Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Elisbritt Karlsen
Law and Bills Digest Section

Contents

Purpose of the Bill ................................................................. 3
Background ................................................................. 3
What is complementary protection? ........................................ 3
Why was the statutory scheme introduced? ................................ 3
Why is the statutory scheme being abolished? .............................. 5
Incentive to come to Australia ................................................. 6
Costly and inefficient processing ............................................... 7
Criminals are satisfying the criteria and are guaranteed a particular visa outcome ......................................................... 8
Complicated and convoluted statutory criteria ............................... 9
Judicial interpretation ............................................................ 10
Minister for Immigration and Citizenship v MZYL ...................... 10
Minister for Immigration and Citizenship v SZQRB .................... 12
Humanitarian issues .................................................................. 13
What will replace the statutory scheme? ....................................... 13
How will the existing applications be processed? ......................... 14
Committee consideration .......................................................... 15
Senate Legal and Constitutional Affairs Committee .................... 15
Senate Standing Committee for the Scrutiny of Bills .................... 15
Parliamentary Joint Committee on Human Rights ....................... 16
Policy position of non-government parties/independents ............... 16
Position of major interest groups .............................................. 16
Financial implications ............................................................ 16
Statement of Compatibility with Human Rights ......................... 17
Key issues and provisions ........................................................ 17

Date introduced: 4 December 2013
House: House of Representatives
Portfolio: Immigration and Border Protection
Commencement: Sections 1 to 3 upon Royal Assent. Schedule 1 commences on the earlier of a day to be fixed by Proclamation or six months after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
Inclusion criteria in section 36 ............................................. 17
Exclusion criteria in section 36 ............................................. 17
Independent merits review ................................................. 18
Concluding comments ...................................................... 18
Appendix ........................................................................... 20
Purpose of the Bill

The primary purpose of the Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013 (the Bill) is to amend the Migration Act 1958 (the Migration Act)\(^1\) to remove the statutory regime for assessing claims that may engage Australia’s non-refoulement (non-return) obligations arising under international human rights treaties, other than the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention).\(^2\)

Background

What is complementary protection?

In late 2011, the Migration Amendment (Complementary Protection) Act 2011 (the Complementary Protection Act) amended section 36 of the Migration Act to provide a new statutory ground upon which protection visas could be granted.\(^3\) Prior to this Act, protection visas could only be granted pursuant to section 36 of the Migration Act to visa applicants who satisfied the definition of ‘refugee’ in the Refugees Convention. The new visa criteria commenced by proclamation on 24 March 2012.

In brief, ‘complementary protection’ is the term used to describe a category of protection for people who are not refugees but who nonetheless cannot be returned to their home country because there is a real risk they will suffer a certain type of harm. The Migration Act prescribes that a person would suffer ‘significant harm’ if:

- the applicant will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the applicant
- the applicant will be subjected to torture
- the applicant will be subjected to cruel or inhuman treatment or punishment or
- the applicant will be subjected to degrading treatment or punishment.\(^4\)

Australia’s non-refoulement obligations to such people arise expressly and impliedly from the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC) to which Australia is a party.\(^5\)

This Bill proposes to repeal (in essentially identical terms) the provisions inserted by the 2011 Complementary Protection Act.\(^6\)

For further information on the development of complementary protection in Australia including, the statutory and policy frameworks and the basis for reform, see the Parliamentary Library’s 2009 research paper entitled ‘Complementary protection for asylum seekers—overview of the international and Australian legal frameworks’.\(^7\)

Why was the statutory scheme introduced?

The reason the statutory scheme was first proposed by the Rudd Labor Government in 2009 is best outlined in the report of the Senate Committee inquiry into the Migration Amendment (Complementary Protection) Bill 2009:\(^8\)

---

4. Subsection 36(2A) of the Migration Act.
6. Note that amendments made by items 17 to 24 in the Migration Amendment (Complementary Protection) Bill 2011 in relation to sections 91T (Non-political crime) and 91U (Particularly serious crime) of the Migration Act are not being repealed. Similarly, the amendments to section 5 of that Bill relating to the interpretation of the terms ‘non-political crime’, ‘serious Australian offence’, and ‘serious foreign offence’ are not being repealed. These amendments simply relocated these definitions from other parts of the Migration Act.
Rationale for complementary protection legislation

1.9 The Second Reading Speech discloses the rationale for introducing complementary protection into the Migration Act as being based on the need to be consistent in the consideration of whether a person would face arbitrary deprivation of his or her life, or be tortured. At present, Ministerial intervention powers provide the only course of action to assist such people, unless they are covered by the refugees convention.

1.10 While the powers enable the minister to grant a visa if the minister considers it is in the public interest to do so, including cases in which non-refoulement obligations are owed under international law, the Government argues that reliance on the ministerial intervention powers brings with it several disadvantages. These include:

- decisions may only be made by the minister personally;
- no-one can compel the minister to exercise the powers;
- there is no specific requirement to provide natural justice;
- there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of decisions by the minister;

1.11 Moreover, the current process is widely considered to be inefficient and unnecessarily burdensome on all parties. The Department summed this up neatly in their submission:

The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.

1.12 During the Second Reading Speech, Mr Ferguson argued:

While there can be no doubt that ministers take very seriously their obligations to consider whether a visa should be granted to meet Australia’s human rights obligations, the very nature of ministerial intervention powers is such that they do not provide a sufficient guarantee of fairness and integrity for decisions in which a person's life may be in the balance.

1.13 The Government points to arguments from both domestic and international bodies for the need for changes to be made to better address complementary protection claims. Mr Ferguson’s Second Reading Speech noted the following:

The Refugee Council of Australia and other organisations with firsthand experience of the shortcomings of Australia’s current arrangements have also been tireless advocates for the introduction of a system of complementary protection. Internationally, this reform has the strong support of the United Nations High
Commissioner for Refugees (UNHCR) and is consistent with a number of conclusions by the state membership of UNHCR’s Executive Committee. It has also been recommended by other key international human rights bodies.

The United Nations Committee against Torture recommended, most recently in May 2008, that Australia adopt a system of complementary protection, ensuring that the minister’s discretionary powers are no longer solely relied on to meet Australia’s non-refoulement obligations under human rights treaties. In addition, the United Nations Human Rights Committee recommended, in May 2009, that Australia should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

Mr Ferguson also noted that:

Australia is almost alone among modern Western democracies in not having a formal system of complementary protection in place. Many European and North American countries already have established complementary protection arrangements. The New Zealand government already has a bill before their parliament to introduce complementary protection. This bill brings Australia into line with what is now recognised as international best practice in meeting core human rights obligations. [Footnotes omitted].

In addition, the Explanatory Memorandum to the 2009 Bill also stated that:

The introduction of complementary protection is an important change, the need for which has been identified by the Senate Legal and Constitutional References Committee report on A Sanctuary under Review: An examination of Australia’s Refugee and Humanitarian Determination Processes (June 2000); Senate Select Committee report on Ministerial Discretion in Migration Matters (March 2004); Legal and Constitutional References Committee report on Administration and Operation of the Migration Act 1958 (March 2006); and the Australian Human Rights Commission, and in the international context by the United Nations Committee Against Torture, the United Nations Human Rights Committee, and the Executive Committee of the United Nations High Commissioner for Refugees.

Why is the statutory scheme being abolished?

