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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship, the Hon. Chris Bowen MP)
The Migration Amendment (Complementary Protection) Bill 2011 (the “Bill”) amends the Migration Act 1958 (the “Act”) to introduce greater efficiency, transparency and accountability into Australia’s arrangements for adhering to its non-refoulement obligations under the International Covenant on Civil and Political Rights (the “Covenant”), the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, the Convention on the Rights of the Child (the “CROC”) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”). Protection from return in situations that engage these non-refoulement obligations is often referred to as “complementary protection”, that being protection under international treaties that is additional to the protection given to refugees under the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees (the “Refugees Convention”).

The purpose of the amendments in this Bill is to establish an efficient, transparent and accountable system for considering complementary protection claims, which will both enhance the integrity of Australia’s arrangements for meeting its non-refoulement obligations and better reflect Australia’s longstanding commitment to protecting those at risk of the most serious forms of human rights abuses.

The amendments in this Bill apply to non-citizens who may make a valid application for a protection visa under the Act. This does not include persons who are prevented from making a valid application for a visa, such as offshore entry persons who are prevented from doing so by section 46A. Such persons may not make a valid application for a protection visa on complementary protection grounds (unless the Minister determines it is in the public interest to do so).

However, such persons will have their complementary protection claims considered through an administrative process designed to mirror, so far as possible, the statutory process for protection visa applicants.

In particular, the Bill amends the Act to:

- introduce complementary protection arrangements to allow all claims by visa applicants that may engage Australia’s non-refoulement obligations under the abovementioned human rights instruments to be considered under a single protection visa application process, with access to the same transparent, reviewable and procedurally robust decision-making framework that is currently available to applicants who make claims that may engage Australia’s obligations under the Refugees Convention;

- provide relevant tests and definitions for identifying whether a non-citizen is eligible for a protection visa on the basis that there are 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;
provide for a criterion (in section 36 of the Act) for the grant of a protection visa in circumstances where a non-citizen has been found not to be owed protection obligations under the Refugees Convention, but 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. The Bill provides that a non-citizen will suffer significant harm if he or she:

(i) will be arbitrarily deprived of his or her life; or
(ii) will have the death penalty carried out on him or her; or
(iii) will be subjected to torture; or
(iv) will be subjected to cruel or inhuman treatment or punishment; or
(v) will be subjected to degrading treatment or punishment;

• maintain strong arrangements for protecting the Australian community, by providing that non-citizens who would currently be ineligible for the grant of a protection visa because of exclusion provisions in Article 1F and Article 33(2) of the Refugees Convention, will also be ineligible for the grant of a protection visa when applying on the basis of their complementary protection claims because of similar exclusion provisions. Non-citizens who are ineligible for a protection visa on complementary protection grounds because of the exclusion provisions will not be removed from Australia but will be managed towards case resolution, taking into account key considerations including protection of the Australian community and the individual circumstances of their case;

• extend current provisions in the Act that make non-citizens ineligible for a protection visa if they can access protection in another country, to cover non-citizens raising complementary protection claims. A non-citizen who applies for a protection visa on complementary protection grounds is taken not to be owed protection obligations if the non-citizen 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 will not apply in relation to a country where there is a real risk the non-citizen will suffer significant harm 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 suffer significant harm in that other country;

• ensure that only non-citizens 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 suffering significant harm. 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 suffer significant harm; 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 will suffer significant harm; or
– where the real risk is one that is faced only by the population of the country generally and is not faced by the non-citizen personally;
enable protection visa applicants who engage Australia’s non-refoulement obligations on complementary protection grounds, and to whom 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; and

extend the current review arrangements for decisions to refuse to grant a protection visa, to decisions to refuse to grant a protection visa to non-citizens who raise complementary protection claims. Decisions to refuse to grant a protection visa on complementary protection grounds may be reviewed in the same way as decisions to refuse to grant a protection visa on Refugees Convention grounds. Decisions to refuse to grant a protection visa relying on exclusion grounds may be reviewed by the Administrative Appeals Tribunal. Decisions to refuse to grant a protection visa not based on exclusion grounds may be reviewed by the Refugee Review Tribunal.

The Bill reflects that a high threshold is required to engage Australia’s non-refoulement obligations under the Covenant and the CAT. In order for a non-citizen to receive complementary protection, the Minister must have 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. This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 as to when a non-refoulement obligation will arise under the Covenant.

