system of protection for those who do not meet the Convention definition of a refugee but who have compelling reasons why they cannot return to their country of origin.
- These reasons might include fleeing generalised violence and abuse of human rights that is not necessarily targeted at the individual personally, but is a result of armed conflict or civil war. It can also apply to people who have no nationality or right of return.
- The most important thing to stress is that Complementary Protection should be used to supplement refugee status and never as a replacement for it.

Where is Complementary Protection used?

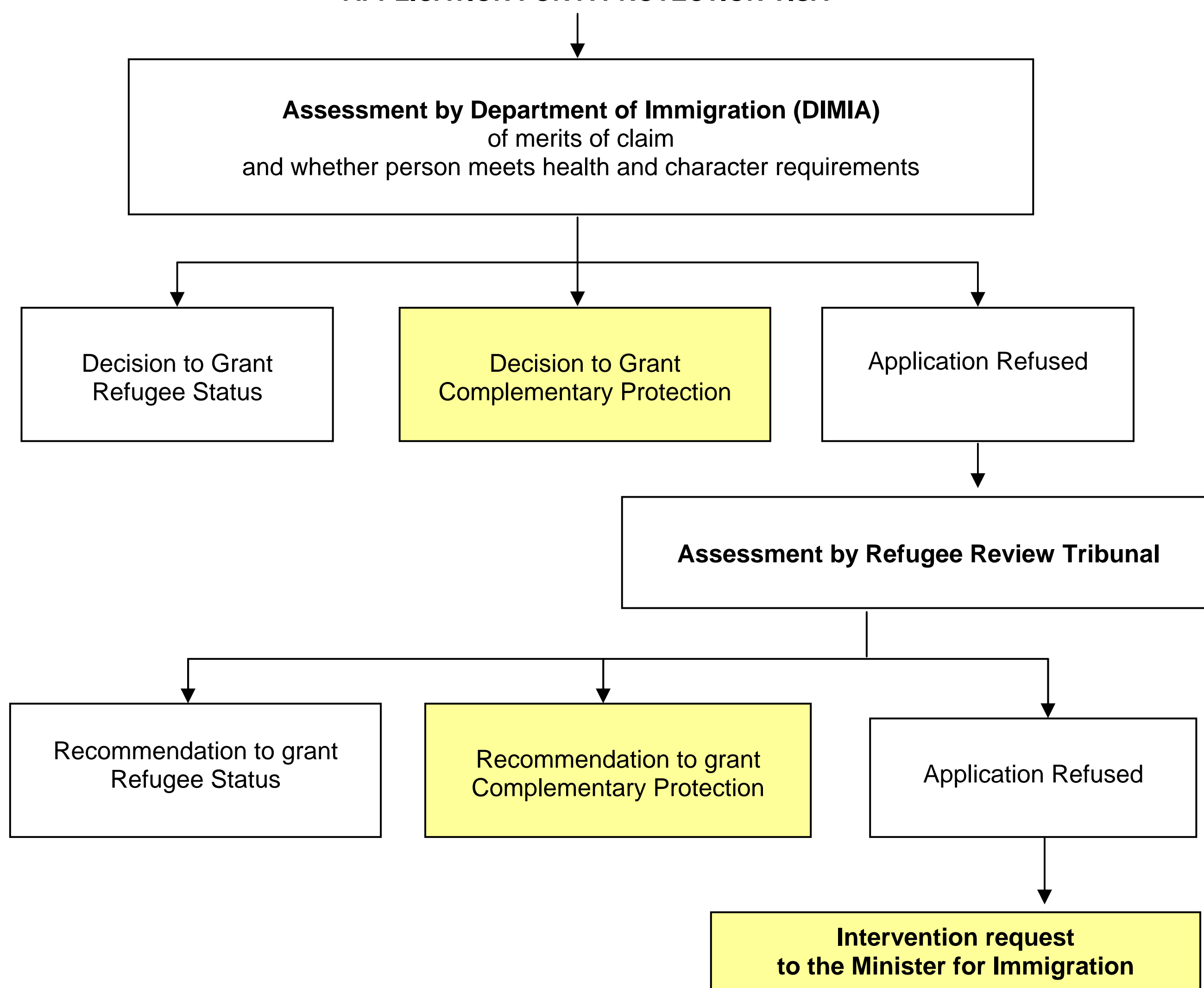
- There has been a long history of use of Complementary Protection in most other western asylum states, including the United Kingdom, Germany and the USA;
- From 1st May 2004 all 25 states of the European Union will be required to introduce some form of Complementary Protection as part of the process of harmonisation of asylum law.

What currently happens in Australia?

- There is a system of onshore humanitarian protection available through various sections of the Migration Act (in particular s.417).
- Under s.417 the Minister for Immigration has the power to grant permission to stay in Australia, but this power is discretionary, non-compellable and non-appealable. Therefore the Minister is under no obligation to exercise this power and is under no obligation to explain or justify the reasons why he/she chooses not exercise this power.
- To appeal to the Minister under s.417, an applicant must first go through the refugee status determination system and have failed at the primary and review stages.
- This system is inefficient, cumbersome, a poor use of resources, is not transparent or publicly accountable, is subject to abuse and may not actually meet the protection needs of applicants.

How could Complementary Protection work in Australia?

- Through a single administrative procedure that will first consider whether a person is a refugee and then, if the answer is no, assess whether there are grounds for granting complementary protection.
- The grounds for the granting of Complementary Protection would be derived from Australia's international treaty obligations, in particular the Convention Against Torture and the two Stateless Conventions which set out specific obligations for States.
- A group of NGOs, including the Refugee Council, Amnesty International and the National Council of Churches has developed a model to show how Complementary protection could operate in Australia:



- The above model allows for an assessment of an applicant's eligibility for complementary protection at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time, thus saving time and resources.

Under the proposed framework, people who should be considered for complementary protection would include, inter alia, those who:

- have no nationality nor right of residence elsewhere;
- would face torture if returned to their country of origin;
- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law;
- would face serious human rights violations if compelled to return.

For further information about the proposed Complementary Protection Model, look on the Refugee Council's website at www.refugeecouncil.org.au.

6/04