The Coalition opposed the introduction of a statutory complementary protection scheme. Liberal Senators summed up their concerns in a dissenting report of the Senate Committee inquiry into Labor’s Migration Amendment (Complementary Protection) Bill 2009:

The Bill is unnecessary, counterproductive and risks being represented as yet another softening of Australia’s immigration laws that sends a clear message to people smugglers and unlawful non-citizens seeking entry that Australia is an easy target... the minister has the power to exercise his or her discretion. This safeguard has been in place for decades and there is no evidence to suggest that it has been anything other than effective. It is a tried and proven system, which meets Australia’s international obligations, and which protects those who are in genuine need of such protection.

Liberal senators further note that if the bill is passed, a departmental decision not to grant ‘complementary protection’ will be appealable. It seems that the lessons of the past have not been learned, as this will inevitably mean that decisions may take many months, if not years to be resolved if the initial decision is unfavourable and appealed...

Codifying a form of complementary protection is counterproductive in that it risks curtailing discretion otherwise available to help genuine refugees languishing in camps around the world. Liberal Senators consider that the passage of this bill will encourage the lodging of a large number of new, non-refugee, protection applications and the making of false asylum claims.

See also:


Notwithstanding these comments, none of the ten or so different asylum policy papers released prior to the 2013 federal election appear to mention any proposed statutory changes to the way in which complementary protection claims are assessed. The Explanatory Memorandum to the Bill simply notes that the Government’s position is that ‘it is not appropriate for complementary protection to be considered as part of a protection visa application and that non-refoulement obligations are a matter for the Government to attend to in other ways’. It does not say why it is not appropriate for such claims to be assessed as part of the protection visa application process. Rather, it is necessary to turn to the Minister’s second reading speech to elucidate the rationale for the introduction of the Bill. In brief, the Minister’s concerns about the existing statutory scheme are that:

- it creates an incentive for people to come to Australia
- it is a costly and inefficient way to process applicants as so few are satisfying the visa criteria
- people who have committed serious crimes, have associated with criminal gangs, or have been involved in blood feuds are satisfying the complementary protection criteria and are guaranteed a particular visa outcome
- the visa criteria are complicated, convoluted, and difficult for decision-makers to apply, which is resulting in inconsistent outcomes
- the courts have interpreted the criteria in a way that has broadened Australia’s obligations beyond what is required under international law
- the criteria do not enable consideration of Australia’s broader humanitarian concerns.

These concerns will now be considered in further detail below.

**Incentive to come to Australia**

The Minister is of the view that having complementary protection in the protection visa framework in the Migration Act creates ‘another statutory product for people smugglers to sell’. However, this Bill is simply proposing to change the way complementary protection claims are assessed. It is not changing Australia’s international obligations or diminishing the fundamental rights of those found to be in need of Australia’s protection. As the Minister’s second reading speech notes:

In saying this, the bill does not propose to resile from or limit Australia’s non-refoulement obligations, nor is it intended to withdraw from any conventions to which Australia is a party. Australia remains committed to adhering to our non-refoulement obligations under the CAT and the ICCPR. Anyone who is found to engage Australia’s non-refoulement obligations under these treaties will not be removed from Australia in breach of these obligations.

One way in which the current statutory regime could be regarded as more favourable to applicants than the re-introduction of the administrative scheme is that successful protection visa applicants who have raised complementary protection claims are currently guaranteed to be granted a permanent subclass 866 protection visa (if they satisfy all the visa criteria), as that is currently the only visa subclass listed in Protection Class XA.

---


15. Such as the right not to be returned to danger in violation of Australia’s international obligations.


On the other hand, people who have successfully had their claims assessed by virtue of the Ministerial intervention powers under sections 417 or 501J of the *Migration Act* will not know what visa they will be granted as the Minister has complete discretion in this regard.\(^\text{18}\) It will be for the Minister to determine whether a temporary or permanent visa is ultimately granted. It is not readily evident that this distinction will make a substantial difference to those considering Australia as a destination country.

The Department of Immigration and Border Protection (the Department) has previously estimated that in 2008—09 (prior to the enactment of the *Complementary Protection Act*) less than 27 visas were granted by the Minister in cases that raised *non-refoulement* issues. Most of the visas granted by the Minister came out of the fixed Humanitarian Program quota—that is, visas that had been allocated to offshore persons such as the Global Special Humanitarian (Subclass 202) visa (or SHP as it is more commonly known) due to the absence of any onshore visa subclass that was specifically for persons who had been found to be owed complementary protection on the basis of Australia’s *non-refoulement* obligations.\(^\text{19}\)

**Costly and inefficient processing**

According to the Minister, from the introduction of the statutory complementary protection criteria on 24 March 2012 to 4 December 2013, there have been 57 applications that have satisfied the statutory criteria for grant of a protection visa on complementary protection grounds.\(^\text{20}\) Perhaps more significantly in the present context, during the period 24 March 2012—31 October 2013, the Refugee Review Tribunal (RRT) remitted (returned) 83 cases to the Department, with a direction that the applicant met the complementary protection criteria.\(^\text{21}\) This is perhaps indicative of the complexity of the issues involved in making assessments in these types of cases. Of the 83 cases remitted back to the Department, approximately half were from people who had arrived by boat.\(^\text{22}\) According to the RRT’s Principal Member, Kay Ransome, ‘the remittals have really been related to an individual’s particular circumstances. They tend to be personal in nature rather than systemic. A couple of examples could be in relation to land disputes or honour killings’.\(^\text{23}\)

The Minister’s second reading speech notes that it is costly and inefficient to conduct a complementary protection assessment for every asylum seeker when only 57 applications have been successful during the period 24 March 2012 to the date of the Bill’s introduction on 4 December 2013. However, due to the primacy given to the Refugees Convention in the *Migration Act*, complementary protection claims are currently only assessed if an applicant is found *not* to meet the definition of refugee. In contrast, resumption of processing claims through the Minister’s personal intervention powers under section 417 of the Migration can only commence once an applicant has applied for a protection visa (for which they are not eligible as they are not a refugee) and then had their application considered afresh and refused by the RRT.\(^\text{24}\) The Minister has previously questioned the merit of this argument on the basis that section 195A of the *Migration Act* enables the Minister to grant an applicant a visa whether or not they applied for one if the Minister thinks it is in the public interest to do so.\(^\text{25}\) However, this power is only enlivened if an applicant is in detention. If they are not, they must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister.

---

\(^{18}\) If the Minister decides to exercise his Ministerial intervention power and substitute a more favourable decision for that of a Review Tribunal by granting a visa, the Minister is unencumbered and can grant what he considers to be the most appropriate visa to the applicant. Further, the Minister is not bound by Subdivision AA (Applications for visas) or AC (Grant of visas) of Division 3 of Part 2 of the Act or by the Regulations: subsections 417(2) and 501J(3) of the *Migration Act*. This means the Minister can grant a visa which might otherwise not be able to be granted because of an applicant’s non-satisfaction of the visa criteria.


\(^{22}\) Ibid.

\(^{23}\) Ibid.

\(^{24}\) Noting that the RRT cannot accept an application for review lodged outside the relevant time limit (either seven working days if the person is in detention or 28 calendar days from notification of decision) or which has been lodged by a person who is not entitled to apply for review: The Review Process [R10], RRT website, accessed 14 January 2014.

Criminals are satisfying the criteria and are guaranteed a particular visa outcome

Under subsection 36(2C) of the Act, a complementary protection applicant is ineligible for the grant of a protection visa if the Minister has serious reasons for considering that the applicant: 26

- has committed crimes against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations
- has committed a serious non-political crime before entering Australia or
- has been found guilty of acts contrary to the purposes and principles of the United Nations.