Australia’s non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Therefore, even if a non-citizen is considered ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove the non-citizen to a country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen’s removal to that country, there would be a real risk that the non-citizen will suffer significant harm.

The introduction of a statutory framework for considering complementary protection claims is an important change, the need for which has been identified by the Senate Legal and Constitutional References Committee report “A Sanctuary under Review: An examination of Australia’s Refugee and Humanitarian Determination Processes” (June 2000); the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004); the Legal and Constitutional References Committee report “Administration and Operation of the Migration Act 1958” (March 2006); and the Australian Human Rights Commission. The need for complementary protection provisions has also been identified 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.

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. The Office of Best Practice Regulation has been consulted and has advised that a regulatory impact statement is not required. The advice reference is 12262.
MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2011

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 2011*.

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 17 of Schedule 1 to this Act, commence on a single day to be fixed by Proclamation. 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 18 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 19 and 20 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 21 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 22 to 35 of Schedule 1 to this Act commence at the same time as the provisions(s) covered by table item 2.

9. The note in subclause 2(1) makes clear that the table relates only to the provisions of this Act as originally enacted. The table will not be expanded to deal with any later amendments of this Act.

10. Subclause 2(2) provides that any information in Column 3 of the table is not part of this Act. It provides that information may be inserted or edited in any published version of this Act.

Clause 3  Schedule(s)

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

Migration Act 1958

Item 1  Subsection 5(1)

12. This item inserts the new defined term of “Covenant” in subsection 5(1) of the Act.

13. This new defined term provides that Covenant means 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.

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

Item 2  Subsection 5(1)

15. This item inserts the new defined term of “cruel or inhuman treatment or punishment” in subsection 5(1) of the Act. The effect of this item is that the term “cruel or inhuman treatment or punishment” is exhaustively defined and means the acts or omissions as provided for in the definition.

16. This new defined term provides that 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 (see item 9).

17. This new defined term also provides that cruel or inhuman treatment or punishment means an act or omission by which pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.

18. However, this defined term does not include an act or omission that is not inconsistent with Article 7 of the Covenant. It also does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

19. 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. This definition derives from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant. This term is relevant when considering under new paragraph 36(2A)(d) (see item 14) whether a non-citizen will be subjected to cruel or inhuman treatment or punishment.

Item 3  Subsection 5(1)

21. This item inserts the new defined term of “degrading treatment or punishment” in subsection 5(1) of the Act. The effect of this item is that the term “degrading treatment or
"punishment" is exhaustively defined and means the acts or omissions as provided for in the definition.

22. This new defined term provides that degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. However, it does not include an act or omission that is not inconsistent with Article 7 of the Covenant. It also does not include an act or omission 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.

23. The term “degrading treatment or punishment” 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.

24. This definition derives from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant. This term is relevant when considering under new paragraph 36(2A)(e) whether a non-citizen will be subjected to degrading treatment or punishment (see item 14).

Item 4 Subsection 5(1)

25. This item inserts the new defined term of “non-political crime” in subsection 5(1) of the Act.

26. This new defined term provides that non-political crime, subject to new paragraph (b) in the definition of that term, means a crime where a person’s motives for committing the crime were wholly or mainly non-political in nature. New 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, is not a political offence in relation to a country for the purposes of that Act.

27. The effect of this amendment, in conjunction with items 18, 19 and 20, is to relocate the definition from existing section 91T to subsection 5(1) of the Act, which is the Act’s interpretation provision. It does not affect the substantive operation of section 91T with respect to Article 1F of the Refugees Convention.

28. This definition is relevant when considering whether a non-citizen who has applied for a protection visa on the basis that they will suffer significant harm is ineligible to be granted a protection visa under new subparagraph 36(2C)(a)(ii) (see item 14).

29. It is also relevant for the consideration of section 91T with respect to Article 1F when assessing whether a non-citizen who has applied for a protection visa on the basis of protection obligations under the Refugees Convention is ineligible for the grant of a protection visa (see item 19).

Item 5 Subsection 5(1)

30. This item inserts the new defined term of “receiving country” in subsection 5(1) of the Act.
31. This new defined term provides that receiving country, in relation to a non-citizen, means a country of which the non-citizen is a national, which is to be determined solely by reference to the law of the relevant country.

32. This new defined term also provides that if a non-citizen has no country of nationality, the receiving country in relation to the non-citizen is the country of which the non-citizen is an habitual resident, which is to be determined solely by reference to the law of the relevant country.

