2008 - 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship, Senator the Hon. Chris Evans)
The Migration Amendment (Complementary Protection) Bill 2009 (the “Bill”) amends the Migration Act 1958 (the “Migration Act”) to introduce greater fairness, integrity and efficiency into Australia’s arrangements for adhering to its non-refoulement obligations under the International Covenant on Civil and Political Rights (“Covenant”), the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty, the Convention on the Rights of the Child (“CROC”) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

In particular, the Bill amends the Migration Act to:

- introduce complementary protection arrangements to allow all claims that may engage Australia’s non-refoulement obligations to be considered under a single Protection visa application process, with access to the same transparent, reviewable and procedurally robust decision-making framework as is currently available to applicants who make claims that may engage Australia’s obligations under the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees (the “Refugees Convention”);

- provide relevant tests and definitions for identifying a non-refoulement obligation in determining whether a person is eligible for a protection visa on complementary protection grounds;

- provide a criterion (in section 36 of the Migration Act) for the grant of a protection visa (where the applicant has been found not to be owed protection obligations under the Refugees Convention) in circumstances where 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:
  (i) be arbitrarily deprived of his or her life; or
  (ii) have the death penalty imposed on him or her and it will be carried out; or
  (iii) be subjected to torture; or
  (iv) be subjected to cruel or inhuman treatment or punishment; or
  (v) be subjected to degrading treatment or punishment.

- maintain strong arrangements for protecting the Australian community, by providing that applicants who would currently be ineligible for the grant of a protection visa because of the exclusion provisions contained in Article 1F and Article 33(2) of the Refugees Convention, will also be ineligible for grant of a visa on complementary protection grounds through a similar exclusion provision;

- extend the current review arrangements for decisions to refuse to grant a protection visa so that decisions to refuse complementary protection claims may be reviewed in the same way as decisions to refuse Refugees Convention claims. Decisions to refuse to grant a protection visa relying on exclusion grounds will be reviewable by the Administrative Appeals Tribunal. Decisions to refuse to grant a protection visa not based on exclusion grounds will be reviewable by the Refugee Review Tribunal;
extend current provisions in the Migration Act that ensure that an applicant raising Refugee Convention claims is not eligible for a protection visa if the applicant can access protection in another country, to also cover applicants raising complementary protection claims. A non-citizen who applies for a protection visa on the grounds of being owed a non-refoulement obligation is taken not to be owed a non-refoulement obligation if the non-citizen has not taken all possible steps to avail him or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. This will not apply in relation to a country where there is a real risk the non-citizen will be irreparably harmed because of a matter listed in (i) to (v) above or where the non-citizen has a well-founded fear that the country will return the non-citizen to another country and there is a real risk that the non-citizen will be irreparably harmed because of a matter listed in (i) to (v) above in that other country;

ensure that only applicants who engage Australia’s non-refoulement obligations will be eligible for a protection visa on complementary protection grounds, by specifying certain circumstances in which a non-citizen will be taken not to face a real risk of being irreparably harmed. These circumstances include where the Minister is satisfied that it would be reasonable for the non-citizen to relocate to an area of the country of which they are a national or habitual resident where there would not be a real risk that the non-citizen will be irreparably harmed, or where the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen would be irreparably harmed, or where the real risk is one that is faced by the population of the country generally and is not faced by the non-citizen personally; and

enable protection visa applicants who engage Australia’s non-refoulement obligations on complementary protection grounds, and to whom the exclusion provisions do not apply, to be granted a protection visa with the same conditions and entitlements as applicants owed non-refoulement obligations under the Refugees Convention.

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. The purpose of these amendments is to establish a fair, transparent and robust system for considering complementary protection claims that will both enhance the integrity of Australia’s arrangements for meeting its non-refoulement obligations and better reflect our longstanding commitment to protecting those at risk of the most serious forms of human rights abuses.

FINANCIAL IMPACT STATEMENT

The financial impact of these amendments is low. These costs will be met from within existing resources of the Department of Immigration and Citizenship.
NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short title

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Amendment (Complementary Protection) Act 2009*.

Clause 2  Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Further, any other statement in column 2 has effect according to its terms.

3. Table item 1 provides that sections 1 to 3 of this Act and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives the Royal Assent.