In addition, an applicant is ineligible for grant of a protection visa if the Minister considers, on reasonable grounds, that the applicant:

- is a danger to Australia’s security or
- having been convicted by a final judgment of a particularly serious crime (including crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community. 27

As is well recognised, Australia’s non-refoulement obligations are absolute and cannot be derogated from. Thus, if an applicant is found to be ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove them from Australia. According to the Department, such people would ‘be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia’s non-refoulement obligations; and the individual circumstances of their case’. 28

Though these people would undeniably present significant challenges for the Minister and the Department, there is an existing inherent flexibility in the way in which their cases may ultimately be resolved. For instance, section 195A of the Migration Act enables the Minister to grant an immigration detainee a visa (temporary or permanent) whether or not the person applied for the visa, if the Minister thinks it is in the public interest to do so. 29

Perhaps the people of greater concern to the Minister are those who do satisfy the complementary protection criteria and thus are not excluded on the basis of the exclusionary criteria contained in subsection 36(2C).

According to the Minister, these include ‘people who have committed serious crimes in their home countries, or people who are fleeing their home countries due to their association with criminal gangs or their involvement in blood feuds’. 30

Under the Migration Regulations 1994, such people can presently only be granted a permanent protection subclass 866 visa as that is the only visa subclass in Protection Class XA. 31 To this end, it is relevant to note that the Government did attempt to reintroduce Temporary Protection Visas in October 2013 but the Australian Labor Party and the Australian Greens united to successfully pass a resolution in the Senate on 2 December 2013 disallowing the Migration Amendment (Temporary Protection Visas) Regulation 2013. 32 Two days later, the Government introduced this Bill to re-establish an administrative process ‘to give more scope to provide protection in different ways’. 33

Nonetheless, and not insignificantly, it should be noted that like all other visas, the permanent protection visa contains a criterion that also requires the visa applicant to satisfy the character requirement set out in

---

26. These crimes and acts are the same as those contained in Articles 1F and 33(2) of the Refugees Convention.
27. ‘Particularly serious crime’ is defined in section 91U of the Migration Act. ‘Serious Australian offence’ and ‘serious foreign offence’ are terms that are defined in section 5 of the Migration Act. In brief, such offences include those involving violence against a person, a serious drug offence, serious damage to property, or offences relating to immigration detention. Such offences must be punishable by imprisonment for life, imprisonment for a fixed term of not less than three years, or imprisonment for a maximum term of not less than three years.
29. An applicant who is refused a visa will become an ‘unlawful non-citizen’ (see sections 13 and 14 of the Migration Act) and must be detained pursuant to section 189 of the Migration Act.
section 501 of the *Migration Act*. The *Migration Act* contains broad ranging powers that enable the Minister or the Department to refuse or cancel a visa on the basis that a person does not pass the character test. A person will not pass the character test if (amongst other things):

- they have a ‘substantial criminal record’
- they have, or have had, an association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct
- having regard to the person's past and present *criminal* conduct, the person is found not to be of good character
- having regard to the person's past and present *general* conduct, the person is found not to be of good character or
- there is a significant risk that the person will engage in criminal conduct in Australia, harass, molest, intimidate or stalk another person in Australia, vilify a segment of the Australian community, or incite discord in the Australian community or in a segment of that community.

**Complicated and convoluted statutory criteria**

The Minister’s second reading speech notes that ‘the complementary protection provisions that were introduced into the *Migration Act* by the previous Government are complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes’. The Minister does not elaborate upon these claims or provide any examples or further information to support this view.

Nonetheless, it is perhaps relevant to note that the statutory criteria that were eventually adopted in the 2011 *Complementary Protection Act* were the subject of much debate when first introduced in 2009. For instance, commenting on the 2009 Complementary Protection Bill, long-term advocate for the introduction of a statutory complementary protection regime in Australia, (then) Associate Professor Jane McAdam from the University of NSW noted (in not dissimilar language to that of the Minister):

> In my view, the Bill makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalizing an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonization is being sought. It invites decision-makers to ‘re-invent the wheel’, rather than encouraging them to draw on the wealth of jurisprudence that has been developed around these human rights principles internationally. That said, many of the underlying premises of the proposed complementary protection regime are sound and principled…’ [Emphasis added and footnotes omitted].

Similarly, Dr Ben Saul from the University of Sydney noted with respect to the 2009 Bill that ‘the criteria for complementary protection are poorly drafted as a result of the inclusion of unnecessary qualifying phrases. Far from creating certainty, the current language would invite needless litigation’. When speaking in the House of Representatives on the 2011 Bill, the Minister (then Opposition Immigration spokesperson) repeated the views of Dr Saul and noted ‘I believe those concerns remain valid’.

---

34. Regulation 866.225 Migration Regulations 1994.
35. A person is taken to have a substantial criminal record if they have been sentenced to either death or life imprisonment; sentenced to a term of imprisonment for 12 months or more; sentenced to two or more terms of imprisonment (whether on one or more occasions), where the total of those terms is two years or more; acquitted of an offence on the grounds of either unsoundness of mind or insanity and, as a result, the person has been detained in a facility or institution: subsection 501(7) *Migration Act*.
In the absence of any publicly available information as to the number of claimants seeking judicial review, it is not known whether these concerns have in fact been realised. It is worth noting though that these comments were made in relation to the 2009 Bill and there were drafting changes made to the 2011 Bill (albeit minor ones) to address matters raised in the report by the Senate Legal and Constitutional Affairs Committee which inquired and reported on the 2009 Bill.\(^1\)

In the absence of any evidence to the contrary, it is not clear whether the statutory complementary protection criteria that came into operation in 2012 is indeed proving unduly problematic for decision-makers. Presumably there has been a significant amount of institutional change that has accompanied the introduction of the statutory scheme at both the primary and merits review stages (such as staff appointments, training, development of guidelines and systems and so forth) that will presumably no longer be required should an administrative system be re-introduced.\(^2\)

**Judicial interpretation**

The Minister notes in his second reading speech that since the introduction of the statutory complementary protection scheme, the Courts have ‘broadened the scope of the interpretation of these obligations beyond that which is required under international law’.\(^3\) The Minister gives two examples where the risk threshold has been lowered. These two examples appear to stem from two notable judgments since the introduction of the statutory complementary protection scheme namely, *Minister for Immigration and Citizenship v MZYYL* (2012) 133 ALD 465\(^4\) and *Minister for Immigration and Citizenship v SZQRB* (2013) ALR 525.\(^5\) In order to understand the Federal Court’s interpretation of the statutory criteria it is necessary to examine these judgments in greater detail.

*Minister for Immigration and Citizenship v MZYYL*

This was an appeal by the Minister from a decision of the RRT which found that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia, there was a real risk that they would suffer significant harm for the purposes of the complementary protection criterion in paragraph 36(2)(a) of the *Migration Act*. The RRT found that the applicant could not obtain from an authority in the receiving country protection such that there would not be a real risk that he would suffer significant harm if he was returned there. The RRT therefore found that paragraph 36(2B)(b) required a standard of protection different from the concept of state protection under the Refugees Convention. The Minister contended that the standard of protection in paragraph 36(2B)(b) is that of ‘reasonable’ protection and the RRT erred in holding that a higher standard was required than under paragraph 36(2)(a) of the Act, namely to reduce the level of risk of significant harm to something less than a real one.

The Federal Court (Lander, Jessup, and Gordon JJ) dismissed the Minister’s appeal. Their Honours found that:

> ... the language in s 36(2B)(b) is different to the state protection test adopted in relation to the Refugees Convention... contrary to the submissions of the Minister, s 36(2B)(b) does not, in its terms or in its operation, require either the conclusion that it is inevitable that the non-citizen will suffer significant harm or the conclusion that it is certain that he or she will not. The express terms of the section require the Minister to be satisfied that, given the protection available to MZYYL in the receiving country, there would not be a real risk that he will suffer significant harm. There is nothing to suggest or warrant the imposition of some kind of guarantee of one or other outcome. And, indeed, such a guarantee is practically impossible.