33. 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 non-citizen’s claim against a country of which they are not a national nor a former habitual resident.

34. The intended effect of the amendment is to ensure that the Minister’s assessment of whether Australia owes a non-refoulement obligation to a non-citizen for the purposes of new paragraph 36(2)(aa) (see item 12) 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 new subsection 36(2B) (see item 14).

**Item 6 Subsection 5(1)**

35. This item inserts the new defined term of “serious Australian offence” in subsection 5(1) of the Act.

36. This new defined term provides that serious Australian offence means an offence against a law in force in Australia, where:

- the offence involves violence against a person; or is a serious drug offence; or involves serious damage to property; or is an offence against section 197A or 197B (offences relating to immigration detention); and
- the offence is punishable by imprisonment for life; or imprisonment for a fixed term or a maximum term of not less than 3 years.

37. The effect of this amendment, in conjunction with item 24, is to relocate the definition of serious Australian offence from existing subsection 91U(2) to subsection 5(1) of the Act, which is the Act’s interpretation provision. It does not affect the substantive operation of section 91U with respect to Article 33(2) of the Refugees Convention.

38. This definition is relevant when considering whether a non-citizen who has applied for a protection visa on the basis that they will suffer significant harm is ineligible for the grant of a protection visa under new subparagraph 36(2C)(b)(ii) (see item 14).

39. It is also relevant for the consideration of section 91U with respect to Article 33(2) when assessing whether a non-citizen who has applied for a protection visa on the basis of protection obligations under the Refugees Convention is ineligible for the grant of a protection visa (see items 22 and 24).
Item 7  Subsection 5(1)

40. This item inserts the new defined term of “serious foreign offence” in subsection 5(1) of the Act.

41. This new defined term provides that serious foreign offence means an offence against a law in force in a foreign country, where:

- the offence involves violence against a person; or is a serious drug offence; or involves serious damage to property; and
- if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the “Territory offence”) against a law in force in that Territory; and
- the Territory offence would have been punishable by imprisonment for life; or imprisonment for a fixed or maximum term of not less than 3 years.

42. The effect of this amendment, in conjunction with item 24, is the removal of the definition of serious foreign offence from existing subsection 91U(3) to subsection 5(1) of the Act, which is the Act’s interpretation provision. It does not affect the substantive operation of section 91U with respect to Article 33(2) of the Refugees Convention.

43. This definition is relevant when considering whether a non-citizen who has applied for a protection visa on the basis that they will suffer significant harm is ineligible for the grant of a protection visa under new subparagraph 36(2C)(b)(ii) (see item 14).

44. It is also relevant for the consideration of section 91U with respect to Article 33(2) when assessing whether a non-citizen who has applied for a protection visa on the basis of protection obligations under the Refugees Convention is ineligible for the grant of a protection visa (see items 23 and 24).

Item 8  Subsection 5(1)

45. This item inserts the new defined term of “significant harm” in subsection 5(1) of the Act.

46. This new defined term provides that significant harm means harm of a kind mentioned in new subsection 36(2A) of the Act. New subsection 36(2A) is inserted by item 14 to, among other things, provide for when a non-citizen will suffer significant harm.

47. This item is necessary to ensure that readers are directed to new subsection 36(2A) of the Act for the meaning of significant harm.

Item 9  Subsection 5(1)

48. This item inserts the new defined term of “torture” in subsection 5(1) of the Act. The effect of this item is that the term torture is exhaustively defined and means the acts or omissions as provided for in the definition.

49. This new defined term provides that 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.

50. However, this definition does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

51. This definition derives from non-refoulement obligations which are contained in Article 3 of the CAT and implied under Articles 2 and 7 of the Covenant.

52. The purpose of stating expressly what torture does not include, is to confine the meaning of torture to the meaning expressed in international expert commentary (for example, commentary by relevant international human rights treaty bodies) 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(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. In choosing to adopt a definition that is broader than the definition outlined in Article 1(1) of the CAT, Australia is mindful that Article 1(2) of the CAT enables States Parties to adopt national legislation that contains provisions of wider application than the CAT definition.

53. This term is relevant when considering under new paragraph 36(2A)(c) (see item 14) whether a non-citizen will be subjected to torture.