4. Table item 2 provides that items 1 to 16 of Schedule 1 to this Act, commence on a single day to be fixed by Proclamation. However, it also provides that if any provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the day after the end of that period.

5. Table item 3 provides that item 17 of Schedule 1 to this Act commences immediately after the commencement of the provision(s) covered by table item 2.

6. Table item 4 provides that items 18 and 19 of Schedule 1 to this Act commence at the same time as the provisions(s) covered by table item 2.

7. Table item 5 provides that item 20 of Schedule 1 to this Act commences immediately after the commencement of the provision(s) covered by table item 2.

8. Table item 6 provides that items 21 to 34 of Schedule 1 to this Act commence at the same time as the provisions(s) covered by table item 2.

9. An explanatory note is provided to assist the reader at the end of this table. It specifies that the table relates only to the provisions of this Act as originally passed by both Houses of Parliament and assented to. It states clearly that the table will not be expanded to deal with provisions inserted in this Act after it receives the Royal Assent.

10. Subclause 2(2) explains that column 3 of the table contains additional information that is not part of this Act. It specifies that information in this column may be added to or edited in any published version of this Act.

Clause 3  Schedule(s)

11. This clause provides each Act that is specified in a Schedule to the *Migration Amendment (Complementary Protection) Act 2009* is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to the *Migration Amendment (Complementary Protection) Act 2009* has effect according to its terms.
SCHEDULE 1 – Amendments

Migration Act 1958

Item 1  Subsection 5(1)

12. This item inserts a definition of ‘Covenant’ in subsection 5(1) of the Migration Act to mean the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the Australian Human Rights Commission Act 1986.

13. The purpose of this amendment is to assist the reader by avoiding use of the long form of the Covenant for each reference in the Migration Act.

Item 2  Subsection 5(1)

14. This item inserts a definition of ‘cruel or inhuman treatment or punishment’ in subsection 5(1) of the Migration Act.

15. For the purposes of the Bill, the definition of ‘cruel or inhuman treatment or punishment’ is an exhaustive definition and means the acts or omissions as set out below.

16. ‘Cruel or inhuman treatment or punishment’ means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. This is an act or omission that would normally constitute an act of torture but which is not inflicted for one of the purposes or reasons stipulated under the definition of torture.

17. ‘Cruel or inhuman treatment or punishment’ also means an act or omission by which pain or suffering, whether physical or mental, is intentionally inflicted on a person: for the purpose of obtaining from the person or from a third person information or a confession; or for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or for the purpose of intimidating or coercing the person or a third person; or for a purpose related to a purpose mentioned above; or for any reason based on discrimination that is inconsistent with the Articles of the Covenant. This is an act or omission which inflicts pain or suffering but not at the level of severity required to be met under the definition of torture (see item 8).

18. ‘Cruel or inhuman treatment or punishment’ also means an act or omission by which pain or suffering, whether physical or mental, is intentionally inflicted on a person for any other reason so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. This covers any other acts or omissions that violate Article 7 of the Covenant and have not been explicitly outlined in this definition.

19. ‘Cruel or inhuman treatment or punishment’ does not include an act or omission that is not inconsistent with Article 7 of the Covenant; or arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant. The purpose of expressly stating what ‘cruel or inhuman treatment or punishment’ does not include is to confine the meaning of ‘cruel or inhuman treatment or punishment’ to circumstances that engage a non-refoulement obligation.

20. The purpose of this amendment is to provide a definition of ‘cruel or inhuman treatment or punishment’ derived from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant, which is relevant when considering under new paragraph 36(2)(aa)
(see item 11) whether a non-citizen, or a member of the same family unit of the non-citizen, is a person in Australia to whom the Minister is satisfied Australia has a *non-refoulement* obligation.

**Item 3 Subsection 5(1)**

21. This item inserts a definition of ‘degrading treatment or punishment’ in subsection 5(1) of the Migration Act.

22. For the purposes of the Bill, the definition of ‘degrading treatment or punishment’ means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission that is not inconsistent with Article 7 of the Covenant; or that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant. As with item 2, this covers acts or omissions which, when carried out, would violate Article 7 of the Covenant. It is not intended to include those acts or omissions that would form part of a lawful sanction that is carried out in accordance with accepted international human rights standards set out in the Covenant.

