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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE INQUIRY INTO THE ADMINISTRATION AND OPERATION OF THE MIGRATION ACT

July 2005

1. Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to provide input into the inquiry being conducted by the Senate Legal and Constitutional Legislation Committee into the administration and operation of the Migration Act (1958).

The Refugee Council of Australia is the peak non-Governmental agency in Australia concerned with issues relating to refugees and asylum seekers and represents over 90 organisational members and a similar number of individual members. The Council works to promote humane, flexible and legally defensible policy towards refugees, asylum seekers and displaced peoples by the Australian Government and the Australian community.

The current inquiry being conducted by the Committee touches on some very important issues, though from the perspective of the Council, the breadth of the terms of reference makes it difficult to do justice to all of the issues they subsume. For this reason, the Council has elected to focus on very particular aspects of the broader issues on the table, believing that in so doing, we will be better able to provide a level of specificity that will be of value to the Committee.

RCOA's submission will confine itself to issues pertaining to refugees and asylum seekers and will focus on:

- processing and assessment of visa applications (term of reference (a));
- deportation of people from Australia (term of reference (a));
- the outsourcing and service provision at immigration detention centres (term of reference (d)).

In addition, RCOA will conclude with some comments about coordination of Government policy with respect to refugees. On face value this might seem tangential to the Committee's second term of reference but in fact, it is something that lies beneath any manner of specific activities that involve interdepartmental cooperation.

As a sectoral peak rather than an operational agency, RCOA has elected to focus on the principles that should inform and be reflected in policy and guide legislative change, acknowledging that many of our member agencies and colleagues will be providing specific case studies to the Committee.

2. Processing and Assessment of Visa Applications

The right to seek asylum from persecution is a fundamental human right articulated in the Universal Declaration of Human Rights (at Article 14).

As a signatory to the 1951 Convention relating to the Status of Refugees, Australia is obliged to provide protection to those who fit the definition of a refugee contained in this Convention:

> *Any person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his[1] nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.*

Australia also has specific and non-derogable obligations under two other important treaties:

- the Statelessness Conventions[2] 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.

Signatory States, such as Australia, have a responsibility to ensure that these obligations are fully discharged.

At present, Australia has administrative determination procedures in place that are designed to assess whether or not an asylum seeker meets the definition of a refugee as set out above. The Council has been advised that a number of the legal centres working with asylum seekers will be submitting evidence to the inquiry about the operation of the determination process and thus will not go into depth on this save to say that the Refugee Council is not confident that the procedures currently in place are sufficiently rigorous and unbiased to ensure that all refugees have their protection needs recognised.

To support this contention, reference is made to the remittal of cases back to the Refugee Review Tribunal (RRT) by the Federal and Federal Magistrates' Courts. In the 12 years since the RRT's inception, courts have remitted an average of 11.9% of the cases that have been brought before them (including a significant number of the cases of the Christmas Island Vietnamese, determined in the first instance not to be refugees and then granted status once their cases were remitted by the Federal Court). RCOA also makes reference to cases where an asylum seeker refused by Australia is granted refugee status elsewhere (such as are set out in David Corlett: Following Them Home; 2005).

To assist the Committee in its deliberations, RCOA presents the following principles which we consider should underpin a State's policy towards refugee status determination:

- A person becomes a refugee from the point at which he or she satisfies the criteria set out in the Refugee Convention, not from the point at which a determination is made by UNHCR or a State authority. This is a fundamental principle that is not well understood.

- Every person who reaches our territory should have an unfettered right to seek asylum and be granted it if warranted.

- Legislative or policy devices should not be used to prevent people from having their status as refugees considered.

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1 The male pronoun is used in the Convention but is not intended to exclude women.

2 The Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).

- Refugee status determination procedures in Australia should be humane, just, fair, timely, transparent and thorough so as to ensure that all who need protection receive it.

- Decisions should be made:

    - by suitably qualified personnel;
    - in accordance with recognised principles of refugee law;
    - on the basis of careful, thorough and balanced analysis of independent information about the situation in the country of origin;
    - without political or Executive interference.

- The decision to deny a person access to the refugee status determination process should be subject to a truly independent merits review.

- Access to judicial review is essential to ensure that decision makers act in accordance with the law and to provide guidance as to the correct legal principles.

- Applications for protection should be processed in a timely manner. The existence of a state of flux in a country of origin should not be used to delay consideration for anything other than a brief period.