\(^3\) S Morrison, *Second reading speech: Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013*, op. cit., p. 1522.


The Minister submitted that the prescribed standard of protection in s 36(2B)(b) is satisfied (as required by international standards) if the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection. That construction is rejected. It is contrary to the express words of the section. To construe the provision in that way would have the Court ignore or read out of s 36(2B)(b) (and, indeed, other sections in the Complementary Protection Regime) the phrase “real risk” and the reference to the non-citizen. The Minister’s construction seeks to have the Court focus on the system rather than the individual. That is not the question posed by the section... 

The Minister’s construction also suffers from two further problems – it is impractical and contrary to existing authority. It is impractical because if adopted it would not provide any objective criteria for assessing whether the “international standards” had been met. Different countries have different systems. Not only do different countries have different standards but, if the Minister’s construction were correct, it would arguably mean that, if the system provided by the receiving country, in some minor way, failed to meet the “international standards”, whatever they might be, then s 36(2B) would not be satisfied. That is contrary to the purpose of the Complementary Protection Regime.

Further, the Minister’s construction proceeds from an assumption that is contrary to existing authority. In considering an application for a protection visa under s 36(2)(a), courts have recognised that the mere existence of a system of state protection may not of itself be sufficient...Unsurprisingly, the particular circumstances of the individual may be determinative.

Section 36(2B)(b) poses the question whether, in obtaining protection from the receiving country, the protection is such that there would not be a real risk that the non-citizen would suffer significant harm if returned. The section proceeds from an assumption (correctly made) that there will be circumstances where the protection offered is not sufficient to remove the fact that there is a real risk that the non-citizen will suffer significant harm.

As the Tribunal found in relation to s 36(2)(aa), that requires an assessment of whether the level of protection offered by the receiving country reduces the risk of significant harm to the non-citizen to something less than a real one. In the present case, the Tribunal found that, for the purposes of s 36(2B)(b), MZYYL could not obtain from an authority in the receiving country protection such that there would not be a real risk that he would suffer significant harm if he was returned to that country. Accordingly, the Tribunal was satisfied that there remains a real risk that if MZYYL is removed to the receiving country, he will suffer significant harm for the purposes of s 36(2A). The Tribunal did not misconstrue the Act. [References omitted].

It is also perhaps relevant to note their Honours’ observations with respect to limitations on the interpretation of the statutory scheme:

The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions: see, by way of example, the definitions in s 5 of the Act of “torture” and “cruel or inhuman treatment or punishment”. Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties. For example, the definition of “torture” in the Complementary Protection Regime is different from that in the CAT... Further, the International Human Rights Treaties do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Sections 36(2B)(a) and (b) have adopted a different and contrary position. Sections 36(2B)(a) and (b) relieve Australia from its protection obligations in s 36(2)(aa) if those two particular circumstances are satisfied.

Further, the test adopted in ss 36(2)(aa), (2A) and (2B) is significant harm, not irreparable harm, being the test referred to in the General Comment No 31 on the ICCPR... or serious harm, being the standard referred to and defined in s 91R of the Act. It is therefore neither necessary nor useful to ask how the CAT or any of the International Law Treaties would apply to the circumstances of this case. The circumstances of this case are

governed by the applicable provisions of the Act, namely ss 36(2)(aa) and 36(2B), construed in the way that has
been indicated. [References omitted].

The former Immigration Minister initially sought to appeal this judgment to the High Court of Australia but
subsequently decided to discontinue proceedings in April 2013.

Minister for Immigration and Citizenship v SZQRB

This was an application by an irregular maritime arrival for judicial review of a decision of the Minister not to
exercise any personal public interest powers in respect of him. Following assessments that the applicant was not
owed protection obligations under the Refugees Convention he was subject to a Departmental ‘International
Treaty Obligations Assessment’ (ITOA). This was the process used to determine whether removal would accord
with Australia’s non-refoulement obligations prior to the commencement of the statutory complementary
protection regime in March 2012. The ITOA concluded the applicant’s removal to Afghanistan would not breach
Australia’s non-refoulement obligations under CAT or the ICCPR.

On the same day the applicant was notified that the Department had not found any international obligations
owing to him, or unique and exceptional circumstances in his case and, as a result, his case had not been
referred to the Minister for the Minister’s consideration. In August 2012, the Department completed a
pre-removal clearance concluding his removal to Afghanistan did not raise concerns relating to Australia’s
non-refoulement obligations and that his removal did not warrant any Departmental protection assessment.

In the absence of Ministerial intervention, section 198 of the Migration Act then required the removal of the
applicant from Australia. On 21 September 2012 the Minister made a decision, based among other things on the
ITOA, that the applicant’s removal to Afghanistan was consistent with Australia’s international obligations under
the Refugees Convention, the CAT and the ICCPR. The Minister decided not to consider, or further consider, the
exercise of any of his personal non-compellable public interest powers in respect of the applicant (including his
power under section 91L to allow the applicant to make a protection visa application, and under section 195A to
grant him a visa).

The issues before the Court were (amongst other things) whether the Minister’s decision not to exercise his
public interest powers was affected by jurisdictional error because it was stated to be made whether or not his
views on compliance with international law obligations were correct, and irrespective of any legal or factual
error in the ITOA or any other circumstance, and because it was based on the ITOA which had applied the wrong
standard of proof required by the CAT and ICCPR and was made by a process that denied the applicant
procedural fairness.

The Federal Court unanimously allowed the applicant’s application. Lander and Gordon JJ (Besanko, Flick and
Jagot JJ agreeing) found that:

In our opinion, the test is as for s 36(2)(a) and as stated by SZQRB — is there a real chance that SZQRB will suffer
significant harm (as that is defined in s 36(2A)) were he to be returned to Afghanistan. That being the case, the ITOA
applied the wrong test in considering SZQRB’s entitlement for Australia’s protection obligations under the CAT and
ICCPR as defined in s 36(2)(aa) and s 36(2A). The ITOA assessed SZQRB’s claims as against whether it was “more
likely than not” that SZQRB would suffer significant harm, which was not the appropriate standard. The
“Departmental policy”, if the ITOA was right to describe it that way, was not in accordance with Australian law.
SZQRB’s contention that the ITOA was not carried out according to law must be accepted on that ground alone...

47. Ibid., at 18—20.
48. Telephone conversation with the High Court of Australia (Melbourne Registry) on 14 January 2014. Though the former Minister may not have
agreed with the RRT’s interpretation and findings in this case it is relevant to note that the RRT remitted the applicant’s claim for a protection
visa, rather than substituting its own decision, because the material before the RRT suggested that consideration would need to be given to
subsection 36(2C) of the Migration Act (exclusion), which the RRT did not have jurisdiction to consider: Minister for Immigration and Citizenship
which involved the cancellation of the applicant’s prior held visa for failure to satisfy the character test.
49. The ITOA stated: ‘...there is a real risk that they will be arbitrarily deprived of life, will have the death penalty carried out on him or her or be
subjected to torture or to cruel, inhuman or degrading treatment or punishment. Departmental policy is that this should be interpreted as
meaning that the necessary chance of the harm occurring is balance of probabilities, but that this should not be construed too narrowly in cases
which are very close to that threshold. That is, the possibility must be more likely than not, which is a higher threshold than the real chance test
used in the Refugees Convention under Australian law’: Minister for Immigration and Citizenship v SZQRB (2013) ALR 525, per Lander and
Gordon JJ at 240.
The ITOA was completed after SZQRB made his written submission and before the Country Information that was relied upon was put to SZQRB. SZQRB was never asked to comment upon the MOU or its effectiveness. Some of the Country Information was published after SZQRB’s written submission. The process that led to the ITOA was flawed in that the assessor failed to accord SZQRB procedural fairness by bringing to his attention information that the ITOA might rely upon for concluding that returning SZQRB would not breach Australia’s non-refoulement obligations under the CAT or ICCPR. For both reasons advanced by SZQRB, SZQRB is entitled to a declaration that the ITOA was not carried out according to law...