**Item 10** At the end of subparagraph 5A(3)(j)(ii)

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

55. This item is consequential to item 11 that inserts new subparagraph 5A(3)(j)(iii) in paragraph 5A(3)(j).

**Item 11** After subparagraph 5A(3)(j)(ii)

56. This item inserts new subparagraph 5A(3)(j)(iii) after existing subparagraph 5A(3)(j)(ii) of the Act.

57. Existing subsection 5A(1) provides for the definition of personal identifier in the Act. Paragraph 5A(1)(g) generally provides that personal identifier means certain identifiers prescribed by the regulations. However, before an identifier may be prescribed under paragraph 5A(1)(g), the Minister must be satisfied that obtaining the identifier will promote one of the purposes set out in subsection 5A(3). Existing paragraph 5A(3)(j) provides that one of the purposes is to ascertain whether: (i) an applicant for a protection visa; or (ii) 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.

58. New subparagraph 5A(3)(j)(iii) provides that: (iii) an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm.

59. The effect of this item is to extend the purposes in paragraph 5A(3)(j) to also include ascertaining whether an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm (see item 14) had sufficient opportunity to avail himself or herself of protection before arriving in Australia.

60. The term “significant harm” is defined (see items 8 and 14) in relation to a person who makes a valid application for a protection visa. New subparagraph 5A(3)(j)(iii) relates to offshore entry persons who are prevented from making a valid application for a protection visa (see subsection 46A(1) of the Act). The reference to “significant harm” in new subparagraph 5A(3)(j)(iii) is not intended to imply that offshore entry persons may make valid applications for protection visas. Rather, it reflects the fact that claims made by offshore entry persons are assessed by reference to the same considerations as those that are relevant when assessing valid applications for protection visas.

**Item 12 After paragraph 36(2)(a)**

61. This item inserts new paragraph 36(2)(aa) after existing paragraph 36(2)(a) of the Act.

62. Currently, paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

63. New paragraph 36(2)(aa) provides for an alternative criterion for a protection visa, which is that the applicant for the visa is a non-citizen in Australia (other than a non-citizen mentioned in existing paragraph 36(2)(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 suffer significant harm.

64. The reference to “significant harm” reflects Recommendation 1 of the Senate Legal and Constitutional Affairs Legislation Committee report on the Migration Amendment (Complementary Protection) Bill 2009. That recommendation was that the words “irreparably harmed” used in that bill be replaced with “subject to serious harm”. This item uses the word “significant” instead of “serious” because “serious harm” is defined elsewhere in the Act (in subsection 91R(2) of the Act).

65. The purpose of new paragraph 36(2)(aa) is to provide for a criterion for a protection visa on the basis of a non-refoulement obligation contained or implied in the Covenant or the CAT, if the Minister is not already satisfied that:

- the non-citizen is a person to whom Australia has protection obligations under the Refugees Convention; or
- the non-citizen is not ineligible for the grant of a protection visa as provided in new subsection 36(2C) (see item 14).
66. 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.

67. 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 satisfy the criterion in new paragraph 36(2)(aa), the Minister must have 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. This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 as to when a non-refoulement obligation will arise 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 suffer significant harm. A real risk of significant 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 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 the non-citizen would be removed, being their country of nationality or former habitual residence.

68. 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 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 15), there is a real risk that the non-citizen will suffer significant harm. The effect of new paragraph 36(2)(aa), read in conjunction with subsection 36(3) and item 15, 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 suffer significant harm, then they will not engage Australia’s non-refoulement obligations.

Item 13 At the end of subsection 36(2)

69. This item adds new paragraph 36(2)(c) at the end of existing subsection 36(2) of the Act.

70. New paragraph 36(2)(c) provides for an alternative criterion for a protection visa, which is that the applicant for the visa is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in new paragraph 36(2)(aa) (see item 12) and holds a protection visa.

71. The purpose of new paragraph 36(2)(c) is to enable members of the same family unit as a person who is mentioned in new paragraph 36(2)(aa) (see item 12) and holds a protection visa to remain in Australia as a family.

Item 14 After subsection 36(2)
72. This item inserts new subsections 36(2A), (2B) and (2C) after existing subsection 36(2) of the Act.

New subsection 36(2A)

73. New subsection 36(2A) provides that a non-citizen will suffer significant harm if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or
(b) the death penalty will be carried out on the non-citizen; 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.