- All asylum seekers should have access to application assistance.

- Convention refugees should be granted permanent protection.

Having said this, it is important not to lose sight of the fact that refugees are not the only group of persons to whom Australia owes protection. As previously mentioned, Australia has obligations towards other groups of persons, including, *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.

There is currently no administrative process to determine Australia's obligations towards such people. The only person able to consider these claims is the Minister for Immigration (or, in some instances the Minister for Citizenship and Multicultural Affairs)[3] who has non-compellable, non-reviewable powers to grant any visa. Until the introduction of the June 2005 changes to the Migration Act, the only way an applicant could seek this intervention was under Section 417 of the Migration Act which required that the person 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. It is too early to assess whether the additional intervention powers granted to the Minister in June will be used to remedy this situation or for other purposes entirely.

It can be argued that Australia's current practice in which there is no administrative process for determining non-Convention protection needs:

- 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;

[3] To whom the Minister for Immigration has delegated some powers.

- 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;[4]

- 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.

In the paper jointly prepared by the Refugee Council, Amnesty International and the National Council of Churches in Australia entitled *Complementary Protection: The Way Ahead* (included as Attachment A), further explanation is given as to why Australia's current procedures are out of step with international practice, inefficient and unnecessarily expensive. Of even greater importance, however, is the fact that they do not provide sufficient safeguards to ensure that all of those to whom Australia owes protection receive it. The paper then sets out to outline a model of how such safeguards can be put in place through the adoption of administrative determination of complementary protection.

The Council strongly urges the Committee to give careful consideration to the question of how Australia discharges its obligations to all persons in need of protection, not just those covered by the Refugee Convention, and in this context look closely at the Complementary Protection Model presented in Attachment A.

3. Deportation of Persons from Australia

The vast majority of people deported or removed from Australia are not and never have been asylum seekers. Such people are outside RCOA's remit. We will confine our comments to the issue of involuntary return of people who sought Australia's protection.

It is acknowledged from the outset that the maintenance of any robust and effective protection system is dependent on those not in need of protection or with no other legitimate reasons to remain, returning or being returned to their country of origin or habitual residence.

As with consideration of processing visa applications (Section 2 above), it is important to consider first the relevant obligations under international law when looking at the issue of return, and central to these is the *Principle of Non-Refoulement*.

In the case of refugees, this refers to the obligation on a state to not send someone back to a country in which he or she would face persecution. This obligation is reflected in the 1951 Convention relating to the Status of Refugees (the Refugee Convention) and in International Customary Law.

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

Non-refoulement obligations also extend to people facing return to a country in which they face torture. This is reflected in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Unlike the Refugee Convention, the Convention Against Torture does not exclude people who have committed war crimes, crimes against peace and crimes against humanity from its protection.

Non-Refoulement is not, however, the only obligation that States have in relation to the removal of people from their shores. As discussed in Section 2, States also have obligations to people who are stateless under the two Statelessness Conventions. Key amongst the obligations under these treaties is ensuring that a person is not involuntarily removed unless there is country that is prepared to acknowledge that person as a citizen or habitual resident and allow admission.

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)[5] or Article 7 (freedom from torture and cruel, inhumane of degrading treatment or punishment).

Another important source of guidance to States are ExCom Conclusions.[6] Those that have direct relevance in this context are:

- **ExCom Conclusion 85** (of 1998) which, *inter alia* and at (bb), "deeply deplores the use of practices for the return of asylum seekers and persons not in need of international protection which seriously endanger their physical safety and reiterates in this regard that, irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect for their human rights and dignity and without resort to excessive force";

- **ExCom Conclusion 96** (of 2003) which, *inter alia* and at (c), "reiterates that return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law; and emphasises that in all actions concerning children, the best interests of the child shall be a primary consideration"; and

- also in **ExCom Conclusion 96** (of 2003) at (l), "stresses the importance of ensuring the sustainability of returns and of avoiding further displacements in countries emerging from conflict, and notes that phasing of returns of persons found not to be in needs of international protection can contribute to this".