On this appeal, the Minister does intend to remove SZQRB from Australia without necessarily first obtaining an ITOA which would be conducted procedurally fairly and in which the law would be correctly applied. The Minister’s decision of 21 September 2012 unambiguously is that he will allow SZQRB to be removed from Australia whether the ITOA with which he was provided was factually or legally correct and even if his view that SZQRB is not a person to whom Australia owes protection obligations is not correct. In other words, the Minister threatens to remove SZQRB from Australia even if SZQRB is a person to whom Australia owes protection obligations and in contravention of Australia’s international obligations. 50

The Court thus granted the injunction restraining the Minister from removing SZQRB from Australia until his claims for protection under the CAT and ICCPR has been assessed according to law and until the Minister has decided that SZQRB is not a person to whom Australia owes protection obligations under paragraph 36(2)(aa) of the Migration Act. 51

The Minister’s application for special leave to appeal this judgment to the High Court of Australia was refused on 13 December 2013 on the basis that there were insufficient prospects of success. 52

Humanitarian issues

The second reading speech notes that an administrative process (Ministerial intervention) will allow the Minister ‘to grant the most appropriate visa depending upon the individual circumstances of the case by taking into consideration not only Australia’s non-refoulement obligations, but also Australia’s broader humanitarian considerations...this is particularly relevant where people may be caught up in situations of civil strife and unable to return home in the short term’. 53 Though the statutory criteria contained in existing section 36 of the Migration Act does not appear to permit consideration of such broader humanitarian considerations (for instance, existing paragraph 36(2B)(c) presently deems that a person will not suffer significant harm in a country if the Minister is satisfied that the real risk of significant harm is faced by the population of the country generally and is not faced by the non-citizen personally), the Minister’s intervention powers under section 417 of the Migration Act currently serves as a ‘safety net’ and such broader humanitarian claims would arguably more appropriately be assessed through this mechanism which continues to operate to complement the existing statutory scheme.

What will replace the statutory scheme?

It is a little unclear how the Government intends to assess complementary protection claims in the future. Prior to the introduction of the statutory scheme, complementary protection claims were assessed by the Ministerial Intervention Unit and prior to departure through the Department’s administrative pre-removal procedure. The Minister’s second reading speech identifies two possibilities for the future:

... it is the Government’s intention to re-establish the consideration of complementary protection issues within an administrative process similar to that which was undertaken prior to the enactment of the complementary protection legislation. This consideration will happen either as part of pre-removal procedures, which are undertaken by departmental officials to assess whether the removal of an asylum seeker could engage Australia’s

However, the Explanatory Memorandum states that the assessment would be conducted using the Minister’s existing intervention powers contained in the *Migration Act*. It makes no mention of the Department’s administrative pre-removal procedure.\(^{55}\)

The former Minister’s guidelines on the exercise of the intervention powers that were used prior to the introduction of the complementary protection statutory scheme are contained in the [*Appendix* to this Digest.\(^{56}\)](http://www.austlii.edu.au/au/cases/cth/HCA/2012/31.html)

With respect to the Minister’s intervention powers under sections 48B, 195A, 351 and 417 of the *Migration Act*, it is also relevant to note that the High Court recently confirmed that due to the distinct nature of these powers, the exercise of the powers is not conditioned on the observance of the principles of procedural fairness.\(^{57}\)

The Department has previously been of the view that the Ministerial intervention power contained in section 417 of the *Migration Act* should be reserved for cases which raise unique and exceptional circumstances, as originally contemplated when the power was created.\(^{58}\) Since 2008—09, the Minister has received in excess of 2000 requests for intervention annually.\(^{59}\) Interestingly, the introduction of the statutory complementary protection scheme in March 2012 did not significantly reduce the number of requests the Minister received in 2012–13.\(^{60}\)

Prior to the introduction of the statutory complementary protection criteria, very little was known about how Australia adhered to its *non-refoulement* obligations under international human rights conventions, other than the Refugees Convention. For instance, it was not known how many requests had been made to the Minister on complementary protection grounds, the success or failure rate of such requests, the reasons for decisions being made, and the visas granted by the Minister to persons on complementary protection grounds. In addition, it was not known what types of claims were being made.\(^{61}\)

### How will the existing applications be processed?

Item 20 of the Bill clarifies that the amendments made by this Bill will apply in relation to each application for a protection visa made on or after Schedule 1 commences or beforehand if the Department has not made a decision on the application. This means that all undecided complementary protection visa applications will (upon commencement of Schedule 1) presumably be refused in due course for failure to satisfy the Refugees Convention criteria. Significantly, this also applies to those who have appealed and had success at the merits review and/or judicial review stage and had their matter remitted/returned to the Department for reconsideration but are yet to have a new decision made on their application. It is not known how many complementary protection visa applications are on-hand with the Department (both at the initial lodgement phase and those that have been remitted from appeal) that remain undecided.

The proposed amendments will also have a significant impact on complementary protection applicants that have had their protection visas refused and are in the process of seeking merits and/or judicial review. As the statutory scheme will to cease to exist upon commencement of the Bill, the processing of all such applications will effectively be futile because the RRT and the AAT will be prohibited from reviewing the application against the statutory complementary protection scheme that existed when the applicant applied. As noted in the Explanatory Memorandum with respect to the RRT, ‘the RRT will only be able to commence or continue a review

---

on the basis of a refusal to grant a protection visa, relying on the applicant not meeting paragraphs 36(2)(a) or 36(2)(b)' (the Refugees Convention criteria). 62

Both Tribunals will continue to have jurisdiction to review complementary protection review applications (by virtue of the transitional amendments being made to existing sections 411 and 500 of the Migration Act by items 17 to 19 of the Bill) but they will not have jurisdiction to review decisions to the extent that they were made relying on paragraphs 36(2)(aa) or (c) (in the case of the RRT) or paragraphs 36(2C)(a) or (b) of the Migration Act (in the case of the AAT). Thus, the RRT will presumably continue to assess their existing review applications and make adverse findings on the basis that the complementary protection applicants do not satisfy the Refugee Convention criteria. At best, this means applicants can then proceed directly to the Minister consider their complementary protections claims under the Ministerial intervention process (under section 417 or 501J) though as this process is completely discretionary, this is not a guaranteed outcome. At worst, it means applicants will be required to pay the RRT $1604 (for applications lodged on or after 1 July 2013) because their review application has been unsuccessful. 63 It is not known how many complementary protection review applications are currently on-hand with the RRT and the AAT.

Nor is it known how many people are currently seeking judicial review of their unsuccessful merits review applications. Though technically, applicants can continue to pursue this avenue and they may have success, the ultimate decision as to whether a protection visa will be granted does not lie with the merits review tribunals or with the courts. Rather, it lies with the Department and as the complementary protection statutory criteria will cease to exist, no protection visas will be granted on this basis from the date of commencement.

Committee consideration

Senate Legal and Constitutional Affairs Committee

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 3 March 2014. Details of the inquiry are at the Committee webpage. 64 At time of writing, only one submission had been received by the Committee.