74. The purpose of new subsection 36(2A) is to set out the circumstances in which a non-citizen will suffer significant harm. The types of significant harm listed in new paragraphs 36(2A)(a) to (e) are those in relation to which a non-refoulement obligation may be owed to a non-citizen in Australia. They are intended to be read in light of the test in new paragraph 36(2)(aa) (see item 12), which requires that to give rise to a non-refoulement obligation (and therefore a protection obligation), 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 suffer significant harm.

75. New paragraph 36(2A)(a) derives from the non-refoulement obligation implied under Articles 2 and 6 of the Covenant.

76. New paragraph 36(2A)(b) derives from the non-refoulement obligation implied under Articles 2 and 6 of the Covenant and the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty. New paragraph 36(2A)(b) provides that a type of significant harm is that the non-citizen will have the death penalty carried out upon him or her.

77. The effect of new paragraph 36(2A)(b), together with the test in new paragraph 36(2)(aa) (see item 12), is that 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 death penalty will be carried out on the non-citizen.

78. It is a requirement that there is a real risk that the death penalty will be carried out, because a non-refoulement obligation would not arise in situations, for example, where the death penalty may be imposed but in the circumstances of the case it is likely to be commuted; or where there is information to indicate that although a death sentence may be imposed, actual executions are rare or non-existent. In such situations, there is no real risk of the application of death penalty, because there is no real risk that the death penalty will be carried out. The situations mentioned above are examples only and are not intended to be exhaustive.

79. Further, the inclusion of the specific reference in new paragraph 36(2A)(b) to the death penalty being carried out reflects the fact that, in a situation where Australia has obtained a reliable undertaking from a country that the death penalty will not be carried out on the non-citizen (although it has been imposed on the non-citizen), such that there is not a
real risk that the death penalty will be carried out on the non-citizen, Australia may remove the non-citizen to that country.

80. “Torture” referred to in new paragraph 36(2A)(c) is a defined term (see item 9).

81. “Cruel or inhuman treatment or punishment” referred to in new paragraph 36(2A)(d) is a defined term (see item 2).

82. “Degrading treatment or punishment” referred to in new paragraph 36(2A)(e) is a defined term (see item 3).

83. 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.

New subsection 36(2B)

84. New subsection 36(2B) provides that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

- 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 suffer significant harm; or
- 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 will suffer significant harm; or
- the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

85. 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 suffer significant harm (and therefore when Australia will not owe 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. The purpose of new subsection 36(2B) is to ensure that Australia’s non-refoulement obligations are applied and implemented consistently with international law.

New subsection 36(2C)

86. New subsection 36(2C) provides that a non-citizen is taken not to satisfy the criterion mentioned in new paragraph 36(2)(aa) (see item 12) 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 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.

87. 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 new paragraph 36(2)(aa) on grounds which mirror Article 1F 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.

88. 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 new 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.

89. Australia’s non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Therefore, even if a non-citizen is considered ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove the non-citizen to a country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen’s removal to that country, there is a real risk that the non-citizen will suffer significant harm.

90. Australia must, however, balance the delivery of its humanitarian program with protecting the Australian community and prevent Australia from becoming a safe haven for, for example, persons who have committed war crimes, 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. In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a non-refoulement obligation, such a person will not be removed from Australia while the real risk of suffering significant harm continues, but will 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.

Item 15 Subsections 36(4) and (5)

91. This item repeals existing subsections 36(4) and (5) of the Act and substitutes new subsections 36(4), (5) and (5A). Subsection 36(3) of the Act provides that 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. The provisions in this item provides for when subsection 36(3) does not apply.

Substituted subsection 36(4)

92. Currently, subsection 36(4) provides 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.
93. Substituted subsection 36(4) provides that subsection 36(3) does not apply in relation to a country in respect of which:

- 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
- 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 will suffer significant harm in relation to that country.

94. 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 will suffer significant harm in relation to that country.

Substituted subsection 36(5)

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

96. 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 will return the non-citizen to another country; and
- the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

97. 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 existing subsection 36(5).

New subsection 36(5A)

98. New subsection 36(5A) provides that subsection (3) also does not apply in relation to a country if:

- 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 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 will suffer significant harm in relation to the other country.
99. 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 the non-citizen has a well-founded fear that that country will 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 will suffer significant harm in relation to that different country.

100. New subsection 36(5A) is intended to confirm 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 suffering significant harm, then the non-citizen is not owed a non-refoulement obligation.