If States are to comply with treaty obligations and the guidance set out in Conclusions, it is necessary that they have in place procedures:

a) to determine protection obligations under relevant treaties (as discussed in section 2 above);

b) to ensure, both prior to and during removal, the safety and dignity of the person being removed are preserved and which do not infringe their rights;

c) to assess the conditions in the country of origin with respect to the physical, legal and material safety of the returnee;[7]

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

6 "ExCom Conclusions" are adopted by consensus by the States that are members of UNHCR's governing body, the Executive Committee. They are not binding on States parties but ought to have strong persuasive value.

7 These concepts are elaborated in RCOA's position Paper on Return which is currently nearing completion and can be provided to the Committee on request.

d) to assess whether there are any health issues (either physical or psychological) that cannot be accommodated in the country of origin and/or would prevent the person from being able to re-establish him/herself in that country;

e) to consider whether there are any compelling compassionate reasons why someone should not be returned, for example if return would separate an Australian citizen child from his/her parent(s).

The Refugee Council argues that as it stands at present, Australian law and policy falls well short of meeting these basic requirements:

- with respect to a) above and as discussed in section 2, administrative determination is restricted to consideration of whether a person is a refugee. There is no codified determination of protection needs under other international treaties and therefore insufficient protection from *refoulement;* [8]

- with respect to b) above, well publicised accounts of the use of chemical and physical restraints during removal (which the Council has no doubt will be drawn to the Committee's attention) make us question whether the removal procedures in place are truly respectful of the rights of the person being removed and, for that matter, whether there is sufficient guidance in law as to how removal should be conducted. This, and the fact that the Migration Act does not apply once a person has left Australian territory, means that the Government is able to sidestep responsibility and accountability in an area where both should be clearly defined;

- with respect to c) above, the fact that there have been forced removals to countries in which there is an ongoing civil war, which is a failed state or which is emerging from a period of crisis[9] suggest that insufficient consideration has be given to the conditions to which the person is being compelled to return;

- with respect to d) above, the forced removal of persons who are under psychiatric care and have been assessed as being in a critical state[10] indicates that there is insufficient protection for such people in the system that exists at present. Similar concerns have been raised by the AMA and other medical bodies about the physical status of those being removed;

- with respect to e) above, there have been cases where Ministerial intervention has not protected Australian citizen children from being separated from a parent by forced removal and also cases where families with children have been retuned to countries where basic services such as health care and education are inadequate to meet the most basic needs. In such cases, it is questioned whether there has been adequate consideration of the best interests of the child, as obliged by the Convention on the Rights of the Child, or adequate respect for the principle of Derivative Protection.[11]

The Refugee Council recommends that the Committee examine the extent to which the Migration Act gives appropriate expression to Australia's obligations (both legal and ethical) in relation to the return of failed asylum seekers, using the framework set out above as the basis for this consideration..

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8 In this regard, RCOA reiterates the need for some form of assessment of Complementary Protection needs.

9 A number of examples of this are documented in "Following Them Home" by David Corlett. 2005

10 Ibid.

11 Derivative Protection is the principle that extends refugee status to all members of an immediate family; i.e. if one member of the family is granted refugee status, all other members of the nuclear family (spouse and dependent children, or parents and minor siblings in the case of a minor) should also be considered as refugees, irrespective of whether the family unit is in tact at the time the grant was made.

Removal to Third Country

While most involuntary removal of failed asylum seekers is to the country of origin, it is important not to lose sight of the fact that the Australian Government has also arranged for failed asylum seekers to be sent to third countries. Most commonly, Iraqis and Kuwaitis have been sent to Syria and Afghans have been sent to Pakistan but there have been many other examples of this, a number of which have been documented in the works of the Edmund Rice Centre[12] and David Corlett.[13]

Sending a person to a third country can be a viable solution in some circumstances but only if:

- the person has had some significant prior connection to that country;
- the country is prepared to issue – in advance of travel – permission for that person to reside indefinitely in that country (i.e. the equivalent of a permanent residency visa);
- the person is able to exercise basic rights such as the right to work, to own property, gain access to medical care and education and to seek protection under the legal system;
- there is no prospect that the person will be returned to their country of origin against their will.

It is clear from the cases documented in the aforementioned research that Australia has failed to comply with these minimum standards when it has removed failed asylum seekers. The fact that these people have not been sent to their country of origin suggests that there are significant obstacles that prevent this. It is not acceptable for the Australian Government to then "dump" such people in a third country where they have no status (or only very temporary status) and no prospects for any sustainable future. This is, the Council suggests, serious abrogation of our responsibility towards these people.