Senate Standing Committee for the Scrutiny of Bills

In its last Alert Digest for 2013, the Scrutiny of Bills Committee identified a number of issues with this Bill. In brief the Committee was concerned:

- that the purely administrative process by which the applicability of Australia’s non-refoulement obligations will be determined is likely to render rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The committee therefore sought the Minister’s advice as to the justification for this approach
- with the absence of a statutory requirement for merits review for determinations about non-refoulement obligations and queried how a purely administrative process can satisfactorily ensure that a person affected by an assessment in relation to complementary protection will have adequate merits review available to them as there are no details about how it is proposed that the availability of merits review will be addressed in the administrative scheme envisaged in the context of this Bill. The committee therefore sought the Minister’s advice as to the justification for the proposed approach and advice as to whether the Bill will ‘make rights, liberties or obligations unduly dependent upon non-reviewable decisions’
- that the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability— if the Minister refuses to even consider the exercise of the Minister’s personal and non-compellable intervention powers, the result is likely to be that judicial review would in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may arise as to the utility of declaratory relief. If Australia’s obligations under the CAT and ICCPR are to be fulfilled through ‘pre-removal assessment procedures’ as an alternative to the

62. Ibid., p. 12.
63. The Review Process [R10], RRT website, accessed 14 January 2014. AAT applicants normally pay a fee when they lodge their application for review (irrespective of outcome). The amount payable is dependent on the applicant’s individual circumstances. For further information see the AAT website: ‘Information about application fees’, accessed 14 January 2014.
exercise of the Minister’s intervention powers, the Committee questioned how effective judicial review of such non-statutory Executive power would be. The committee therefore sought the Minister’s advice as to the extent to which judicial review may, in practical effect, be limited under the new arrangements. In addition, if the amendments would diminish the practical effectiveness of judicial review in securing legal accountability, the committee sought the Minister’s justification for this result.

- that it is not clear why it is considered appropriate for these amendments to apply to applications made prior to the commencement of the amendments or to RRT and AAT reviews of decisions made prior to the commencement of the proposed amendments. Further, it is not clear why persons who apply before the commencement of the proposed amendments should not be considered to have an ‘accrued right’ to have their applications determined according to the law and legal processes that applied at the time their application was lodged (see *Esber v Commonwealth* (1992) 174 CLR 430). The committee therefore sought the Minister’s further advice in relation to these issues so it may better consider the proposed approach against its scrutiny principles.65

At time of writing, any response provided to the Committee from the Minister had not yet been published.

**Parliamentary Joint Committee on Human Rights**

In its first report of the 44th parliament, the Parliamentary Joint Committee on Human Rights noted it ‘considers that the Bill may give rise to significant human rights concerns. It therefore has decided to defer its consideration of this Bill to allow for the closer examination of the issues and the opportunity to take account of submissions made to the Senate Legal and Constitutional Affairs Legislation Committee’ which is due to report on 3 March 2014.66

**Policy position of non-government parties/independents**

The Australian Greens have long been supportive of a statutory complementary protection scheme and similarly, oppose the Bill.68 However, though they supported the passage of the Migration Amendment (Complementary Protection) Bill 2011, they did voice concerns when the Bill was being debated ‘that some wording contained within the Bill could result in some applicants still falling through the gap when seeking protection’.59

Independent MP Andrew Wilkie has also confirmed in Parliament that he will not be supporting this Bill.70 The position to be taken by the other independents and minor parties is not currently known.

**Position of major interest groups**

When a formal statutory system of complementary protection was introduced, it received broad support from key domestic and international human rights agencies as well as legal agencies, non-government organisations, refugee advocacy and church groups.71

**Financial implications**

The Explanatory Memorandum states that the financial impact of these amendments is expected to be low and will be met from within the Department’s existing budget.72


Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at Attachment A of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible because Australia’s human rights obligations will continue to be met through administrative processes.

Key issues and provisions

**Inclusion criteria in section 36**

Existing section 36 of the Migration Act contains the main statutory criteria used to assess whether Australia has protections obligations to non-citizens – either under the Refugees Convention or because they are likely to suffer significant harm if removed from Australia (complementary protection).

More explicitly, existing paragraph 36(2)(aa) contains the alternative (non-Refugees Convention) criterion for a protection visa, which is that the applicant for the visa is a non-citizen in Australia (not a refugee) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer ‘significant harm’. **Item 4** proposes to repeal existing paragraph 36(2)(aa) and **Item 6** proposes to repeal existing paragraph 36(2)(c) which applies the above criterion to members of the same family unit as the main applicant.

**Item 7** proposes to repeal existing subsection 36(2A) which contains the definition of ‘significant harm’ for the purposes of existing subsection 36(2)(aa). In brief, it provides that a person would suffer ‘significant harm’ if they will be arbitrarily deprived of their life; the death penalty will be carried out on them; they will be subjected to torture; they will be subjected to cruel or inhuman treatment or punishment; or they will be subjected to degrading treatment or punishment.

**Item 1** also proposes to repeal a number of definitions in existing subsection 5(1) of the Act that relate to the complementary protection criteria in section 36. Namely, the definitions of ‘Covenant’, ‘cruel or inhuman treatment or punishment’, ‘degrading treatment or punishment’, ‘receiving country’, ‘significant harm’, and ‘torture’.

**Exclusion criteria in section 36**

**Item 7** also proposes to repeal existing subsection 36(2B) which contains the circumstances in which there is taken not to be a ‘real risk’ for the purposes of subsection 36(2)(aa), namely where the applicant can relocate or obtain protection from an authority or where the risk they face is faced by the population generally. **Item 7** similarly proposes to repeal existing subsection 36(2C) which sets out other circumstances in which the non-refugee applicant will be ineligible for the grant of a protection visa. These circumstances include if the Minister has serious reasons for considering that:

- the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations
- the non-citizen committed a serious non-political crime before entering Australia
- the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations or the Minister considers, on reasonable grounds:
  - that the non-citizen is a danger to Australia’s security or
  - that the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

---

Items 8 and 9 propose to repeal existing paragraph 36(4)(b) and subsection 36(5A) respectively, which provide that Australia is taken not to have ‘protection obligations’ as mentioned in paragraph 36(2)(aa) if the applicant could have sought effective protection in another country (other than Australia), unless:

- the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant doing so, there would be a real risk that they will suffer significant harm in relation to that country, or
- the non-citizen has a well-founded fear that the country will return the non-citizen to another country and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence, there would be a real risk that the applicant will suffer significant harm in relation to that country.

**Independent merits review**

Item 17 proposes to repeal existing paragraphs 411(1)(c) and (d), which currently provide that the RRT has jurisdiction to review a decision to refuse or cancel a protection visa (including a decision based on existing paragraph 36(2)(aa)), except where that decision that was made relying on existing paragraph 36(2C)(a) or (b). Proposed new paragraphs 411(1)(c) and (d) clarify that the RRT will continue to have jurisdiction to review decisions to refuse or cancel a protection visa (the criterion for which, after the commencement of these amendments, will be that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention).

Items 18 and 19 similarly propose to repeal existing paragraphs 500(1)(c) and (4)(c) to remove the jurisdiction of the AAT to review a decision to refuse or cancel a protection visa relying on existing paragraphs 36(2C)(a) or (b) of the Act. Substituted paragraphs 500(1)(c) and (4)(c) clarify that the AAT will continue to have jurisdiction to review decisions to refuse or cancel a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugee Convention.

