COMPLEMENTARY PROTECTION
The Way Ahead

January 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

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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.

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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;

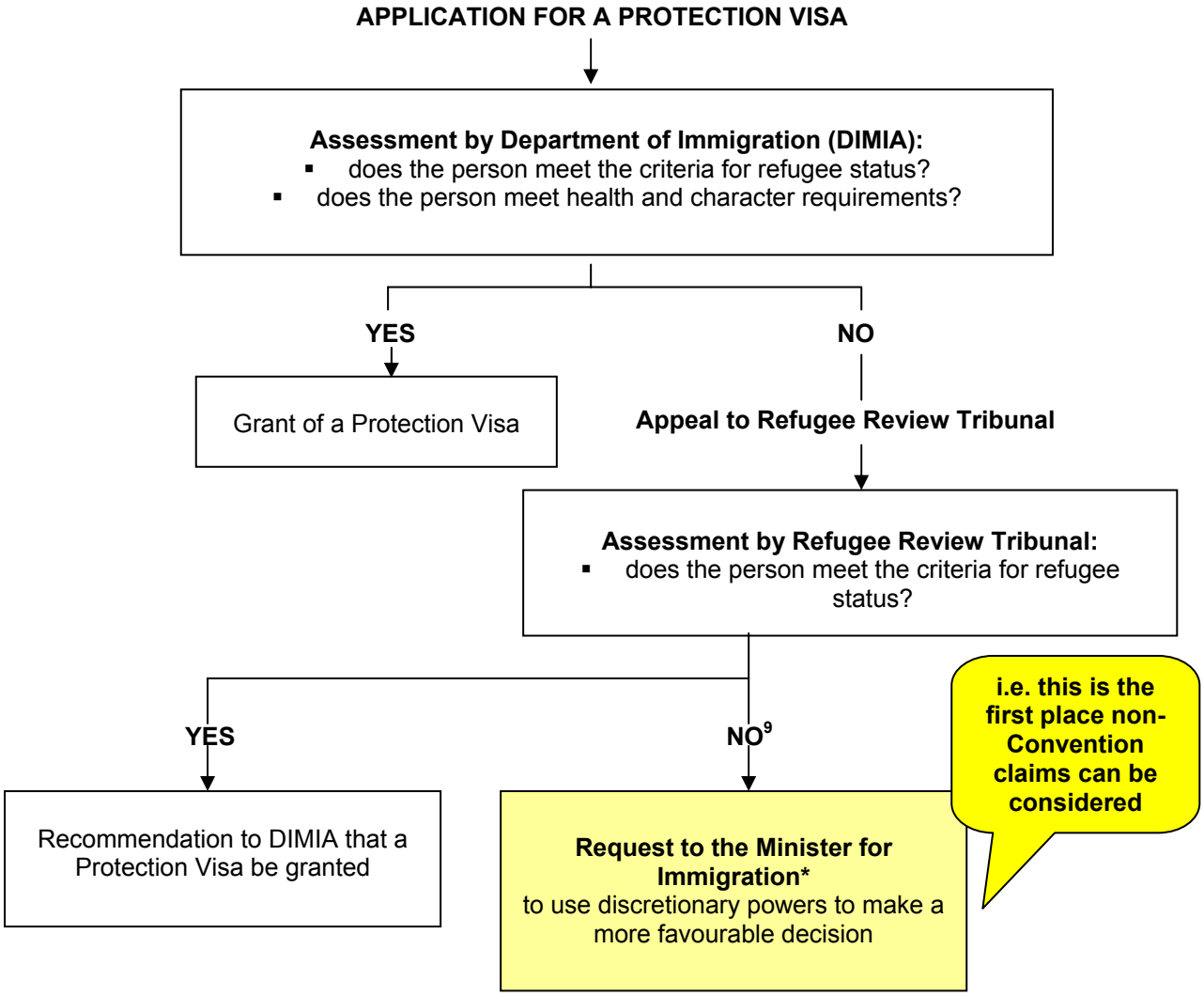
- is lacking in transparency and accountability: the Minister may simply choose to intervene if the Minister deems it is in the public interest to do so. The grounds for this intervention are not legally binding and no reason is given for the decision. Further, as no legally binding criteria are employed, 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