The Refugee Council recommends that the Committee consider the issue of removal of persons to third countries and the absence of any protection under the Migration Act or of criteria to determine when such transfers are acceptable and when they are not.

Decisions About Returns

When reflecting on the above issues, the Committee will face the dilemma of what can be done to ensure that forced removal is undertaken within a legal and ethical framework.

While not suggesting it as a complete solution, RCOA would like to suggest to the Committee that they examine Canada's Pre-Removal Risk Assessment Tool. See:

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

and/or

http://www.cic.gc.ca/english/irpa/fs%2Drisk.html

This tool is used as a "safety net" to ensure that all obligations under the Convention Against Torture and other relevant human rights instruments are met before forced removal. As Canada does not have a first instance determination of Complementary Protection, this is especially important.

12 Edmund Rice Centre: *Departed to Danger.* 2003

13 David Corlett: *Following Them Home*. 2005

It is RCOA's view that the eligibility criteria for the Canadian model are too narrow to meet the needs identified in previous sections, however the idea of having some form of pre-removal risk assessment is a sound one and this is something that should be explored.

The Refugee Council recommends that the Committee consider the issue of risk assessment for involuntary returns and the possibility of including a legislative requirement that this occur.

Use of Private Contractors for Return

RCOA also questions the practice of contracting private companies such as P&I and GSL to undertake the removals.[14] The Refugee Council argues that there are good grounds for the Committee to consider this practice and recommends that in so doing, it reflect on the following questions:

- how is it possible for the Australian Government to remain accountable should an incident occur outside Australian airspace, given that the company used to undertake such tasks is registered outside Australia?

- is it not the case that handing over a failed asylum seeker to a private company constitutes placing an individual in the custody of an agent for an undetermined period and in conditions under which the Government has no control?

- is it not the case that handing over people whose identity and nationality has not been established to a private removal company running the risk of generating "refugees in orbit" (i.e. people unable to secure entry to any country) and breaching Australia's obligations under the Statelessness Conventions?

- can the very large sums paid to such companies (believed to be in excess of $10,000 per removal plus costs) be justified?

It is also important that the Committee note that one of the main reasons why the activities of the private firms are so little known to human rights observers is that, as private entities, their activities are beyond the purview of the Freedom of Information Act.

The Refugee Council recommends that the Committee include consideration of how the Government's use of private companies to effect removals constitutes a breach of duty of care and is being used to evade legal obligations to those being removed.

Monitoring Returns

Another relevant issue to consider in relation to removal is that of monitoring. This was covered in detail in the *Sanctuary Under Review* report of the Senate Legal and Constitutional References Committee (2000) in Chapter 11. RCOA notes that the inquiry recommended that "the Government place the issue of monitoring on the agenda for the discussion at the InterGovernment/Non-Government Organisations Forum with a view to examining implementation of a system of informal monitoring". RCOA is a participant in this Forum and is not aware that substantive discussions have been held on this issue. Nor is the Council aware that the recommendation of the inquiry ahs been advanced in any other way.

[14] This issue was explored in detail in the 2000 report of the Senate Legal and Constitutional References Committee: *A Sanctuary Under Review,* Chapter 10.

The Refugee Council recommends that the Committee revisit the consideration of monitoring of removal contained in* Sanctuary Under Review *with a view to reiterating the recommendation about putting in place a system that enables appropriate monitoring of involuntary removals to ensure the protection of those being removed.

4. Outsourcing and Service Provision at Immigration Detention Centres

The deprivation of liberty of any person is a serious act and must only be done in accordance with national and international law.

While acknowledging the right of the Government to control the borders and to detain, for an initial brief screening period, any person who seeks to enter without authorisation, the Refugee Council has long held that Australia's policy of mandatory non-reviewable detention of unauthorised arrivals, in so much as it affects asylum seekers, is contrary to the country's international obligations. The Council contends that the current policy fails to comply with, *inter alia,* the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, and UNHCR's Guidelines on Detention. The Council has also expressed concerns on many occasions over the years about the management of and conditions within detention centres, concerns that have been echoed by both international[15] and national[16] human rights monitors.