23. The purpose of this item is to provide an exhaustive definition of ‘degrading treatment or punishment’ as derived from the *non-refoulement* obligation implied under Articles 2 and 7 of the Covenant. This is relevant when considering under new paragraph 36(2)(aa) (see item 11) whether a non-citizen, or a member of the same family unit of the non-citizen, is a person in Australia to whom the Minister is satisfied Australia has a *non-refoulement* obligation.

**Item 4 Subsection 5(1)**

24. This item inserts a definition of ‘non-political crime’ in subsection 5(1) of the Migration Act.

25. The definition of non-political crime, subject to paragraph (b), means a crime where a person’s motives for committing the crime were wholly or mainly non-political in nature. Paragraph (b) provides that ‘non-political crime’ includes an offence that, under paragraph (a), (b), (c) or (d) of the definition of political offence in section 5 of the *Extradition Act 1988 (Cth)*, is not a political offence in relation to a country for the purposes of that Act.

26. The effect of this amendment in conjunction with items 17, 18 and 19 is to relocate the definition in section 91T to subsection 5(1).

27. The purpose of this amendment is that it will be relevant when considering whether a non-citizen is ineligible for grant of a protection visa as provided in new subsection 36(2C), if the Minister has serious reasons for considering that the non-citizen committed a serious non-political crime before entering Australia.

**Item 5 Subsection 5(1)**

28. This item inserts a definition of ‘receiving country’ in subsection 5(1) of the Migration Act.

29. The definition of receiving country, in relation to a non-citizen, means a country of which the non-citizen is a national, or if the non-citizen has no country of nationality—the country of
which the non-citizen is an habitual resident. The definition of receiving country in relation to a non-citizen is to be determined solely by reference to the law of the relevant country.

30. The purpose of this item is to provide a country of reference for the Minister when considering whether Australia owes a non-refoulement obligation to a non-citizen who makes an application for a protection visa. The Minister is not required to assess a person’s claims against countries of which a non-citizen is not a national or former habitual resident.

31. The intended effect of the amendment is to ensure that, when assessing whether Australia owes a non-refoulement obligation to a non-citizen for the purposes of paragraph 36(2)(aa) (see item 11), the consideration will be undertaken in relation to the destination country to which the non-citizen would be removed from Australia. This will also be relevant when considering subsection 36(2B) (see item 13) as to whether Australia owes protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in a country of which the non-citizen is a national or former habitual resident.

**Item 6 Subsection 5(1)**

32. This item inserts a definition of ‘serious Australian offence’ in subsection 5(1) of the Migration Act.

33. The effect of this amendment, in conjunction with item 23, is the removal of the definition of ‘serious Australian offence’ from subsection 91U(2) in Subdivision AL of Division 3 of Part 2 of the Migration Act, and its placement in subsection 5(1) of the Migration Act, the Migration Act’s interpretation provision.

34. The purpose of this amendment is to define the term ‘serious Australian offence’ for the purposes of the consideration whether a person is eligible for the grant of a protection visa on the basis of a non-refoulement obligation, in addition to its application in relation to the Refugees Convention.

**Item 7 Subsection 5(1)**

35. This item inserts a definition of ‘serious foreign offence’ in subsection 5(1) of the Migration Act.

36. The effect of this amendment, in conjunction with item 23, is the removal of the definition of ‘serious foreign offence’ from subsection 91U(3) in Subdivision AL of Division 3 of Part 2 of the Migration Act, and its placement in subsection 5(1) of the Migration Act, the Migration Act’s interpretation provision.

37. The purpose of this amendment is to define the term ‘serious foreign offence’ for the purposes of the consideration whether a person is eligible for the grant of a protection visa on the basis of a non-refoulement obligation, in addition to its application in relation to the Refugees Convention.

**Item 8 Subsection 5(1)**

38. This item inserts an exhaustive definition of ‘torture’ in subsection 5(1) of the Migration Act.
39. The definition of torture means an act or omission by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person:
   (a) for the purpose of obtaining from the person or from a third person information or a confession; or
   (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
   (c) for the purpose of intimidating or coercing the person or a third person; or
   (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
   (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant.

40. Torture does not mean an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

41. The purpose of stating expressly what ‘torture’ does not include, is to confine the meaning of 'torture' to international commentary on the meaning of that term as defined by this item. As for items 2 and 3, this definition covers acts or omissions which, when carried out, would violate Article 7 of the Covenant. For the purposes of this definition, the act or omission is not limited to one that 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 as is required under Article 1, paragraph 1 of the CAT. Torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity.