Item 21 provides transitional arrangements for the RRT and AAT. Subitem 21(2) clarifies that a decision by the Department to refuse a protection visa on the basis of the complementary protection criterion, that is made before Schedule 1 commences, is not an ‘RRT-reviewable decision’ for the purposes of existing section 411 of the Migration Act. As the Explanatory Memorandum notes ‘the RRT will be required to apply the amendments made by this Schedule, and not the law that applied at the time of the primary decision’. Similarly, subitem 21(3) clarifies that the AAT will no longer have jurisdiction to review a decision to refuse a protection visa to the extent that the decision was made relying on existing paragraphs 36(2C)(a) or 36(2C)(b) if on the day Schedule 1 commences the:

- decision would (apart from this item) still be subject to a form of review by the AAT or
- period within which such a review could be instituted would (apart from this item) not have ended.

Item 22 clarifies that applicants who have previously had their protection visa application refused on the basis of the complementary protection criterion will be prevented (by virtue of existing section 48A) from applying for another protection visa. The Explanatory Memorandum notes that the bar on further applications would apply ‘unless the Minister exercises the non-compellable power under section 48B to enable the person to make a valid visa application for a protection visa’.

**Concluding comments**

The issue of whether Australia should have a legally enforceable statutory regime for determining complementary protection claims or whether it should rely on an administrative system to determine claims on a discretionary basis has been the subject of consistent debate for over twenty years. The Coalition strongly opposed the former Labor Government’s introduction of a statutory complementary protection regime and thus this is the first immigration Bill to be introduced by the Coalition after they regained power in late 2013. The Coalition’s main concerns when the statutory criteria were being drafted in 2009 was that they would ‘open the floodgates’ and unsuccessful claimants would abuse the appeal process. Though there is very little information currently in the public domain about the number of people making claims, as only 57 people so far having
satisfied the criteria these concerns do not appear to have been realised. Similarly, it appears unlikely that the emerging jurisprudence from the judiciary on the interpretation of the statutory criteria is likely to have the effect of dramatically broadening Australia’s protection obligations. Rather, the case law that is emerging is creating greater clarity for decision-makers and in the process arguably highlighting the inherent deficiencies of the administrative system of ensuring Australia adheres to its international non-refoulement obligations.

The complementary protection caseload would undeniably be the most difficult for the Immigration Department to manage—due mainly to the absolute and non-derogable nature of Australia’s international non-refoulement obligations. The Government must not only adhere to these obligations but balance this with the need to protect the Australian community from those it considers undeserving of protection. It is not difficult to see why a government would prefer to manage this caseload using a non-codified administrative model. However, existing mechanisms within the Migration Act provide enormous flexibility for the Government to resolve complementary protection cases in a transparent, consistent and lawful manner—similar to the way in which Australia manages to adhere to its non-refoulement obligations under the Refugees Convention. The concerns raised in the second reading speech outlining the need for this Bill present a picture of a system in disarray, but with so few people being found to satisfy the complementary protection criteria since its commencement nearly two years ago, there seems to be limited evidence to support the view that the Government has ‘lost control’ of Australia’s protection obligations or that it would do so in the near future.
Appendix
PAM3: Act - Ministerial powers - Minister’s guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)\textsuperscript{76}

1  Purpose of these guidelines

The purpose of these guidelines is to:

- explain the circumstances in which I may wish to consider exercising my public interest powers under s345, s351, s391, s417, s454 or s501J of the Act to substitute for a decision of a review tribunal a decision which is more favourable to the visa applicant(s)
- explain how a person may request my consideration of the exercise of my public interest powers and
- inform departmental officers when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.

2  Referral to the Parliamentary Secretary

In some instances, cases that meet the criteria in these guidelines for referral to the Minister may be referred to the Parliamentary Secretary for consideration. As a portfolio minister, the Parliamentary Secretary may exercise the Minister’s public interest powers under the Act.

3  Public interest powers

Under s345, s351, s391, s417, s454 and s501J of the Act, I have the power to substitute, for a decision made by one of the review tribunals, a decision that is more favourable to the visa applicant(s), if I think it is in the public interest to do so. In these guidelines, these powers are referred to as my public interest powers.

4  Review tribunals

These public interest powers are available in respect of decisions that have been taken by the following review tribunals - the:

- former Migration Internal Review Office (MIRO - ceased operation on 31 May 1999)
- former Immigration Review Tribunal (IRT - ceased operation on 31 May 1999)
- Migration Review Tribunal (MRT - commenced operation on 1 June 1999)
- Refugee Review Tribunal (RRT) and
- Administrative Appeals Tribunal (AAT).

5  Powers are non-compellable

My public interest powers are non-compellable: that is, the powers are available to me, but under the legislation, I do not have a duty to consider whether to exercise those powers (see s351(7), s454(7), s391(7), s417(7) and s501J(8)).

6  Only a more favourable decision

As my public interest powers only allow me to substitute a more favourable decision for a decision of one of the review tribunals (see section 3 Review tribunals), I am not able to use these powers until after a decision has been made by the relevant review tribunal.

7  When powers are not available

These public interest powers are not available:

- if the primary decision was not reviewable by the relevant tribunal or
- if no review decision has been made or
- the review decision was made prior to 1 September 1994 or

\textsuperscript{76}  Department of Immigration and Border Protection (DIBP), LEGENDcom Database, accessed 14 January 2014.
• if the review tribunal has made a decision to remit the matter to the department and a departmental decision-maker has made a subsequent decision on the case or
• if the review tribunal has made a decision to set aside a cancellation decision or
• once I have intervened in a case (my power is exhausted unless enlivened by another review tribunal decision).

8 Cases which may be finalised without further assessment

I consider the following types of cases inappropriate to consider:
• repeat requests where there is migration-related litigation that has not been finalised, unless the case has been referred to my department by a tribunal for my attention
• where it may be open to a person to make a valid application for a Partner visa onshore, as prescribed under regulation 2.12(1)
• where an application for a Partner visa onshore, as prescribed under regulation 2.12(1), has subsequently been refused
• where there is another visa application concerning the person ongoing with my department or a review application in relation to a visa application ongoing with a review authority
• where there is an ongoing ministerial intervention request under a different public interest power covered by these guidelines
• where there has been a remittal or a set aside from a review authority or from a court and a subsequent decision has not yet been made by the department or review tribunal
• which were decided by MIRO and are now at the MRT and
• where the request is made by a person who is not the subject of the request or their authorised representative.

Generally, these cases should not be brought to my attention and may be finalised without further assessment. The department should reply on my behalf that I do not wish to consider exercising my power.

9 Court proceedings - use of public interest powers

Because it may affect the exercise of my public interest powers, case officers must, when referring a case to me, inform me of any court proceedings challenging a decision in relation to a case which has commenced at time of referral to me, including any outcome which may arise prior to my consideration of the case.

10 Public interest

The public interest may be served through the Australian Government responding with care and compassion where an individual’s situation involves unique or exceptional circumstances.

I may only exercise my public interest powers if it is in the public interest to do so in each case. What is and what is not in the public interest is a matter for me to determine. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

I will generally only consider the exercise of my public interest powers in cases which are referred to the department for my consideration by a review tribunal or which exhibit one or more unique or exceptional circumstances. Where a person is in the community (that is, is not in immigration detention), however, I generally do not wish to consider their case unless they hold a bridging or other visa, or have an application for a bridging visa before the department.

11 Referral by a review tribunal

When a review tribunal member considers a case should be brought to my attention, they may refer the case to my department and their views will generally be brought to my attention using the process outlined in:

• section 16 Requests for the exercise of my public interest powers and
• section 17 Initial requests for the exercise of public interest powers. The exception to this is where the client may be eligible to lodge a valid application for a Partner visa onshore, as prescribed under Regulation 2.12(1).
In this case, the request will generally be finalised without further review, as outlined in section 8 Cases which may be finalised without further assessment.