RCOA contends that the conditions in immigration detention centres must be informed by, and consistent with relevant international treaties and accepted standards for the treatment of people deprived of their liberty. These include (but are not limited to):

- The International Covenant on Civil and Political Rights:
  - Article 7 - no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
  - Article 9 - no one shall be subjected to arbitrary arrest or detention.
  - Article 10 - all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- The International Covenant on Economic, Social and Cultural Rights:
  - This covenant includes the right to the highest attainable health care standards.
- The Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment:
  - Article 1 - torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted to obtain a confession or information; or punishment for an act; or intimidation or coercion; or discrimination of any kind.
- The Convention on the Rights of the Child:
  - Article 3 - the best interests of the child must be a prime consideration in all actions concerning children.
  - Article 37 (b) - detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of their liberty unlawfully or arbitrarily.

15 For example the UN Working Group on Arbitrary Detention and Amnesty International.

16 For example the Human Rights and Equal Opportunity Commission.

- Article 37 (a and c) - children in detention have the right to be treated with humanity and respect for the inherent dignity of the person.

- Articles 6 and 39 - children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma.

- Article 22 - asylum seeking and refugee children are entitled to appropriate protection and assistance.

- UNHCR Guidelines on Detention.

- Standard Minimum Rules for the Treatment of Prisoners (1957).

- Principles of medical ethics relevant to the role of health personnel particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (1982).

- Basic Principles for the Treatment of Prisoners (1990).

The Australian Government, as party to these treaties and entity accountable for compliance with these standards, must ensure that they are adequately reflected in all circumstances where a person is deprived of his or her liberty.

It is the view of the Refugee Council that in order to ensure proper effect to these obligations, the management of immigration detention centres must remain with the Government and should not be delegated to private contractors.

In addition to the importance of accountability remaining squarely with the Commonwealth, using private contractors for the provision of detention services is inherently problematic for a number of reasons, not least:

- private contractors are driven by the requirement to maximise profits for their shareholders;

- in order to maximise profits, private contractors could well do only that which is required of them under the contract;

- if the contract requirements fall short of the minimum standards outlined above, there is no incentive or compulsion for the company to lift their standards to ensure compliance;

- contracts contain penalty clauses which then create a disincentive for the company to be open about problems and report incidents.

The Refugee Council argues that the Committee should recommend that immigration detention centres revert to Commonwealth management under codified minimum conditions and with appropriate scrutiny.

Having said this, the Council also wishes to make the point that considerable expertise in working with asylum seekers and refugees exists in the community sector and that who ever manages detention centres would benefit by drawing on this is an advisory or subcontractural capacity.

5. Coordination of Government Policy

The Committee has indicated, in its terms of reference, its desire to consider cooperation between the Department of Immigration and the Department of Foreign Affairs and RCOA has no

doubt that the Committee will receive many submissions giving instances where this was not as effective as it could or should have been.

Rather than focusing on this in the current submission, however, the Refugee Council would like to argue that it is important for the Committee to not lose sight of the fact that lack of cooperation is indicative of something more fundamental, namely lack of coordination.

It is the view of the Refugee Council that an ethically sound and legally defensible policy on refugees must be balanced and internally consistent within and between the various areas in which Australia responds to refugees. To achieve this, it is necessary that there be coordination of policy and programming within and across portfolios in five key areas:

i) Prevention of human rights abuses that lead to population displacement, through participation in international fora and bilateral initiatives.
ii) Participation in international peacekeeping operations.
iii) Assistance for refugees, returnees, internally displaced persons and host communities through the international aid program.
iv) Provision of resettlement opportunities for refugees for whom no other durable solution exists.
v) Granting asylum to those who are determined to be refugees.

RCOA contends that at present border protection and exclusion concerns dominate policy making to the detriment of initiatives that focus on protection of vulnerable people. For as long as this ethos exists, Australian policy cannot be considered either balanced or ethically and legally sound.

ATTACHMENT A:

COMPLEMENTARY PROTECTION: The Way Ahead
April 2004

1. Background

For over 50 years the Refugee Convention[17] 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,[18] by Latin American States in the Cartagena Declaration[19] and through the Bangkok Principles of 2001.[20] Further some countries, Canada being one, apply a broader definition of what constitutes a refugee than is used elsewhere; or

17 1951 Convention relating to the Status of Refugees, with the later addition of the 1967 Protocol.
18 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. 1969.
19 Cartagena Declaration on Refugees. 1984.
20 Asian-African Legal Consultative Organization's Bangkok Principles on the Status of Refugees.