42. The purpose of this item is to provide a definition of ‘torture’, which is relevant when considering under new paragraph 36(2)(aa) (see item 11) whether a non-citizen, or a member of the same family unit of the non-citizen, is a person in Australia to whom the Minister is satisfied Australia has a non-refoulement obligation.

**Item 9**  At the end of subparagraph 5A(3)(j)(ii)

43. This item adds “or” at the end of subparagraph 5A(3)(j)(ii) of the Migration Act.

44. This item is a consequential amendment to item 10, which inserts a new subparagraph in paragraph 5A(3)(j).

**Item 10**  After subparagraph 5A(3)(j)(ii)

45. This item inserts a new subparagraph in paragraph 5A(3)(j) of the Migration Act that relates to an offshore entry person who makes a claim for protection on the basis of any of the matters mentioned in subsection 36(2A) (see item 13).

46. Section 5A provides the definition of ‘personal identifier’ in the Migration Act. Subsection 5A(3) provides the purposes for which the Minister must be satisfied before an identifier may be prescribed under paragraph 5A(1)(g). Paragraph 5A(3)(j) provides that one of the purposes is to ascertain whether an applicant for a protection visa; or an offshore entry person who makes a claim for protection under the Refugees Convention; had sufficient opportunity to avail himself or herself of protection before arriving in Australia.

47. The effect of this item is to extend the purpose in paragraph 5A(3)(j) to also include ascertaining whether an offshore entry person who makes a claim for protection on the basis
of any of the matters mentioned in subparagraphs 36(2A) (see item 13) had sufficient opportunity to avail himself or herself of protection before arriving in Australia.

**Item 11**  
After paragraph 36(2)(a)

48. This item inserts new paragraph 36(2)(aa) (a new criterion for a protection visa) after paragraph 36(2)(a) of the Migration Act.

49. This new criterion is that the applicant is a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) 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 be irreparably harmed because of a matter mentioned in new subsection 36(2A) (see item13).

50. The purpose of new paragraph 36(2)(aa) is to provide a criterion for a protection visa on the basis of a non-refoulement obligation if the Minister is not already satisfied Australia has protection obligations under the Refugees Convention and the non-citizen is not ineligible for the grant of a protection visa as provided in new subsection 36(2C) (see item 13). This retains the primacy of the Refugees Convention and means that non-citizens found to be owed protection obligations under the Refugees Convention do not require further assessment of other non-refoulement obligations.

51. Australia’s non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. In each case and in order for an applicant to meet the criteria in paragraph 36(2)(aa), there must be substantial grounds for believing that, as a necessary and foreseeable consequence of a non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed. This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 in assessing a non-refoulement obligation under the Covenant. Australia’s non-refoulement obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will be irreparably harmed. The intention of new paragraph 36(2)(aa), read in conjunction with item 5, is to assess a non-citizen’s protection claims in relation to the destination country to which a non-citizen would be removed, being their country of nationality or former habitual residence.

52. Further, the intention of new paragraph 36(2)(aa) is that consideration of whether a non-refoulement obligation is owed to a non-citizen is done in respect of a receiving country (see item 5), which is the applicant’s country of nationality or habitual residence. However, under subsection 36(3) of the Migration Act, Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. This applies unless, according to substituted subsection 36(4) (see item 14), there is a real risk that the non-citizen will be irreparably harmed because a matter mentioned in new subsection 36(2A) will apply to the non-citizen. The effect of new paragraph 36(2)(aa), read in conjunction with subsection 36(3) and item 14, is to reiterate the principle that if a non-citizen can avail themselves of a right to enter and reside in a third country and if, in doing so, they will not be irreparably harmed, then they will not engage Australia’s non-refoulement obligations.
**Item 12 At the end of subsection 36(2)**

53. This item adds new paragraph 36(2)(c) to subsection 36(2) of the Migration Act. This new paragraph is an additional criterion for a protection visa.

54. New paragraph 36(2)(c) relates to an applicant for a protection visa who is a non-citizen in Australia who is a member of the same family unit as a non-citizen who: is mentioned in paragraph (aa) (see item 11) and holds a protection visa.

55. The purpose of this provision is to enable members of the same family unit of a person who is owed a *non-refoulement* obligation and holds a protection visa to remain in Australia as a family.