**Item 16 Subsection 48A(2) (paragraphs (aa) and (ab) of the definition of application for a protection visa)**

101. This item repeals existing paragraphs 48A(2)(aa) and (ab) of the definition of *application for a protection visa* in subsection 48A(2) of the Act and substitutes new paragraph 48A(2)(aa). Substituted paragraph 48A(2)(aa) provides that an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c).

102. Among other things, section 48A currently provides that a non-citizen who, while in the migration zone, has made an application for a protection visa where the grant(s) of the visa(s) has or have been refused, may not make a further application for a protection visa while in the migration zone. For the purposes of section 48A, subsection 48A(2) provides that *application for a protection visa*, among other things, include:

   (aa) 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 under the Refugees Convention; and

   (ab) 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 under the Refugees Convention and who holds a protection visa.

103. However, subsection 48A(2) does not currently mention that an application for a protection visa includes an application for a protection visa on complementary protection grounds. The purpose of the substituted provision is to provide for applicants for a protection visa on the basis of a claim for complementary protection.

104. The effect of substituted paragraph 48A(2)(aa) is that *application for a protection visa* includes:

   • an application for a visa, a criterion for which is mentioned in new paragraph 36(2)(a) or (b) (which retains the intention of existing paragraph 48A(2)(aa) or (ab)); and

   • an application for a visa, a criterion for which is mentioned in new paragraph 36(2)(aa) or (c) (which deals with complementary protection claims).
105. The effect is that, for the purposes of section 48A, a non-citizen who, while in the migration zone, has made an application for a protection visa (either on Refugees Convention grounds, or complementary protection grounds) where the grant(s) of the visa(s) has or have been refused, may not make a further application for a protection visa while in the migration zone.

**Item 17 Subparagraph 91N(3)(a)(i)**

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

107. The purpose of this amendment is to update subparagraph 91N(3)(a)(i) to be consistent with the amendments to section 36 of the Act (see item 12 in particular), which incorporate protection obligations on grounds of Australia’s non-refoulement obligations under the Covenant, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty and the CAT, in addition to protection obligations on grounds of the Refugees Convention.

108. 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, revoke such a declaration.

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

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

110. This item is consequential to item 20 that repeals existing subsections 91T(2) and (3) of the Act.

**Item 19 Subsection 91T(1)**

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

112. This item is consequential to item 4 that inserts the definition of “non-political crime” in subsection 5(1) of the Act.

**Item 20 Subsections 91T(2) and (3)**

113. This item repeals existing subsections 91T(2) and (3) of the Act.

114. This item is consequential to item 4 that inserts the definition of “non-political crime” in subsection 5(1) of the Act.
Item 21  **Subsection 91U(1)**

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

116. This item is consequential to item 24 that repeals existing subsections 91U(2) and (3) of the Act.

**Item 22  **Paragraph 91U(1)(a)**

117. This item omits the words “(as defined by subsection (2))” in existing paragraph 91U(1)(a) of the Act.

118. This item is consequential to item 24 that repeals existing subsection 91U(2) of the Act (which defines *serious Australian offence*) and item 6 that inserts the definition of *serious Australian offence* in subsection 5(1) of the Act.

**Item 23  **Paragraph 91U(1)(b)**

119. This item omits the words “(as defined by subsection (3))” in existing paragraph 91U(1)(b) of the Act.

120. This item is consequential to item 24 that repeals existing subsection 91U(3) of the Act (which defines *serious foreign offence*) from section 91U of the Act and item 7 that inserts the definition of *serious foreign offence* in subsection 5(1) of the Act.

**Item 24  **Subsections 91U(2) and (3)**

121. This item repeals existing subsections 91U(2) and (3) of the Act.

122. This item is consequential to items 6 and 7 which insert the definitions of *serious Australian offence* and *serious foreign offence*, respectively, in subsection 5(1) of the Act.

**Item 25  **Subparagraph 336F(3)(a)(ii)**

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

124. This item is consequential to item 26 that adds new subparagraph 336F(3)(a)(iii) after the end of existing paragraph 336F(3)(a) of the Act.

**Item 26  **At the end of paragraph 336F(3)(a)**

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

126. Among other things, subsection 336F(1) of the Act provides that the Secretary may, in writing, authorise a specified officer, or any officer included in a specified class of officers, to disclose identifying information of the kind specified in the authorisation to one or more specified foreign countries, bodies or international organisations as provided for in subsection 336F(1).
127. Subsection 336F(3) of the Act currently provides that a disclosure is taken not to be authorised under section 336F if:

- the person to whom the identifying information relates is an applicant for a protection visa; or
- the person to whom the identifying information relates is an offshore entry person who makes a claim for protection under the Refugees Convention; 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.