- 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.[21]

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**[22] 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.*[23]

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.

- [illegible] 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

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21 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.

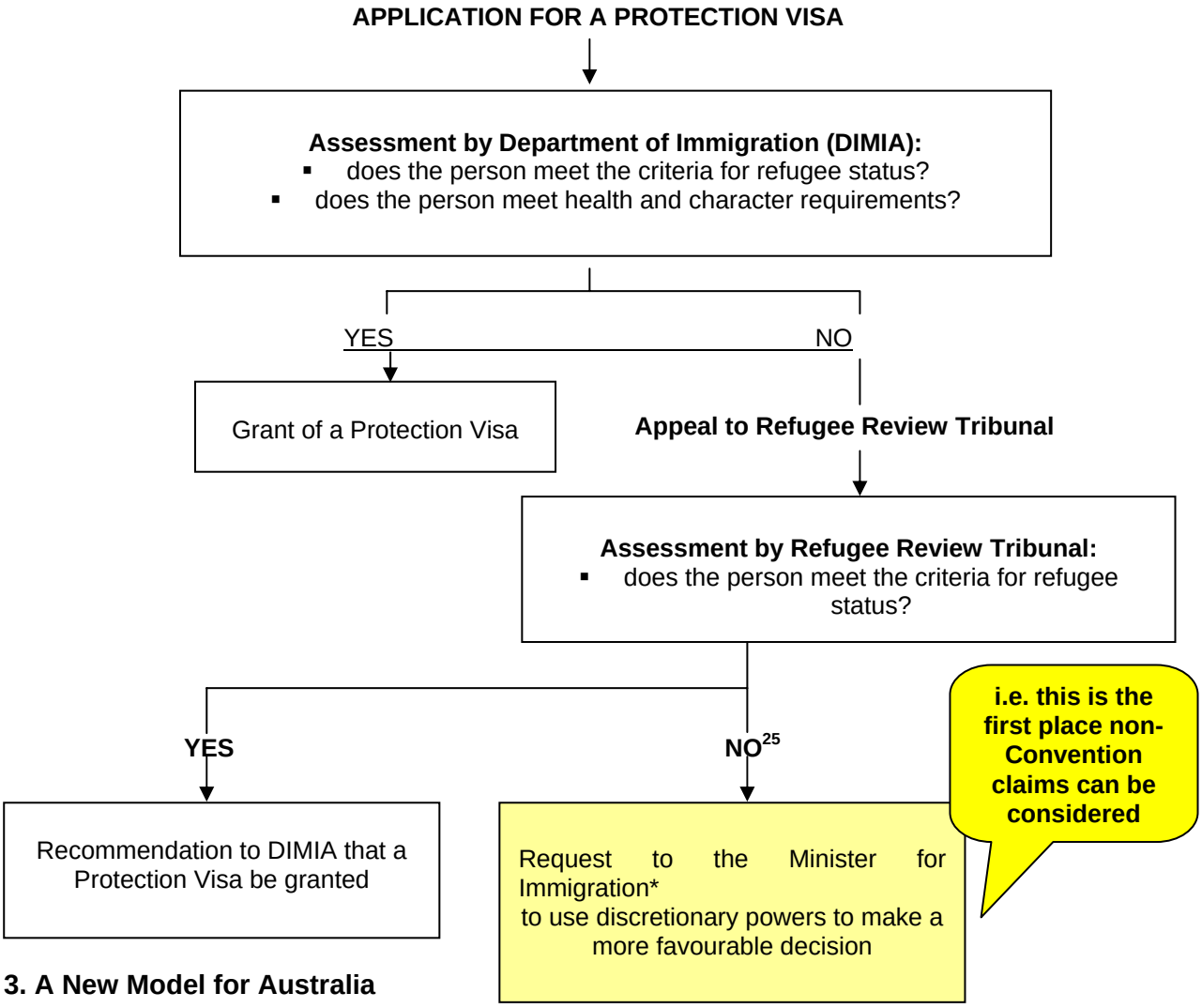
22 UNHCR's Agenda for Protection is available in full from www.unhcr.ch.

23 At Goal 1, Objective 3.

criteria are employed, no avenue of review exists. This leaves the Minister vulnerable to claims of abuse of power;[24]

- 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**



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.