**Item 13 After subsection 36(2)**

56. This item inserts three new subsections: subsections (2A), (2B) and (2C), after subsection 36(2) of the Migration Act.

57. New subsection 36(2A) provides that the matters referred to in new paragraph 36(2)(aa) are:

   (a) the non-citizen will be arbitrarily deprived of his or her life; or  
   (b) the non-citizen will have the death penalty imposed on him or her and it will be carried out; or  
   (c) the non-citizen will be subjected to torture; or  
   (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or  
   (e) the non-citizen will be subjected to degrading treatment or punishment.

58. The purpose of new subsection 36(2A) is to set out the types of irreparable harm (referred to in new paragraph 36(2)(aa) (see item 11)) in relation to which a *non-refoulement* obligation may be owed to a non-citizen by Australia. New paragraph 36(2A)(a) is derived from the *non-refoulement* obligation implied under Articles 2 and 6 of the Covenant. New paragraph 36(2A)(b) is derived from the *Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty*. ‘Torture’ in new paragraph 36(2A)(c), is a defined item (see item 8). ‘Cruel or inhuman treatment or punishment’ is a defined term (see item 2). ‘Degrading treatment or punishment’ is a defined term (see item 3). The *non-refoulement* obligations noted above may also be implied under the CROC, to the extent that the CROC contains obligations in the same terms as the Covenant. Claims by children will be assessed in an age-sensitive way, in view of the specific needs of children.

59. New subsection 36(2B) provides that there is taken not to be a real risk that a non-citizen will be irreparably harmed in a country because of a matter mentioned in subsection (2A) if the Minister is satisfied that:

   (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in that subsection; or  
   (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in that subsection; or  
   (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.
The effect of new subsection 36(2B) is to state expressly when there is taken not to be a real risk that a non-citizen will be irreparably harmed (and therefore when Australia will not have a non-refoulement obligation to the non-citizen). Australia’s non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. A real risk of harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. The purpose of new subsection 36(2B) is to ensure Australia’s non-refoulement obligations are applied and implemented consistently with international law.

New subsection 36(2C) provides that a non-citizen is taken not to satisfy the criterion mentioned in paragraph 36(2)(aa) (see item 11) if:

(a) the Minister has serious reasons for considering that:
   (i) 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; or
   (ii) the non-citizen committed a serious non-political crime before entering Australia; or
   (iii) the non-citizen has been found guilty of acts contrary to the purposes and principles of the United Nations; or
(b) the Minister considers, on reasonable grounds, that:
   (i) the non-citizen is a danger to Australia’s security; or
   (ii) 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.

The purpose of new paragraph 36(2C)(a) is to provide when a non-citizen is taken not to satisfy the protection visa criterion in paragraph 36(2)(aa) on grounds which mirror Article 1F of the Refugees Convention. This provision provides the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

The purpose of new paragraph 36(2C)(b) is to provide when a non-citizen is taken not to satisfy the protection visa criterion in paragraph 36(2)(aa) on grounds which mirror Article 33(2) of the Refugees Convention. The intended effect of this provision is to provide the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

Australia’s non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Australia must, however, balance the delivery of its humanitarian program with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern. There is no obligation imposed on Australia to grant a particular form of visa to those to whom non-refoulement obligations are owed. It is intended that, although a person to whom Australia owes a non-refoulement obligation might not be granted a protection visa because of this exclusion provision, alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected.
65. This item repeals subsections 36(4) and (5) and substitutes new subsections 36(4), (5) and (5A) into the Migration Act.

66. Subsection 36(4) provided that if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection 36(3) does not apply in relation to that country.

67. Subsection 36(3) provides Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

68. Substituted subsection 36(4) provides that subsection 36(3) does not apply in relation to a country in respect of which:
   (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
   (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in subsection (2A) in relation to the country.

69. The purpose of substituted subsection 36(4) is to ensure that subsection 36(3) does not operate in relation to a person who could have sought effective protection in another country apart from Australia if, in relation to that other country, they have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in subsection (2A) in relation to the country.

70. Subsection 36(5) provided that if the non-citizen has a well-founded fear that a country would return the non-citizen to another country; and the non-citizen would be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion; that subsection (3) does not apply in relation to the first-mentioned country.