12 Unique or exceptional circumstances

• the following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances:

• particular circumstances or personal characteristics of a person which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity should they return to their country of origin. This may include:

• circumstances where persons who have been or may be individually subjected to a systematic program of harassment or denial of basic rights available to others in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred or is not likely to occur for a Convention reason

• persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees, and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country

• substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

• Article 3.1 of the CAT states:

“No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

• torture is defined by Article 1.1 as:

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

• circumstances that may bring Australia’s obligations as a party to the International Covenant on Civil and Political Rights (ICCPR) into consideration. For example:

• a non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (no matter whether lawfully imposed);

• issues relating to Article 23.1 of the ICCPR are raised. Article 23.1 provides:

“The family is the natural and fundamental group unit of society, and is entitled to protection by society and the state.”

• issues relating to Article 23.1 may be balanced against other considerations, including countervailing considerations.

• circumstances that may bring Australia’s obligations as a party to the Convention on the Rights of the Child (CROC) into consideration.

• Article 3 of the CROC provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
• while the best interests of the child must be treated as a primary consideration, this may be balanced against other primary considerations.
• circumstances that the legislation does not anticipate
• clearly unintended consequences of legislation
• circumstances where the application of relevant legislation leads to unfair or unreasonable results in a particular case
• strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident)
• circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia
• the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
• compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person; or
• where the department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

I generally expect persons making a request to provide appropriate documentation to support their claims. All requests should be accompanied by supporting documentation, unless there are compelling reasons why it cannot be provided and the department considers it is not reasonable for the person to do so.

Cases identified as involving unique or exceptional circumstances will sometimes raise other issues that I may wish to take into account, in considering whether to exercise my public interest powers.

While I regard the following issues as relevant, officers should bring to my attention any information that they consider may be relevant to my consideration.

13 Other relevant information
Where cases are assessed as involving unique or exceptional circumstances and are referred to me, the following other information, if relevant, should be brought to my attention for consideration:
• whether the continued presence of the person in Australia would pose a threat to an individual in Australia, to Australian society or security, or may prejudice Australia's international relations
• whether there are character concerns in relation to the person, particularly in relation to criminal conduct
• information regarding any offence or fraud against the migration and citizenship legislation should be specifically brought to my attention
• whether Australia's international obligations in relation to matters of extradition, or other relevant multilateral or bilateral agreements may be engaged
• where the person is likely to face a significant threat to their personal security, human rights or human dignity if they return to a particular area in their country of origin but they could safely and reasonably relocate elsewhere within that country
• whether the person would not be required to return to a country where a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they are able to enter and stay in another country and
• the degree to which the person has failed to comply with any conditions of their visa

14 Minister’s instruction
The procedures set out below are to be followed, in order to ensure the efficient administration of my public interest powers.

15 Following a decision by a review tribunal
Action to be taken
When a case office receives notification of a review tribunal’s decision to affirm a primary decision, they may assess the visa applicant's circumstances against these guidelines, and if the case falls:

- within the ambit of these guidelines, bring the case to my attention in a submission, so that I may consider exercising my public interest powers or
- outside the ambit of these guidelines, write a file note to that effect.

When a review tribunal member holds the view that a case should be brought to my attention, they may refer the case to my department and their views will be brought to my attention using the process outlined in:

- section 16 Requests for the exercise of my public interest powers and
- section 17 Initial requests for the exercise of public interest powers.

The exception to this is where the client may be eligible to lodge a valid application for a Partner visa onshore, as prescribed under Regulation 2.12(1). In this case the request will generally be finalised without further review, as outlined in section 8 Cases which may be finalised without further assessment.

16 Requests for the exercise of my public interest powers

A request for the exercise of my public interest powers can be made only by a person who is the subject of a request or their authorised representative or can be initiated by my department. Requests must be made in writing or by electronic transmission. Information provided by supporters will be taken into account where a request has been made.

A request will be initiated by the department where a tribunal has referred a case for my attention.

The department may initiate or refer a request at any time, particularly where I have not previously considered a case. I may also consider the use of my public interest powers in cases which do not fall within the ambit of:

- section 10 Public interest
- section 11 Referral by a review tribunal and
- section 12 Unique or exceptional circumstances

of these guidelines if I consider this to be in the public interest.

17 Initial requests for the exercise of public interest powers

If a request for me to exercise my public interest powers in respect of a person is received and I or another Minister has not previously considered the exercise of the public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person’s present or any previous visa application) an officer is to assess that person’s circumstances against these guidelines and:

- for cases which fall within the ambit of:
  - section 10 Public interest
  - section 11 Referral by a review tribunal and
  - section 12 Unique or exceptional circumstances

  of these guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or for:

  - cases falling outside the ambit of section 10 Public interest, or
  - cases which fall outside the ambit of both:

  - section 11 Referral by a review tribunal and
  - section 12 Unique or exceptional circumstances

  of these guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power.

If I do not wish to exercise, or consider exercising my power, the department should reply on my behalf that I do not wish to exercise my power.
Where a case is in the process of being litigated, the following approach should be adopted depending on the circumstances - where:

- a visa applicant has started litigation, and it is a repeat request for ministerial intervention, I generally consider it inappropriate to consider as specified in section 8 Cases which may be finalised without further assessment
- there is a Bridging E visa refusal, the case officer may use their discretion to process the request if it falls within these guidelines.

In all circumstances, where a case is referred to me and is in the process of being litigated, case officers are to advise me of the status of the case.

18 Repeat requests
If a request for me to exercise my public interest powers in respect of a person is received and I or another Minister has previously considered the exercise of the public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person’s present or any previous visa application), all subsequent requests in respect of that person are considered to be “repeat” requests.

I generally do not wish to consider a repeat request. Where I or a previous Minister has declined to intervene in a case, I generally expect that person to depart Australia.

In limited circumstances, a repeat request may be referred to me where the department is satisfied there has been a significant change in circumstances which raise new, substantive issues not previously provided or considered in a previous request, and which, in the opinions of the department, falls within the ambit of:

- section 10 Public interest
- section 11 Referral by a review tribunal and
- section 12 Unique or exceptional circumstances.

For other cases, the department should reply on my behalf that I do not wish to consider exercising my power.

19 Outcome of Minister’s consideration
If I choose to consider a case for substitution of a decision for that of a review tribunal, I may ask that health, character or other assessments be carried out, or some form of surety is arranged before I determine whether or not I wish to substitute a more favourable decision.

If I choose to consider a case for substitution of a decision, I may choose not to substitute a more favourable decision for that made by a review tribunal.

If I choose to substitute a more favourable decision for that of a review tribunal by granting a visa, I will grant what I consider to be the most appropriate visa.

Every person whose case is brought to my attention is to be advised of the outcome of their request.

20 No limitation to minister’s powers
These public interest powers exist whether or not a case is brought to my attention in the manner described above (providing that a review tribunal decision has been made and continues to exist, for example, the review decision has not been set aside by a court).

Where I consider it appropriate, I will seek further information to enable me to make a determination on whether to consider application of my public interest powers, or whether to consider the exercise of my public interest powers.

21 Removal policy
Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizens in immigration detention who have exhausted all available visa application and merit review entitlements. See: PAM3: Act - Compliance and Case Resolution - Case resolution - Removal from Australia.

A request for me to exercise my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.
Minister for Immigration and Citizenship

14 September 2011
Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.