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

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

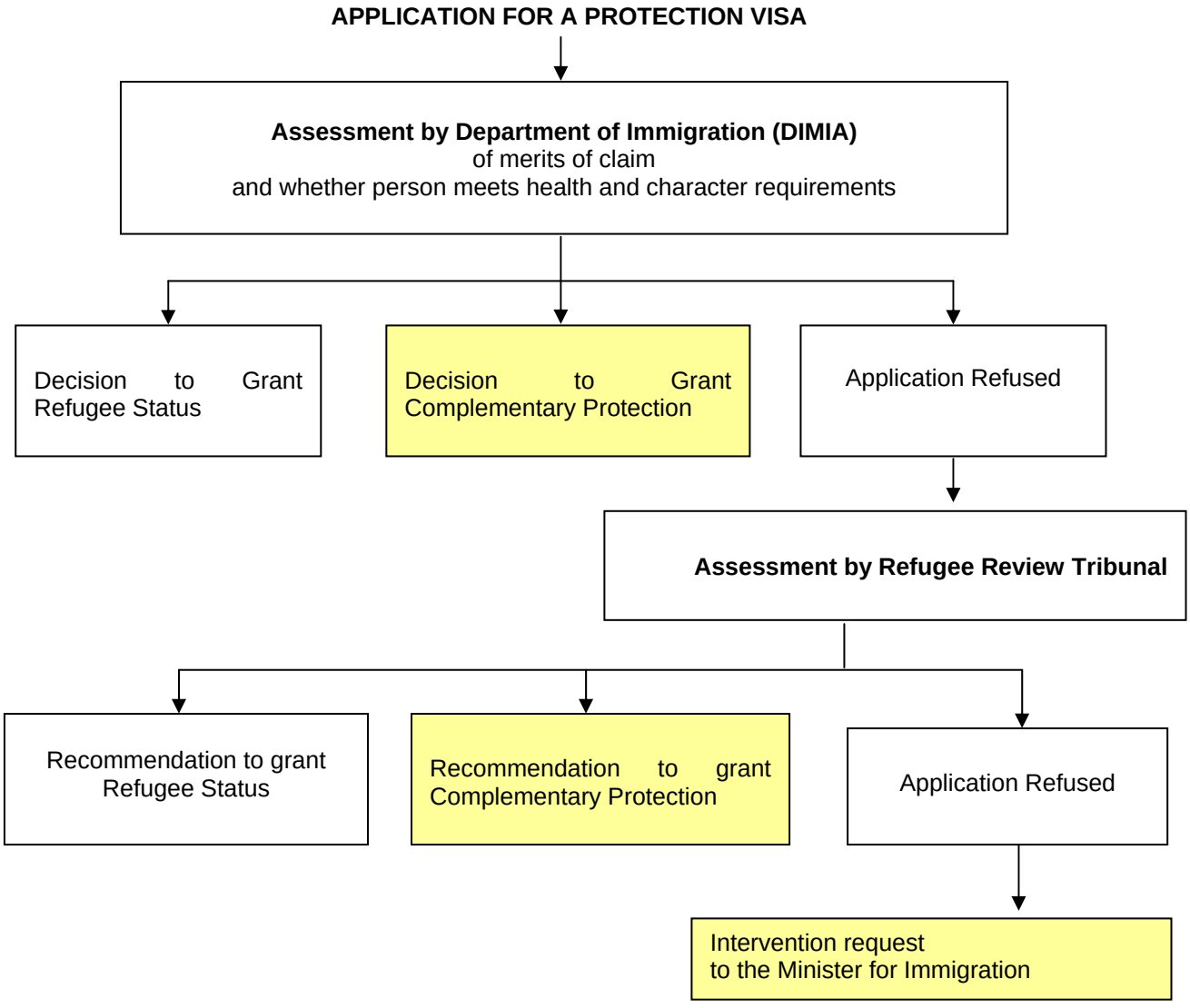
The following section will make recommendations in relation to the application process and determination criteria and will then explain the benefits of this model.

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:

PROPOSED MODEL



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[26] 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.[27] 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).[28]

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.

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,

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

27 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.

28 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).

would face a real risk of violation of his/her rights under Article 6 (right to life)[29] 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[30] serious harm[31]",* 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.

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

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

30 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.

31 "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".

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.[32] 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;[33]

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;[34]

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;[35]

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,[36] 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;

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

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

34 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.

35 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.

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

- 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

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:

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

- 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.

- 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.

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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