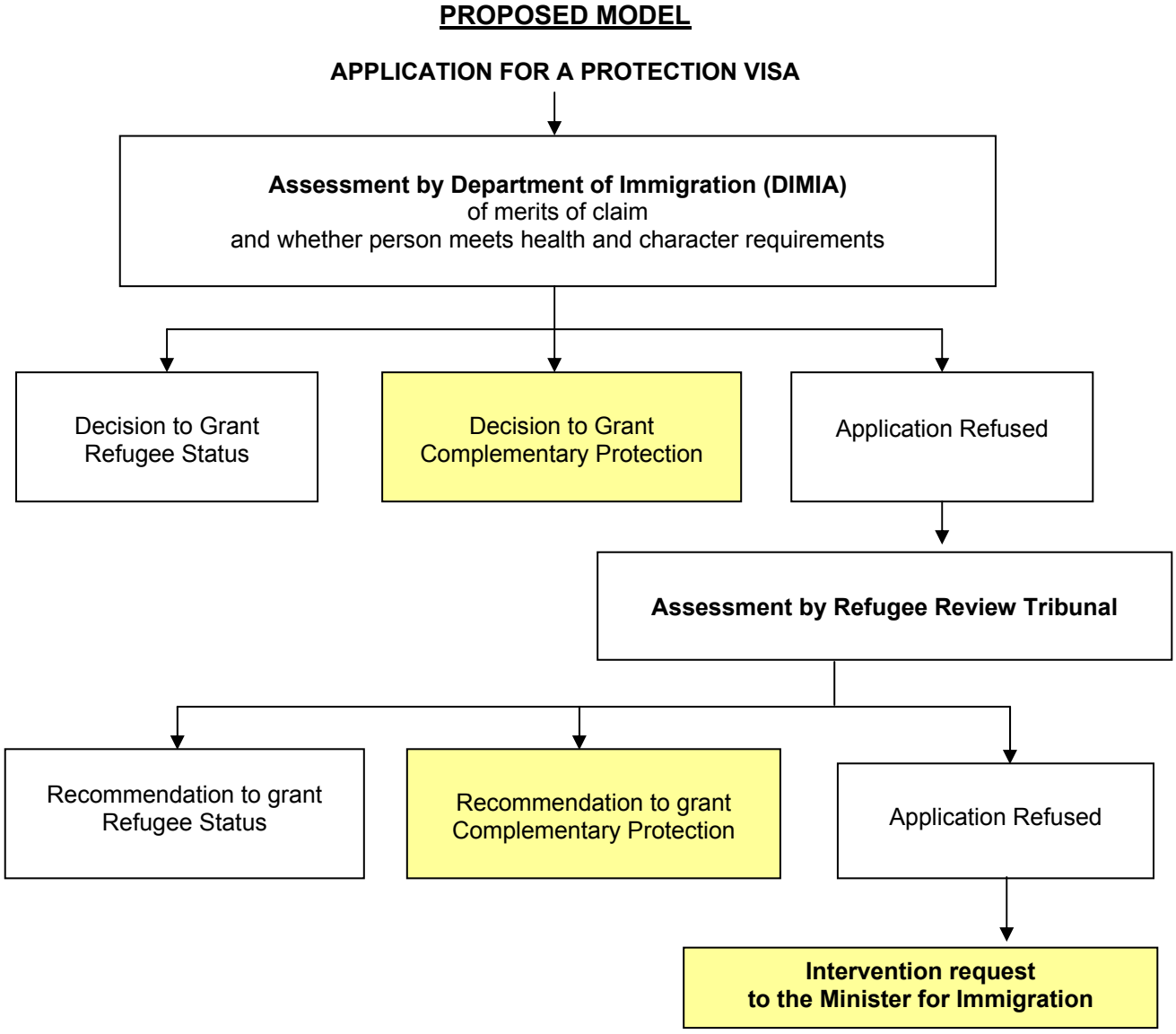
In order to address the identified deficiencies in Australia's current procedures and to ensure that Australian practice is both consistent with internationally recognized best practice and the promises made by the Government when adopting the Agenda for Protection, changes are required to the way that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

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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 the most appropriate test is that which Australia already applies in relation to selection for the Special Humanitarian Program (visa subclass 202) which is part of the offshore humanitarian intake. To be eligible for this program, a person must have experienced, or have a well-founded fear of *gross discrimination amounting to a substantial violation of their human rights*.[14] International human rights norms are the benchmarks for making assessments in this regard.

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 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;

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

14 It is interesting to note that after many years deliberation on the question of threshold, the European Union (in their Qualification Directive) have settled on the notion of "well-founded fear of unjustified serious harm" to parallel the Refugee Convention concept of "well-founded fear of persecution".

ii. entitle the recipient to the same rights and entitlements as those who have received refugee status.[15] 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;[16]

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;[17]

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;[18]

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,[19] 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;

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

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

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

17 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.

18 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.

19 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
- 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.

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:

- 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

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 (Australia)
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