71. Substituted subsection 36(5) provides that subsection 36(3) does not apply in relation to a country if the non-citizen has a well-founded fear that the country would return the non-citizen to another country; and the non-citizen would be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

72. The purpose of substituted subsection 36(5) is to provide harmony of drafting in relation to new subsection 36(5A), and it is not intended to provide a different meaning to subsection 36(5).

73. New subsection 36(5A) also provides subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that the country would return the
non-citizen to another country; and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in subsection (2A) in relation to the other country.

74. The purpose of new subsection 36(5A) is to ensure that subsection 36(3) does not operate in relation to a person who could have sought effective protection in another country apart from Australia if that country would return the non-citizen to a different country and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in subsection (2A) in relation to the other country.

75. The provisions of this item incorporate into the Migration Act the principle that if a non-citizen can avail themselves of a right to enter and reside in a third country and in doing so they will not face a real risk of being irreparably harmed, then the non-citizen is not owed a *non-refoulement* obligation.

**Item 15 Subsection 48A(2) (after paragraph (ab) of the definition of application for a protection visa)**

76. This item inserts new paragraphs 48A(2)(ac) and 48A(2)(ad) after paragraph 48A(2)(ab) of the definition of *application for a protection visa* in subsection 48A(2) of the Migration Act.

77. The purpose of new paragraph 48A(2)(ac) is to update subsection 48A(2) so that an application for a protection visa includes one made on the basis of a *non-refoulement* obligation.

78. The effect of new paragraph 48A(2)(ac) is that an application for a protection visa includes an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations because of the matters mentioned in subsection 36(2A) (see item 13).

79. The purpose of new paragraph 48A(2)(ad) is to update subsection 48A(2) so that an application for a protection visa includes one made on the basis of being a member of the same family unit as a non-citizen to whom Australia has a *non-refoulement* obligation.

80. The effect of new paragraph 48A(2)(ad) is that an application for a protection visa includes an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen in Australia to whom Australia has protection obligations because of the matters mentioned in subsection 36(2A) (see item 13) and who holds a protection visa.

**Item 16 Subparagraph 91N(3)(a)(i)**

81. This item omits “asylum” in subparagraph 91N(3)(a)(i) of the Migration Act and substitutes “protection”.

82. The purpose of this item is to update subparagraph 91N(3)(a)(i) in-line with the amendments to section 36 (see item 11 in particular), which incorporates protection on the
grounds of Australia’s *non refoulement* obligations in addition to protection on the grounds of the Refugees Convention.

83. The effect of this item is that the Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees declare in writing that a specified country provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and provides protection to persons to whom that country has protection obligations; and meets relevant human rights standards for persons to whom that country has protection obligations; or in writing, may revoke such a declaration.

**Item 17  
Subsection 91T(1)**

84. This item omits “(1)” from subsection 91T(1) of the Migration Act.

85. This item is a consequential amendment to item 19 that repeals subsections (2) and (3) from section 91T of the Migration Act.

**Item 18  
Subsection 91T(1)**

This item omits all the words after “were a reference to” in subsection 91T(1) of the Migration Act, and substitutes “a non-political crime within the meaning of this Act”.

86. This item is a consequential amendment to item 4 that inserts the definition of non-political crime in subsection 5(1) of the Migration Act.

**Item 19  
Subsections 91T(2) and (3)**

87. This item repeals subsections 91T(2) and (3) from the Migration Act.

88. This item is a consequential amendment to item 4 that inserts the definition of non-political crime in subsection 5(1) of the Migration Act.

**Item 20  
Subsection 91U(1)**

89. This item omits “(1)” from subsection 91U(1) of the Migration Act.

90. This item is a consequential amendment to item 23 that repeals subsections (2) and (3) from section 91U of the Migration Act.

**Item 21  
Paragraph 91U(1)(a)**

91. This item omits “(as defined by subsection (2))” from paragraph 91U(1)(a) of the Migration Act.

92. This item is a consequential amendment to item 23 that repeals subsection (2) (which defines serious Australian offence) from section 91U of the Migration Act and item 6 that inserts the definition of serious Australian offence in subsection 5(1) of the Migration Act.
Item 22  \hspace{1cm} \textbf{Paragraph 91U(1)(b)}

93. This item omits “(as defined by subsection (3))” from paragraph 91U(1)(b) of the Migration Act.

94. This item is a consequential amendment to item 23 that repeals subsection (3) (which defines serious foreign offence) from section 91U of the Migration Act and item 7 that inserts the definition of serious foreign offence in subsection 5(1) of the Migration Act.