128. New subparagraph 336F(3)(a)(iii) provides for an additional group of non-citizens where disclosure of the identifying information relating to them is taken not to be authorised under section 336F. This group refers to “an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm”.

129. The effect of new subparagraph 336F(3)(a)(iii), together with paragraph 336F(3)(b), is that a disclosure 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 that the person will suffer significant harm, and the disclosure is to a foreign country in respect of which the claim is made, or a body of such a country.

130. The term “significant harm” is defined (see items 8 and 14) in relation to a person who makes a valid application for a protection visa. New subparagraph 336F(3)(a)(iii) relates to offshore entry persons who are prevented from making a valid application for a protection visa (see subsection 46A(1) of the Act). The reference to “significant harm” in new subparagraph 336F(3)(a)(iii) is not intended to imply that offshore entry persons may make valid applications for protection visas. Rather, it reflects the fact that claims made by offshore entry persons are assessed by reference to the same considerations as those that are relevant when assessing valid applications for protection visas.

**Item 27 Subparagraph 336F(4)(a)(ii)**

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

132. This item is consequential to item 28 that adds new subparagraph 336F(4)(a)(iii) after the end of existing paragraph 336F(4)(a) of the Act.

**Item 28 At the end of paragraph 336F(4)(a)**

133. This item adds new subparagraph 336F(4)(a)(iii) at the end of existing paragraph 336F(4)(a) of the Act.

134. Among other things, subsection 336F(1) of the Act provides that the Secretary may, in writing, authorise a specified officer, or any officer included in a specified class of officers, to disclose identifying information of the kind specified in the authorisation to one or more specified foreign countries, bodies or international organisations as provided for in subsection 336F(1).

135. Subsection 336F(4) of the Act currently provides that a disclosure is taken not to be authorised under section 336F if:
• the person to whom the identifying information relates is an applicant for a protection visa; or
• the person to whom the identifying information relates is an offshore entry person who makes a claim for protection under the Refugees Convention; 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.

136. New subparagraph 336F(4)(a)(iii) provides for an additional group of non-citizens where disclosure of the identifying information relating to them is taken not to be authorised under section 336F. This group refers to “an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm”.

137. The effect of new subparagraph 336F(4)(a)(iii), together with paragraph 336F(4)(b), is that a disclosure 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 that the person will suffer significant harm; 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 29 At the end of paragraph 336F(5)(c)

138. This item adds the word “or” at the end of existing paragraph 336F(5)(c) of the Act.

139. This item is consequential to item 30 that inserts new paragraphs 336F(5)(ca), (cb) and (cc) after existing paragraph 336F(5)(c) of the Act.

Item 30 After paragraph 336F(5)(c)

140. This item inserts new paragraphs 336F(5)(ca), (cb) and (cc) after existing paragraph 336F(5)(c) of the Act.

141. Among other things, subsection 336F(1) of the Act provides that the Secretary may, in writing, authorise a specified officer, or any officer included in a specified class of officers, to disclose identifying information of the kind specified in the authorisation to one or more specified foreign countries, bodies or international organisations as provided for in subsection 336F(1).

142. Subsections 336F(3) and (4), in conjunction with new subparagraphs (3)(a)(iii) and (4)(a)(iii) (see items 26 and 28), provide for circumstances where a disclosure is taken not to be authorised. Items 26 and 28 relate to an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm.

143. Existing subsection 336F(5) provides for circumstances where subsections 336F(3) and (4) do not apply. However, subsection 336F(5) does not currently apply to a person who is an offshore entry person who makes a claim for protection on the basis that he or she will suffer significant harm.
Consequently, this item provides for subsection 336F(5) to apply to such a person.

**New paragraph 336F(5)(ca)**

New paragraph 336F(5)(ca) provides that the person is an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm and who, following assessment of his or her claim, is found not to be a person for whom there is a real risk of suffering significant harm.

The effect of new paragraph 336F(5)(ca) is that a disclosure of identifying information in relation to such an offshore entry person may be authorised.