Item 23  \hspace{1cm} \textbf{Subsections 91U(2) and (3)}

95. This item repeals subsections 91U(2) and (3) from the Migration Act.

96. This item is a consequential amendment to items 6 and 7 that insert the definitions of serious Australian offence and serious foreign offence, respectively, in subsection 5(1) of the Migration Act.

Item 24  \hspace{1cm} \textbf{Subparagraph 336F(3)(a)(ii)}

97. This item omits “Refugees Protocol; and”, and substitutes “Refugees Protocol; or” in subparagraph 336F(3)(a)(ii) of the Migration Act.

98. This item is a consequential amendment to item 25 that inserts a new subparagraph after the end of paragraph 336F(3)(a) of the Migration Act.

Item 25  \hspace{1cm} \textbf{At the end of paragraph 336F(3)(a)}

99. This item adds new subparagraph 336F(3)(a)(iii) at the end of paragraph 336F(3)(a) of the Migration Act.

100. The effect of subparagraph 336F(3)(a)(iii) is to provide, as is the case with an offshore entry person who makes a claim for protection under the Refugees Convention, that a disclosure of identifying information is taken not be authorised under section 336F if the person to whom the identifying information relates is an offshore entry person who makes a claim for protection on the basis of any of the non-refoulement obligations mentioned in subsection 36(2A) and the disclosure is to a foreign country in respect of which the application or claim is made, or a body of such a country.

Item 26  \hspace{1cm} \textbf{Subparagraph 336F(4)(a)(ii)}

101. This item omits “Refugees Protocol; and”, and substitutes “Refugees Protocol; or” in subparagraph 336F(4)(a)(ii) of the Migration Act.

102. This item is a consequential amendment to item 27 that inserts a new subparagraph after the end of paragraph 336F(4)(a) of the Migration Act.

Item 27  \hspace{1cm} \textbf{At the end of paragraph 336F(4)(a)}

103. This item adds subparagraph 336F(4)(a)(iii) at the end of paragraph 336F(4)(a) of the Migration Act.
104. The effect of subparagraph 336F(4)(a)(iii) is to provide, as is the case with an offshore entry person who makes a claim for protection under the Refugees Convention, that a disclosure of identifying information is taken not to be authorised under section 336F if the person to whom the identifying information relates is an offshore entry person who makes a claim for protection on the basis of any of the non-refoulement obligations mentioned in subsection 36(2A) and the officer making the disclosure is not reasonably satisfied that the country or body to which the disclosure is made will not disclose the identifying information to a foreign country in respect of which the application or claim is made, or a body of such a country.

**Item 28**  
At the end of paragraph 336F(5)(c)

105. This item adds “or” at the end of paragraph 336F(5)(c) of the Migration Act.

106. This item is a consequential amendment to item 29 that inserts a new paragraph after paragraph 336F(5)(c) of the Migration Act.

**Item 29**  
After paragraph 336F(5)(c)

107. This item inserts new paragraph (ca) after paragraph 336F(5)(c) of the Migration Act.

108. New paragraph (ca) relates to a person who is an offshore entry person who makes a claim for protection on the basis of any of the matters mentioned in subsection 36(2A); and who, following assessment of his or her claim, is found not to be a person to whom those matters apply or is found to be a person mentioned in paragraph 36(2C)(a) or (b).

109. The effect of new paragraph (ca) is that if a person is an offshore entry person who makes a claim for protection on the basis of non-refoulement obligations (which are mentioned in subsection 36(2A)), and who has been assessed as not being owed such obligations or is excluded on the basis of a matter mentioned in paragraph 36(2C)(a) or (b) then a disclosure of identifying information in relation to the non-citizen may be authorised.

**Item 30**  
At the end of paragraph 411(1)(c)

110. Paragraph 411(1)(c) provides that a decision to refuse to grant a protection visa is an RRT-reviewable decision. This item adds “(other than a decision that was made relying on paragraph 36(2C)(a) or (b))” at the end of paragraph 411(1)(c) of the Migration Act.