**New paragraph 336F(5)(cb)**

New paragraph 336F(5)(cb) provides that the person is an offshore entry person:

- who makes a claim for protection on the basis that the person will suffer significant harm; and
- who, following assessment of his or her claim, is found to be a person in respect of whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime or a crime against humanity (as defined by international instruments prescribed by the regulations) or a serious non-political crime before entering Australia, or that he or she has been guilty of acts contrary to the purposes and principles of the United Nations.

The effect of new paragraph 336F(5)(cb) is that a disclosure of identifying information in relation to such an offshore entry person may be authorised.

**New paragraph 336F(5)(cc)**

New paragraph 336F(5)(cc) provides that the person is an offshore entry person:

- who makes a claim for protection on the basis that the person will suffer significant harm; and
- who, following assessment of his or her claim, is found to be a person in respect of whom there are reasonable grounds for considering that he or she is a danger to Australia’s security or is a person who, 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 effect of new paragraph 336F(5)(cc) is that a disclosure of identifying information relation to such an offshore entry person may be authorised.

**Item 31 At the end of paragraph 411(1)(c)**

This item adds the words “(other than a decision that was made relying on paragraph 36(2C)(a) or (b))” at the end of existing paragraph 411(1)(c) of the Act.
Currently, section 411 of the Act provides for the kind of decisions that are reviewable by the Refugee Review Tribunal (the “RRT”). Existing paragraph 411(1)(c) provides that an RRT-reviewable decision is a decision to refuse to grant a protection visa.

The RRT has the jurisdiction to review decisions where a non-citizen has been refused a protection visa. This will include a decision to refuse a protection visa on the basis of not satisfying the criterion in either new paragraph 36(2)(aa) or 36(2)(c). The purpose of the amendment is to provide 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.

The purpose of this amendment, in conjunction with items 32, 33 and 34, is to ensure that a decision made relying on new paragraph 36(2C)(a) or (b) (see item 14) is not reviewable by the RRT, but is reviewable by the Administrative Appeals Tribunal (the “AAT”).

**Item 32** At the end of paragraph 411(1)(d)

This item adds the words “(other than a decision that was made because of paragraph 36(2C)(a) or (b))” at the end of existing paragraph 411(1)(d) of the Act.

Currently, section 411 of the Act provides for the kind of decisions that are reviewable by the RRT. Existing paragraph 411(1)(d) provides that an RRT-reviewable decision is a decision to cancel a protection visa.

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.

The purpose of this amendment, in conjunction with items 31, 33 and 34, is to ensure that a decision made because of new paragraph 36(2C)(a) or (b) (see item 14) 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 33** Paragraph 500(1)(c)

This item repeals existing paragraph 500(1)(c) of the Act and substitutes new paragraph 500(1)(c).

Existing paragraph 500(1)(c) of the Act provides that applications may be made to the AAT for review of a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Article 1F, 32 or 33(2) of the Refugees Convention.
Substituted 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 Article 1F, 32 or 33(2) of the Refugees Convention; or on new paragraph 36(2C)(a) or (b) of the Act (see item 14).

The effect of this amendment is that under substituted 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 Article 1F, 32 or 33(2) of the Refugees Convention, a decision that relies on new paragraph 36(2C)(a) or (b) can be the subject of an application for review to the AAT.

The purpose of this amendment, in conjunction with items 31, 32 and 34, is to ensure that a decision made relying on new 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 Article 1F, 32 or 33(2) of the Refugees Convention.

Item 34 Paragraph 500(4)(c)

This item repeals existing paragraph 500(4)(c) of the Act and substitutes new paragraph 500(4)(c).

Existing paragraph 500(4)(c) of the Act provides that a decision that is not reviewable under Part 5 or 7 of the Act (that is, not reviewable by the Migration Review Tribunal or the RRT), is a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Article 1F, 32 or 33(2) of the Refugees Convention.

Substituted 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 Article 1F, 32 or 33(2) of the Refugees Convention; or on new paragraph 36(2C)(a) or (b) of the Act (see item 14).

The effect of this amendment is that under substituted 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 Article 1F, 32 or 33(2) of the Refugees Convention, a decision that relies on new paragraph 36(2C)(a) or (b) is not reviewable under Part 5 or 7 of the Act.

The purpose of this amendment, in conjunction with items 31, 32 and 33, is to ensure that a decision made relying on new 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 Article 1F, 32 or 33(2) of the Refugees Convention.

Item 35 Application

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

This item provides that the amendments made by Schedule 1 apply in relation to an application for a protection visa (within the meaning of the 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 Act) before the day on which this item commences.
171. 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.