111. This amendment is intended to confirm that the Refugee Review Tribunal (“RRT”) only has the jurisdiction to review decisions where a non-citizen has been refused a protection visa because they have not been found to be owed a non-refoulement obligation (a decision to refuse a protection visa on the basis of not meeting the criterion in paragraph 36(2)(aa)). This amendment also clarifies that a decision to refuse to grant a protection visa because the Minister has serious reasons for considering that a person has committed certain serious international or non-political crimes; or because the Minister considers on reasonable grounds that the person is a danger to Australia’s security or the person, having been convicted of a particularly serious crime, is a danger to the Australian community; is not reviewable by the RRT.

112. The purpose of this amendment, in conjunction with items 31, 32 and 33, is to ensure that a decision made relying on paragraph 36(2C)(a) or (b) is not reviewable by the RRT, but is reviewable by the Administrative Appeals Tribunal (“AAT”).
Item 31  At the end of paragraph 411(1)(d)

113. Paragraph 411(1)(d) provides that a decision to cancel a protection visa is an RRT-reviewable decision. This item adds “(other than a decision that was made relying on paragraph 36(2C)(a) or (b))” at the end of paragraph 411(1)(d) of the Migration Act.

114. This amendment clarifies that a decision to cancel a visa because the Minister has serious reasons for considering that a non-citizen has committed certain serious international or non-political crimes; or because the Minister considers on reasonable grounds that the non-citizen is a danger to Australia’s security or the non-citizen, having been convicted of a particularly serious crime, is a danger to the Australian community; is not reviewable by the RRT. This is consistent with existing RRT jurisdiction to review decisions in relation to protection obligations owed under the Refugees Convention.

115. The purpose of this amendment, in conjunction with items 30, 32 and 33, is to ensure that a decision made relying on paragraph 36(2C)(a) or (b) is not reviewable by the RRT, but is reviewable by the AAT as is the current practice with decisions in relation to protection obligations owed under the Refugees Convention.

Item 32  Paragraph 500(1)(c)

116. This item repeals paragraph 500(1)(c) and substitutes a new paragraph 500(1)(c). New paragraph 500(1)(c) relates to a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or on paragraph 36(2C)(a) or (b) of the Migration Act.

117. The effect of this amendment is that, under paragraph 500(1)(c), in addition to a decision to refuse to grant a protection visa or to cancel a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, such a decision that relies on paragraph 36(2C)(a) or (b) can be the subject of an application for review to the AAT.

118. The purpose of this amendment, in conjunction with items 30, 31 and 33, is to ensure that a decision made relying on paragraph 36(2C)(a) or (b) is not reviewable by the RRT, but can be the subject of an application for review to the AAT. This provides consistency with the current protection visa framework in relation to review of decisions made in relation to Articles 1F or 33(2) of the Refugees Convention.

Item 33  Paragraph 500(4)(c)

119. This item repeals paragraph 500(4)(c) and substitutes a new paragraph 500(4)(c). New paragraph 500(4)(c) relates to a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or on paragraph 36(2C)(a) or (b) of the Migration Act.

120. The effect of this amendment is that, under paragraph 500(4)(c), in addition to a decision to refuse to grant a protection visa or to cancel a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, such a decision that relies on paragraph 36(2C)(a) or (b) is not reviewable under Part 5 (review by the Migration Review Tribunal) or 7 (review by the RRT) of the Migration Act.
121. The purpose of this amendment, in conjunction with items 30, 31 and 32, is to ensure that a decision made relying on paragraph 36(2C)(a) or (b) is not reviewable by the RRT, but can be the subject of an application for review to the AAT. This provides consistency with the current protection visa framework in relation to review of decisions made in relation to Articles 1F or 33(2) of the Refugees Convention.

Item 34 Application

122. This item provides for the application of amendments made by Schedule 1.

123. This item provides that the amendments made by Schedule 1 of this Act apply in relation to an application for a protection visa (within the meaning of the Migration Act) that is made on or after the day on which this item commences; or that is not finally determined (within the meaning of subsection 5(9) of the Migration Act) before the day on which this item commences.

124. The effect of this item is that protection visa applications not decided by the Minister at the time of commencement, and protection visa applications made on or after the day on which this item commences, will have to be considered in accordance with the amendments made by Schedule 1 of this Act. Additionally, protection visa applications not decided by the RRT at the time of commencement will have to be considered in accordance with the amendments made by Schedule 1 of this Act.